Introduction

Melvin I. Urofsky

During the nineteen years he served as an Associate Justice of the U.S. Supreme Court, David H. Souter was a good friend to the Supreme Court Historical Society, and we shall all miss not only his presence but his good humor as well. In this issue we are pleased to carry tributes to him by another friend of the Society, former Justice Sandra Day O'Connor, and two of Justice Souter's former clerks. Heather K. Gerken is currently the J. Skelly Wright Professor at the Yale Law School, and Kermit Roosevelt III teaches law at the University of Pennsylvania.

This issue carries an even greater diversity of materials than usual and once again testifies to how extensive we now consider the field of Supreme Court history. Jeffrey L. Amestoy is the retired chief justice of the Supreme Court of Vermont and well knows how a judicial case can affect public policy. His article focuses on Richard Henry Dana, best known to most people for his memoir *Two Years Before the Mast* (1840). Dana had an eventful life and was known in his time as a champion of two downtrodden groups, sailors and slaves. He served as counsel in one of the first instances in which the U.S. Supreme Court considered the extent of the executive's war powers—Lincoln's blockade of Southern ports after the start of the rebellion. The litigation, known as the *Prize Cases* (1863), involved ships seized during the blockade, and if the Court had chosen to declare the blockade illegal—as Chief Justice Roger Taney wanted to do—it would have struck a serious blow to the Union. According to Chief Justice Amestoy, Dana's skill averted a potential catastrophe.

One always hears the phrase "I'll take it all the way to the Supreme Court," but we know that in any given Term, the Court routinely turns away literally thousands of petitions for review. The ones that the Court chooses to hear normally deal with questions of constitutional or statutory interpretation. Yet every now and then it chooses to hear something different. U.S. Circuit Court Judge Myron H. Bright tells us about one of those cases, and especially about the dogged determination of a particular lawyer to do right by his client. A Nebraska farmer was found dead in his barn, and while it might have been an accident, the coroner initially ruled suicide and the

insurance company refused to pay on the modest policy. How this case got to the High Court is a fascinating story.

Stefanie Lepore graduated from George Washington Law School last year. While there, she wrote a paper on the origins of the Court's practice of seeking the views of the Solicitor General in certain cases. We thought it so good that we are happy to publish it in this issue.

The role of law clerks has been the focus of a number of books and articles in recent years, including some in this journal. All clerks take a vow of secrecy, but over the years information emerges as to how certain Justices interacted with their clerks, the work that clerks performed, and, occasionally, a tidbit about some judicial quirk. Richard Arnold clerked for Justice William J. Brennan during the Term that the Court heard and decided one of the key cases in the so-called due-process revolution, *Mapp v. Ohio* (1961), which extended the protections of the Fourth Amendment to the states as well as the federal government. Arnold kept a diary of his time in Brennan's chambers, and Professor Polly J. Price of the Emory University School of Law uses that diary to explore the Court's thoughts and processes in deciding *Mapp*.

Finally, under the sponsorship of Justice Ruth Bader Ginsberg, Professor Emerita Jill Norgren gave a slide show presentation to the Association of the Bar of the City of New York in October 2008, and her article in this issue of the *Journal* grew out of that talk. Professor Norgren, who for many years taught government at the John Jay School of City University of New York, is well known as the author of *Belva Lockwood: The Woman Who Would Be President* (2007).

As always, enjoy the feast!

Tribute to Justice Souter

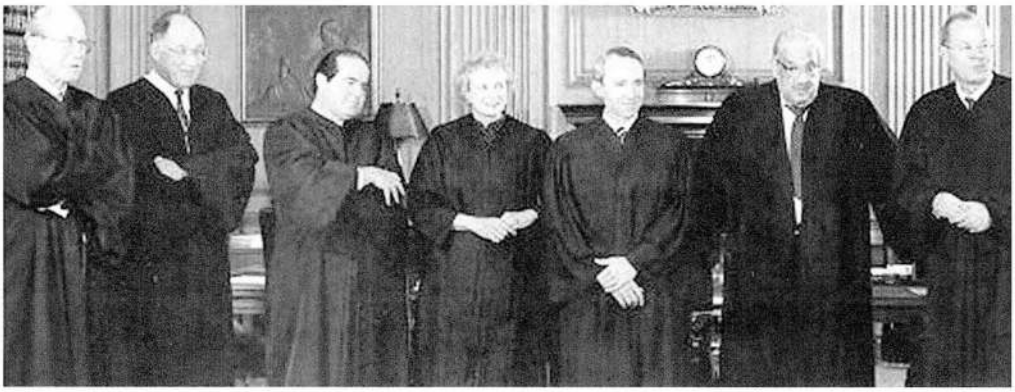
SANDRA DAY O'CONNOR

When the U.S. Supreme Court Justices took their seats at the beginning of the 2009 Term, the Bench looked different. Gone from the Bench, after nineteen years, was David H. Souter. He returned to his home in New Hampshire, a state he likes enormously. Justice Souter will be missed by his former colleagues and by advocates before the Court, by legal scholars nationwide and by all who follow the Court's work and activities.

I was privileged to serve on the Court with Justice Souter for more than fifteen years. He was an admirable Justice and is a cherished friend. While serving on the Court, Justice Souter produced 157 majority opinions, 121 dissenting opinions, and 83 concurring opinions. He served as the Circuit Justice for both the First and the Third circuits. His opinions were always thoroughly researched and written, with full explanations of the facts, the issues, and the governing principles. He cut no corners and explained his reasoning in depth.

His writing was evidence of his scholarly nature. He was, after all, a Harvard Law School graduate, a Rhodes Scholar, a former New Hampshire trial court judge, a New Hampshire supreme court justice, and a judge on the First Circuit Court of Appeals. His opinions, written while he was on the Supreme Court of the United States, were as methodical as they were measured. Justice Souter's concurring opinion in *Washington v. Glucksburg*[1] captured his judicial philosophy nicely. He wrote: "[T]he usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The 'tradition is a living thing,' albeit one that moves by moderate steps carefully taken."[2] His careful approach to opinion-writing meant that he very seldom felt compelled to make a major alteration to one of his circulating opinion drafts because he wrote such thorough explanations in his original draft opinions.

Justice Souter was an especially treasured colleague on the Bench. He has a delightful sense of humor and a natural wit that often entertained his colleagues. He has a remarkable memory for details of conversations and events going back a great many years. The Justices



Sandra Day O'Connor served with David Souter on the Bench for more than fifteen years. They are pictured here at Souter's oath-of-office ceremony in 1990, shortly after the New Hampshire Justice was confirmed.

often have lunch together in the Justices' dining room on days of oral argument or conference. Justice Souter would eat his customary cup of yogurt and contribute to the conversation with the occasional story, always told with humor and vivid detail. One day at lunch, someone mentioned a family wedding one of the Justices had recently attended. Justice Souter said the discussion reminded him of a story told to him by Justice William Brennan's son. He told us that Justice Brennan's father was, at the time, Democratic Party "boss" in New Jersey. His granddaughter got married to a young man whose grandfather was the Republican Party "boss" in New Jersey. Someone asked Justice Brennan's father, "Doesn't it bother you that your granddaughter is marrying the grandson of your archrival?" "No," said Justice Brennan's father. "You have to remember that we always stood shoulder to shoulder against the interests of the people."

From time to time, I would have reason to stop by Justice Souter's Chambers to inquire about some Court matter. He would always cordially welcome my unannounced visit to his Chambers. Entering his Chambers was unlike entering any other Chambers at the Court. He disliked bright lights and his office was always rather dark. Only some natural light from windows illuminated his personal office. Every part of the floor space between his desk and the couch was piled high with books. Often even the seats on the couch, save one for a visitor, would be stacked with books. Justice Souter is a reader and a collector of books. There was simply not enough space in his Chambers for the ever-growing number of books on his "reading list."

There is an enormous amount of reading of court documents and opinions that every Justice must do in order to keep up with their work at the Court. But that did not prevent Justice Souter from reading many other books as well, books unrelated to the work of the Court. He was also a student of history and the various figures in the Court's history. The walls in his Chambers were hung with paintings of such people as Daniel Webster and Henry Clay alongside former Supreme Court Justices Bushrod Washington and Harlan Fiske Stone.

It is customary at the Court for law clerks in the various Chambers to invite each Justice to join them for lunch at some time during the Term of the Court. Justice Souter was gracious about accepting such invitations. He would bring his own cup of yogurt for his lunch and would talk to the law clerks at length in conversations lasting well over the appointed hour. Needless to say, the law clerks were always delighted and impressed.

Justice Souter did not accept many of the numerous invitations sent to him for social

events in Washington, D.C. He typically declined invitations for speaking engagements throughout the United States and in other countries as well. He preferred to return to New Hampshire at every opportunity. For years, he had a Volkswagen automobile, and he would drive it up to Weare as soon as the Term ended and as soon as the holiday and winter recesses occurred. While in Washington, D.C., he would rise early every day and run on the grounds of the Naval base at the foot of Capitol Hill before coming to the Court for the balance of the day and often late into the evening. He remained a bachelor and had no need to interrupt his work to meet family obligations, as most of the Justices typically would do. Now, back in New Hampshire, Justice Souter has managed to replace his daily Capitol Hill runs with frequent hikes across the White Mountains near his home.

ENDNOTES

[1] *Washington v. Glucksberg*, 521 U.S. 702 (1997).

[2] *Washington*, 521 U.S. at 769 (quoting Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961)).

Clerking for Justice Souter

HEATHER GERKEN

Adam Gopnik once observed that "Paris is a struggle between its pompous official culture and its matchless . . . commonplace civilization." The aphorism applies even more clearly to the Supreme Court. It is an institution cloaked in formality, from the ceremonies of First Monday to the grand generalities it invokes in its ruling. It is also an institution that takes itself extremely seriously, with its strongest opinions penned when it thinks another institution—Congress in passing Commerce Clause legislation or the Religious Freedom Restoration Act, the Florida supreme court during *Bush v. Gore*—is treading on the Court's privileges. The Court's pompous officious culture contributes to the studied cynicism lawyers exhibit whenever they talk about judges.

The Court's matchless commonplace civilization has always redeemed it in the eyes of the profession. Our faith in the Court is built upon the common sense and decency of those behind the Court's official culture. Souter perfectly embodied those values, something that may explain why he dissented in each of the cases described above. He was a judge's judge and a lawyer's lawyer. He prepared meticulously for each case and displayed a sure-footed sense of that path the doctrine would take.

Justice Souter wasn't just fair-minded; he was one of the rare jurists who could step outside the bounds of his experience. The year that I clerked for him, he wrote an extraordinary dissent in a voting-rights case. There he carved out a position on the fraught relationship between race and voting that was both more nuanced and more pragmatic than that of his Brethren. Souter was perhaps the least politically connected person on the Court, and his racially homogenous home state of New Hampshire hadn't had much experience with the Voting Rights Act. Yet even as someone who had self-consciously lived outside of politics, he understood its dynamism and had an astute sense of how to harness it in the service of racial integration.

Though there is no one who cares more deeply about the Court as an institution, Justice Souter displays none of the pomposity that occasionally mars the Court's reputation. In person, he is a delight—witty, charming, and erudite. He knows the names of the guards and the cleaning staff. He is the most powerful

Justice David Souter signing his judicial oath as Chief Justice William Rehnquist looks on.

person I know well, and yet the most decent and humble one. To this day, I cannot fathom how a man of such integrity negotiated the Serbonian bog of Washington.

Justice Souter's clerks adore him. We protect his privacy with a tribal ferocity, much to the dismay of reporters. We refer to him as "the Boss," as if we never had another boss. We return every year for the annual reunion—for the announcement of the new "Souter babies," the painfully amateurish skit by the prior year's clerks, the Justice's after-dinner speech. We go even as the tribe has grown so large that we know we will have only a few minutes' worth of conversation with him. For us, it is enough.

It's quite funny that the Souter clerks tend to look upon the clerkship as the greatest job they ever had, since we were all but useless appendages. To be sure, we wrote memos and did research and provided initial drafts of opinions. But no one would ever call the Justice "clerk-driven." To the contrary, we sometimes wondered what purpose we served. The Justice prepared for oral arguments entirely on his own, reading the clerk's memorandum at the end of his preparation simply as a check to be sure he hadn't missed anything. His penchant for entirely rewriting our drafts always prompted dark jokes from clerks; we'd boast to each other that we could identify one "the" and three "ands" that were left from the original draft. My co-clerk once glumly showed me a mass of sticky papers he'd just gotten from the Boss. The Justice had taken the phrase "cut and paste" quite literally, laying waste to my co-clerk's shiny draft with scissors and rubber cement.

And yet . . . the Justice managed to make us feel important. He could restate your garbled argument in such elegant terms that you began to fancy yourself a genius. And I remember one night, as dusk fell and the Court grew quiet, when the Justice called me back into his office after I'd handed him some papers he required. The day before, I'd told him I thought his initial take on a case was mistaken, arguing with the passion of a 24-year-old just out of law school. I'd spent the day agonizing about the conversation, wondering whether I should have been more deferential. As I lingered at the door, he said a few kind words about the day before. It was enough. It was more than enough.

Looking back on the clerkship, I realize what a profound effect Justice Souter had on my view of the law and the profession. In law school, I had romanticized the Warren Court's opinions, with their epic sweep and grand style. Souter, however, was a Florentine,

not a Venetian. As the clerkship wore on, I came to admire the lapidary qualities of his opinions, the care he took with each facet of the argument. I began to grow impatient with the breadth of other judges' pronouncements, the lack of attention to detail, the slippage in the analytics.

Souter always had a firm sense of the relationship between large and small in the law. He thus perfectly understood the relationship between the Court's pompous official culture and its matchless commonplace civilization, the ways in which the law's grand generalities must be grounded in common-sense intuitions. He knew that an institution as powerful as the Court must be careful with the facts and attentive to the dictates of craft. That is because Souter is, at his core, a common-law judge. The Justice wrote of that tradition that "the judicial paradox [is] that we have no hope of serving the most exalted without respecting the concrete." In doing so, he invoked the myth of Antaeus, the giant who drew his strength from contact with the earth and could not be defeated until Hercules had the wit to hold him aloft with his feet flailing uselessly in the sky.

Adam Gopnik recently wrote a lovely piece in *The New Yorker* that brought the Justice to mind. Gopnik quoted G.K. Chesteron as saying that "all my life I have loved frames and limits, and I will maintain that the largest wilderness looks larger through a window." Gopnik added that Chesterton's insight "is not that small is beautiful, but that beautiful is always small, and that we cannot have a clear picture in the white light of abstractions."

Souter was always skeptical of the white light of abstractions. He insisted that we must look through the window of fact and precedent if we hoped to glimpse law's grand generalities. He approached the Court's docket as a craftsman, not a poet; as a country lawyer, not a seer. He was the sort of judge who renews your faith in judging. With Justice Souter's retirement, the Court has lost its finest common-law judge. As any of the Boss's clerks will tell you, that's the highest of compliments.

David Souter: A Clerk's View

KERMIT ROOSEVELT

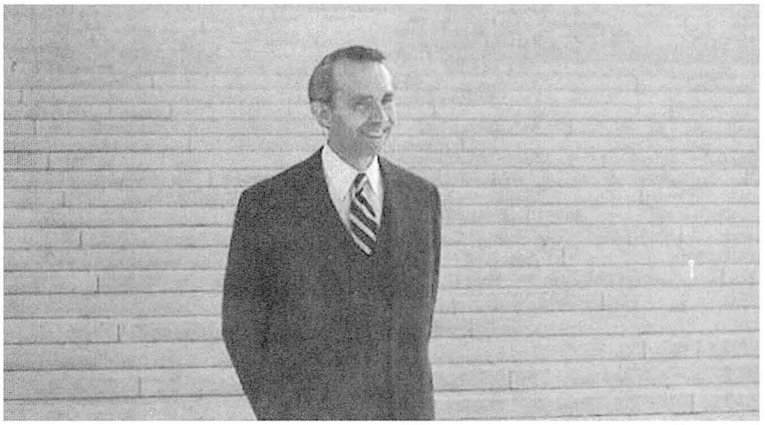
Many former Supreme Court clerks describe their clerkship as the best job of their lives. David Souter's former clerks do too, though with what I believe is a greater than normal frequency. (As a former Souter clerk I confess to partiality.) But while Souter resembles other Justices in the devoted affection he inspires, he was in many other ways a very unusual presence at the Supreme Court.

There are, of course, the foibles for which Souter was well known. His frugality and simplicity are colorful by the standards of Supreme Court Justices, and so the media paid attention to the fact that he ate apples and yogurt for lunch, wrote with a fountain pen, and disdained overcoats.

It is true that Justice Souter abhors extravagance and waste. He would read by natural light rather than use electricity even if he had to stand by the window to do so, and he once wrote me a note on a napkin I had left on my desk rather than use a fresh sheet of paper. But these characteristics are not simple eccentricities; they are indications of deeper currents in Souter's character. Souter is a judge, and a man, of true humility. He treated clerks, Court staff, and fellow Justices with the same respect, and he had a modest vision of the judge's role, one rooted in the common-law methodology he brought to the Supreme Court.

Law is important, Souter believes, individual judges less so. Satisfaction, he once told the Third Circuit judicial conference, comes less from great moments than from being part of the great stream of law. On his resignation, some writers complained that he did not leave bold doctrines or memorable phrases. But Souter does not see the judge's role as working dramatic changes in the law or whipping up passions outside the court. A great moment for a judge is not the dramatic break with precedent or the minting of a sparkling phrase; it is the quiet resistance against excess.

There are moments of crisis, and sometimes judges must confront them. Souter has also spoken of Gettysburg, and of the men who found themselves facing Pickett's charge. But the role he sees for courts in such times is not to wade in gleefully on one side or the other. It is to moderate, to be a safe place in society, as free of passion and partisanship as human nature allows. At the clerk reunion after his



David Souter had only served for a few months as a federal judge when President George H. W. Bush selected him to fill the Supreme Court seat vacated by Justice William Brennan.

retirement was announced, he told us the story of a New England ancestor who had stopped the witch trials of Salem from spreading to his town, refusing to issue a warrant against an accused girl with the simple words "We will have none of that here." It is not a lofty phrase or an ambitious theory, but it is a pretty good judicial philosophy, and if we look back at Souter's notable decisions, I think we will see it has explanatory power. When the time found him, he stood against extremism and held the line.

Souter was also unusual in his fondness for New Hampshire and distaste for Washington. No Justice was more eager to leave the capital at the end of the Term, and speaking to the Justice when he was in New Hampshire, you could almost hear over the phone line the pleasure and renewal he drew from its simple calm.

This, too, was indicative of deeper currents. Who would not enjoy the social status and accolades accorded Supreme Court Justices? Someone who thought they got in the way of real personal interaction. Because of his distaste for the events and parties of Washington society, Souter was often mistaken for an awkward recluse. But his clerks know him as a warm and witty man who most afternoons would emerge from Chambers to take a cup of coffee and put us in stitches with anecdotes about New Hampshire or Oxford. We know him as a gifted storyteller who speaks at reunions with extemporaneous fluency, sometimes holding a glass of port and a folded sheet of paper and consulting the former in preference to the latter. He can show a sly humor even with strangers: when a couple mistook him for Justice Breyer and asked him his favorite part of sitting on the Supreme Court, he gravely informed them that it was the honor of serving with David Souter.

Souter did not like the social trappings of the Court, and he did not enjoy the position for its own sake. Most Justices retire only when age or circumstance makes continued service difficult, and some hang on much longer than they should. I have always found it understandable. Who would want to turn from dramatic constitutional issues to the life of a private citizen?

Someone who found real meaning and pleasure in that life, someone whose sense of himself went far beyond his status as a Supreme Court Justice. And that is David Souter, too. He retired at 69; to find a younger ex-Justice we have to go back forty years to Abe Fortas, whose decision to leave was assisted by the threat of impeachment. In a column I wrote at the time of his resignation, I likened Justice Souter to Cincinnatus, the Roman farmer called to service who cast off his power and went home when the crisis was done.

I still think the comparison is apt. But when he spoke to me later, Souter invoked instead Calvin Coolidge, who said simply "The work is done." The Justice was being modest, and Coolidge is in some ways quite different. (No one would have called him a charming raconteur, for instance.) But some of what he said does capture Justice Souter on the occasion of his retirement as well. "We draw our Presidents from the people," wrote Coolidge. "It is a wholesome thing for them to return to the people. I came from them. I wish to be one of them again."

The Supreme Court Argument that Saved the Union: Richard Henry Dana, Jr., and the *Prize Cases*

JEFFREY L. AMESTOY

On January 1, 1863, Abraham Lincoln signed the Emancipation Proclamation, claiming constitutional authority to do so "as a fit and necessary war measure." The epic struggle between North and South had been raging for nearly two years. There were over a million soldiers under arms. At Antietam there had been more than 20,000 casualties in the bloodiest single day of battle in American history.[1] But was it, in point of law, a war?

This astounding question—conceivable under such circumstances only in the U.S. constitutional system—was answered by the Supreme Court in the *Prize Cases*.[2] It was very nearly answered in the negative. That it was not was due to the extraordinary argument of a lawyer who, fortunately for the history of the United States, went to sea as a young man.

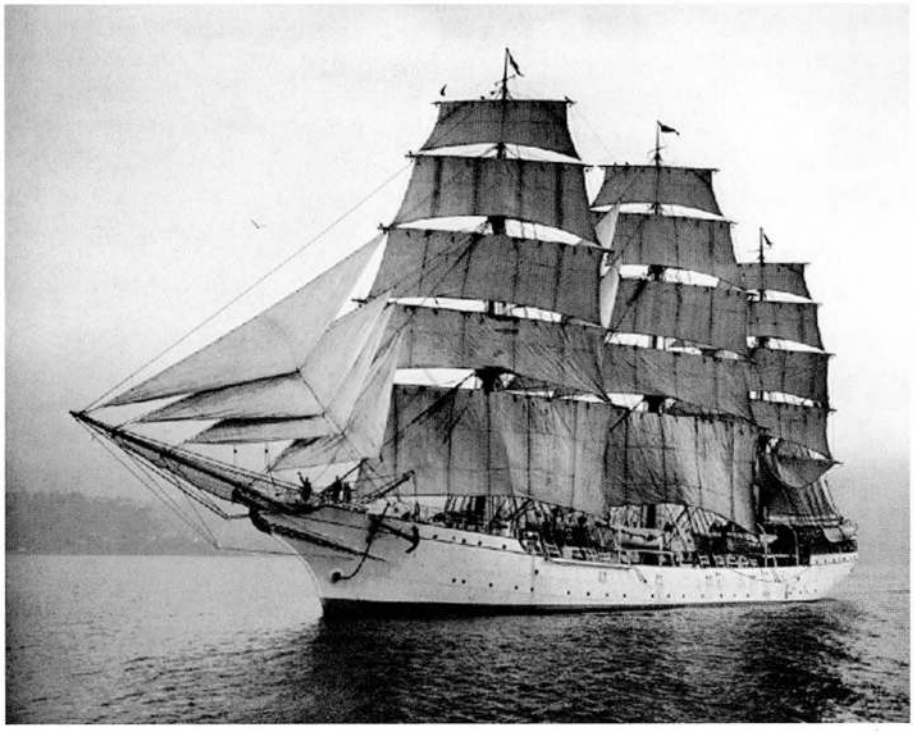
Richard Henry Dana, Jr. is today remembered as the author of *Two Years Before the Mast*, his classic account of a voyage around Cape Horn to the California coast. Published in 1840, the year the twenty-five-year-old Dana opened his law office, the book has never been out of print. Scholars of American literature have expressed regret that Dana "dissipated" his enormous literary talent in the practice of the law.[3] But Dana always saw himself, first and foremost, as a lawyer. He had written *Two Years Before the Mast*, in part, to express his outrage at the unjust and unlawful treatment of seamen.[4]

Dana's book brought the young lawyer a succession of clients who seldom had access to legal representation. He quickly built a reputation as a zealous advocate for the common sailor. His office "[i]n those days, and indeed long afterwards, ... was apt to be crowded with unkempt, roughly dressed seamen, and it smelled on such occasions much like a forecastle."[5] Dana's experience at sea shaped and informed his development as a lawyer. By the

Richard Henry Dana was twenty-five in 1840 when he wrote *Two Years Before the Mast*, his first-hand account of a voyage around Cape Horn to California in a merchant vessel similar to the one pictured. This photo of Dana was taken two years later.

outbreak of the Civil War, no lawyer in America was more well-versed in maritime law or more experienced in the intricacies of "prize law"—the arcane avenue of jurisprudence that, in 1863, threatened to unravel Lincoln's attempt to preserve the Union.

The *Prize Cases* arose from the capture of four vessels—the brig *Amy Warwick*, the barque *Hiawatha*, and the schooners *Brilliante* and *Crenshaw*—in the early months of the Civil War. Each had been seized pursuant to a blockade of Southern ports proclaimed by President Lincoln in April 1861.[6] The right to interdict, seize, and dispose of vessels and cargo belonging to those residing in "enemy's territory" upon the implementation of a lawful blockade was a recognized principle of international law. But the right was predicated on a war between sovereign nations. Lincoln did not accept the claim of the Confederacy that it was a sovereign government. He had an equal interest in ensuring that no other nation did either.[7]



Lincoln's first blockade proclamation characterized the Southern secessionists as a "combination of persons" engaged in "an insurrection against the government of the United States."[8] The difficulty posed by this description was that a government engaged in the suppression of an insurrection could "close" its domestic ports but could not, according to accepted tenets of international law, "blockade" them.[9] Why, then, had Lincoln not chosen to close Southern ports—a decision clearly within his executive authority and consistent with international law?

The question had divided Lincoln's "team of rivals."[10] Secretary of the Navy Gideon Welles, supported by Attorney General Edward Bates, argued strenuously against the blockade because its legal validity presupposed a conflict between two distinct nations. The issue of whether to close or blockade was revisited in the summer of 1861 when Congress, on July 13, specifically authorized the President to declare ports closed where the authority of federal customs collections was challenged. Lincoln requested his Navy Secretary to advise him whether the blockade should be continued. Welles responded in a lengthy memorandum asserting that a port closure would be "legally ... impregnable" but that a blockade was unlikely to be sustained by a federal court. Welles warned the President that the Union would face huge damage claims for selling vessels and cargoes as prizes if the blockade was declared illegal.[11]

Lincoln was a good enough lawyer to recognize the validity of the legal arguments espoused by his Secretary of Navy and Attorney General, but he was President of the United States during a war. Secretary of State William Seward conveyed the view of the Cabinet member who mattered most: the British foreign secretary, Lord Russell. Her Majesty's government made clear it would not accept American "closure" of Southern ports that would expose British shippers to arrest as common smugglers. A "blockade," on the other hand, would enable England to exercise the rights of a neutral nation. The British message was coupled with the implicit threat that port closure could lead to direct recognition of the Confederacy and the intervention of the British fleet to preserve the shipping rights of British subjects.[12] Secretary Welles acknowledged Lincoln's convincing rationale for choosing a legally problematic blockade over a legally sound closure: "The President said we could not afford to have two wars on our hands at once."[13]

History has proved the soundness of Lincoln's judgment. But it has made remote the enormous stakes at risk in the *Prize Cases*. "Contemplate, my dear Sir, the possibility of a Supreme Court deciding this blockade is illegal," Dana wrote to Charles Francis Adams, the American ambassador to England. Dana thought "it would end the war."[14] At the very least, an adverse decision would subject the Union to immense damages when it least had the capacity to pay them. Depending on its scope, an opinion concluding the President had acted illegally in declaring a blockade could raise constitutional challenges to decisions already made by Lincoln pursuant to his interpretation of the war power. If there was no constitutional basis for Lincoln's blockade of Southern ports, where was the authority for the decision he had made to suspend habeas corpus nearly two years earlier? Or to emancipate slaves from states in rebellion against the government, taken less than two months earlier?

Lincoln had already expressed his view that the judiciary did not comprehend the reality confronted by a President in a civil war. The judiciary, he stated, "seemed as if it had been designed not to sustain the government but to embarrass and betray it."[15] By the time the *Prize Cases* were ripe for Supreme Court review, Lincoln had no reason to be more optimistic. Counsel for the ship owners in the *Prize Cases* were eager for a hearing before the Court despite their lack of success in the courts below. Their well-founded optimism was based on the Court's composition.

There had been one vacancy on the nine-member Supreme Court when Lincoln was

elected President. In March 1861, Justice John McLean died shortly after Lincoln took office. One month later, Justice John Campbell followed his home state of Alabama out of the Union by tendering his resignation to the President. The six remaining members of the Court included four Justices (James Wayne, Robert Grier, John Catron, and Samuel Nelson) who had joined Chief Justice Roger Taney in the *Dred Scott* decision of 1857.[16] The sixth member of the Court, Justice Nathan Clifford of Maine, had not been on the Court at the time the *Dred Scott* case was decided, but as a Buchanan appointee, he had made clear his agreement with the decision.[17]

In early 1862, attorneys for the claimants in the *Prize Cases* pressed Attorney General Bates to advance the cases on the Supreme Court calendar.[18] Bates wavered, despite the certainty that a hearing before the Court as then composed would have led to an opinion adverse to the government. Asserting that he was being "urged in several quarters to ask for a special term," Bates asked William M. Evarts for advice. Evarts, who had represented the United States in the *Hiawatha* and the *Crenshaw* claims before federal courts in New York, advised the Attorney General that the government had little to gain by accelerating the case, especially when President Lincoln had yet to fill a vacancy on the Court.[19]

The posture of the *Prize Cases* presented Attorney General Bates with greater challenges than an unsympathetic Court. That obstacle he could partly surmount by refusing to grant the claimants' request for an expedited hearing before a truncated Court. But Bates was no closer to a compelling legal theory with which to defend the blockade decision than he had been nearly two years earlier when he joined Secretary of Navy Welles in expressing doubts about its legality. In the words of Chief Justice Taney's biographer:

> The Supreme Court was in position to greatly embarrass the government in either of two ways. It might hold that the conflict was not a war ... and that the prizes had been illegally taken ... Such a decision would make the government liable for huge sums in damages, and its psychological effect would be such as seriously to cripple the conduct of the war. On the other hand the court might hold that the Confederacy was an independent sovereign power and although holding the blockade to be legal, it might do it in such a way as to encourage the recognition of the Confederacy by foreign governments.[20]

Bates had been a rival of Abraham Lincoln's for the Republican presidential nomination in 1860, and his appointment as Attorney General owed more to his political value than to his legal acumen. Bates's opinion justifying Lincoln's decision to suspend the writ of habeas corpus was not persuasive.[21] But he at least had some self-knowledge of his shortcomings as an oral advocate.[22] With the *Prize Cases* scheduled for the Court's December 1862 term, Bates began assembling the legal team to argue the most momentous case heard by the U.S. Supreme Court during the Civil War. His first choice almost cost the government its case. His last choice saved it.

As principal advocate for the government in the *Prize Cases*, the Attorney General chose Charles Eames, a prominent Washington lawyer. Eames, a former newspaper editor and U.S. minister to Venezuela, was often used by Secretary Welles to represent the Navy Department.[23] Given the Secretary's longstanding reservations about the legality of the blockade and his high regard for Eames, Welles undoubtedly influenced Bates's choice. Although the Secretary's characterization of Eames as "the most correct admiralty lawyer in the country" is often cited as evidence of the reasonableness of the Attorney General's selection, it is revealing to note a further description from Welles's diary. Eames, wrote the Secretary, "did not love the practice of the law,

but necessity impelled him.... Not endowed with a strong constitution, he broke down upon the pressure of certain great cases entrusted to him."[24] The Supreme Court was soon to make it clear that Charles Eames was a disastrous choice for the *Prize Cases*.

The Court scheduled twelve days of oral argument commencing on February 10, 1863 and ending on February 25.[25] Allowing each side six days to present its case would be inconceivable today, but even in a legal culture where lengthy argument was the norm, the grant of two weeks to oral advocacy emphasized the significance the Court attached to the *Prize Cases*. The cause "attracted a display of legal and forensic talent rarely equaled in the history of the Court."[26]

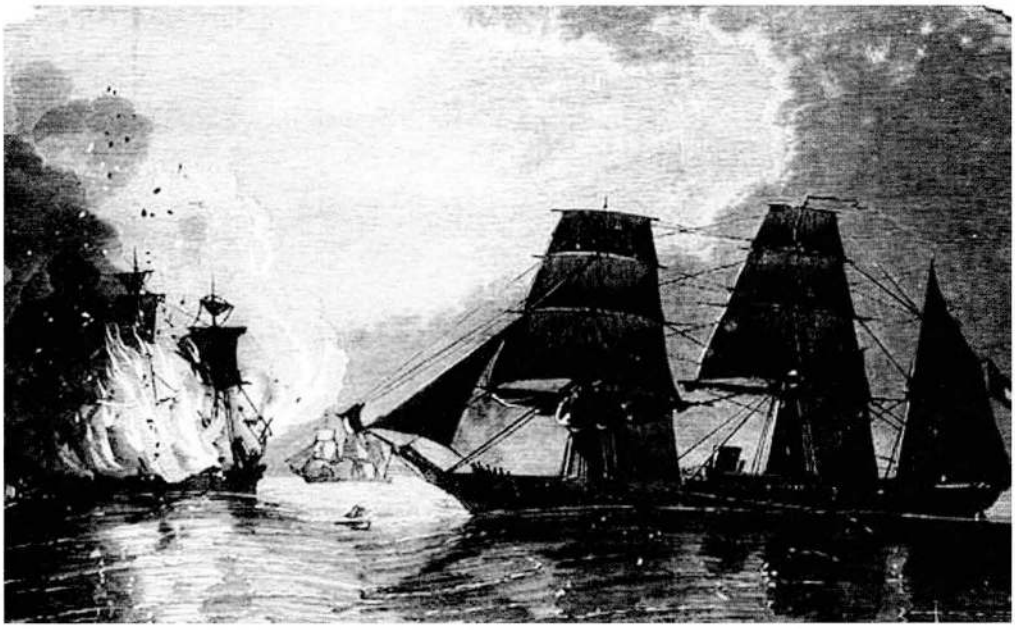
Attorneys for the claimant ship owners divided their time among four accomplished appellate lawyers. James M. Carlisle of Washington, a friend of Chief Justice Taney's, represented the Mexican owner of the *Brilliante*, seized on June 23, 1861 for attempting to run the blockade of New Orleans and condemned as a lawful prize by the U.S. district court in Key West. Claimants in the seizures of the *Hiawatha* and the *Crenshaw* were represented by the prominent New York firm of Lord, Edwards, and Donohue. Daniel Lord was an experienced appellate attorney, and he and his partner Charles Edwards often represented British interests. The British-owned *Hiawatha* and the Virginia-owned *Crenshaw* had each been captured in Hampton Roads in May 1861 and condemned as lawful prizes by the U.S. district court in New York City. Counsel for the Virginia claimants in the *Amy Warwick* was Edward Bangs of Boston, who had represented the ship's owners in the U.S. district court in Boston after its capture off the Virginia coast on July 10, 1861.[27]

Attorney General Bates apparently intended to have Charles Eames argue three of the four consolidated cases—*Brilliante*, *Crenshaw*, and the *Amy Warwick*—though Eames, unlike opposing counsel, had argued the cases in neither the district nor the circuit courts. In the case of the *Hiawatha*, the Attorney General assigned the argument to Evarts and Charles B. Sedgwick. Bates had already relied on Evarts's sensible advice not to expedite the *Prize Cases*. Sedgwick was a New York Congressman and Chair of the House Committee on Naval Affairs. Astonishingly, Bates did not, in the first instance, consider Richard Henry Dana as counsel for the government.[28]

The Attorney General's failure to immediately draw upon Dana's unequalled expertise, immense talent, and legendary diligence is particularly difficult to understand given the origin of the *Amy Warwick* case. Unlike the other three ships, the *Amy Warwick* had not been seized for attempting to run a blockade after notice. It had been captured on the "high seas" by the *U.S.S. Quaker City,* much to the surprise of its master, who was bringing coffee from Rio de Janeiro to Richmond. In response to the standard interrogatories taken in the *Prize Cases*, the master had explained:

> At the time of the first pursuit and capture, the ship was steering directly for Cape Henry... Saw a man-of-war ... some two or three hours before she weighed anchor and bore down on us; did not alter course but hoisted American flag when she hoisted hers ... The ship brought us to by firing a gun, on which I hove to and waited for orders, and was much surprised to hear that there was a blockade on the port, and Virginia had seceded.[29]

The captured vessel was taken to Boston, where Dana served as U.S. Attorney. U.S. district courts had jurisdiction in prize cases. Although prize courts in Philadelphia and New York were ordinarily nearer to blockade stations than was Boston, captains preferred to bring their prizes to Boston, where Dana's knowledge of prize law enabled him to devise the most "honest, rapid, and inexpensive" Prize Court proceedings in the country. Dana's integrity and sympathy for ships' crews, who shared in the proceeds derived from the sale



Captured prize ships were often taken to Boston, where Dana served as U.S. Attorney, because captains knew Dana's knowledge of prize law would help him to devise the most "honest, rapid and inexpensive" Prize Court proceedings in the country. His integrity and sympathy for ships' crews, who shared in the proceeds derived from the sale of a captured vessel and its cargo, were also valued. In this figure, a captain burns a prize ship to decoy another ship toward him.

of a captured vessel and its cargo, made the U.S. district court of Boston one of the busiest prize courts in the country.[30]

It also made Judge Peleg Sprague one of the most respected maritime jurists in the nation. Judge Sprague knew full well, as did Dana, that the issues of "enemy's property" and "enemy's territory" raised by the circumstances of the *Amy Warwick*'s seizure on the open sea went to the heart of the prize-case controversy. "[I]t is contended," wrote Judge Sprague in deciding the *Amy Warwick* case, "that although this property might be liable to confiscation if the contest were a foreign war, yet it is otherwise in a rebellion or civil war. This requires attention." Relying extensively on Dana's brief and argument, Judge Sprague foreshadowed the legal theory that was ultimately to persuade a majority of the Supreme Court that the United States could invoke both belligerent and sovereign power against the Confederacy without a Congressional declaration of war.[31]

Unaccountably inattentive, Attorney General Bates did not see fit to consult with Dana, despite the evidence that Dana's work had persuaded one of the nation's most knowledgeable prize-case judges of a novel legal theory that could preserve Lincoln's presidential authority. It has been suggested that Dana's lack of experience in the Supreme Court (he had appeared only once) was the reason Bates looked elsewhere.[32] If so, the Attorney General had very little familiarity with Dana's reputation for oral advocacy. Judge Sprague, who served for a quarter-century, said upon his retirement that Dana "made the best arguments that I ever heard from anybody, except perhaps, some of [Daniel] Webster's." Dana's former law partner, who passed along this accolade to Dana, noted that "this is, as Dr. Johnson would say, a compliment enhanced by an exception, if indeed, it be an exception, for Judge Sprague evidently doubted whether he could make it."[33]

Dana viewed the Attorney General's preparations for the *Prize Cases* with

increasing apprehension. As events were soon to prove, Dana had reason to question whether Eames had the mastery of the law and subtlety of argument the cause required. Sedgwick's perfunctory brief was evidence that his selection owed more to the Attorney General's view of Sedgwick's Congressional significance than to Sedgwick's legal standing. Dana had great respect for Evarts, whom he had known since their days as law students. Though Evarts had successfully represented the government before the U.S. district Court and the Second Circuit in the *Hiawatha* and *Crenshaw* cases, Dana correctly judged Evarts' argument to be an incomplete exposition on the law of prize.[34]

The man and the moment were at hand. Two of the most striking aspects of Dana's character—his fearless devotion to a just cause and his complete immersion in the work needed to further it—had been shaped and strengthened by his years "before the mast." In 1841, Dana had written *The Seaman's Friend*, a comprehensive handbook on seamanship, sailors' rights, and masters' duties. Of the latter Dana had written, "[h]e may ask advice, but he must act upon his own account, and is equally answerable for what he does himself and what he permits to be done."[35]

Dana's legal career was a testament to that standard. No lawyer of equivalent standing had done as much on behalf of fugitive slaves—or paid a higher price. Dana had been socially ostracized, economically boycotted, and physically assaulted for his defense of fugitive slaves and their "rescuers." Dana had taken the cases without fee when Boston's other prominent attorneys, Rufus Choate and Charles Sumner among them, had refused. Dana's unwavering commitment to "the unpopular side ... kept the rich clients from his office. He was the counsel of the sailor and the slave—persistent, courageous, hard-fighting, skillful but still the advocate of the poor and unpopular. In the mind of wealthy and respectable Boston almost anyone was to be preferred to him. . . ."[36]

"Every man rates himself when he ships," Dana had written in *The Seaman's Friend*. He knew well that "by training at the bar and before the mast, no less than by the natural turn of his thought and habit of mind [he] was better qualified to present the case on the side of the government as, in view of all the circumstances, it ought to be presented than any other lawyer in America."[37] On November 16, 1862, Dana wrote to Attorney General Bates offering to participate in the *Prize Cases* without fee. One week later, an assistant attorney general replied that he could do so.[38]

Dana prepared for the *Prize Cases* in characteristic fashion. "Dana . . . was always absolutely absorbed in the one thing he was doing," an associate in his office has written, "and this question of—was there a war? Could there be prize?—took absolute possession of him."[39] Dana's power of advocacy owed much to the literary gift so apparent in *Two Years Before the Mast*. It was this "same faculty of seeing and describing" that enabled Dana to "[see] things clearly himself, and then [make] others see them as he saw them."[40]

That faculty and more were critical to success in the *Prize Cases*. As the first day of oral argument approached, there was very little evidence that a majority of the Supreme Court would see things as clearly as the government claimed to see them. The three new appointees of President Lincoln—Justices Noah Swayne, Samuel Miller, and David Davis—could be reasonably counted on to be receptive to the Lincoln administration's case. Chief Justice Taney could not. Of the five remaining Justices, four of whom had sided with the Chief Justice in *Dred Scott*, only Justice Grier provided a basis for hope: sitting as a circuit judge, Justice Grier upheld the blockade in an appeal from the U.S. district court in Philadelphia.[41] Attorney General Bates, however, had little regard for Grier, whom he considered a "natural-born vulgarian." In a later case before the Court in which Bates appeared for the government, he had been appalled when Justice Grier said to him from the

Bench: "If you speak, give that damned Yankee hell."[42]

Two other Justices had also affirmed the blockade while sitting as circuit judges. Neither was likely to accept the government's argument. Justice Nelson had affirmed the *Hiawatha* and *Crenshaw* condemnations with "a view to facilitate a hearing before the Supreme Court."[43] Justice Clifford had upheld Judge Sprague's blockade decision in the *Amy Warwick* case, but asserted that should the issue come before the Supreme Court, "[m]y mind is open to conviction on this great question."[44] Justice Clifford had the unusual distinction of being a Southern sympathizer from Maine, so his "openness" did not bode well for the government. That left, as "swing votes," the two Southern Justices who had refused to resign their seats during the war: Justice Wayne of Georgia and Justice Catron of Tennessee. Attorney General Bates could expect them to approach the *Prize Cases* with as much objectivity as their sympathies would allow, but it was clear that, absent a coherent and compelling legal theory to support the government's case, the cause would be lost.

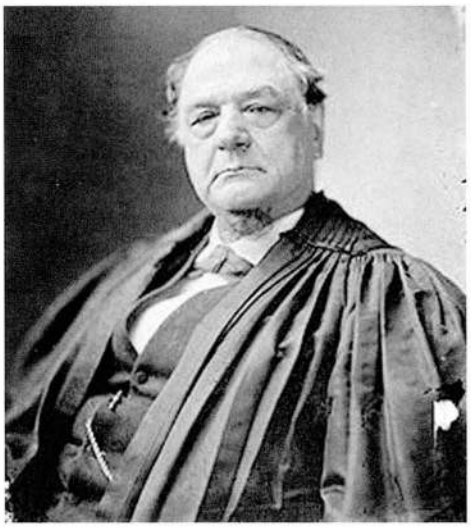
The legal quandary confronted by the government's attorneys was more easily stated than resolved. Could the United States government seize the ship and cargo of its citizens without any proof of treasonable acts, on the sole ground that their residence was in a part of the United States controlled by persons in rebellion against the government? Prize was permitted only in war. Congress had never declared war. The necessary predicate for the legality of blockade and the taking of prizes was a state of war between sovereign nations. But if the United States conceded that such a state of war existed between it and the Confederate States of America, foreign powers had a much greater incentive—some would argue an obligation—to recognize the Confederacy as a *de jure* nation.[45]

There was an added complication that only Dana appeared to grasp. Under prize-law doctrine, the vessel and cargo seized pursuant to a lawful blockade must be "enemy's property," and the owners of the captured prize must reside in "enemy's territory." Both terms were fraught with potential extrajudicial consequences. The first would appear to condemn the property of United States citizens without proof of their disloyalty—or even, as the owners of the *Amy Warwick* insisted, in the face of loyalty to the Union. The second implicitly recognized the status of the Confederacy, for it was difficult to see how the United States could argue that the ship's owners were residents of "enemy's territory" without acknowledging that it was passage of secessionist ordinances that had created the territory.[46]

The government's dilemma was not lost on the attorneys for the ship owners. Nearly a century and a half later, it is still possible to feel the force of Carlisle's argument when, on February 10, 1863, he appeared before the Supreme Court on behalf of the Mexican owners of the captured schooner *Brilliante*.[47] Carlisle argued, as did counsel for the captured vessels *Hiawatha* and *Crenshaw*, that there had been no intent to violate the blockade. But that was a question of fact, and as Carlisle well knew, subsumed by the largest question of all:

> To justify this condemnation, there must have been *war* at the time of this so-called capture; not war as the old essayists describe it, beginning with the war between Cain and Abel; not a fight between two, or between thousands . . . but war as known to international law—war carrying with it the mutual recognition of the opponents as *belligerents*; giving rise to the right of blockade of the *enemy's* ports, and affecting all other nations with the character of neutrals. . . . War, in this, the only sense important to this question, is matter of law, and not merely matter of fact.[48]

Carlisle made effective use of Lincoln and Seward's evasion of the war issue. The seizure



Justice Noah Swayne (pictured) had been appointed to the Court by President Abraham Lincoln and was thus considered a reliable vote in upholding the President's power in the *Prize Cases*. He visited Attorney General Edward Bates to complain that the government's counsel had botched his argument. Bates then turned to Dana to shore up the government's case.

of the *Brilliante*, Carlisle asserted, took place "when the President, casting about among doubtful expedients," used the Navy under the Act of 1807 to suppress insurrection. Lincoln and Seward, Carlisle emphasized, denied to all the world that a war, with its attendant rights and obligations, existed between the United States and the Confederacy. Therefore, Carlisle maintained, blockade and prize jurisdiction could not have existed.[49]

The "most extraordinary part of the argument for the United States," claimed Carlisle, is that "[t]he principle of self-defense is asserted; and all power is claimed for the President. This is to assert that the Constitution contemplated and tacitly provided that the President should be dictator ... It comes to the plea of necessity. The Constitution knows no such word."[50] The impact of Carlisle's argument is testified to by those to whom it was directed. Immediately after the hearing, Justice Catron wrote a congratulatory note to Carlisle expressing his hope that the argument would be reprinted in the Court's reports. Justice Catron added that Justice Nelson and Clifford joined in the request.[51]

Eames opened for the government.[52] The record of his argument has not been preserved, but the Court's reaction to it is well documented. Justice Swayne, whom the government counted as a certain vote for its position, told Attorney General Bates that Eames had made "no argument at all." Swayne complained that Eames had made a "speech" that had turned the hearing "into a farce."[53] The thrust of Eames's argument may be glimpsed in the remarks of Carlisle, who addressed himself to "counsel for the United States ... [who] testifies, in well-considered rhetoric, his amazement that a judicial tribunal should be called upon to determine whether the political power was authorized to do what it has done."[54]

When a court has scheduled twelve days for oral argument, counsel does not open from a position of strength by questioning the Court's decision to take the case. Justice Swayne provided further evidence of Eames's woeful performance by passing along to Bates a remark of the Chief Justice. Eames had unsuccessfully represented Union General Fitz-John Porter, court-martialed for misconduct at the Second Battle of Bull Run. After hearing Eames argue, Taney had said of the General: "[H]e deserved to be convicted for trusting his case to such counsel."[55]

When Dana rose to argue the *Prize Cases*, "the supreme crisis, in jurisprudence as well as in war" was at hand.[56] Here in the midst of his country's most terrible storm was a peril equal to that Dana confronted when his ship nearly foundered in a fearsome gale off Cape Horn. Dana had the characteristic qualities of an accomplished appellate lawyer: quickness of mind, command of the law, and verbal dexterity. But that could be said of each of the eminent attorneys in the case except the unfortunate Eames. Dana, however, possessed an extraordinary trait, first exhibited when he went to sea and well described by his biographer and former law associate:

Dana many years after the attorney-sailor made such an extraordinary argument before the Court that he garnered the crucial fifth vote in favor of Lincoln's power to blockade southern ports.

> [H]e displayed in a high degree that great quality of physical and mental nerve . . . which has always been a noticeable characteristic of great commanders. Never flustered even when taken unawares, Dana invariably rose to an equality with the occasion. As new difficulties presented themselves and danger increased he seemed to grow cooler and more formidable; what excited others only toned him up to the proper key, and thus it was in the moment of greatest peril that he appeared in most control of all his faculties.[57]

There can be no doubt of the profound impact Dana's legal reasoning had upon the Court's decision in the *Prize Cases*. That may be readily seen by comparing Dana's brief and the Reporter's notes of his argument with the Court's majority opinion.[58] Dana's method of preparing for argument was unorthodox. He looked to precedent last. Always a master of the facts, Dana first sought to identify fundamental principles and work out the reasoning that would apply those principles to the issue at hand. Only then would Dana examine precedent in light of the legal theory he had evolved.[59]

There is no greater evidence of the effectiveness of this method than Dana's argument in the *Prize Cases*. He first brilliantly framed the issue:

> The case of the *Amy Warwick* presents a single question which may be stated thus: At the time of the capture, was it competent for the President to treat as prize of war property found on the high seas, for the sole reason that it belonged to persons residing and doing business in Richmond, Virginia?[60]

Upon this question, Dana proceeded to construct a logic that could compel only one answer.

Dana began with the law of prize applicable to cases of war with a recognized foreign power: property on the high seas owned and controlled by persons who themselves reside in "enemy's territory" is liable to capture as prize of war. His comprehensive knowledge of the law of prize and even greater capacity to educate the Court provided a path through the political minefield of the terms "enemy's property" and "enemy's territory." Each phrase, Dana emphasized, was a technical term peculiar to prize courts. The owners of the *Amy Warwick* asserted that they were American citizens residing within an insurrectionary district but neither implicated in the rebellion nor disloyal to the United States. They contended that seizure of their property was an unlawful confiscation and unjust penalty. But Dana artfully contrasted forfeitures and confiscation, which depended upon a nation's "internal codes"—applicable if Lincoln had "closed" the ports—

with the law of prize derived from the rights and powers of war.[61]

The right of the sovereign power to capture property on the high seas did not depend on any actual or presumed disloyalty of the property's owners. To the contrary, asserted Dana, prize law made immaterial whether an owner was loyal, neutral, or disloyal. Nor was it material whether the seized cargo would directly benefit the enemy or whether the commerce was with neutral nations.[62] The test, Dana maintained, was the "predicament" of the property. If found on the high seas and owned by persons residing in "enemy's territory," the property was subject to capture *jure belli*, a prize of war. Characteristically, Dana emphasized the reason for the right: "The reason why you may capture it is that it is a justifiable mode of coercing the power with which you are at war. The fact which makes it a justifiable mode of coercing that power, is that the owner is residing under his jurisdiction and control."[63]

The rule was clear enough when the war was between established sovereign powers, but why was it applicable to an "internal war" where the sovereign claiming the right of blockade denied the war was against another government? Here again Dana argued from first principles. In internal wars, the sovereign can exercise belligerent powers. The object of the sovereign is to coerce the power that is organized against it and making war upon it. Insurrectionists can compel inhabitants of the territory controlled by the insurgency. Therefore, Dana maintained, the parent state has the same interest and right to capture property on the high seas for the purpose of coercing the rebel power as it would if the insurrectionists were a *de jure* rather than *de facto* state.[64]

Dana brought an equal clarity of argument to the issue of "enemy's territory." The test, he argued, was whether the residence of the property's owner is within the *de facto* jurisdiction and control of the enemy. Again, Dana coupled reason to rule and rule to example. The reason for the rule, Dana explained, was because captured property "must be condemned or restored to the claimant." If the *Amy Warwick* had been permitted to go to Richmond, Dana argued, duties would have been paid to the rebel government. Vessel and cargo could have been taken by the insurrectionists for military purposes with or without compensation. Indeed, Dana observed, if the owners of the *Amy Warwick* were as loyal to the Union as they claimed, it increased the likelihood that the Confederacy would confiscate the vessel.[65]

It was unnecessary, Dana asserted, to "draw a fine line" as to what constituted "enemy's territory." The occupation of Richmond by rebel forces was more than sufficient for the purposes of deciding the *Prize Cases*. Thus, Dana neatly avoided drawing the Court into the political thicket of whether articles of secession established a territorial sovereignty that might provide a basis for recognition of the Confederate states as a *de jure* power.[66]

Dana's careful explication of the law of prize resurrected a government case that had almost been sunk by Eames's argument. There remained, in Dana's words, "another branch of the question": whether the President could exercise the war power without a preceding act of Congress declaring war. In light of the relevance of the *Prize Cases* to current debate about presidential authority in undeclared wars, it is of interest to note how Dana framed the issue.[67]

Dana conceded that the right to initiate a war as a voluntary act of sovereignty was vested solely in Congress. Dana asserted that "[t]he question is not what would be the result of a conflict between the Executive and Legislature, during an actual invasion by foreign enemy, the Legislature refusing to declare war ... it is as to the power of the President before Congress shall have acted, in case of war actually existing."[68]

Dana argued that actions of Congress subsequent to Lincoln's April 1861 blockade proclamation had ratified the President's decision. The essence of his argument, however, was "the overwhelming reasons of necessity"

derided by Carlisle in his opening argument for the ship owners. "War is *a state of things*, and not an act of legislative will," Dana asserted. The President's authority to use the Army and Navy "within the rules of civilized warfare and subject to established laws of Congress, must be subject to his discretion as a necessary incident to the use, in the absence of any act of Congress controlling him."[69]

The influence of Dana's carefully constructed logic on the Court's opinion is clear. What cannot be precisely recaptured is the brilliance of Dana's oral presentation. Oral argument was not only longer in the nineteenth century than today, it was also of far greater significance to the outcome of the case. Dana's argument before the Supreme Court "with all its power of illustration, force of logic, clear statement, philosophy and eloquence, except as a tradition, has died with the death of those who heard it."[70] We do, however, have a remarkable account of Dana's performance:

> There are but few now living who heard that argument . . . but those who are left can easily recall the glow of admiration and delight with which they listened to that luminous and exquisite presentation which armed the Executive with power to use the methods and processes of war to suppress the great rebellion . . . [T]he . . . right of capture of private property at sea was for the first time in the hearing of most of the judges . . . applied to the pending situation with a power of reasoning and a wealth of illustration and a grace and felicity of style that swept all before them.[71]

Oral argument concluded in the *Prize Cases* on February 25, 1863. Justice Swayne's confidential visit to Attorney General Bates occurred the very next day. The Attorney General confided to his diary: "Mr. Eames who was entrusted by me, with the chief management of the *Prize Cases* . . . seems . . . in the conduct of the cases, [to have] made himself very obnoxious to the Court . . . I am afraid that the feeling may endanger the *Prize Cases*."[72]

Bates now had some inkling of his grievous error in selecting Eames, but he had yet to realize the significance of the fortuitous appearance of a sailor turned lawyer. The Attorney General was apparently not privy to the "impulsive compliments" Dana's argument had prompted from the Justice who was to write the majority opinion in the *Prize Cases*. In the words of one who was present:

> After Mr. Dana had closed his argument, I happened to encounter Judge Grier who had retired for a moment to the corridor in the rear of the bench . . . and, in a burst of unjudicial enthusiasm he said to me, "Well, your little 'Two Years Before the Mast' has settled that question; there is nothing more to say about it!"[73]

There remained the not inconsequential step of transforming Dana's argument into the majority opinion of the United States Supreme Court.

On March 10, 1863, the Court was crowded in anticipation of a decision. The *New York World* reported that lawyers and spectators were attracted from throughout the land. It was widely recognized that the nation was at a crossroads awaiting a momentous ruling.[74]

Justice Grier delivered the opinion of the Court. His very first sentence revealed the profound effect Dana's reasoning had upon the majority. Justice Grier began by observing that "[t]here are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each."[75]

Joined by the three Lincoln appointees—Justices Swayne, Miller, and Davis—and by Justice Wayne, Grier's decision adopted every significant argument Dana had advanced in support of the blockade. The "right of prize and capture has its origin *jus belli* and is governed and adjudged under the law of nations";

"it is not necessary to constitute war that both parties should be acknowledged as independent nations"; "[t]he President was bound to meet [war] in the shape it presented itself, without waiting for Congress to baptize it with a name"; enemies' territory "has a boundary marked by lines of bayonets"; "whether property be liable as enemies' property does not in any manner depend on the personal allegiance of the owner."[76]

Dana may not "have swept all," but his argument was unquestionably the key to the government's victory. Justice Catron, Justice Clifford, and Chief Justice Taney joined the dissent authored by Justice Nelson. Nelson's language provides a stark reminder of what was at stake in the *Prize Cases*:

> So the war carried on by the President against the insurrectionary districts in the Southern states, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion ... with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war ... but in the case of the President no such power existed ...
>
> I am compelled to the conclusion that no civil war existed between this government and the states in insurrection til recognized by the Act of Congress, 13th of July 1861; that the President does not possess the power of the Constitution to declare war or recognize its existence ... and, consequently that the President had no power to set on foot a blockade under the law of nations ... and in all cases before us in which the capture occurred before the 13th of July 1861 for breach of blockade or as enemies' property are illegal and void.[77]

The single-vote majority in the *Prize Cases* preserved Lincoln's capacity to carry on the war. We cannot know if, in the words of one historian, "a defeat at the hands of the Court at this time would have shattered the morale of the union."[78] But Supreme Court historian Charles Warren was certainly correct in describing the *Prize Cases* as "far more momentous" than any other case arising out of the war.[79] And Dana expressed the view of the Lincoln administration when he wrote that the consequences of an adverse decision were "fearful to contemplate."[80] By securing a majority in the *Prize Cases*, Dana may well have deterred constitutional challenges to other actions essential to the Union's success, including the Legal Tender Act of 1862, the Emancipation Proclamation, and the Conscription Act of 1863.[81]

The significance of the *Prize Cases* decision was amply illustrated by attempts, in modern parlance, to "spin" the result. Those sympathizing with the South, including many in the North and in Europe, seized upon the phrase "enemy's territory" to argue that the Supreme Court had acknowledged the right of secession and the independence of the Confederate States.[82] To counter misleading use of the Court's decision, Dana published a pamphlet entitled "Enemy's Territory and Alien Enemies—What the Supreme Court Decided in the Prize Causes."[83] The pamphlet was widely circulated, and Dana's clarity impressed another fair stylist: Abraham Lincoln.

Dana visited Lincoln at the White House in May 1864. Superficially, there could scarcely be a greater contrast between two men. By the time of Lincoln's birth in a Kentucky log cabin, three generations of Danas had graduated from Harvard. Yet for all their dissimilarities, each had, to borrow Churchill's phrase, "the root of the matter" in him. Dana had written of Lincoln that "[h]is life seems a series of wise, sound conclusions, slowly reached, oddly worked out, on great questions."[84] That is an equally apt description of Dana's argument in the *Prize Cases*.

Dana wrote to his wife of his visit with the President: "When I return, I will tell you

of a high compliment he paid me, in a sincere, awkward manner." Lincoln had told Dana that he had read his *Prize Cases* pamphlet and that " it reasoned out . . . what he had all along felt in his bones must be the truth of the matter and was not able to find anywhere in the books, or to reason out satisfactorily to himself."[85]

It was indeed the highest of compliments. In the *Prize Cases*, Dana had confronted the critical challenge to a constitutional democracy in the time of war: "to keep the discrepancy between what had to be done and what could be done constitutionally, as narrow as possible."[86] The sailor-lawyer's extraordinary argument enabled the great work of the prairie lawyer to continue, because each felt in their bones that the Constitution mattered.

ENDNOTES

[1]James M. McPherson, **Crossroads of Freedom: Antietam, The Battle That Changed the Course of the Civil War** (Oxford University Press, 2002), 3.

[2]The *Prize Cases*, 67 U.S. 635 (1863).

[3]Robert F. Lucid, ed., **The Journal of Richard Henry Dana, Jr.** (Cambridge, MA: The Belknap Press of Harvard University Press, 1968), vol. I, xxxiii.

[4]Richard Henry Dana, Jr., **Two Years before the Mast** (New York, The Modern Library, 2001), 115. After seeing two of his shipmates brutally flogged, Dana wrote: "I . . . vowed that if God should ever give me the means, I would do something to redress the grievances and relieve the sufferings of that poor class of beings, of whom I then was one."

[5]Charles Francis Adams, **Richard Henry Dana** (Cambridge, MA: The Riverside Press, 1890), vol. I, 27. Adams did not use "Jr.," though both he and Dana were named after fathers well known in the nineteenth century. The senior Richard Henry Dana was a noted poet and essayist. The senior Charles Francis Adams was the U.S. ambassador to England during the Civil War. There was a long and intimate connection between the two families.

[6]The *Prize Cases*, 67 U.S. at 637–38.

[7]Brian McGinty, **Lincoln and the Court** (Cambridge: Harvard University Press, 2008), 122.

[8]John T. Woolley and Gerhard Peters. The American Presidency Project (online). "Proclamation of Blockade in South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas (April 19, 1861)." Santa Barbara, CA. Available at http://www.presidency.ucsb.edu/ws/?pid=70101.

[9]Stuart L. Bernath, **Squall across the Atlantic** (Berkeley: University of California Press, 1970), 19.

[10]Doris Kearns Goodwin, **Team of Rivals** (New York: Simon and Schuster, 2005), 351.

[11]David M. Silver, **Lincoln's Supreme Court** (Urbana: University of Illinois Press, 1998 reissue; original publication, 1957), 105.

[12]McGinty, 123.

[13]Gideon Welles, **Lincoln and Seward: Remarks upon the Memorial Address of Chas. Francis Adams, on the Late Wm. H. Seward** (New York: Sheldon and Company, 1874), 124.

[14]Charles Francis Adams, **Richard Henry Dana** (Cambridge, MA: The Riverside Press, 1890), vol. II, 267.

[15]Quoted in William H. Rehnquist, **All the Laws But One** (New York: Vintage Books, 2000), 59.

[16]*Dred Scott v. Sandford,* 60 U. S. 393 (1857).

[17]McGinty, following 143, Justice Nathan Clifford.

[18]Howard K. Beale, ed., **The Diary of Edward Bates, 1859–1866** (Washington, D.C.: Government Printing Office, 1933), 231. The Attorney General's entry of February 14, 1862 notes that he met with attorneys "anxious to bring on the prize cases."

[19]Silver, 107.

[20]Carl B. Swisher, **Roger B. Taney** (New York: Macmillan, 1935), 563–64.

[21]Rehnquist, 44.

[22]*Id.* at 121.

[23]McGinty, 134.

[24]Gideon Welles, **Diary of Gideon Welles** (Cambridge, MA: The Riverside Press, 1911), vol. III, 67–68.

[25]McGinty, 134.

[26]Clinton Rossiter, **The Supreme Court and the Commander-in-Chief** (Ithaca, NY: Cornell University Press, 1951), 69.

[27]McGinty, 134.

[28]Dana's offer to assist in the argument before the Supreme Court was not initially welcomed by Attorney General Bates and precipitated correspondence with an assistant attorney general that must have seemed demeaning to Dana. "I beg you to inform the Attorney General that I did not know, when I wrote him, that he retained counsel in such a manner as to include *The Amy Warwick.* I supposed that Mr. Evarts' retainer included only the case he had argued before Judge Betts and Judge Nelson, and I did not know that Mr. Eames had been retained at all." Richard Henry Dana to Assistant Attorney General T. J. Coffey, November 24, 1862. National Archives, NARA-CP RG 60, letters received Massachusetts, 1813–1864. Entry 9, Box 1. *See also* Samuel Shapiro, **Richard Henry Dana, Jr.** (East Lansing: Michigan State University Press, 1961), 121.

[29]Testimony of Charles Brown, Interrogatory No. 29, *United States of America v. The Brig Amy Warwick & Cargo,* In Admiralty, Circuit Court of United States, Ma.

Dist., printed case, p. 27, Dana Family Papers 1862–1868, Mass. Historical Society.

[30]Shapiro, 117–18.

[31]*The Amy Warwick*, 2 Spr. 123, 1 Fed. Cas. 799 (1862).

[32]Shapiro, 120.

[33]Adams, vol. II, 277.

[34]*The Hiawatha, The Crenshaw*, Blatchf. Prize Cas. 1, 12 F.Cas. 95 (1861).

[35]Richard Henry Dana, Jr., **The Seaman's Friend** (Mineola, NY: Dover Publications, 1997), 193.

[36]Adams, vol. I, 129.

[37]Adams, vol. II, 268–69.

[38]Richard Henry Dana, Jr. to Attorney General Edward Bates, November 16, 1862 and to Assistant Attorney General T. J. Coffey, November 24, 1862; Coffey to Dana, November 28, 1862, National Archives, *supra* 28.

[39]Thorton K. Lothrop to Charles Francis Adams, Jr., August 25, 1890, quoted in Adams, vol. II, 418.

[40]Adams, vol. II, 138.

[41]*United States v. The Cargo of Prize Barque Meaco*, unreported case, cited by Carl B. Swisher, **History of the Supreme Court of the United States: The Taney Period, 1836–64** (New York: Macmillan, 1974), vol. V, 882.

[42]Beale, 340.

[43]*The Hiawatha, The Crenshaw*, 12 F. Cas. 94 (1861).

[44]McGinty, 133.

[45]Bernath, 18–19.

[46]Richard Henry Dana III, **Speeches in Stirring Times and Letters to a Son** (Cambridge, MA: The Riverside Press, 1910), 276.

[47]The *Prize Cases*, 67 U.S. at 639–50.

[48]The *Prize Cases*, 67 U.S. at 648–49 (emphasis in original).

[49]The *Prize Cases*, 67 U.S. at 643.

[50]The *Prize Cases*, 67 U.S. at 648.

[51]McGinty, 135.

[52]*Id.*

[53]Beale, 281.

[54]The *Prize Cases*, 67 U.S. at 645.

[55]Beale, 281.

[56]Silver, 118 (quoting Hampton L. Carson, **The History of the Supreme Court of the United States with Biographies of All the Chief and Associate Justices** (Philadelphia, 1902), vol. II, 382).

[57]Adams, vol. II, 143.

[58]Richard Henry Dana brief, reprinted in Van Vechten Veeder, ed., **Legal Masterpieces** (Chicago: Callaghan and Co. 1912), vol. II, 907–28.

[59]R. H. Dana III, 3.

[60]The *Prize Cases*, 67 U.S. at 650.

[61]The *Prize Cases*, 67 U.S. at 650–57.

[62]The *Prize Cases*, 67 U.S. at 651.

[63]The *Prize Cases*, 67 U.S. at 651, 653.

[64]The *Prize Cases*, 67 U.S. at 654–55.

[65]The *Prize Cases*, 67 U.S. at 658.

[66]The *Prize Cases*, 67 U.S. at 659.

[67]*See, e.g.*, Deborah Pearlstein, "Contemporary Lessons from the Age-Old *Prize Cases*: A Comment on the Civil War in U.S. Foreign Relations Law," 53 *St. Louis U. L.J.* 73 (Fall 2008).

[68]The *Prize Cases*, 67 U.S. at 660.

[69]The *Prize Cases*, 67 U.S. at 659–61.

[70]R. H. Dana III, 275.

[71]Adams, vol. II, 269.

[72]Beale, 281.

[73]Adams, vol. II, 269.

[74]*The New York World*, March 11, 1863; Silver, 113–14.

[75]The *Prize Cases*, 67 U.S. at 665.

[76]The *Prize Cases*, 67 U.S. at 666–74.

[77]The *Prize Cases*, 67 U.S. at 694–95, 698–99 (Nelson, J., dissenting).

[78]Silver, 116.

[79]Charles Warren, **The Supreme Court in United States History** (Boston: Little, Brown, & Company, 1922), vol. III, 103.

[80]Adams, vol. II, 267.

[81]Rossiter, 75.

[82]R.H. Dana III, 276–77.

[83]Richard Henry Dana, Jr., **Enemy's Territory and Alien Enemies—What the Supreme Court Decided in the Prize Causes** (Boston: Little, Brown, & Company, 1864).

[84]Adams, vol. II, 274.

[85]*Id.*, 273–74.

[86]Harold Melvin Hyman, **A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution** (New York: Knopf 1973), 101.

The Case of William Dick: Ransom County, North Dakota

MYRON H. BRIGHT*

In May 2009, a decision of the United States Supreme Court with North Dakota roots turned fifty years old. A case unique in the annals of the law, *Dick v. New York Life Insurance Company*[1] still fascinates lawyers today. Factually, the case presented a strange question: could an experienced hunter accidentally shoot himself not once, but twice? Some of North Dakota's finest lawyers, including Philip Vogel, Donald Holand, and Norman Tenneson, aimed to get to the bottom of that matter. The judges were equally impressive: Judge Ronald Davies of the federal district court; Judge John Sanborn of the U.S. Court of Appeals for the Eighth Circuit; and Chief Justice Earl Warren and Justice Felix Frankfurter. Finally, as a matter of Supreme Court jurisprudence, *Dick* may have been the last time the High Court granted a petition for certiorari in a case that turned almost exclusively on questions of fact. In honor of its golden anniversary, this article recounts the captivating story of *Dick v. New York Life*.

The Facts

William Dick, a healthy, good-natured, 47-year-old farmer from rural Ransom County, began the morning of January 20, 1955, like any other. Dick sat down for an otherwise ordinary breakfast with his 14-year-old daughter and his beloved wife, Blanche. The night before, the family had eaten ice cream together as they watched television, and Dick had helped his daughter with her science homework. At breakfast, Dick and Blanche discussed his plan to make sausage with his cousin later that day. After breakfast, Dick put on his winter work clothes—including bulky gloves and a heavy jacket—and Blanche drove their daughter to school. Before leaving, Dick said goodbye in the normal way, and he started to feed silage to his cattle and milk to his pigs.

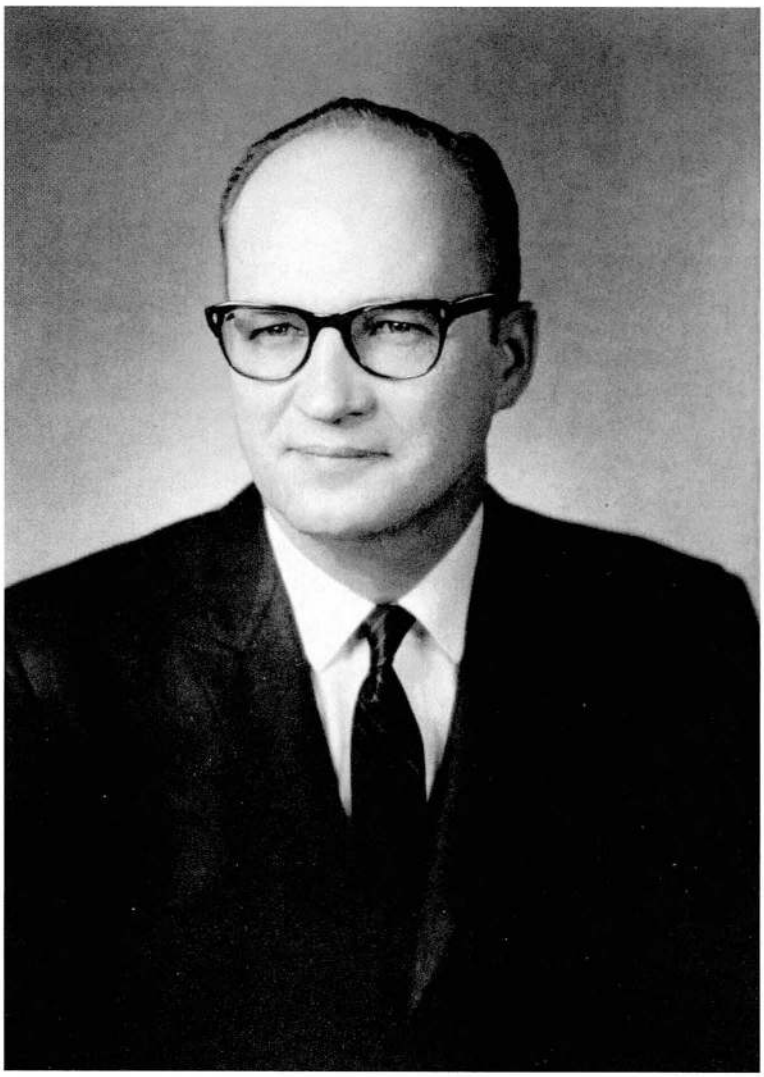
About thirty minutes later, Blanche returned to the farm and went inside the main house to complete her housework. When Blanche thought it was time to go to Dick's cousin's house, she went to the barn to look for her husband. After a short search, Blanche found Dick lying on his back in a pool of blood in the silage shed. Dick's double-barreled

shotgun, which he kept loaded in the shed because of animal attacks on his livestock, was on the floor nearby, as was a screwdriver that Dick used to open the silage shed's broken door. Dick had been hit by pellets from two shotgun shells: one discharge entered his chest and was not immediately fatal; the other entered his head, killing him instantly. A coroner's jury later determined the death to be a suicide.

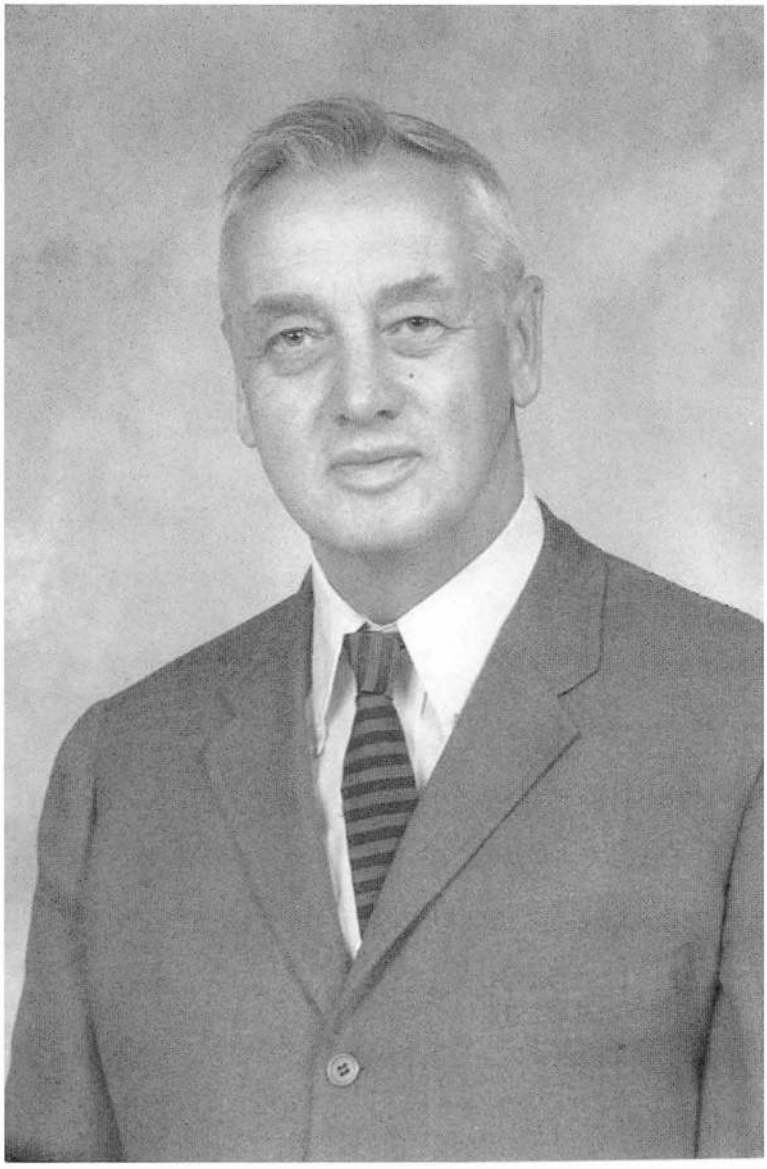
At the time of his death, Dick carried a life insurance policy with the New York Life Insurance Company with benefits of $7,500 on his death but $15,000—that is, double indemnity—for an accidental death. Blanche, the policy's beneficiary, filed a claim. New York Life, while admitting liability for the policy's face value of $7,500, denied Blanche's claim for the double indemnity, contending that Dick's death was a suicide.

The Lawyers, a Theory, and a Lawsuit

Dick's family, unsatisfied with the finding that Dick had killed himself, eventually retained lawyer and state senator Donald Holand on



Donald Holand (left) was a state senator and a leading lawyer in Lisbon, North Dakota, when the Dick family hired him as their counsel.



Philip B. Vogel (left) served as lead counsel in the *Dick* case and worked with the author in their law firm for twenty-one years. Vogel, whom the author has described as a true "Renaissance man," served as his mentor during their early years.

the advice of Dick's brother, state representative Lawrence Dick. Holand was my good friend; both our families had immigrated from Europe and first settled near the turn of the twentieth century in the small city of McKinley, on Minnesota's Iron Range. Holand attended the University of North Dakota and started out at the law school, but service in the India Theater during World War II interrupted his studies. After the war, he served on the staff of Senator Milton Young and completed his law degree at George Washington University in Washington, D.C. He returned to Lisbon, North Dakota shortly thereafter, began a successful legal practice, and got elected to the North Dakota legislature. Holand was the leading lawyer in Lisbon at that time.

Holand initially thought that the Dick case "sounded pretty hopeless," but he revised his view when he began to reconstruct the

incident. Holand visited the Dick farmstead, where he learned that the shotgun had a hair trigger and frequently misfired. After numerous attempts to recreate the events of the day with a broom, Holand had an epiphany, which he explained as follows:

> [I]t hit me that [Dick] might have been carrying the gun by the barrel; that being in a hurry or for some reason he slammed the gun against the casing of the door entering the silo shed, and that it discharged causing a grazing wound to his left chest wall and spraying pellets into the upper far corner of the silo shed. I surmised that [Dick] had sited something in the holding pen, hurried to the barn, grabbed the gun by the door, rushed to the silo shed door, and in his haste had hit the gun against the door casing, causing it to fire the first shot. The rest was easy. His forward motion and the impact had spun him around. Still hanging on to the gun he landed on the floor on his back with the gun pointed to his head. Upon hitting the floor, the gun discharged a second time, hitting him in the head and spraying pellets next to the west door.

On the basis of this theory, Holand had the coroner's jury's verdict voided. Then Blanche sued New York Life in state district court, alleging that the death was accidental and seeking the double indemnity. Norman Tenneson represented New York Life. Tenneson had graduated from Yale Law School and was considered an excellent lawyer in every legal area, including trial and appellate.

When Tenneson removed the case to federal district court, Holand, who had never tried a federal case, decided to associate with a longtime friend: Philip Vogel. Vogel, born in 1909, graduated from the UND School of Law. Vogel had been my mentor when I joined the Vogel firm as an associate in 1947 and remains one of the finest lawyers that I have ever known. When Holand explained the bizarre facts to Vogel, Vogel was convinced in the rightness of the Dick cause and agreed to join the case, despite the small amount of money at stake. Holand wrote that "[t]here really would be no big reward if we won, but money was not the motive. We were both certain that William Dick had not committed suicide and we wanted to erase that stigma for the family."

The Proceedings

The case was tried to a jury in Fargo in 1957, with Judge Ronald Davies presiding. About the same time as the *Dick* proceedings, Judge Davies gained international recognition for ordering the integration of all-white Little Rock Central High School, which led to President Eisenhower's deployment of the 101st Airborne Division to escort the so-called "Little Rock Nine." The *Dick* trial, which featured Holand on the floor with the empty shotgun demonstrating his theory to the jury, resulted in a swift verdict. The jury found that Dick's death was an accident, not suicide, and found New York Life to be liable on the double-indemnity provision.

Tenneson appealed on behalf of New York Life to the Eighth Circuit, arguing that the record contained insufficient evidence to sustain a jury verdict. The case was assigned to a distinguished panel of jurists. Judge John Sanborn, a very experienced judge, had three years tenure as a State of Minnesota judge, then seven years as a federal district judge, and thereafter twenty-six years as a federal circuit judge. He was about seventy-five years old. The second judge was Judge Joseph Woodrough, then eighty-four years of age. Judge Harvey Johnsen, a youngster then aged sixty-four, was the third judge of the panel.

Much to the dismay and surprise of Holand and Vogel, the panel unanimously reversed. The judges believed they could justifiably set aside the jury verdict:

> One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point.[2]

The court's critical assumption was that Dick's shotgun could not have misfired; the panel believed that the record "definitively established" that "neither barrel could have been fired unless someone or something either pulled or pushed one of the triggers."[3] The court mentioned North Dakota law only in passing:

> The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of accidental death makes a prima facie case that death was accidental, and "that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or non-intentional injury."[4]

Finally, the court concluded that

> the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other

Norman Tenneson (pictured), counsel for New York Life, successfully appealed the *Dick* case to the Eighth Circuit. The three lawyers involved in the case were good friends with each other and with the author.

> in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury.[5]

After reading the decision, Holand called Vogel to discuss what, if anything, would come next. Vogel thought that the Eighth Circuit opinion had paid lip service to North Dakota law but utterly failed to apply it. He was determined to right the wrong, despite the fact that the amount at issue might not have justified further litigation. Both attorneys wanted to proceed, thinking that if a relatively small case had come this far, it would be worth pursuing it a little further.

But desire often wrecks on reality's shoals, and the prospect that the U.S. Supreme Court would grant certiorari was dim indeed. So here they were, two North Dakota lawyers faced with the almost impossible task of trying to get justice from the U.S. Supreme Court on a simple insurance case that turned primarily on an interpretation of facts, with apparently no great constitutional issue in the case.

Vogel got to work drafting and produced a persuasive and excellent petition for the writ of certiorari. In less than eight pages of facts and argument, he conveyed the following:[6]

1. That the case presented an important constitutional question: the right to a trial by jury as guaranteed by the Seventh Amendment.
2. A compelling (but accurate) statement of the facts and how those facts justified the writ.
3. A strong, concise legal argument, which concluded:

> We recognize that writs are sparingly granted, but the failure to follow the North Dakota law and the denial to Mrs. Dick of her right to trial by jury, is of sufficient importance, not only to the petitioner, but to other citizens of North Dakota, that we submit the writ should be allowed.
>
> Wherefore, it is respectfully submitted that petitioner's prayer for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeal should be granted.[7]

It worked. On June 23, 1958, to the delight of Vogel and Holand, the Supreme Court granted the writ.

In January 1959, Vogel, Holand, and Tenneson traveled to Washington, D.C. to present their oral arguments. Vogel believed that he would win. In fact, Vogel was a great believer in himself. As I have said in the past about this lawyer, "If he believes he's right, by gosh, he'll leave no stone unturned to get the relief his clients are entitled ... On the other side, he's fair and objective in attempting to resolve issues fairly for everybody before they go to litigation."[8]

When Vogel returned, we talked about the Supreme Court argument. Vogel mentioned that the Court seemed agreeable to the arguments that he had made, and he was fairly confident that he would succeed in the appeal. He also mentioned that he had been asked about the shotgun, which Dick claimed had a defect, and he brought that exhibit to the Justices. Later on, the marshals told him that he had made a mistake: the lawyers do not approach the Bench in the Supreme Court but give an exhibit to the marshals. Despite the breach of formal protocol, the Justices seemed unbothered.

Vogel also conveyed to me an incident that happened after the arguments had concluded. He and Holand were descending the steps in front of the Supreme Court when a couple of young priests approached them and asked if they might ask a question. Holand said, "Sure." One of the priests asked, incredulously, how the Dick case had reached the highest court in the land with only $7,500

involved. The priest pointed out that in his part of the country, it would cost much more than that amount just for legal representation. Vogel responded that lawyers do things differently in North Dakota. He also said that the case was a matter of principle: to prove that Dick's death was not suicide. He told the priest that, even if he received a favorable decision, Mrs. Dick would still be receiving the proceeds. As they left, one of the young priests said, "God bless you. We will say a prayer for you this evening."

The prayers must have helped. On May 18, 1959, the Supreme Court handed down its decision. It reversed the Eighth Circuit and reinstated the jury verdict and judgment in the district court.

A Decision and a Dissent

Chief Justice Earl Warren drafted the majority opinion. After a careful description of the record evidence, he wrote the following:

> In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not fire unless someone or something pulled the triggers. Petitioner's evidence on this score ... could support a jury conclusion that the gun might have fired accidently from other causes. Once an accidental discharge is possible, a jury could rationally conceive of a number of explanations of accidental death which were consistent with evidence which the jury might well have believed showed the overwhelming improbability of suicide.[9]

At the conclusion of the Warren opinion, the Chief Justice added:

William Dick's wife, Blanche, found him lying on his back in a pool of blood in the silage shed on their farm in North Dakota, similar to the one above. Dick's double-barreled shotgun, which he kept loaded in the shed because of animal attacks on his livestock, was on the floor nearby. His death from the pellet wound to his head was hastily ruled a suicide.

> Under all the circumstances, we believe that he was correct and that reasonable men could conclude that the respondent failed to satisfy its burden of showing that death resulted from suicide.[10]

Thus, a jury could reasonably believe that Dick accidentally shot himself twice.

Incidentally, the Court also noted that "[l]urking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship."[11] The Court noted that on this question, the lower courts are not in agreement.[12] However, the Court said that since this issue had not been briefed and all parties assumed that the North Dakota standard applied, it would apply the North Dakota standard in its decision.

For the dissent, this was exactly the type of case that the Supreme Court should not review. Justice Frankfurter, joined by Justice Charles Whittaker, railed against the grant of certiorari. Frankfurter stated that certiorari had been improperly granted and argued that the Supreme Court exists to decide important matters and not mere factual matters:

> If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence.

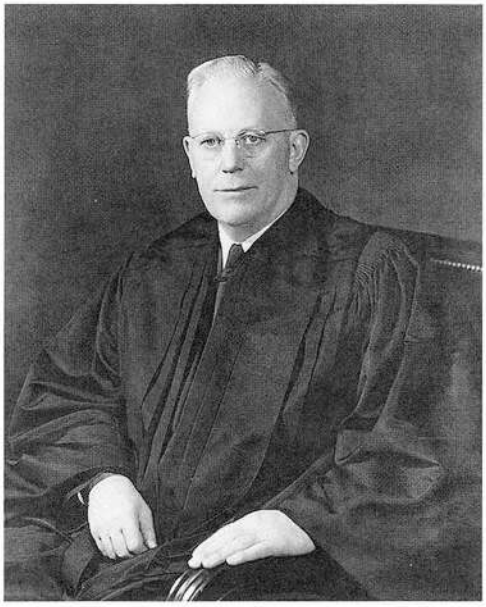
On the merits, Justice Frankfurter added:

> It is the staple business of the Courts of Appeals to examine records for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury.[13]

The dissent concluded, "If we are to consider the merits of the case, I would affirm the judgment of the Court of Appeals."[14]

Justice Frankfurter's unusually lengthy lament was the manifestation of long conflict with Chief Justice Warren about the proper role of the Supreme Court. In his biography of Chief Justice Warren, Bernard Schwartz noted the disagreement between Frankfurter and Warren in taking cases in which only the facts were in dispute, particularly in Federal Employers Liability Act cases. As noted by Schwartz, the Dick case brought the matter to a head:

> Frankfurter did, however, publicly dispute Warren on whether the Court should take . . . minor cases in a 1959 case in which the Court reinstated a $7,500 jury verdict for a widow on an insurance policy. According to Anthony Lewis in the *New York Times*, the opinion of the Court by Chief Justice Warren "reviewed in human, almost folksy terms, the issues in the case." Frankfurter, Lewis went on, then "read his colleagues a lecture on



Chief Justice Earl Warren wrote the majority opinion for the Supreme Court, which reversed the lower court's ruling on the ground that the shooting could have been accidental. Felix Frankfurter penned the dissent, disputing whether the Court should have reviewed such a minor case involving a $7,500 jury verdict for a widow on an insurance policy.

> the need to conserve the Court's time and energy by avoiding trivial cases." Frankfurter declared (in a passage not contained in his printed dissenting opinion), "This is a case that should never have been here. It will set no precedents. It will guide no lawyers. It will guide no courts."[15]

Dick's Legacy

Vogel disputed Frankfurter's characterization of the case as "trivial." It certainly wasn't for Mrs. Dick. Moreover, Vogel told me, "Frankfurter said this case is of importance to nobody else but the parties. In fact, it's one of the most widely cited cases from that term in the Supreme Court."

Well, courts across the land have cited the case about 150 times, including 21 citations in the U.S. Supreme Court. To be sure, most of those citations relate to the standard of proof, either under federal or state law, that applies to a judgment entered in federal court in a diversity case. Of course, the Supreme Court never decided that issue. But the enduring legal importance of *Dick* is probably its acknowledgement of the central role of the jury in our judicial system. Cases relating to facts may or may not get to the highest court in the land. And when they do, the High Court will still support the validity of a jury verdict where sufficient evidence will support that verdict. *Dick* also caused a reappraisal of the Supreme Court's certiorari process. Whether the High Court should review more cases is a contentious issue that continues to divide the legal community today.

Cases are not only about legal principles. *Dick*'s legacy has a human component too. For the family, the case provided justice and finality. A wrong was righted. For the lawyers, the case showed the importance of zealous advocacy, legal acumen, and perseverance. The lawyers are now dead, but their conduct in this case represents the quality of representation that the lawyers in North Dakota should aspire to for their own clients. For the judges, the case reflected how different minds analyze similar issues and how a diversity of opinion in the judiciary improves the administration of justice. It also calls for our admiration and respect for a great Chief Justice, Earl Warren, who believed that the role of the Supreme Court included taking cases when justice requires. It has been said that Chief Justice Warren had a soft spot in his heart for widows, orphans, and railroad workers (his father worked for a railroad). Whether for its legal effect or its human effect, *Dick v. New York Life* deserves our warm praise.

ENDNOTES

*I am indebted to the following sources for background information on the *Dick* case: Ms. Shirley Berg, friend of Mr. Holand, who provided Mr. Holand's personal written reminiscences about the *Dick* case, and the Vogel law firm of Fargo, North Dakota for a copy of the Supreme Court record of the case.

I thank my former law clerk, Alex Hontos (J.D. 2007, Univ. of Minn. Law School) for his editorial and research assistance.

[1]359 U.S. 437 (1959).

[2]*New York Life Ins. Co. v. Dick*, 252 F.2d 43, 46 (8th Cir. 1958).

[3]*Dick*, 252 F.2d at 46.

[4]*Id.* (quoting *Svihovec v. Woodmen Accident Co.*, 69 N.D. 259, 285 N.W. 447, 449 (1931)).

[5]*Id.* at 47.

[6]Petition for Writ of Certiorari, *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959) (No. 58).

[7]*Id.* at 8.

[8]Chet Gebert, "Philip Vogel Projects Low Profile." *The Forum*, Nov. 23, 1975, at B2.

[9]*Dick v. New York Life Ins. Co.*, 359 U.S. 437, 445–46 (1959).

[10]*Id.* at 455–56.

[11]*Id.* at 444–45.

[12]*See id.* at 445.

[13]*Id.* at 461–62.

[14]*Id.* at 463.

[15]Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** 270 (1983).

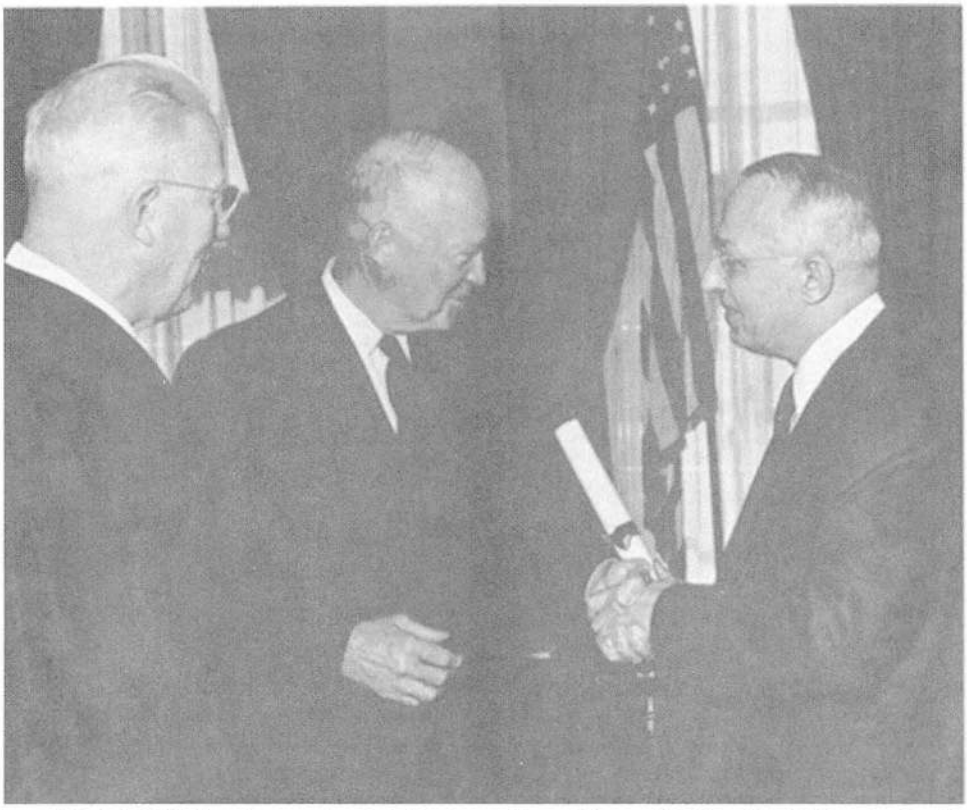
The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General

STEFANIE A. LEPORE

I. Introduction

"When the Supreme Court invites you, that's the equivalent of a royal command. An invitation from the Supreme Court just can't be rejected."[1] The guest most frequently invited to the Supreme Court is the Solicitor General. Even before the practice of the Supreme Court calling for the views of the Solicitor General process developed, the Court occasionally invited the Solicitor General to participate as amicus in important cases by submitting a brief and/or participating in oral arguments before the Court.[2] As then–Solicitor General Simon E. Sobeloff remarked to then–Attorney General Herbert Brownell in a 1954 letter about the landmark school desegregation cases, "The Supreme Court has expressly extended an invitation to the United States to participate in the reargument. While this by no means compels participation, such an invitation is not to be lightly declined."[3]

The Solicitor General "has developed a unique relationship with the Supreme Court, one in which it serves as an adviser as well as an advocate."[4] The Solicitor General fulfills his role as the Court's adviser and advocate by responding to the Court's invitation to express the views of the United States in given petitions for certiorari.[5] Here, the Solicitor General acts as a special type of amicus, because the Solicitor General is neither a party to the proceeding nor opining on behalf of one of the parties, but rather acting as a sort of "partner" to the Justices.[6] When the Justices believe that, before they can grant or deny a petition for certiorari, they would like another opinion of the merits of a petition, they "call for the views of the Solicitor General," known colloquially as CVSG.[7] Because of the



Simon E. Sobeloff (right), who served as Solicitor General from February 1954 to July 1956 under President Dwight D. Eisenhower (center), enjoyed friendships with several of the Justices, especially Felix Frankfurter and Earl Warren (at left)

enormous amount of trust that the Court has in the Solicitor General's office, the Court values the Solicitor General's opinion as "provid[ing] [the] best judgment with respect to the matter at issue."[8] However, this unique relationship of trust between the Court and the Solicitor General, such that the Solicitor General's opinion is treated as tantamount to the opinion of a tenth Justice,[9] did not develop until the 1950s.

This paper will examine how the CVSG process developed. Part II will provide general background information, explaining the office of the Solicitor General, the Supreme Court practice of granting certiorari and the reasons for doing so, and the process by which the Supreme Court invites the Solicitor General to express the opinion of the United States. Part III will examine the environment that laid the groundwork for the CVSG process to emerge: the personal relationships that existed between individual Justices and attorneys in the Office of the Solicitor General and the political climate that instituted a political partnership between the Court and the Solicitor General. Finally, Part IV will argue that the CVSG process represents the culmination of the mutually beneficial relationship between the Court and the Solicitor General and then describe the first petitions for certiorari in which the Supreme Court exercised its option to CVSG.

II. Background Information

A. The Solicitor General

Congress created the Office of the Solicitor General with the Federal Judiciary Act of 1870.[10] As an officer within the executive branch, the President appoints the Solicitor General, and the Solicitor General is then subordinate to both the President and the Attorney General.[11] In appointing the Solicitor

General, the President looks at the same criteria that affect the nomination of a Supreme Court Justice: well-respected, legal experience, and probably shares a similar legal philosophy of the President's administration.[12] Because the Solicitor General is formally a member of the Department of Justice, his office is in that department's building.[13] However, as a testament to the Solicitor General's dual roles as government lawyer and adviser to the Supreme Court, he also has permanent chambers in the Court.[14]

"Politics and law are at the intersection of the solicitor general's responsibilities."[15] The Solicitor General must be "learned in the law" and is entrusted with representing the interests of the United States, assisting the Attorney General, and "translating the policies of the government, the president, and the executive branch into litigation."[16] The Solicitor General decides which cases that the government lost in lower courts will be appealed to the Supreme Court, controls government litigation at the Supreme Court, advocates as amicus curiae in cases where the government is not a party, and advises the Supreme Court on petitions for certiorari.[17] Although the Solicitor General experiences some political pressure from the President and the President's administration, the tradition of independence of the Solicitor General's office helps to ensure that the Solicitor General largely retains autonomy from political sways.[18] Indeed, the Attorney General does not usually attempt to control the litigation strategy of the Solicitor General.[19] Instead, the Solicitor General's agenda is structured by the Supreme Court's agenda: as the Supreme Court's power and docket changes, so does the role of the Solicitor General.[20] Not only is the Solicitor General's agenda structured around the Supreme Court, but the Solicitor General helps to set that of the Court: a "principal chore of the Solicitor's office is to help the Supreme Court set its docket by screening petitions for certiorari."[21]

B. Grant, Deny, or CVSG: The Certiorari Process

"A petition for certiorari is, stripping away the legal verbiage, a request to the Supreme Court to hear and decide a case that the petitioner has lost either in a federal court of appeals or in a state supreme court."[22] Parties can file petitions for certiorari throughout the year, and the petitions therefore generally accumulate at between 80 to 100 per week.[23] When a petition for certiorari first arrives at the Court, it is sent to the "cert pool," which was first created at the suggestion of Justice Powell in 1972.[24] The "cert pool" consists of the law clerks of the participating Justices, who collectively pool their law clerks to divide the petitions for certiorari among themselves.[25] The law clerks divide the thousands of petitions so that one of them reads every petition, assesses the worthiness of the petition for the Court's review, and writes an annotated certiorari memo "outlining the facts and contentions" of the petition.[26] The law clerks circulate the annotated certiorari memos for each petition for certiorari to the participating Justices, who then review the memos and make a preliminary decision on how to vote on the petition.[27] Before the Justices meet collectively to determine the fate of a petition for certiorari, the Chief Justice circulates a "discuss list"—a list of the petitions that he would like to discuss with the other Justices.[28] The Associate Justices are also free to add petitions to the "discuss list," and any petition for certiorari not discussed at a conference is denied certiorari without a vote.[29] For much of the year, except during the Court's recess between July and the last week of September, the Justices vote on the petitions for certiorari in weekly conferences held in a room next to the Chief Justice's Chambers.[30] These Conferences in which the Justices vote on petitions for certiorari are only attended by the Justices; "they are not open to the public or to other Court personnel."[31]

When a petition for certiorari is on the discuss list at a weekly conference and therefore ready for the Justices' ultimate decision, the Justices have several voting options.[32] Most obviously, they can vote to grant in full or deny in full certiorari.[33] However, they have several options that fall between these two extremes. For instance, sometimes the Justices believe that more information is necessary before they can reach a full decision to grant or deny certiorari, and they will therefore CVSG.[34] If several petitions for certiorari raise the same issue, the Court may accept all of them "to address that issue more fully than a single case would allow them to do."[35] The Court may also choose to narrow the granting of certiorari by choosing one issue raised in the petition or posing an issue *sua sponte* to the parties.[36]

After the Court has granted certiorari, either in full or in part, the Court then decides between giving the petition full consideration and giving it summary consideration.[37] For petitions granted full consideration, the Court will hear oral arguments, receive briefing on the merits from the parties, and issue "a decision on the merits with a full opinion explaining the decision."[38] If, instead, the Court gives a petition summary consideration, the petition may take two routes.[39] Usually, in summary consideration, the Court issues a "GVR," which entails granting certiorari (G), vacating the lower court decision (V), and remanding the case to the lower court for reconsideration (R).[40] In the remainder of summary consideration petitions, the Court issues a per curiam opinion—a short, unsigned opinion on the merits.[41]

When hearing and deciding cases on the merits, the Court operates by majority rule.[42] However, when making certiorari decisions, the historical practice of the Court, called the "rule of four,"[43] is to require four out of nine votes from the Justices.[44] The Court has never been very forthcoming about why one petition is deemed worthy of certiorari and another not worthy. Instead, it advises that "certiorari will be granted only for compelling reasons."[45] Those compelling reasons, though "neither controlling nor fully measuring the Court's discretion," are described in Rule 10 of the Rules of the Court.[46] The criteria described in Rule 10 for evaluating a petition for certiorari are: (1) a conflict between two appellate courts, often called a circuit split; (2) a conflict between the court at issue and Supreme Court precedent; (3) importance of the issues in the petition; and (4) procedural posture of the case.[47] Although these criteria for certiorari may seem somewhat imprecise and vague, it has long been certain that "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions."[48]

C. The CVSG Process: Calling for the Views of the Solicitor General

"[T]he group of lawyers that has the greatest impact on the Court is the set of about two dozen who work for the Office of the Solicitor General in the Justice Department."[49] Indeed, when the Supreme Court calls for the views of the Solicitor General, the Solicitor General becomes "an important ally for the justices, who rely on the office's expertise to control their docket and help structure doctrinal development."[50] Essentially, the Supreme Court is requesting the Solicitor General's opinion on a petition for certiorari because the Justices believe that the petition is important and potentially worthy of certiorari but need more information, in the form of another legal opinion, before they can make a final decision.[51] In the CVSG role, the Solicitor General puts aside any partisan advocacy concerns that the Office may otherwise have in order to "assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit."[52] The Solicitor General provides "a less partisan review of the law and a survey of existing precedent."[53] Traditionally, even where government interests would prefer otherwise, the Solicitor General does not hesitate to advise the Justices that the Court lacks jurisdiction

over an issue raised in a petition or that the petition simply does not satisfy the Court's criteria for granting certiorari.[54] There are a number of circumstances in which the Court will CVSG: where a federal interest is involved; where there is a new issue without established precedent; where there has been a change in the development of an issue; or where an evolving issue has become more complicated and attached to other issues.[55] Former Solicitor General Kenneth Starr described the purposes of the CVSG process as follows:

> The CVSG has a twofold purpose. First, it serves to guide the Court or assist the Court as to whether the case is important enough to merit review. Second, it serves to offer the position of the U.S. on the merits of the issue. With respect to the former . . . [i]t is a courtesy to the government. With respect to the latter—the position of the U.S.—there we followed the professional responsibility of assimilating the views of different parts of the Justice Department and the agencies and putting forth the best arguments.[56]

The high rate of correlation between the Solicitor General's certiorari recommendations and the Court's certiorari decisions is a testament to the Court's trust in the nonpartisan legal opinion of the Solicitor General.[57] Indeed, the Terms from 2001 to 2006 saw a 100-percent correlation between the Solicitor General's recommendation that the Supreme Court grant certiorari and the Court's doing so.[58] While the correlation is slightly less when the Solicitor General recommends that the Court should deny certiorari, the rate is still high enough to suggest more than simple coincidence.[59]

III. 1943–1957: Laying the Groundwork for a Partnership

Typically, the Solicitor General did not file voluntary amicus curiae briefs when the Supreme Court was hearing a groundbreaking or emerging issue.[60] In the days before the CVSG process became established, the Solicitor General was only involved in emerging issues before the Court when the government was a party to the proceeding.[61] Also, in a number of cases where the Court wanted the government's opinion, the Court simultaneously granted certiorari and requested that the Solicitor General file an amicus brief expressing the views of the United States or of a particular agency of the United States.[62]

However, during the late 1950s, the Court began to gravitate away from its practice of requesting an amicus curiae brief from the Solicitor General as it was granting certiorari and towards the CVSG practice of requesting the Solicitor General's opinion in determining if a petition for certiorari merited review. Several factors came together during this time period to provide a framework in which the CVSG practice seemed like the logical extension to the Court's certiorari practices. Attorneys in the Solicitor General's Office cultivated personal and professional relationships with Supreme Court Justices as the two groups were acting as political advocates in the civil-rights movement.

A. Personal Relationships between Supreme Court Justices and Attorneys in the Office of the Solicitor General

J. Lee Rankin was the Solicitor General between August 1956 and January 1961, the time that the CVSG process blossomed.[63] Before President Dwight D. Eisenhower appointed him Solicitor General on August 14, 1956, Rankin worked as the assistant attorney general in the Department of Justice's Office of Legal Counsel, where he argued in favor of the plaintiffs in the landmark case of *Brown v. Board of Education*.[64] As Solicitor General, Rankin "developed the Justice Department's position that led to the principle of one person, one vote" in response to the legislative reapportionment cases that the Supreme Court

J. Lee Rankin was the Solicitor General between August 1956 and January 1961, during which time the practice of the Supreme Court calling for the views of the Solicitor General was first developed.

heard.[65] Rankin was also a close friend and associate of Chief Justice Earl Warren,[66] who later wrote the majority opinion in *Reynolds v. Sims*,[67] which held "that the Constitution guarantees equal representation in state legislatures, to be measured generally by the formula 'one man, one vote.'"[68] Rankin also maintained a friendship with Justice Harold H. Burton, inviting the Justice to his home to visit with his wife and family.[69]

Rankin's predecessor as Solicitor General was Simon E. Sobeloff, who served from February 1954 to July 1956.[70] He became Solicitor General after the arguments in the landmark case of *Brown v. Board of Education* and therefore "inherited the responsibility for representing the government in the upcoming legal battle over implementation."[71] Sobeloff worked with Philip Elman, who at that time was the special assistant to the Attorney General on civil rights, to prepare the government's brief for implementing desegregation.[72] The Court's ultimate decision in *Brown II*[73] largely tracked the government's suggestion, except that it removed Sobeloff's proposed ninety-day limit for desegregation.[74]

Sobeloff, more than Rankin, had direct and continuing friendships with several of the Justices who were on the Court during the formative years of the CVSG process. For example, the collection of Justice William Brennan's papers shows that Brennan and Sobeloff maintained a correspondence.[75] Unfortunately, the content of this correspondence cannot yet be examined, as not all of the Brennan papers are available to the public.[76] Sobeloff was also friends with Justice Thurgood Marshall, who, while not on the Supreme Court during the crucial Terms of 1956–1958, joined the Court in 1967 as the CVSG process was just becoming entrenched in Supreme Court practice. Sobeloff and Marshall corresponded during the early 1960s, when both were federal appellate judges.[77] On September 12, 1962, Sobeloff wrote a letter to Marshall, congratulating him on his confirmation as a Second Circuit Court of Appeals judge.[78] Indeed, their close friendship is evident from an exchange between the two men during March 1963, where then Judge Marshall joked to Sobeloff, "I am taking this means of making the opening statement that if you get pushed for judges and need help, I would be more than agreeable to help out on a Baltimore sitting or two, providing, of course, it did not involve any cases of segregation, etc."[79]

Like his successor, Rankin, Solicitor General Sobeloff was close friends with Justice Burton.[80] Discussing a recent trip to North Carolina, Justice Burton signed his letter to Sobeloff, "with cordial regards to Mrs. Sobeloff and you from Mrs. Burton and I."[81] Sobeloff also maintained correspondence with Justice Felix Frankfurter between 1955 and 1956 and then again in 1961.[82] The two discussed personal subjects—including their opinions on the possible forming of a Jewish state in the Middle East and Sobeloff's relationship with his father—that indicate the depth and breadth of their friendship.[83] Sobeloff also turned to

Frankfurter for professional guidance, seeking Frankfurter's comments and suggestions on a "rough draft" of his "Address for New School for Social Research" that he planned to present in New York City on June 5, 1956.[84]

Lastly, and perhaps most importantly, Sobeloff and Chief Justice Warren also had a professional and, at times, political relationship. On October 7, 1955, Sobeloff sent a handwritten letter to Warren stating that "this is the letter I mentioned the other day."[85] Both the attachment and the wording of this particular letter are significant. The attached letter was one addressed to Sobeloff from the New York Chapter of the American Sons of the Revolution, reporting on a speech by Senator Eastland on the Supreme Court's recent Fourteenth Amendment jurisprudence in the segregation cases.[86] By forwarding a copy to the Chief Justice, Sobeloff was acting as a sort of political partner to the Court by alerting the Justices to the unfavorable speech by a member of another branch of the federal government.[87] The text of the letter itself not only serves as evidence of the relationship between Sobeloff and Warren, but also demonstrates that the two had previously discussed the politics surrounding the segregation cases.[88]

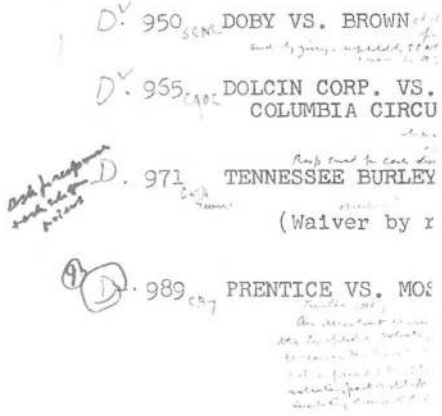
B. The Story behind *Sinclair v. United States*[89] : A Case Study of the Interplay between the Court and the Office of the Solicitor General

A feuding separated husband and wife, the Sinclairs, had been trading insults. When the husband mailed a letter containing many "four-letter words" to his wife, she angrily took the letter to the post office, and he was subsequently charged under a federal statute prohibiting mailing "obscene, lewd, and lascivious letters."[90] After Sinclair was convicted, he filed a petition for certiorari at the Supreme Court, and the Criminal Division of the Department of Justice drafted a brief in opposition to certiorari.[91] The opposition brief would have been routinely filed and the petition denied, but, as luck would have it, that draft in opposition landed in the hands of Philip Elman, then a staff attorney in the Office of the Solicitor General.[92] Elman believed that the Sinclair case and the mail-obscenity statute presented great constitutional issues. But the then Solicitor General, Philip Perlman, did not want to get involved and said that the Office would not file in the case.[93] It was at this point that Elman states he "probably acted improperly"[94]: He mentioned the case to Justice Frankfurter, for whom he had previously clerked, and his friend David Feller, the senior law clerk to Chief Justice Fred Vinson, and specifically mentioned to Feller that the Solicitor General might confess error in this case.[95] Feller "told the Clerk of the Court that the Chief Justice's office wanted to know what the government's position in the case was and wanted the government to file a brief."[96] The Solicitor General filed the Criminal Division's brief in opposition to certiorari, but Justice Frankfurter lobbied the other Justices and Feller lobbied the other law clerks, resulting in the Supreme Court granting certiorari.[97]

C. The Court and Solicitor General as Political Partners and Advocates

"The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's business is not to achieve victory, but to establish justice."[98] Indeed, when the Court grants certiorari in a case, it "helps shape political discourse in our society."[99] And

> [i]f one were required to identify a single societal impulse informing more significantly than any other the development of constitutional law under Earl Warren, it would be the civil rights movement. The rising social consciousness of racial minority groups—partially manifest in their demands for equality under the law—was at once the principal



Justice Harold H. Burton (left) wrote a "D" in his conference notes (right), indicating that the Justices intended to deny certiorari in the tobacco growers' case. But he also wrote "ask for response & ask sol. gen.," indicating that the Justices had decided to seek the Solicitor General's advice for the first time on how to respond to a petition for certiorari.

impetus and the result of many of the Supreme Court's decisions during those years.[100]

The civil rights movement and the many Supreme Court cases associated with it consumed much of the attention of Solicitors General Sobeloff and Rankin, who argued all of the civil rights cases except *Brown II*.[101] Sobeloff worked closely with his principal staff attorneys during some of the Warren Court years, Elman and Ralph Spritzer, on the pivotal civil rights cases of the day.[102] Sobeloff also collaborated with attorneys from the Attorney General's office, including Attorney General Brownell and his successor as Solicitor General, Rankin, on pivotal civil rights cases, especially the school-desegregation cases.[103] In a Memorandum from Attorney General Brownell to Solicitor General Sobeloff, Brownell wrote of the need for the two of them, as well as Rankin, who was then an attorney in the Attorney General's Office, to meet and discuss a unified approach for the Department of Justice to take in the school-desegregation cases.[104] At the same time, Elman was in frequent contact with Justice Frankfurter about the most advantageous position for the government to take.[105] Although, later in life, Elman explained that he and Justice Frankfurter "weren't plotting strategy," Frankfurter was one of the five Justices who, from the time the graduate-school-desegregation cases came to the Court, was ardently in favor of overruling *Plessy v. Ferguson*, thereby ending segregation.[106] But because "[t]he two men concluded that the best hope for success required separating the issue of constitutional principle from proposed remedy," Elman lobbied Solicitor General Sobeloff and then–assistant attorney general Rankin to suggest later implementation in the government's brief in *Brown*.[107] In addition to his political and legal interest in the desegregation cases, Frankfurter probably had a personal interest in the inner workings of the Solicitor General's office, as he had declined that office in 1933 when President Franklin D. Roosevelt offered it to him.[108]

It was quite true that the Justices on the Warren Court were simultaneously grappling with these same complicated political-legal issues of desegregation and, later, reapportionment and redistricting.[109] "The Court invalidated state practices and policies that segregated and excluded black people from enjoying the social and political equality promised in the 14th Amendment."[110] In doing so, the Court was acting in what has been described as "its dual legal-political role," wherein "[t]he special burden of the Court,

then, is to exercise great political powers while still acting like a court, or, if we prefer, to exercise judicial powers over a wide domain while remaining concrete, realistic, and alert as to the political significance of what it is doing."[111] Because much of the Court's work was "policy-oriented and profoundly political," the distinction between law and politics could often become blurred.[112] This is very similar to the work of the Office of the Solicitor General, which has been described as at the "intersection of law and politics."[113]

IV. 1957–1969: The Emergence of the CVSG Process

A. Administrative Problems and Suggestions: The Solicitor General as the Solution

The mutual need of the Court and the Solicitor General for political support in the difficult civil-rights cases, coupled with the Court's feeling that borderline important cases were being improvidently denied certiorari, led the Court to turn to the Office of the Solicitor General. Indeed, Harvard Law School professor Paul Freund observed that the increasing number of petitions for certiorari loomed "as a serious barrier to the true mission of the Supreme Court: to clarify, expound, and develop the law in its most significant national aspects."[114]

During the years leading up to the *Tennessee Burley*[115] case—the first case in which the Supreme Court decided to request the Solicitor General's opinion—Solicitor General Sobeloff's notes indicate that the attorneys in the Solicitor General's office, along with the attorneys in the Attorney General's office, were discussing the Court's certiorari process. In a meeting in which the attorneys were working on the "1956 Criminal Law Program of the Department" because they planned to "adjust to attitude of Sup. Ct. toward federal prosecutions," Sobeloff's handwritten notes include

Tennessee Burley Tobacco Growers Ass'n v. Range **(1957) is the first instance of the Supreme Court calling for the views of the Solicitor General before granting certiorari. It is not clear why the Justices needed extra advice in the case, which involved the right of members of a tobacco-growers' association to seek relief from the association. Pictured is a crop of burley tobacco.**

mention of certiorari petitions.[116] Under the heading "Sketch of Office's work for the past year and plans for the future," the item labeled "(d)" is "Our problems respecting certiorari—midway between Court and Divisions."[117] The next few pages of the notes contain several references to the certiorari process that, while not entirely clear, still demonstrate that the certiorari process was a subject of discussion and planning among the attorneys in the Solicitor General's Office.[118] For example, Sobeloff wrote that "certiorari becomes obsolete with the first bomb" and "I'll take advantage of the emergency to seize a jugful of certioraris."[119]

Around this same time, the late 1950s, there also seemed to be some unrest among the Justices as to the proper role of the certiorari process. For example, Justice Burton was against gratuitous grants of certiorari and instead informed Chief Justice Warren in January 1956 that he was "alert against taking cases except those that obviously call for determination by this Court."[120] Burton's letter to the Chief Justice grew out of his frustration over the large number of certiorari petitions brought by employees under the Federal Employers Liability Act, the Jones Act, the Fair Labor Standards Act, and "like legislation."[121] While Burton expressed his sympathy for employees because some of the lower courts "undoubtedly" made incorrect factual judgments, he was adamant that the certiorari process was not to be used to correct errors in fact-based determinations.[122] In response to Justice Burton's concerns, Justice Frankfurter agreed that "effective functioning of this Court" is the Justices' foremost concern but defended the "join 3" practice of the certiorari process—that is, "when three members of this Court urge that a petition for certiorari raises a serious question and one or more of their brethren feel that the strength of their conviction should elicit a fourth vote."[123]

Later that year, in a Memorandum to the Conference, Justice Frankfurter elaborated further on the certiorari process, finding the cursory review that so many important and complicated petitions were given to be inadequate and troubling.[124] Specifically, Frankfurter complained that

> because of the very nature of the customary conduct of our business, we have at times discussed and voted on cases involving important or complicated issues at a state when few, if any, of us could have come to grips with them or had time to explore the relevant materials, considering the meagerness of briefs.[125]

After identifying this weakness, Frankfurter made several suggestions to modify the Court's certiorari practice so that "in doubtful, difficult, important cases" there was more thorough review of the petitions before the Justices' certiorari votes.[126] His three suggestions in this memorandum all had the goal of providing "some sort of investigation of doubtful cases prior to vote-taking."[127] One suggestion to provide this investigation was for the Court to assign the doubtful, borderline certiorari petition to a Justice for a full report before voting to grant or deny certiorari.[128] In support of his suggestion, Frankfurter wrote that

> in those cases in which the nature of the subject matter, the limited time that has been had for exploration of problems and materials . . . etc., etc., call for the allowance of a period of time for the maturing of wisdom, a report by a member of the Court . . . will enlist desirable collaborative contributions of all the Justices in the final formulation of the Court's opinion.[129]

Frankfurter's second suggestion largely tracks his first, but with less specificity, as he suggests that there needs to somehow be "fuller consideration of cases prior to discussion at Conference."[130] His last suggestion to improve the Court's certiorari process was for the Justices to give more consideration to dissenting

from denials of certiorari, so that there were clear majority and dissenting opinions at the certiorari stage.[131]

In another Memorandum to the Conference, Justice Brennan also discussed his concerns over the certiorari process, explaining that

> [a] number of state courts have certiorari practices under various names. Some, like New York, distribute applications for review among the court's members, each member assuming the responsibility of digesting the applications assigned to him and recommending action for or against a grant. Other courts, like Ohio, allow fifteen minutes for oral argument and decide grant or not by majority vote. None of the courts represented followed our practice of individual review.[132]

Although it seems that this particular memorandum did not deal with concerns over the substantive review of the petitions, as Frankfurter's did, one could speculate that Brennan's concerns were an impetus towards the creation of the "cert pool," and perhaps these memoranda from the Justices played a very significant role in shaping Supreme Court practices and processes. Indeed, it appears that Justice Frankfurter's first suggestion in his September 1956 Memorandum—that individual Justices should be assigned to do more thorough reviews of the borderline and important certiorari petitions—provided the initiative for the Court to decide to CVSG eight months later.[133] With the CVSG process, the Justices obtained the "investigation of doubtful cases prior to vote-taking" that Frankfurter suggested, because the attorneys in the Solicitor General's office provided a detailed and exhaustive opinion regarding the merits of each petition for certiorari that the Court CVSGed.[134]

The Solicitor General was a natural substitution for a Justice in Frankfurter's suggestion to the Court that a full, detailed report on the merits of certiorari be provided before the Justices' vote on certiorari. "At critical junctures, the Court looked to the executive and legislative branches for support."[135] With the Court's expanding docket and the increasing workload handled by each Justice, it was natural for the Justices to look outside the Court for a closer examination of doubtful and important cases.[136] The Court likely looked to the Solicitor General because of the personal relationships that individual Justices had established with Solicitor General Sobeloff, who had just left office at the time of *Tennessee Burley*, and with newly appointed Solicitor General Rankin.[137] The similar politically turbulent legal issues that both the Court and the Office of the Solicitor General were facing also led the Court to view the Solicitor General as a political and legal partner.[138] Thus, when the Court decided to get a tenth opinion on borderline certiorari petitions, as was likely per Justice Frankfurter's suggestions, it turned to the attorneys of the Solicitor General's Office, who were dealing with similar political issues and scrutiny and with whom many Justices had personal friendships. Also, it was especially important for the Court to turn to someone whom it trusted and knew closely, as most of the Justices later violently opposed outsourcing certiorari petition review to "a national court of appeals that would evaluate all petitions for review now filed in the Supreme Court."[139]

B. The First of Many: *Tennessee Burley Tobacco Growers Ass'n v. Range*[140]

Tennessee Burley Tobacco Growers Ass'n v. Range is the first instance of the Supreme Court calling for the views of the Solicitor General before granting certiorari.[141] Justice Burton kept exhaustive records during his tenure on the Court from 1945 to 1958.[142] Included in those records are the conference lists—the lists of all of the petitions for certiorari, petitions for rehearing, and judgments to

be announced at each of the Justices' weekly conferences.[143] On Friday, May 31, 1957, the Justices discussed *Tennessee Burley Tobacco*, case 971 of that Term.[144] Burton, who kept notes on each of the cases discussed at the conference, indicated that the respondents in that case had waived their response.[145] Next to the case number, where Burton indicated if the Justices had granted or denied certiorari, is a capital "D," indicating that certiorari had been denied.[146] However, in almost indecipherable pen, he wrote "ask for response & ask sol. gen."[147] This scrawl appears to represent the first time that the Justices decided to seek the Solicitor General's advice on how to respond to a petition for certiorari.[148]

From Justice Burton's notes, it is not clear how exactly the Justices decided to CVSG—who first suggested it, if there was a vote, and if so, the specifics of each Justice's vote.[149] It is also unclear what made the *Tennessee Burley* case unique in that it demanded extra attention at the certiorari stage.[150] The court below, the Court of Appeals of Tennessee, had affirmed the trial court's ruling that Ivan Range and the other members of the defendant tobacco-growers' cooperative association were not entitled to relief against the association itself.[151] Specifically, the Court of Appeals affirmed that the complainants had failed to show that the association's actions constituted waste or mismanagement, but it also affirmed that the association could not withhold equities from the members of the association, who could choose to withdraw those equities if they so desired.[152] The appellate court further elaborated that if the parties' counsel were unable to agree upon dollar amounts for the equities, then the issue should be remanded to the trial court for determination.[153] There was no dissent from the Court of Appeals decision, so this lower decision offers no additional insight into how or why the Justices determined that this case merited the extra certiorari attention of the Solicitor General.[154] Indeed, the Supreme Court never heard the merits of the case, as, following the advice of Solicitor General Rankin, it later denied certiorari on October 14, 1957.[155]

After this initial CVSG order, the Court simultaneously granted certiorari and requested the Solicitor General's opinion in two cases in 1958, *Williams v. Lee* in April 1958 and *Aaron v. Cooper* in August 1958.[156] Although this practice by the Court has since largely faded away, it remained fairly common in the 1960s, 1970s, and 1980s.[157] Particularly in the highly charged case of *Aaron v. Cooper*, the Supreme Court had a political interest in collaborating with the Office of the Solicitor General.[158] The original draft order of the Court's order in *Aaron v. Cooper* stated that "[t]he Solicitor General is invited to file a brief, if he is so advised, on September 10, 1958."[159] But this order was revised to include stronger, more definitive language: "The Solicitor General is invited to file a brief by September 10, 1958, and to present oral argument if he is so advised."[160] Despite this somewhat strong and urgent language from the Court, Solicitor General Rankin responded on September 10, 1958 with a letter to the Clerk of the Supreme Court that the Solicitor General's office would not be filing an additional brief because the "brief previously filed by the United States adequately states the reasons for our view that the order of the District Court was erroneous and was properly reversed by the Court of Appeals."[161]

Then, almost a year later, the Court issued its second CVSG in *San Diego Building Trades v. Garmon*.[162] Unfortunately, Justice Burton's meticulous certiorari notes end before this case was discussed, and his files do not contain the conference list indicating when and how the Justices discussed *Garmon*'s petition for certiorari.[163] However, *Garmon* is notable in the history of the CVSG process because it is the first instance in which the Court requested the Solicitor General's opinion before granting certiorari using its now standard language, "The Solicitor General is invited to file a brief in this case setting forth the views of the United States."[164]

During these initial years of the Court's CVSG practice, the Court proceeded slowly. Approximately one month after the CVSG in *Garmon*, the Court requested the Solicitor General's certiorari opinion on a petition,[165] but nearly a year lapsed before the Court's CVSGed on its fourth and fifth petitions, both on October 12, 1959.[166] Then the Court hit a slight lull, not utilizing the newly minted CVSG practice once in either the 1960 or 1961 Terms, and utilizing it only once in 1962.[167]

During the politically charged years between 1963 and 1969, the Court's tendency to CVSG exploded: it called for the Solicitor General's views on forty-eight petitions.[168] By 1970, the Court's practice of utilizing the Solicitor General as a "tenth Justice" vote was firmly established as an integral part of and an often-advantageous option in the certiorari process.[169] Approximately 100 petitions were CVSGed in the 1970s,[170] 200 in the 1980s,[171] 150 in the 1990s,[172] and well over 100 more from 2000 to the present.[173]

Although the Supreme Court's usage of the CVSG practice became common during the politically turbulent 1960s and 1970s, in a large number of the petitions in which the Court sought the advice of the Solicitor General, the issue was not civil rights but labor and employment.[174] The Court's focus here on employer-employee relations tracks Justice Burton's earlier concern over the growing number of certiorari petitions being filed in this area of the law.[175] His concern that the Court might be granting certiorari too often in petitions arising under federal employment legislation, coupled with Justice Frankfurter's concern that the Court was making hasty and uninformed certiorari decisions in borderline or difficult petitions, likely led the Court to utilize its new ability to get a tenth opinion in certiorari petitions presenting labor and employment issues.[176]

V. Conclusion

The Office of the Solicitor General is a peculiar one within the Department of Justice. The Solicitor General straddles the intersection of law and politics, and also that of the executive branch and the judicial branch.[177] The Solicitor General's relationship with the Supreme Court exemplifies these intersections, particularly when the Court requests the Solicitor General's opinion in determining which petitions for certiorari will be granted time on the Court's busy docket. Although this practice is quite common today and is indeed one of the areas where the Solicitor General exerts a good deal of influence over the Supreme Court, it did not become routine for the Court to CVSG until the 1960s.[178]

The first CVSG orders from the Court trickled in slowly, beginning with the *Tennessee Burley* petition for certiorari in 1957.[179] While the reasons for the Court's adoption of this practice are neither entirely clear nor entirely definite, there are several factors that made this seem like a rational and natural choice for the Justices in 1957. Solicitor General Sobeloff, who was in office until 1956, and Solicitor General Rankin, who was his successor, both maintained close personal and professional relationships with a number of the Justices on the Court at that time.[180] Although the Office of Solicitor General has generally enjoyed a high level of respect and trust from the Supreme Court, these Solicitors General increased the institutional capital of the Office through their close relationships with the Justices. The political turmoil of the era and the confluence of politics and law in many of the pivotal issues of the day were challenges to both the Solicitor General's Office and the Court, so that collaboration or at least dialogue between the two groups occurred.[181]

So when the Justices were faced with some administrative problems, identified by Justices Burton and Frankfurter, meaning that petitions for certiorari were not receiving the

TABLE 1: **The Relevant Years for the CVSG Development: 1954–1969**[a]

Year	President	Solicitor General	Supreme Court Justices
1954	Eisenhower	Sobeloff	Jackson, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, **Warren**
1955	Eisenhower	Sobeloff	Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, **Warren**, Harlan
1956[b]	Eisenhower	Sobeloff/ Rankin	Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton/Brennan, **Warren**, Harlan
1957[c]	Eisenhower	Rankin	Black, Reed/Whittaker, Frankfurter, Douglas, Burton, Clark, **Warren**, Harlan, Brennan
1958[d]	Eisenhower	Rankin	Black, Frankfurter, Douglas, Burton/Stewart, Clark, **Warren**, Harlan, Brennan, Whittaker
1959	Eisenhower	Rankin	Black, Frankfurter, Douglas, Clark, **Warren**, Harlan, Brennan, Whittaker, Stewart
1960	Eisenhower	Rankin	Black, Frankfurter, Douglas, Clark, **Warren**, Harlan, Brennan, Whittaker, Stewart
1961	Kennedy	Cox	Black, Frankfurter, Douglas, Clark, **Warren**, Harlan, Brennan, Whittaker, Stewart
1962	Kennedy	Cox	Black, Frankfurter/Goldberg, Douglas, Clark, **Warren**, Harlan, Brennan, Whittaker/White, Stewart
1963	Johnson	Cox	Black, Douglas, Clark, **Warren**, Harlan, Brennan, Stewart, White, Goldberg
1964	Johnson	Cox	Black, Douglas, Clark, **Warren**, Harlan, Brennan, Stewart, White, Goldberg
1965	Johnson	Cox/ Marshall	Black, Douglas, Clark, **Warren**, Harlan, Brennan, Stewart, White, Goldberg/Fortas
1966	Johnson	Marshall	Black, Douglas, Clark, **Warren**, Harlan, Brennan, Stewart, White, Fortas
1967	Johnson	Marshall	Black, Douglas, Clark/Marshall, **Warren**, Harlan, Brennan, Stewart, White, Fortas
1968	Johnson	Griswold	Black, Douglas, **Warren**, Harlan, Brennan, Stewart, White, Fortas, Marshall
1969	Nixon	Griswold	Black, Douglas, **Warren/Burger**, Harlan, Brennan, Stewart, White, Fortas, Marshall,

[a]The name of the Chief Justice is in bold. Where one Justice retired and another was nominated as a replacement, that is represented by "[departing Justice]/[newly appointed Justice]."

[b]Several particularly important events in the development of the CVSG process occurred in 1956: Sobeloff's notes regarding the Office of the Solicitor General's "problems respecting certiorari," Justice Burton's January 1956 letter to Chief Justice Warren, Frankfurter's September 1956 Memorandum to the Conference. *See* Part IV(A), *supra*.

[c]Several particularly important events in the development of the CVSG process occurred in 1957: May 31, 1957 decision of the Court to CVSG in *Tennessee Burley*, October 14, 1957 denial of certiorari in *Tennessee Burley*. *See* Part IV(B), *supra*.

[d]An important event in the development of the CVSG process occurred in 1958: October 13, 1958 decision of the Court to CVSG in *San Diego v. Garmon*. *See* Part IV(B), *supra*.

attention they merited—particularly in borderline or important petitions[182]—they turned to the Solicitor General. The Supreme Court's trust in and respect for the Solicitor General, along with established relationships and a recognition that the two institutions were dealing with similar political-legal issues justified the Court's reliance on the Solicitor General as a solution. Justice Frankfurter had initially suggested that one of the Justices provide a full and detailed report on the borderline or important petitions for certiorari to ensure that these petitions were not being improvidently denied,[183] but, perhaps because of the already increasing workload of the Justices,[184] the Court turned instead to the Solicitor General for advice and assistance, where he then fulfilled his "tenth Justice"[185] responsibilities.

ENDNOTES

[1] Philip Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History," 100 *Harv. L. Rev.* 817, 833 (1987) (discussing Elman's experience in the Solicitor General's office when the Supreme Court invited the government to file as amicus curiae in *Brown v. Board of Education*).

[2] *See, e.g., Brown v. Board of Education*, 349 U.S. 294 (1955). The government's original amicus brief on the merits is available at 1952 WL 82045. The government's supplemental amicus brief on re-argument is available at 1953 WL 78291.

[3] Letter of July 7, 1954, Simon Sobeloff to Herbert Brownell, Papers of Simon E. Sobeloff. Library of Congress, Washington, D.C.

[4] Lawrence Baum, **The Supreme Court** 88 (8th ed. 2004).

[5] *Id.* at 89.

[6] *See id.* at 89, 101.

[7] Barbara Palmer, "The 'Bermuda Triangle?' The Cert Pool and Its Influence over the Supreme Court's Agenda," 18 *Const. Commentary* 105, 110 (2001).

[8] Drew S. Days III, "In Search of the Solicitor General's Client: A Drama," 83 *Ky. L. J.* 485, 488 (1994); *see also* Cornelia T. L. Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," *103 Mich. L. Rev.* 676, 726 (2005) (quoting Burt Neburne) ("[T]he Solicitor General's role as a reliable, non-ideological and, essentially, non-political source of technically excellent advice to the Supreme Court").

[9] Lincoln Caplan, **The Tenth Justice: The Solicitor General and the Rule of Law** 3 (Vintage ed. 1988).

[10] Act of June 22, 1870, ch. 150, SS 1–2, 16 Stat. 162, 162.

[11] Richard L. Pacelle, Jr., **Between Law and Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation** 9 (2003).

[12] *Id.*

[13] Caplan, *supra* note 9, at 3.

[14] *See id.*

[15] *Id.* at 10.

[16] *Id.* at 5.

[17] *Id.*

[18] *Id.* at 10.

[19] *See* Days, *supra* note 8, at 487 ("the Solicitor General is not a 'hired gun.'"). An instance where Solicitor General Sobeloff refused to sign the government's brief or participate in oral argument in a case where he disagreed with the Attorney General's construction of the government's brief "set a standard of integrity for SGs to come." *See* Caplan, *supra* note 9, at 11–12.

[20] *Id.* at 11.

[21] Caplan, *supra* note 9, at 257.

[22] William H. Rehnquist, **The Supreme Court** 263 (1987).

[23] *Id.* at 253.

[24] Doris Marie Provine, **Case Selection in the United States Supreme Court** 22 (1980); *see also id.* at 263. "The individual Justices are of course quite free to disregard whatever recommendation the writer of the pool memo may have made, as well as the recommendation of his own law clerks." *Id.* at 266.

[25] *Id.* at 264.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 265.

[29] *Id.* Any petition that is wholly not discussed by the Justices is termed "dead listed," the opposite of putting a case on the "discuss list." *Id.* at 266.

[30] *Id.* at 253–54.

[31] *Id.* at 254.

[32] Palmer, *supra* note 7, at 105.

[33] *Id.*

[34] *Id.*

[35] Baum, *supra* note 4, at 90–91.

[36] *Id.* at 91.

[37] *Id.* at 91–92.

[38] *Id.*

[39] *Id.* at 92.

[40] *Id.* ("Most of these orders are issued because some event since the lower court decision, usually a Supreme Court decision, is relevant to the case. On the first day of the 2002 term, for example, the Court issued nine GVRs in light of decisions it had reached in the 2001 term.")

[41] *Id.* Many, including the Justices themselves, have criticized this process of issuing per curiam opinions because a decision is reached on the merits without briefing on the merits by the parties. *See id.*

[42]Rehnquist, *supra* note 22, at 264.

[43]*See* Provine, *supra* note 24, at 32–33. While the origins of the rule of four are not clear, it became common knowledge in 1924 when Justice Van Devanter "described the rule and its rationale to the Senate Committee on the Judiciary."

[44]*Id.*

[45]Eugene Gressman, **Supreme Court Practice** 238 (9th ed. 2007).

[46]Rules of the Supreme Court of the United States, Rule 10, adopted July 17, 2007, effective October 1, 2007, *available at* http://www.supremecourtus.gov/ctrules/2007rulesofthecourt.pdf (last accessed Mar. 16, 2010). The full text of Rule 10 is:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that the Court considers:
>
> a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

[47]Gressman, *supra* note 45, at 241, 262, 280.

[48]Chief Justice Vinson, "Work of the Federal Courts," Address before the American Bar Association, Sept 7, 1949. Library of Congress, Wahington, D.C.

[49]Baum, *supra* note 4, at 88.

[50]Pacelle, *supra* note 11, at 10.

[51]Palmer, *supra* note 7, at 29.

[52]*See* Days, *supra* note 8, at 488. Here, Days recognizes that one of the ways in which the Solicitor General assists in the orderly development of the law is by providing sound legal advice to the Supreme Court about whether the Court should grant certiorari in a given petition.

[53]Pacelle, *supra* note 11, at 24.

[54]*See* David A. Strauss, "Government Lawyering: The Solicitor General and the Interests of the United States," 61 *Law & Contemp. Prob.* 165, 169 (1998) (arguing that in responding to CVSGs, the Solicitor General acts in "perhaps the closest approximation to the tenth Justice role").

[55]Pacelle, *supra* note 11, at 25.

[56]*Id.*

[57]Stephen S. Meinhold & Steven A. Shull, "Policy Congruence between the President and the Solicitor General," 51 *Political Research Quarterly* 527, 527 (1998).

[58]John F. Duffy, Database of Supreme Court CVSGs (on file with author).

[59]*Id.*

[60]Pacelle, *supra* note 11, at 17.

[61]*Id.*

[62]*See, e.g., Aaron v. Cooper*, 358 U.S. 27 (1957); *Williams v. Lee*, 356 U.S. 930 (1957); *Mazer v. Stein*, 346 U.S. 811 (1953) (requesting the views of the copyright office).

[63]The United States Department of Justice, Office of the Solicitor General, About the Office of the Solicitor General, Former Solicitor Generals, J. Lee Rankin, *available at* http://www.usdoj.gov/osg/aboutosg/rankinbio.html (last accessed Mar. 16, 2010).

[64]*Id.*

[65]*Id.*

[66]Robert D. McFadden, "J. Lee Rankin, Solicitor General Who Was a Vote for Desegregation, Dies at 88," *N.Y. Times*, June 30, 1995. Indeed, the Warren Court unanimously agreed that Rankin would lead the Warren Commission, the investigation into President John F. Kennedy's assassination.

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

[68]*See* Earl Warren Resolution 14–15, undated, in Papers of Justice Thurgood Marshall, Supreme Court Bar of the United States (Library of Congress, Washington, D.C.); *see also* Harry N. Scheiber, ed., **Earl Warren and the Warren Court** 3 (2007) ("Warren himself later wrote that he regarded these reapportionment cases as his Court's single most profound contribution to the law.").

[69]*See* "The Road to the Rankins," undated, in Papers of Justice Harold H. Burton (Library of Congress, Washington, D.C.). This document contained directions, described in a story-like fashion, to Solicitor General Rankin's home. From this, one can assume that the two shared more than just a cordial business-associate relationship, as the directions include references to Mrs. Burton, Mrs. Rankin, and the Rankin children.

[70]The United States Department of Justice, Office of the Solicitor General, About the Office of the Solicitor General, Former Solicitor Generals, Simon E. Sobeloff,

available at http://www.usdoj.gov/osg/aboutosg/sobeloff_simon_bio2.htm (last accessed Mar. 16, 2010).

[71] Michael Mayer, Judge Simon E. Sobeloff, Solicitor General (1980, rev. 2006), *available at* http://www.law.umaryland.edu/marshall/specialcollections/sobeloff/solgeneral.asp (last accessed Mar. 16, 2010).

[72] *Id.*

[73] *Brown v. Board of Education*, 349 U.S. 294 (1955).

[74] Mayer, *supra* note 71.

[75] *See* Papers of Justice Brennan (Library of Congress, Washington, D.C.), Part II.

[76] *See id.* It could also be speculated that Brennan kept correspondence with J. Lee Rankin, as the Library of Congress outline of the Brennan papers shows that, beginning in 1956, there are eleven folders of Brennan correspondence with "Ra miscellaneous" names. Furthermore, when Part II of the Brennan Papers is available, it may provide additional insight into the development of the CVSG process, as the unavailable records include memoranda of internal Court practices, memoranda to the conferences, and Brennan's correspondence with his four law clerks during the 1956 and 1957 Terms, Peter Fishbein, Dennis Lyons, Daniel O'Hern, and Richard Rhodes. Indeed, the records show that Brennan continued his correspondence with these four clerks for several decades, into the 1990s, and they likely served as sounding boards or confidantes during the late 1950s. For a personal reflection on Justice Brennan by former law clerk O'Hern, *see* Roger Goldman and David Gallen, **Justice William J. Brennan, Jr.: Freedom First** 53–57 (1994).

[77] *See* Papers of Justice Marshall.

[78] Letter of September 12, 1962, Simon Sobeloff to Thurgood Marshall, in Papers of Justice Marshall. The text of the letter is as follows: "Hearty congratulations on your confirmation. Though you had to endure some inconvenience, it was inevitable that the opposition would sputter out. At that, you were delayed less than I was. Our common admirers in the Senate held me up a year and a day. And our friend and fellow gladiator Almond is still not out of the woods, though for the wrong reason. Best wishes."

[79] Letter of March 29, 1963, Thurgood Marshall to Simon Sobeloff; letter of March 15, 1963, Simon Sobeloff to Thurgood Marshall, in Papers of Justice Marshall.

[80] Letter of January 27, 1957, Harold Burton to Simon Sobeloff, Papers of Justice Burton.

[81] *Id.*

[82] *See generally* Papers of Sobeloff.

[83] Letters of November 9, 1955 and September 25, 1956, Simon Sobeloff to Felix Frankfurter; Letter of December 1, 1955 from Felix Frankfurter to Simon Sobeloff, in Papers of Simon E. Sobeloff.

[84] Letter of June 1, 1956, Simon Sobeloff to Felix Frankfurter, in Papers of Simon E. Sobeloff.

[85] Letter of October 7, 1955, Simon Sobeloff to Earl Warren, in Papers of Simon E. Sobeloff.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Sinclair v. U.S.*, 338 U.S. 908 (1950); Elman, *supra* note 1, at 848–50.

[90] Elman, *supra* note 1, at 848.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 849.

[96] *Id.* Chief Justice Vinson, unhappy at having to hear the four-letter-word case, reportedly later told Feller, "Dave, I should kick your ass." *Id.*

[97] *Id.* The Supreme Court ultimately decided *Sinclair* in a short *per curiam* opinion reversing Sinclair's conviction because he was convicted under the incorrect provision of the postal obscenity statute. *Sinclair v. Lewis,* 338 U.S. 908 (1950); *see also* Elman, *supra* note 1, at 850. The order granting certiorari is available at 337 U.S. 955, and the government's appellate brief on the merits is available at 1949 WL 50408.

[98] Simon E. Sobeloff, "Attorney for the Government: The Work of the Solicitor General's Office," 41 *A.B.A. J.* 229, 229 (Mar. 1955).

[99] Provine, *supra* note 24, at 2.

[100] Earl Warren, Resolution 6 (undated) (expressing a sense of loss at Chief Justice Warren's passing), in Papers of Justice Marshall.

[101] Pacelle, *supra* note 11, at 77.

[102] *See generally* Papers of Sobeloff.

[103] Attorney General Herbert Brownell, Office Memorandum, July 15, 1954, in Papers of Sobeloff.

[104] *Id.*

[105] Pacelle, *supra* note 11, at 78.

[106] James F. Simon, **The Antagonists** 220 (1989).

[107] *Id.*; *see also* Brownell, Memorandum, July 15, 1954, *supra* note 103.

[108] *See* Caplan, *supra* note 9, at 13. Frankfurter told President Roosevelt that while he was flattered, he could "'do more to be of use to you by staying in Cambridge than by becoming Solicitor General.'" *Id.* While Roosevelt complained that "'Felix is a stubborn pig!'" he later appointed him as a Supreme Court Justice. *Id.*

[109] *See* Scheiber, *supra* note 68, at 29–30, 77–78.

[110] *Id.* at 77; *see also* Goldman and Gallen, *supra* note 76, at 107 ("Brennan defended the reapportionment decisions as necessary to bring about equal protection of the laws.").

[111] Provine, *supra* note 24, at 62.

[112] Pacelle, *supra* note 11, at 10.

[113] *Id.* at 13.

[114]Paul A. Freund, **The Supreme Court of the United States: Its Business, Purposes, and Performance** 183 (1961).

[115]*Tennesse Burley Tobacco Growers Ass'n v. Range*, 353 U.S. 981 (1957).

[116]Simon E. Sobeloff, handwritten notes, undated, in Papers of Sobeloff. Sobeloff's notes show that, with respect to the Criminal Law Program of the Department, the attorneys were discussing all aspects of criminal cases: civil-rights problems, preventative measures, investigatory issues, prosecutory issues, sentencing, appeals, review while a defendant is incarcerated, pardon cases, habeas cases, and probation.

[117]*Id.*

[118]*Id.*

[119]*Id.* (emphasis in original). Again, it is important to note that the substantive value of these certiorari references is very unclear, as there is no indication as to why Sobeloff mentioned a "jugful" of certioraris or of the certiorari process becoming obsolete.

[120]Letter of January 26, 1956, Harold Burton to Earl Warren, Papers of Justice Burton.

[121]*Id.*

[122]*Id.*

[123]Letters of January 31, 1956 and February 1, 1956, Felix Frankfurter to Harold Burton, in Papers of Justice Burton.

[124]Justice Frankfurter, Memorandum to the Conference, September 5, 1956, in Papers of Justice Burton.

[125]*Id.* at 2.

[126]*Id.*

[127]*Id.*

[128]*Id.*

[129]*Id.* at 3.

[130]*Id.* at 4.

[131]*Id.* Some of the other Justices felt that Justice Frankfurter treated each of them as one of his students of constitutional law and Supreme Court practice, and they even commented that he had an "overbearing nature." *See* Simon, supra note 106, at 235–36. As Brennan commented, "When he felt strongly about something, he could be a pain in the neck." *Id.* at 239.

[132]Justice Brennan, Memorandum to the Conference, undated, in Papers of Justice Burton. Although this Memorandum is undated, it must have been written some time during 1956 or 1957, the crucial years in the development of the CVSG process, because Justice Brennan was appointed to the Court on October 16, 1956 and Justice Burton retired from the Court on October 13, 1958.

[133]*See* Frankfurter, Memorandum to the Conference, *supra* note 124; *see also* For Conference Memorandum May 31, 1957, List 1, Sheet 1, Petitions for Certiorari, in Papers of Justice Burton (Library of Congress, Washington, D.C.).

[134]*Id.* at 2.

[135]Goldman and Gallen, *supra* note 76, at 65 (discussing the political challenges "that the Warren Court took up and spoke to in a forceful manner.").

[136]*See* Gressman, *supra* note 45, at 236–37.

[137]*See* Section III(A), *supra*.

[138]*See* Section III(c), *supra*.

[139]Provine, *supra* note 24, at 66–73.

[140]353 U.S. 981 (1957).

[141]*Id.* The relevant portion of the Court's June 3, 1957 order provides that "[t]he Solicitor General is invited to file a brief expressing his views."

[142]*See generally* Papers of Justice Burton.

[143]*See id.*

[144]For Conference Memorandum, May 31, 1957, *supra* note 133.

[145]*Id.*

[146]*Id.*

[147]*Id.* In attempting to decipher the writing that indicates that the Justices intended to ask the Solicitor General for his opinion, the author consulted with three employees of the Library of Congress Manuscript Division.

[148]*See id.*

[149]*See generally* Papers of Justice Burton.

[150]*Id.*

[151]*Range v. Tennessee Burley Tobacco Growers Ass'n*, 298 S.W.2d 545, 549 (Tenn. App. 1955).

[152]*Id.* at 549–50.

[153]*Id.* at 554.

[154]*See id.*

[155]*Tennessee Burley Tobacco Growers Ass'n v. Range*, 355 U.S. 813 (1957).

[156]*Williams v. Lee*, 356 U.S. 930 (1958); *Aaron v. Cooper*, No. 1, Misc., 358 U.S. 27 (1958).

[157]The Court requested the Solicitor General's views as it granted certiorari in twelve cases in the 1960s, ten cases in the 1970s, and eight cases in the 1980s. *See, e.g., Moses Lakes Homes, Inc. v. Grant County*, 364 U.S. 814 (1960); *Yiatchos v. Yiatchos*, 372 U.S. 905 (1962); *Vaca v. Spies*, 384 U.S. 969 (1965); *McGautha v. California*, 399 U.S. 924 (1969); *Johnson v. Railway Express Agency, Inc.*, 417 U.S. 929 (1973); *Gregg v. Georgia*, 423 U.S. 1082 (1975); *Ford Motor Credit Co. v. Milhollin*, 442 U.S. 940 (1978); *Jim McNeff, Inc. v. Todd*, 458 U.S. 1120 (1981); *Air France v. Saks*, 469 U.S. 815 (1984).

[158]*See* Court Memorandum, August 28, 1958, in Papers of Justice Burton.

[159]*Id.*

[160]*Id.*

[161]*See* Letter of September 10, 1958, J. Lee Rankin to James Browning, in Papers of Justice Burton.

[162]*San Diego Building Trades v. Garmon*, 358 U.S. 801 (1958).

[163]*See generally* Papers of Justice Burton.

[164]*Garmon*, 358 U.S. at 801.

[165] *NBC v. Philco Corp.*, 358 U.S. 876 (1958).

[166] *S.S. Silberblatt, Inc. v. Tax Comm. Of New York*, 361 U.S. 802 (1959); *Superior Court of Washington for King Cty. v. Washington ex rel. Yellow Cab Serv.*, 361 U.S. 802 (1959).

[167] *Banco Nacional de Cuba v. Sabbatino*, 371 U.S. 907 (1962).

[168] *See, e.g., Sanapaw v. Wisconsin*, 377 U.S. 920 (1963); *Kristovich v. Shu Tong Ng*, 379 U.S. 986 (1964); *Linn v. United Plant Guard Workers*, 380 U.S. 930 (1964); *Poafpybitty v. Skelly Oil Co.*, 386 U.S. 1029 (1966); *Benton v. Maryland*, 393 U.S. 994 (1968).

[169] *See* Caplan, *supra* note 9.

[170] *See, e.g., Moses v. Washington*, 405 U.S. 914 (1970); *Bonelli Cattle Co. v. Arizona*, 409 U.S. 1022 (1972); *Tonasket v. Thompson*, 416 U.S. 954 (1973); *Piper v. Chris-Craft Industries, Inc.*, 423 U.S. 944 (1975); *University of Chicago v. McDaniel*, 431 U.S. 963 (1976); *Arkansas Louisiana Gas Co. v. Hall*, 440 U.S. 904 (1978); *American Commercial Lines, Inc. v. Griffith*, 444 U.S. 1042 (1979).

[171] *Board of Education v. Rowley*, 450 U.S. 907 (1980); *Porcher v. Brown*, 457 U.S. 1104 (1981); *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 466 U.S. 902 (1983); *Liphete v. Stierheim*, 471 U.S. 1114 (1984); *Rose v. Arkansas State Police*, 476 U.S. 1156 (1985); *Peters v. Shreveport*, 484 U.S. 1024 (1987); *Montero v. Meyer*, 490 U.S. 1018 (1988); *Sanchez v. Bond*, 493 U.S. 916 (1989).

[172] *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 498 U.S. 1080 (1990); *Drilake Farms v. Surrillo*, 503 U.S. 981 (1991); *Ibarra v. Duc Van Le*, 509 U.S. (1992); *Seminole Tribe v. Florida*, 513 U.S. 804 (1994); *Auer v. Robbins*, 516 U.S. 1109 (1995); *Jefferson County v. Acker*, 519 U.S. 1106 (1996); *Coates v. Strahan*, 523 U.S. 1116 (1997); *Slack v. McDaniel*, 528 U.S. 949 (1999).

[173] *See, e.g., Yarnell v. Cuffley*, 531 U.S. 955 (2000); *Hillside Dairy, Inc. v. Lyons*, 535 U.S. 985 (2001); *Regal Cinemas, Inc. v. Stewmon*, 540 U.S. 1101 (2003); *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 543 U.S. 1185 (2004); *Microsoft Corp. v. AT&T Corp.*, 547 U.S. 1096 (2005); *Reigel v. Medtronic, Inc.*, 127 S. Ct. 575 (2006).

[174] *See, e.g., Linn v. United Plant Guard Workers*, 380 U.S. 930 (1964); *Placid Oil Co. v. Union Producing Co.*, 384 U.S. 937 (1965); *Brotherhood of Locomotive Engineers v. McElroy*, 393 U.S. 918 (1968); *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*, 421 U.S. 986 (1974). Specifically in the Linn petition, the issue, as framed by Solicitor General Archibald Cox in recommending that the Court grant certiorari, was

> whether the National Labor Relations Act bars the maintenance of a libel action instituted under State law by an official of an employer subject to the Act, seeking damages for defamatory statements made during a union organizing campaign by the union and its officers with alleged knowledge that the statements were false. The Court of Appeals held that under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, the subject matter of the complaint was "arguably subject" to, and therefore preempted by, the National Labor Relations Act, and that the district court properly dismissed the complaint.

Case Notes, *Linn v. United Plant Guard Workers*, 380 U.S. 930 (1964), in Papers of Justice Marshall.

[175] Letter of January 26, 1956, Harold Burton to Earl Warren, Papers of Justice Burton.

[176] *Id*; *see also* Frankfurter, Memorandum to the Conference, September 5, 1956, *supra* note 124.

[177] Caplan, *supra* note 9, at 10.

[178] *See* note 168 and accompanying text, *supra*.

[179] *See* notes 144–48 and accompanying text, *supra*.

[180] *See* Section III(A), *supra*.

[181] *See* Section III(C), *supra*.

[182] *See* notes 120–31 and accompanying text, *supra*.

[183] *See* Frankfurter, Memorandum to the Conference, September 5, 1956, *supra* note 124.

[184] *See* Gressman, *supra* note 45, at 236–37.

[185] *See* Caplan, *supra* note 9, at 3.

Mapp v. Ohio Revisited: A Law Clerk's Diary

POLLY J. PRICE[1]

> At conference Frankfurter said *Mapp* is the worst tragedy since *Dred Scott.* Justice Brennan says he means it.
>
> —Richard S. Arnold, from his diary of the 1960 Supreme Court Term[2]

The 1960 Supreme Court Term laid the groundwork for the subsequent revolution in the relationship between state and federal law accomplished by the Supreme Court under Chief Justice Earl Warren. The "most famous search and seizure case in American history"[3] —*Mapp v. Ohio*[4]—would be decided that Term. *Mapp* held that the Fourth Amendment's protection against "unreasonable searches and seizures" required the exclusion of evidence found through an illegal search by state and local police officers, extending to the states a rule that had previously applied only to federal law enforcement. *Mapp* became a pivotal chapter in the story of civil rights in the United States.

Mapp v. Ohio remains a prominent topic today. In bringing state law in line with the older federal exclusionary rule, the decision made the United States the only country to take the position that some police misconduct must automatically result in the suppression of physical evidence. The position of the United States on this subject remains unique more than fifty years after *Mapp* was decided.[5] The future of the exclusionary rule, however, has been the topic of much debate, particularly following the Supreme Court's decision in *Herring v. United States* in January 2009.[6]

Richard S. Arnold, later a renowned judge on the Eighth Circuit Court of Appeals, kept a diary of his clerkship year with Justice William Brennan in 1960–1961. When Arnold began his clerkship, Chief Justice Warren met with all of the new law clerks to impress upon them the need for secrecy. "You will learn things, hear things, know things that you will take to your grave with you," Warren said.[7] But the secrecy already had been breached. Before Arnold began his clerkship, William

Richard S. Arnold (pictured), later a renowned judge on the Eighth Circuit, kept a diary of his clerkship with Justice William J. Brennan in the 1960–1961 Term, the year *Mapp v. Ohio* was handed down.

Rehnquist, a law clerk for Justice Robert H. Jackson and later Chief Justice of the Supreme Court, provided the "first signed statement"[8] by a former law clerk describing the role, in a 1958 article entitled, "Who Writes Decisions of the Supreme Court?"[9] Arnold, by contrast, did not share any part of his diary until after all the Justices who had served during his clerkship had died.[10]

When Arnold became a law clerk, Warren—appointed by Dwight Eisenhower—had been serving as Chief Justice since 1953. The "Warren Court" became synonymous with the liberal exercise of judicial power in favor of civil liberties and civil rights. *Brown v. Board of Education*,[11] decided in 1954, was only the beginning, but already the Warren Court had engendered a political backlash. When driving Justice Brennan to his home in the evenings, Arnold and his fellow clerk Daniel Rezneck would pass along the way an occasional "IMPEACH EARL WARREN" billboard.[12]

The Supreme Court in 1960

In addition to Warren, Felix Frankfurter, and Brennan, the other members of the Supreme Court in 1960 were William O. Douglas, Hugo L. Black, Potter Stewart, Charles Evans

Whittaker, Tom C. Clark, and John Marshall Harlan II. "Harlan II" was the grandson of the first John Marshall Harlan, who served on the Supreme Court from 1877 until 1911 and who was the only Justice to dissent in *Plessy v. Ferguson*.[13]

Arnold's diary reveals his fascination with the Supreme Court as an institution that was dependent upon the character of the individuals who comprised it. He especially enjoyed the tradition of each Justice inviting the other law clerks to lunch during the year, at the Supreme Court dining room usually populated only by the law clerks and staff. Arnold recorded personal characteristics of each Justice, along with anything particularly memorable that the Justice had said.

One example is Arnold's diary entry for November 22, 1960: "The law clerks had lunch today with Justice Black. He intimated that things would have turned out better had the South been required to proceed much more rapidly, instead of 'with all deliberate speed.' He agreed with this formulation in the second round because unanimity was important."[14]

According to biographer Roger Newman, Justice Black believed the Supreme Court in the 1960 Term faced "more cases of great importance" than at any time since he joined the Court. As quoted by Newman, Black told a former clerk: "I do not anticipate a year in which I shall have to rarely dissent."[15]

Arnold was clearly in awe of the seventy-five-year-old Black. Arnold wrote in his diary: "I found him very kind and gracious—he was pleased I was going back to Texarkana. He was perfectly poised and dignified and very acute and bright—not the slightest hint of age. He is truly a great man."[16]

Frankfurter was a professor at Harvard Law School when he was nominated to the Supreme Court by Franklin Roosevelt in 1939. He had previously served Roosevelt as an informal advisor on many New Deal matters. Frankfurter retained his ties with the Harvard Law School faculty and surrounded himself with its recent graduates as law clerks. Frankfurter held the deep esteem of many of the Harvard law faculty and was widely considered the Court's most influential member.[17]

When Frankfurter invited the other law clerks for lunch, Arnold was taken with Frankfurter's antics: "Frankfurter shouted, gesticulated, flung his silver onto the table, and accused a law clerk of being slippery. Frankfurter literally shouted his disapproval of Senator Fulbright for not taking a more forthright stand on *Brown*."[18]

At sixty-two, John Marshall Harlan II was substantially younger than either Frankfurter or Black. Arnold's notes from their law-clerk lunch with Justice Harlan describe him as "very grandfatherly and judicious, verging on the stuffy, but not without humor. He disagrees with almost everything of importance his grandfather ever said. He does not believe Negroes are an unduly favored class of litigants. He asserted further that he would not restrict congressional investigations of communism with a probable cause showing requirement—everything would be all right up to dragging just anyone off the street and asking him if he were a communist."[19] Harlan was "the soul of dignity," and "deserved the title of 'august' if anyone ever did," Arnold recalled. It amused Arnold greatly that when Justice Brennan saw Harlan in the halls, he would say delightedly, "Hiya, Johnny." Arnold did not believe that anyone else, including Harlan's mother, ever called the Justice "Johnny."[20]

Douglas, nominated to the Supreme Court by Franklin Roosevelt, served on the Court for nearly thirty-seven years, making him the longest-serving Justice in Supreme Court history. Arnold wrote that Douglas "was actually rather nice and friendly. He refused to admit that there was any split on the court between two wings or blocks."[21]

Arnold's impression of Justice Whittaker was improved by the clerks' lunch. "He made a much more favorable appearance than we had expected. He is a simple but tough-minded man, well aware of his own limitations,

genuinely humble. He supports *Brown* but thinks *Shelley v. Kraemer* [22] is wrong. He is very sensitive to criticisms of the court as too liberal, procommunist. He was truly a character to inspire affection."[23]

Lunch with a Justice other than one's boss was a rare event, occurring by tradition but once during the Term. More frequently, Arnold and Rezneck ate lunch with Brennan, especially on Saturdays. On one occasion Arnold met the two retired Justices who still had offices at the Supreme Court, Harold H. Burton and Stanley Reed. "The Justice and I had lunch in the Methodist building, and Mr. Justice Burton, who is often there, joined us. He is rapidly declining in physical strength. His left hand shakes, and his mental reactions are slow and dull. When we came back to the Court we saw Mr. Justice Reed on the ground floor—he was a model of courtesy and vigor, showing no signs of age."[24]

But overwhelmingly, Arnold's diary reflects his observations of his "boss," as he put it, Justice Brennan. In the 1960 Term, Brennan was only in his fourth year on the Court.[25] Brennan's relatively junior status at the time and the ideological divisions on the Court left him frequently on the dissenting side that year. The 1960 Term, which Arnold would witness, was particularly noteworthy for the number of 5–4 decisions handed down during it, with Brennan often in the minority.

Professor Paul Freund selected law clerks for Justice Brennan, Eisenhower's recent nominee to the Court. Freund was one of the leading scholars of constitutional law. One Brennan clerk for the 1960–1961 year had already been selected: Rezneck, a graduate of the Harvard class of 1959, who had spent 1959–1960 as a research assistant for Freund on the **Holmes Devise History of the Supreme Court**.[26]

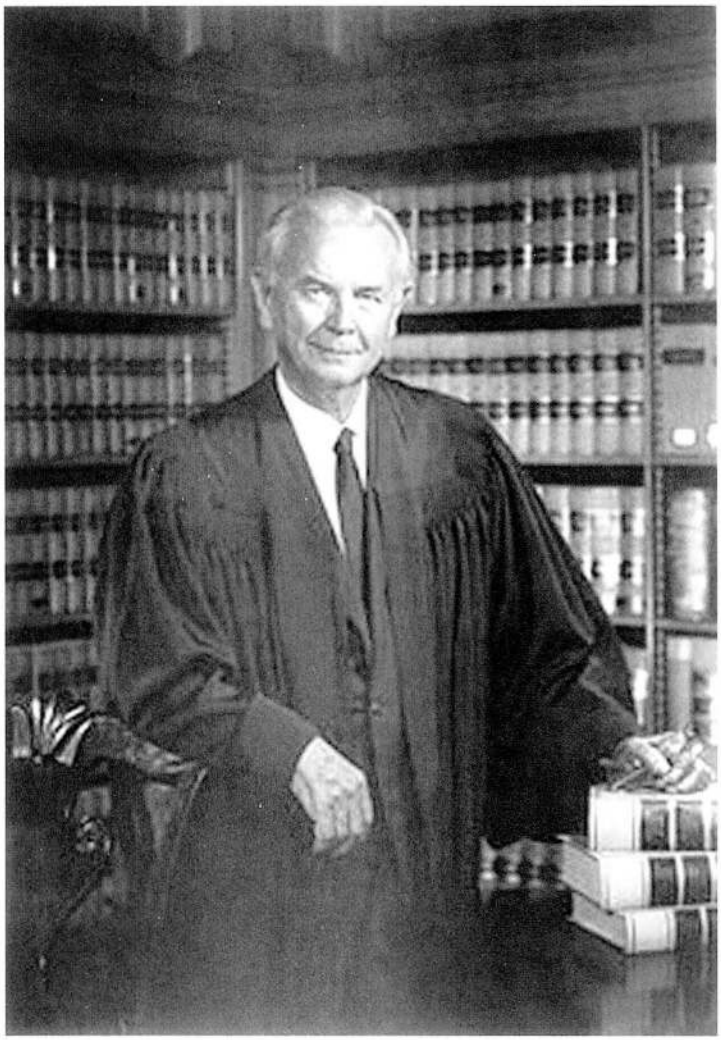
In mid-fall of 1959, Freund called Arnold into his office to offer him a clerkship with Brennan. A short time later, Brennan wrote to Arnold, "I am most happy to follow the suggestion of Professor Freund and invite you to accept a law clerkship with me for the 1960 term. It will give me great pleasure if you will accept."[27] Arnold's prompt reply stated that he was "delighted to receive this morning your letter inviting me to serve as your law clerk for the Court's 1960 Term. I view the appointment as a great honour and promise to do my best to justify your confidence."[28]

Arnold did not meet Brennan until he started work. The two Brennan law clerks chosen for that year—Arnold and Rezneck—developed a close relationship with Brennan. On most days they would drive him to and from his home in Georgetown, often discussing the Court's pending cases.[29]

The politics of determining which cases to take and which to avoid was an important feature of the 1960 Term. The Justices weighed priorities for disposition on a weekly basis. The custom at the time was for the Justices to hold a weekly conference on Fridays to discuss the cases argued during that week, assign opinions to be written, and also consider which, if any, of the numerous appeals filed during the week to accept for review. On occasion, these conferences would carry over to Saturday morning.

Brennan made it a regular practice to discuss with his clerks the results of the Friday conferences. Law clerks were never present for any of these conferences, but Justice Brennan would relate the day's events to his clerks. Stories from the Justices' conferences, as recorded in Arnold's diary, are from Brennan's explanations. Not all Justices favored their clerks with a blow-by-blow of the conferences. Arnold would sometimes find himself in the position of informing other Justices' law clerks about what had happened there.[30]

It was a busy Term for the Justices and their law clerks. Throughout the year, the Supreme Court heard 146 cases on oral argument out of nearly 2,000 petitions for review presented to the Court.[31] An early entry in Arnold's diary notes: "Tomorrow, conference. How can the court dispose of five or six argued cases, most of them of considerable difficulty,



There were five separate opinions in *Mapp* because the Justices could not agree on which part of the Constitution to base their reasoning. Brennan joined Justice Tom Clark's majority opinion holding that evidence obtained in violation of the Constitution could not be used in state prosecutions.

and then go on to deal with all the appeals and petitions for certiorari (at least 30 of which are to be discussed)? Who knows?"[32]

Civil Liberties in the Supreme Court, 1960–1961

It was an auspicious time for anyone, let alone a Southerner like Arnold, to be present at the Supreme Court. Only two years before Arnold began his clerkship, the Supreme Court handed down its famous decision in *Cooper v. Aaron*.[33] This case was the only instance in which the Supreme Court accepted an appeal involving desegregation in Little Rock, Arkansas. Members of the Little Rock School Board, including the Superintendent, had succeeded in securing from a federal district court an order to delay integration of the schools for another two and one-half years, citing the turmoil created by Governor Orval Faubus's stand against integration and the arrival, for a time, of the United States Army's 101st Airborne division, sent by President Eisenhower.

The Eighth Circuit Court of Appeals had reversed the district court, but the Supreme Court took the case, in an August

Dollree Mapp, an Ohio woman, had been sentenced to seven years in prison for possessing obscene literature, which she claimed she was merely storing for a former tenant who had left it behind with other belongings. Police officers had searched her home, without a warrant, based upon the allegations of an unnamed informant who claimed that a person wanted for a recent bombing was hiding there.

Special Term, in order to affirm federal judicial supremacy and the mandate of *Brown v. Board of Education*:

> Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.[34]

Justice Brennan was the primary author of *Cooper v. Aaron*, although it was signed by all nine Justices.[35] While Arnold was clerking for Justice Brennan, he later noted, "the memory of *Cooper v. Aaron* was fresh."[36] And the nation still had, in the scheme of things, a fresh memory of *Brown v. Board of Education*. The

"Southern Manifesto"—a statement by Southern members of Congress that *Brown v. Board of Education* was illegal and illegitimate as a matter of constitutional law—came in 1956. It had been signed by, among others, Arkansas Senator J. William Fulbright.

But the 1960 Term was perhaps most notable for the steps it did not take in favor of racial equality. Part of the reason for this had to do with the composition of the Court. In his last years on the Court, Frankfurter became an outspoken critic of many of the Court's ground-breaking decisions to end racial segregation. He was also the Court's most ardent advocate of judicial restraint at the time. Frankfurter left the Court in 1962 after suffering a stroke, so the 1960 Term—documented in Arnold's diary—was for all practical purposes Frankfurter's last full year.

The fault lines on the Supreme Court are apparent not only in Arnold's diary but also in academic assessments of the 1960 Term. In many close cases, Warren, Black, Douglas, and Brennan found themselves together in dissent. Justices Frankfurter and Douglas were the furthest apart; Chief Justice Warren and Justice Brennan agreed more often than any other two Justices.[37] Arnold recognized the link between Warren and Brennan, noting on one occasion: "The Chief was in to see the boss today twice—he seems to look to Justice Brennan quite a bit for advice."[38] There were stark ideological differences that year in particular, resulting in both unusual techniques of withholding ultimate constitutional adjudication and what one observer termed "deeds without doctrine"—Court actions without a rationale sufficient to provide jurisprudential guidance for the future.[39]

In the 1960 Term, there was only a smattering of civil-rights cases involving race that the Supreme Court decided to hear. It was a year of retrenchment on racial matters, but the Court's decisions on the Fourteenth Amendment and how it applied to the states would have a significant impact on the nation. The Court struggled to articulate what obligations the states must recognize in order to make meaningful a national system of individual rights. The Supreme Court was in the midst of a federalism revolution that many observers found astonishing.

Mapp v. Ohio: The Exclusionary Rule in State Criminal Prosecutions

The most striking and revolutionary decision of the Term was *Mapp v. Ohio*,[40] which held that evidence obtained by a search in violation of the federal constitution could not be admitted in state prosecutions. Nominally a 6–3 decision, the case resulted in five separate opinions. The decision was handed down on the last day of the Term, and Arnold's diary explains why it took until then for the Justices to work out a resolution. Robert McCloskey, reviewing the 1960 Supreme Court Term in the *American Political Science Review*, said *Mapp v. Ohio* was a development "so spectacularly libertarian" that it must play a major part in any evaluation of the Term's results.[41]

Dollree Mapp, an Ohio woman, had been sentenced to seven years in prison for possessing obscene literature, which she claimed she was merely storing for a former tenant who had left it behind along with other belongings. Police officers had searched her home, without a warrant, based upon the allegations of an unnamed informant who claimed that a person wanted for a recent bombing was hiding there, along with gambling paraphernalia. All the police found after an extensive search of the home were allegedly obscene books and pictures. Those materials—evidence that was admittedly seized illegally—were introduced in court and resulted in Mapp's jail sentence.

Mapp v. Ohio came to the Supreme Court seemingly as a First Amendment case. The lawyers had argued it that way before the Court, and the only suggestion that it might turn on another provision of the U.S. Constitution came in an amicus brief filed by the American Civil Liberties Union. In one

paragraph, the ACLU suggested instead that Dollree Mapp's conviction was invalid because it was based on evidence from an illegal search.

Arnold's conversations with Brennan reflect little early emphasis on the illegal search. On a drive home from the Supreme Court, Arnold discussed the case with Brennan: "The Justice not only thinks that [the Ohio obscenity statute is] unconstitutional, but went so far as to say the states cannot constitutionally punish a man for reading, in private but with prurient interests, obscene books. Dan and I disagreed, and the Justice labeled us as 'hopeless reactionaries.'"[42]

Arnold also recorded a strategy session between Warren and Brennan: "The Chief came in today to talk over *Mapp* with the Justice. He, too, thinks it must be reversed. [Brennan] and Dan and I argued the matter at some length again this afternoon. The Justice admits he's in an analytical dilemma, but he is 'damn well going to vote to reverse, anyway.'"[43]

The analytical dilemma was this: Three years earlier, in a case known as *Roth v. United States*,[44] the Supreme Court redefined the constitutional test for obscene material. Brennan had written the majority opinion. The First Amendment, he said, protected "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion."[45] But material that would qualify as "obscene" received no such protection: "We hold that obscenity is not within the area of constitutionally protected speech or press."[46] Obscenity, in turn, was determined by "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[47]

The problem, then, was that by all accounts the material in Mapp's house *was* obscene, or at least had been determined to be obscene in a state judicial proceeding. There were only three dissenters in *Roth*, so there would be no way Brennan could find enough votes to reverse Mapp's conviction on the basis of the First Amendment while *Roth*—an opinion he had written—was still good law.[48]

This left the possibility that the Court might view the illegal search and seizure at Mapp's house as requiring reversal of her conviction. But here again, the analytical dilemma was great. An "exclusionary rule" had long been applied in federal prosecutions where evidence had been obtained in violation of the Fourth Amendment's prohibition of "unreasonable searches and seizures." Such evidence could not be used against the defendant at trial. But the federal exclusionary rule did not apply to state prosecutions, and half of the states at that time—including Ohio—still admitted illegally seized evidence in criminal prosecutions. Eleven years earlier, in a case titled *Wolf v. Colorado*,[49] the Supreme Court had concluded that the exclusionary rule did not apply to state court proceedings. In *Wolf*, four Justices read the Fourteenth Amendment to incorporate all the protections of the Fourth Amendment in state criminal prosecutions, but Frankfurter's majority opinion would not go that far. State officials, Frankfurter wrote, need not apply the exclusionary rule in state court proceedings.[50] Justice Black went even further. In a concurring opinion in *Wolf*, he said that the failure to exclude evidence obtained by an illegal search did not violate the Due Process Clause of the Fourteenth Amendment.

Later conversations reflect Brennan's difficulty with the case: "The Justice is determined to vote to reverse *Mapp*, but he doesn't quite know how. I argued at length with Dan and him that since the First Amendment is out of the case, that the only way to strike down the Ohio statute is to say that to make knowing possession a crime is to use an impermissible means of implementing the state's permissible anti-obscenity policy. Of course, best of all would be to overrule *Wolf* and reverse this case on the Fourth Amendment, but no one thinks there's a chance of that."[51]

This is precisely what would happen. Writing for a bare majority, Justice Clark held that Fourth Amendment protections,

incorporated through the Due Process Clause of the Fourteenth Amendment, did require state courts to follow the exclusionary rule, and overturned *Wolf*. The voting was complicated, with the deciding vote falling to Justice Black, who had voted with the majority in *Wolf*.

At the Friday conference that week, Arnold wrote that "[t]he Chief Justice, Douglas, Brennan, and Clark, were all in favor to overrule *Wolf* (great effort is to be made to get a fifth somewhere for this proposition, to apply the fourth amendment exclusionary rule to states through the 14th amendment)."[52]

The conference notes also described indecision on the part of other Justices about whether the case could be decided on First Amendment grounds (a decision ultimately rejected): "Two—Black, also Douglas—to overrule *Roth*. Two—Harlan, Frankfurter—say it violates substantive due process to forbid mere possession. Five—The Chief Justice, Brennan, Clark, Whittaker, and Potter Stewart—say the First Amendment forbids prohibition of mere possession; *Roth* distinguished as involving only possession for purposes of sale."[53]

Mapp v. Ohio was not decided at the first conference. Instead, that conference began a series of exchanges between individual Justices concerning strategies to resolve the case. Private meetings of coalitions among the Supreme Court were not uncommon in the 1960 Term, according to Arnold's diary, with Frankfurter often the convener.

The most important development was Black's decision on the Fourth Amendment question. Arnold wrote: "Black in to see the Justice before lunch. He has decided to go along with overruling of *Wolf* in *Mapp*. He had just talked an hour with Clark—is convinced that the Fourth Amendment is an empty guarantee without the exclusionary rule. He told Clark he would join him if his opinion applied the Fourth Amendment to the states, as such, as a specific of the Bill of Rights. Naturally the Justice is overjoyed. We are not to speak of it to anyone else within the court for the time being, however."[54]

Brennan informed his clerks that Justice Felix Frankfurter (pictured) had taken his defeat in *Mapp* very badly in conference. According to Arnold's diary, Brennan told him: "In conference Frankfurter became violent. He shook, almost cried—it is 'a death blow for federalism.'"

Justice Clark had been assigned the majority opinion. His opinion, which he circulated to the other Justices, overruled *Wolf*, applied the exclusionary rule to the states, and made that the sole ground of reversal. As Arnold noted, Clark held "that the Fourteenth Amendment absorbs or incorporates the Fourth Amendment as such and in full." This was apparently too much for Frankfurter. When Frankfurter received the *Mapp* circulation, Arnold wrote, "he took one look and shot off down the hall in a great hurry, perhaps to see Clark."[55]

Clark received complaining letters from two Justices who would end up among those

dissenting in the case, "one from Potter Stewart (as *Wolf* was not discussed at conference, and was raised only by ACLU as amicus), one from Harlan (four pages insisting that the exclusionary rule is not a constitutional requirement even in the federal courts)."[56]

Frankfurter took his defeat in *Mapp* as a personal affront, and he looked for ways to change the result even after Clark's opinion had gained a majority. According to Arnold (as reported by Brennan, whom Arnold referred to as "the Justice" or "the boss"):

> In conference Frankfurter became violent. He shook, almost cried—it is "a death blow for federalism." He demanded reargument—which was voted down, five to four. Most of the tirade was aimed straight at the boss [Brennan], who said "I've had things said to me today that haven't been said since I was a child." Frankfurter said he would vote against the procedure of the decision—question not fully argued, counsel incompetent, no thorough survey of state law, wrong to go on a ground which divides the court when it unanimously believes the Ohio statute is unconstitutional. Frankfurter wants special counsel appointed to argue the states' case, with a team of experts to study state law. The Justice said he and Clark were the only calm ones there. Brennan told me, "Finally I got fed up and said as calmly as possible, 'I can't help thinking all this furor is directed only to the result in this case, not to the circumstances of reaching it.'" That made Felix furious.[57]

Brennan told Arnold that he had "never seen Harlan so exercised. He's going to write a bitter dissent on the affront to collegial spirit of the court." Stewart and Whittaker also were troubled about "turning *Mapp* into an unexpected vehicle for overruling *Wolf*, but that they will join the court on the merits." Arnold records that Harlan, Frankfurter, Stewart, and Whittaker had met privately before the conference to plan their attack. Brennan said, "I would have been more impressed if I hadn't known it was planned." Frankfurter and Harlan planned to file dissents after the term was over. Frankfurter said it would take him at least ten months to write his dissent.[58]

Along the way, Brennan worried that Black was "getting cold feet" and might ask for re-argument. If he did, Arnold wrote, Clark would "withdraw his whole opinion, and rewrite to hold the Ohio statute unconstitutional under the First Amendment."[59] Black thought *Mapp* would be "the most damned case of the term."[60]

Mapp became the subject of yet another conference of the Justices, the last collective discussion of *Mapp* before the end of the Term. "At conference Frankfurter said *Mapp* is the worst tragedy since *Dred Scott*. Justice Brennan says he means it. A note from the Justice in conference says *Mapp* will not come down [on Monday]. The conference was long—lasted until 2:15 p.m. *Mapp* was the subject of much argument."[61]

Justice Black resolved his dilemma over *Wolf* with an explanation in a concurring opinion. In *Wolf*, Black had characterized the exclusionary rule to be merely "a judicially created rule of evidence," not required by the Fourth Amendment. In *Mapp*, Black wrote, "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized in violation of its commands." Nevertheless, a "more thorough understanding of the problem" led him to conclude that "the Fifth Amendment's ban against compelled self-incrimination" was the true basis of the exclusionary rule.[62] To accept the Black position would have required the Court to "incorporate" the privilege against self-incrimination within the due process protections of the Fourteenth Amendment.[63] The Supreme Court would not take this step until 1964.[64]

The debate between Frankfurter and Brennan (along with Black) over incorporation was of long standing. Arnold recorded an amusing exchange between Brennan and Frankfurter toward the end of the Term: "Last night at 11 p.m., the Justice [Brennan], who had gone to sleep, got a call from Frankfurter. Frankfurter said 'Potter? Potter Stewart? Potter?' The Justice said, 'This is Bill.' Felix said, 'Oh, all right, I wanted to talk to you, too.'" Frankfurter brought up an opinion Brennan had circulated in a case involving search warrants for allegedly obscene material. Frankfurter told Brennan his opinion was "substantially all right," but Frankfurter wanted the case to go on the Fourteenth Amendment alone, with no reference to the First. "'You're throwing absorption in my face,' he said. The Justice said he had no such design, and agreed to alter the opinion."[65]

Arnold preferred the view openly expressed by Black that "incorporation" of the individual guarantees of the Bill of Rights in the Constitution against state action should be total and should result from the Privileges and Immunities Clause. As Arnold described Justice Brennan's position on incorporation of the Bill of Rights,

> He didn't go as far as Black. He wanted to incorporate only some provisions. And I never did understand how you would decide which you would incorporate and which you wouldn't. And I don't think that anybody has ever answered that question satisfactorily.[66]

The explicit overruling of a recent Supreme Court decision—*Wolf v. Colorado*, decided in 1949—was a rare step for the Warren Court. The line-up in *Mapp,* expressed in five separate opinions, represented only five votes to reverse *Wolf*, with the primary rationale for doing so receiving only a four-vote plurality (Warren, Clark, Douglas, and Brennan). Justice Black wrote that a combination of the Fifth and Fourth Amendments, rather than the Fourteenth Amendment's Due Process Clause, required states to follow the exclusionary rule.[67] Justice Stewart, in a two-sentence separate opinion, had concurred in the judgment solely on First Amendment grounds, otherwise joining Justice Harlan's dissent.[68]

The dissenters—Harlan, Frankfurter, and Whittaker—refused to apply the exclusionary rule to the states. Harlan wrote, "I think it fair to say that five members of this Court have simply 'reached out' to overrule *Wolf*. With all respect for the views of the majority, and recognizing that *stare decisis* carries different weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*."[69]

In 1983, then-retired Justice Stewart spoke about the case in his Harlan Fiske Stone lecture at Columbia Law School.[70] Stewart said, "I was shocked when Justice Clark's proposed Court opinion reached my desk. I immediately wrote him a note expressing my surprise and questioning the wisdom of overruling an important doctrine in a case in which the issue was not briefed, argued, or discussed by the state courts, by the parties' counsel, or at our conference following the oral argument." More than two decades after the decision, Stewart maintained his concern that "a first amendment controversy was transformed into perhaps the most important search-and-seizure decision in history."[71]

There are several other accounts in print of the machinations behind *Mapp v. Ohio*.[72] Arnold's version, recorded from his conversations with Justice Brennan, is largely consistent with these earlier stories. It confirms, for instance, Justice Stewart's suspicion that "the members of the soon-to-be *Mapp* majority had met in a . . . 'rump caucus' to discuss a different basis for their decision."[73] Arnold's diary adds color and detail, especially in the period after it was clear to the dissenters that *Wolf* would be overturned. Frankfurter's histrionic comparison of *Mapp* to the *Dred Scott*

decision at conference, presumably on federalism grounds, is especially informative. *Mapp* was, after all, a "major step away from Frankfurter's reading of the Due Process Clause."[74]

Other Dividing Lines in the 1960 Term

In its lasting effects, *Mapp v. Ohio* was the most significant decision of the Supreme Court's 1960 Term. But there were other momentous cases that year that Court watchers likely anticipated to be of greater moment than a case about obscenity. Some of these cases further inform the divisions on the Court that were evident in *Mapp*.

In the 1960 Term, the Supreme Court heard a number of cases related to Communist party activities—real or imaginary—and the efforts of Congress and the states to stamp out "subversion." In the cases involving the "communist menace," as McCloskey summarized, "[t]he Court, with minor exceptions, held against the individual and in favor of governmental power."[75] Many of the decisions were 5–4, with Brennan often notably in dissent.

One of the more surprising racial-rights decisions of the Term, according to contemporary observers, *Gomillion v. Lightfoot*[76] involved gerrymandered city elections in Tuskegee, Alabama, which excluded from voting all but 4 or 5 of its 400 former Negro residents. The Supreme Court held that the legislature had affirmatively acted to deny the vote on *racial* grounds, specifically forbidden by the Fifteenth Amendment.[77] *Gomillion* thus stood for the proposition that electoral apportionment is subject to challenge on the ground of racial discrimination. In the same Term, the Court had agreed to hear *Baker v. Carr*,[78] a more general challenge to apportionment schemes that left some populations within a state proportionately less represented. The *Gomillion* opinion was assigned to Felix Frankfurter.

At Warren's urging, the Court had previously presented a unanimous front on racial cases, most notably *Brown v. Board of Education* and *Cooper v. Aaron*. But one Justice was convinced that the case should turn on the Equal Protection Clause. "Charles Whittaker has circulated a short concurrence in *Tuskegee*," Arnold wrote, "in spite of the various Justices' efforts to persuade him not to last night at the Chief's black-tie dinner. The Justice said all the wives were disgusted at the conversations all being taken up with this subject."[79]

Whittaker would not be dissuaded, and his concurrence set out the path the Court would take in *Baker v. Carr*, a case that was argued, but not decided, that year. The following year, *Baker v. Carr* yielded one of Justice Brennan's most important opinions.[80] It also yielded Frankfurter's last opinion of any sort—a dissent. Warren called *Baker v. Carr* "the most vital decision" during his service on the Court.[81] *Baker v. Carr* would be politically more explosive than the Tuskegee case because it permitted federal courts to examine state apportionment on general equality principles ("one man, one vote"), not solely for overt racial manipulation of elections.

The case was originally argued that spring. Frankfurter and Stewart were primarily responsible for the decision to reargue the case in the following year. Arnold's diary records the following account:

> Frankfurter filibustered for 90 minutes before lunch, and it was all directed at Whittaker, who had been openly for appellants at the argument, more than any other Justice, and who had spoken brave words about the plain duty of courts to enforce the Constitution. Frankfurter conducted a parade of horribles, playing on Whittaker's fears. "He scared the hell out of him," the Justice said. "It worked. He certainly knows his man." Whittaker became very nervous, his lip trembled. Frankfurter started out by citing the morning's

> papers, which recount the U.S.'s horrible blunder in Cuba, caused by lack of foresight. Frankfurter said "Let's not make the same mistake here. Do you realize the terrible difficulties you would place the court in? Look ahead, not just in front of your noses. Look before you act!" He then launched into a very detailed, erudite, and effective lecture on the political question cases. His voice was grave, his arms wildly gesticulating. Harlan and Clark went solidly with Frankfurter. The Chief Justice, Black, Douglas, and the boss were firm to reverse. That left the case up to Whittaker and Potter Stewart.[82]

At the following week's conference, the Justices decided *Baker v. Carr* would be reargued, at the request of Stewart. Arnold wrote that Stewart "needs the summer to make up his mind. Whittaker says he's relieved—had grave doubts about his vote to affirm."[83]

In between the two conferences, Frankfurter had "worked on" Whittaker in particular. Arnold wrote: "Black called the Justice today—he said that Whittaker had called him over the weekend, was very troubled over the position he had taken on *Baker v. Carr* at the conference of April 21, wanted to come see Black. He did so, they had long colloquy. Whittaker left saying he was solid to reverse. Later in the week Frankfurter had a private meeting of Clark, Harlan, Potter Stewart, and Whittaker, and beat Whittaker down again."[84]

Arnold's report of the maneuvers in *Baker v. Carr* ended there. When the case was reargued the following fall, Arnold had completed his clerkship for Justice Brennan.

Racial equality in public accommodation was also largely a development for the future, not the 1960 Term. Yet Arnold observed the careful and cautious approach of the Justices to matters of race. He recorded, for instance, an anecdote from Brennan about efforts to avoid unnecessary confrontation with segregationists:

> The Justice told me last Saturday that no Supreme Court opinion on schools has ever used the word "integration"—only "desegregation." In the two *Brown* cases this was pure chance. But not so in *Aaron v. Cooper*. While the Justice was sitting on his porch one day writing the opinion in that case, his next-door neighbor, an NBC-TV news man, came over and told him that at a meeting of the full NBC news staff it had been decided not to use the word "integration" over the air because (it was thought) in the South that word connoted racial intermarriage. So the next day at conference, at the Justice's suggestion, it was decided not to use the word in the opinion.[85]

The agreement not to use the word "integration" did not survive the Term. Arnold described a visit from Black to Brennan's office in late February. The purpose was to discuss two cases involving contempt prosecutions by the House Un-American Activities Committee (HUAC). Black was "most anxious to get the Justice to join his dissents in *Braden*[86] and *Wilkinson*,[87] but the Justice wouldn't budge, although he again asked Dan and me what we thought."[88] Brennan also dissented in those cases, in which the majority narrowly affirmed the convictions, but he would not join Black's dissents, which were far more strident on the First Amendment. Black believed Braden's harassment by HUAC had to do not with alleged communist sympathies, but with the fact that Braden had promoted "racial integration" in the south. Arnold later reported: "Black's *Braden* uses the word 'integration.' The Justice said he forgot to remind Hugo Black of the court's practice of not using that word."[89]

Conclusion: William Brennan and the Coming Due-Process Revolution

When Earl Warren stepped down as Chief Justice of the Supreme Court in 1969, the Warren Court's near-complete incorporation of the Bill of Rights into the Fourteenth Amendment meant that there was no longer any significant difference between rights applicable in federal courts and rights applicable in state courts.[90] The most liberal period of the Warren Court—1962 to 1969—was a due-process revolution.[91]

In the late 1960s, as public concern with crime and violence became a feature of political debate, Richard Nixon ran for president in 1968 as a critic of the Warren Court's rulings in favor of criminal defendants, especially the Court's decision in *Miranda v. Arizona*.[92] Immediately after the *Miranda* decision, Congress enacted a statute ostensibly overruling the case to make "voluntary" statements admissible.[93] Nearly all of these later decisions from the Warren Court are still good law, however, despite later attempts to staff the Court with nominees willing to undo some or all of this legacy.

Although the Supreme Court's strides in favor of civil rights and civil liberties in the 1960 Term were small in comparison with the earlier great leap forward in *Brown v. Board of Education*, McCloskey concluded at the time that "the signs of forward movement in the field of criminal procedure . . . seem unmistakable."[94] The *Mapp* decision, he wrote, stood out "like a beacon, perhaps even portending a general erosion of the scruples about federalism that have heretofore retarded movement of this kind."[95]

As was apparent to Arnold, the composition of the Court was an important factor. The most liberal of the Warren Court's decisions on criminal procedure and racial equality occurred after Frankfurter was no longer a member of the Court.

Brennan and Arnold began a lifelong correspondence.[96] The two remained close friends until Brennan's death in 1997, at the age of ninety-one. Later in his life, Arnold rebutted the view that Justice Brennan molded the Warren Court through the force of his personality:

> Personality, no doubt, is important. Judges are human beings. They live in bodies and react on a personal level. But judges do not cast votes simply because their backs are slapped in a particularly engaging way. What Justice Brennan did, he did as a lawyer and as a judge, and his mastery of the English language, of the history of the Constitution, and of the technical aspects of the law played at least as big a part in his success at constructing majorities as the warmth of his personality and manner.[97]

By the end of the 1960–1961 Term, Brennan's weariness was apparent to his clerks. It was marked in one respect by Brennan's openness with his clerks about his fears for the Court: "The other day in the car going home the Justice said sadly the court is deteriorating to the point where Justices, especially Black, Frankfurter, and Harlan, are more concerned with maintaining the integrity of their own constitutional positions than with getting a decision in particular cases."[98]

Arnold observed how Brennan coped with the relentless parade of controversies to be decided. In his later years as a judge on the Eighth Circuit, Arnold learned to appreciate what Brennan and the other Justices faced:

> Justice Brennan would come back from a conference with his notebook and sit down with us and go over the cases they had discussed, and tell us what the Court was going to do. Except on days when he was too tired, and on those days, he'd just give us the notebook. I never did understand why it would make somebody so tired to sit in a room and talk about the law

> for a couple of hours, until I did it myself with a bunch of other judges. And now I understand it.[99]

The perspective portrayed in Arnold's diary reveals the evolution of Justice William Brennan to become, as Morton Horwitz wrote, "the most important intellectual influence on the Warren Court."[100] But relationships among the Justices were also significant drivers for the outcome in *Mapp v. Ohio*. The Justices were passionate. Arnold's recount of the decision in *Mapp* is instructive for the level of disagreement and temper it reveals. This episode enhances our understanding of the division-creating federalism issues in the early stages of the Warren Court's due-process revolution.

ENDNOTES

[1]Some of the diary entries included here previously appeared in Polly J. Price, **Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench** (Prometheus Books, 2009).

[2]Richard S. Arnold, Personal Diary (June 5, 1961) (Arnold Papers, archival designation pending).

[3]Yale Kamisar, "*Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure 'Revolution,'" in C.S. Steiker, ed., **Criminal Procedure Stories** 46 (2006).

[4]*Mapp v. Ohio*, 367 U.S. 643 (1961).

[5]Adam Liptak, "U.S. Stands Alone in Rejecting All Evidence When Police Err," *N.Y. Times*, July 19, 2008, A1.

[6]*Herring v. United States*, 129 S.Ct. 695 (2009). Morgan Cloud has written extensively both about the original underpinnings of *Mapp* and contemporary debate about the exclusionary rule. *See* Morgan Cloud, "Rights without Remedies: The Court That Cried 'Wolf,'" 77 *Miss. L. J.* 467 (2007); Morgan Cloud, "A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment," 3 *Ohio St. J. Crim. L.* 33 (2005); Morgan Cloud, "Judicial Review and the Exclusionary Rule," 26 *Pepp. L. Rev.* 835 (1999).

[7]Interview with Daniel A. Rezneck, Senior Counsel, Office of the Att'y Gen. of D.C. (Dec. 12, 2005).

[8]William D. Rogers, "Clerks' Work Is 'Not Decisive of Ultimate Result,'" *U.S. News & World Report*, Feb. 21, 1958, at 114.

[9]William H. Rehnquist, "Who Writes Decisions of the Supreme Court?", *U.S. News & World Report*, Dec. 13, 1957, at 74. In this article, Rehnquist charged that the Court was staffed with an overabundance of liberal, left-wing law graduates. *Id.*

[10]*See, e.g.*, David J. Garrow, **Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade*** 184–85 (1994) (relating an anecdote from the 1960 Term Arnold diary, provided by Richard Arnold).

[11]*Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

[12]John D. French, "Remembering Richard," 58 *Ark. L. Rev.* 505, 506 (2005).

[13]*Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy v. Ferguson* was a landmark decision upholding the doctrine of "separate but equal" in public accommodations, later repudiated in *Brown v. Board of Education*, 349 U.S. 294 (1954).

[14]Personal Diary of Richard S. Arnold (Nov. 22, 1960).

[15]Roger K. Newman, **Hugo Black: A Biography** 502 (2d ed. 1997) (quoting letter from Hugo L. Black, former Associate Justice, U.S. Supreme Court, to John McNulty (Oct. 10, 1960)).

[16]Personal Diary of Richard S. Arnold (Nov. 22, 1960).

[17]Robert O'Neil, "Clerking for Justice Brennan," 1991 *J. Sup. Ct. Hist.* 2, 3 (1991) (describing view of Harvard faculty at the time).

[18]Personal Diary of Richard S. Arnold (Nov. 22, 1960).

[19]Personal Diary of Richard S. Arnold (Apr. 11, 1961).

[20]Richard S. Arnold, "A Remembrance: Mr. Justice Brennan," 1991 *J. Sup. Ct. Hist.* 5, 7 (1991).

[21]Personal Diary of Richard S. Arnold (Mar. 14, 1961).

[22]*Shelley v. Kraemer*, 334 U.S. 1 (1948). *Shelley v. Kraemer*, a case from Missouri, was argued by Thurgood Marshall. The Supreme Court held that restrictive covenants excluding sales of property on the basis of race could not be enforced by states as a violation of the Fourteenth Amendment. *Id.* at 21–22.

[23]Personal Diary of Richard S. Arnold (May 16, 1961).

[24]*Id.* at Apr. 1, 1961.

[25]Justice Brennan would serve on the Court for a total of thirty-four years.

[26]Interview with Daniel A. Rezneck, *supra* note 7.

[27]Letter from William Brennan, former Associate Justice, United States Supreme Court, to Richard S. Arnold (Dec. 14, 1959) (Brennan Papers, on file with the Library of Congress).

[28]Letter from Richard S. Arnold to William Brennan (Dec. 17, 1959).

[29]Arnold, "A Remembrance," *supra* note 19, at 6.

[30]Arnold's diary for Saturday, October 15, 1960, notes that Arnold had lunch with Chief Justice Warren's law clerks. Arnold "told them the news of what went on at the conference. Apparently the Chief tells them very little about what happens." *Id.* at Oct. 15, 1960.

[31]"Supreme Court, 1960 Term," 75 *Harv. L. Rev.* 83, 85 (1961).

[32]Personal Diary of Richard S. Arnold (Oct. 13, 1960).

[33] *Cooper v. Aaron*, 358 U.S. 1 (1958).

[34] *Id.* at 19–20.

[35] Richard Arnold wrote about this episode in a tribute to Justice Brennan: "It is well known that Justice Brennan wrote the Court's opinion in *Cooper v. Aaron*, or most of it, at any rate. (The Justice told me that Justice Black wrote the opening paragraph, and that Justice Harlan inserted into the last paragraph the statement that the three new Justices who had come to the Court since the first opinion in *Brown v. Board of Education*, Justices Harlan, Brennan, and Whittaker, were fully persuaded of the correctness of the opinion.)" Richard S. Arnold, "In Memoriam: William J. Brennan, Jr.," 111 *Harv. L. Rev.* 6–7 (1997).

[36] Letter from Richard S. Arnold to Bennett Boskey (Arnold Papers, archival designation pending).

[37] "Supreme Court, 1960 Term," *supra* note 30, at 92.

[38] Personal Diary of Richard S. Arnold (Oct. 19, 1960).

[39] *Compare* Alexander M. Bickel, "The Supreme Court, 1960 Term, Foreword: The Passive Virtues," 75 *Harv. L. Rev.* 40, 40 (1960), *with* Robert G. McCloskey, "Deeds without Doctrines: Civil Rights in the 1960 Term of the Supreme Court," 56 *Am. Pol. Sci. Rev.* 71, 71–89 (1962).

[40] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[41] McCloskey, *supra* note 38, at 81.

[42] Personal Diary of Richard S. Arnold (Oct. 18, 1960).

[43] *Id.* at Mar. 30, 1961.

[44] *Roth v. United States*, 354 U.S. 476 (1957).

[45] *Roth*, 354 U.S. at 484.

[46] *Roth*, 354 U.S. at 485.

[47] *Roth*, 354 U.S. at 489 (citations omitted).

[48] Justice Brennan would later abandon this view of obscenity under the First Amendment. By the time the Supreme Court abandoned the *Roth* test in *Miller v. California*, 413 U.S. 15 (1973), Brennan argued all obscenity was constitutionally protected unless it involved minors or was distributed to minors or unwilling third parties.

[49] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[50] Thomas Y. Davies, *Mapp v. Ohio*, in **Oxford Companion to the United States Supreme Court** 520 (Kermit L. Hall et al. eds., 1992).

[51] Personal Diary of Richard S. Arnold (Mar. 29, 1961).

[52] *Id.* at Mar. 31, 1961.

[53] *Id.*

[54] *Id.* at Apr. 12, 1961.

[55] *Id.* at Apr. 28, 1961.

[56] *Id.* at May 2, 1961.

[57] *Id.* at May 5, 1961.

[58] *Id.*

[59] *Id.* at June 8, 1961.

[60] *Id.* at June 5, 1961.

[61] *Id.* at June 9, 1961.

[62] *Mapp v. Ohio*, 367 U.S. 643, 661, 665 (1961).

[63] Francis A. Allen, "Federalism and the Fourth Amendment: A Requiem for *Wolf*," 1961 *Sup. Ct. Rev.* 25 (Phillip B. Kurland ed., 1961).

[64] *Malloy v. Hogan*, 378 U.S. 1 (1964).

[65] Personal Diary of Richard S. Arnold (June 1, 1961). The case Frankfurter referred to was *Marcus v. Search Warrants of Property, Kansas City, Missouri*, 367 U.S. 717 (1961). That case presented a challenge to Missouri's procedures authorizing the search for and seizure of allegedly obscene publications. Brennan's opinion held that the search procedure lacked adequate safeguards required by due process under the Fourteenth Amendment, and it avoided a discussion of the First Amendment, as Frankfurter had suggested. *Id.*

[66] Interview with Richard S. Arnold, Little Rock, Ark., July 1, 2004.

[67] *Mapp*, 367 U.S. at 661–62 (Black, J., concurring).

[68] Justice Stewart's concurrence states: "Agreeing fully with Part I of Mr. Justice Harlan's dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of §2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.'" *Mapp*, 367 U.S. at 666–67 (Stewart, J. concurring).

[69] *Mapp*, 367 U.S. at 674–75 (Harlan, J., dissenting).

[70] Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases," 83 *Colum. L. Rev* 1365 (1983).

[71] *Id.* at 1368.

[72] *See, e.g.*, Carolyn N. Long, ***Mapp v. Ohio*: Guarding Against Unreasonable Searches and Seizures** 81–85 (2006); Roger K. Newman, **Hugo Black: A Biography** 555–57 (2d ed. 1997); Yale Kamisar, "*Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure 'Revolution,'" in C. S. Steiker, ed., **Criminal Procedure Stories** 45–99 (2006); Dennis D. Dorin, "Marshalling *Mapp*: Justice Tom Clark's Role in *Mapp v. Ohio*'s Extension of the Exclusionary Rule to State Searches and Seizures," 52 *Case W. Res. L. Rev.* 401 (2001).

[73] Stewart, *supra* note 69, at 1368.

[74] Morton J. Horwitz, **The Warren Court and the Pursuit of Justice** 93 (1998).

[75] McCloskey, *supra* note 38, at 86.

[76] *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[77] McCloskey, *supra* note 38, at 84.

[78] *Baker v. Carr*, 364 U.S. 898 (1960), prob. juris. noted.

[79] Personal Diary of Richard S. Arnold (Nov. 3, 1960).

[80] *Baker v. Carr*, 369 U.S. 186 (1962).

[81] Jack W. Peltason, "*Baker v. Carr*," in **Oxford Companion to the United States Supreme Court**, *supra* note 49, at 57.

[82]Personal Diary of Richard S. Arnold (Apr. 21, 1961).
[83]*Id.* at Apr. 28, 1961.
[84]*Id.* at May 1, 1961.
[85]*Id.* at Nov. 22, 1960.
[86]*Braden v. United States*, 365 U.S. 431 (1961).
[87]*Wilkinson v. United States*, 365 U.S. 399 (1961).
[88]Personal Diary of Richard S. Arnold (Feb. 27, 1961).
[89]*Id.*
[90]D. Grier Stephenson, Jr., "Book Review," 33 *J. Sup. Ct. Hist.* 212 (2008) (reviewing Jim Newton, **Justice for All: Earl Warren and the Nation He Made** (2007)).
[91]*Id.*
[92]Jim Chen, "Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice under the Law," 59 *Wash. & Lee L. Rev.* 1203, 1249 (2002); Jack Harrison Pollack, **Earl Warren: The Judge Who Changed America** 269 (1979).
[93]18 U.S.C. §3501 (1968). In 2000, the U.S. Supreme Court ruled that *Miranda*, not this statute, governs statements made during custodial interrogations in both state and federal courts. *Dickerson v. United States*, 530 U.S. 428 (2000).
[94]McCloskey, *supra* note 38, at 86.
[95]*Id.*
[96]*See* correspondence file, "Richard S. Arnold," in Brennan Papers, Library of Congress, Washington, D.C.
[97]Arnold, "In Memoriam," *supra* note 34, at 9.
[98]Personal Diary of Richard S. Arnold (June 10, 1962).
[99]Interview with Richard S. Arnold (July 1, 2004).
[100]Horwitz, *supra* note 73, at 8.

Ladies of Legend: The First Generation of American Women Attorneys[1]

JILL NORGREN

In 1893, Chicago attorney Ellen Martin sent an invitation to her sisters in law to attend a first ever Congress of Women Lawyers, a convention to be held in conjunction with the Chicago World's Fair. Her announcement went out to "All women in the United States and elsewhere who have been admitted to the bar of a court of record or graduated from a law school." Martin and Fredrika Perry, her law partner, had chronicled the rise of the woman lawyer in an 1887 article titled "Admission of Women to the Bar."[2] Thanks to their survey and the 1890 national census, Martin knew there were more than 200 female attorneys in the United States—what we may think of as the first generation of U.S. women lawyers.[3] Speculating that many of them would come to a meeting that coincided with the World's Fair, Martin made the argument that her sisters needed to form a professional association for the purpose of learning from each other and binding themselves more closely together.

Three dozen women of this first generation—including three members of the U.S. Supreme Court bar—answered the call, meeting for three warm August days in the shadow of the dazzling new Ferris wheel called "the wonder of two continents."[4] During the official program, several of the older women reminisced about their early struggle against discrimination, but most of the speakers eschewed the opportunity to discuss personal

The first ever Congress of Women Lawyers convened in 1893 in conjunction with the Chicago World's Fair.

experience, talking instead about contemporary legal and political issues.[5] Lawyer and Republican party activist J. Ellen Foster spoke about naturalization and election laws. Mary Ellen Lease, the fiery Kansas Populist sometimes dubbed "Yellin' Mary," used a lawyer's perspective to analyze political movements. California attorney Clara Foltz chose not to present her proposal for an office of public defender, instead delivering a new, esoteric talk titled "Evolution of the Law." Former presidential candidate (1884 and 1888) Belva Lockwood, deeply involved in the international peace movement, unsurprisingly used the time allotted to her to present the case for a permanent international court of arbitration.

These and other talks reflected the intellectual prowess of this first generation, barely a quarter of a century after they had battled, cajoled, petitioned, and litigated their way into the profession of law.

MYRA BRADWELL

In 1865, at the conclusion of the American Civil War, the idea of equal rights filled the air. In the optimistic decade that followed, a small group of women imagined that they might act on their aspirations to become lawyers. It was a radical ambition. Law was an all-male profession and most Americans believed that any woman who did not need to work outside her home or farm ought not to. Nevertheless, the thought of equality was addicting, and these women marched forward, reading law with fathers and brothers, knocking on law-school doors, and petitioning county, state, and federal courts for bar privileges.

Where these women lived and *which* law-school deans and judges they encountered *mattered*. Columbia University Law School refused to admit women in 1868 (and until 1927), while within two years of that date Washington University in St. Louis, Union College (later Northwestern), and the University of Michigan permitted female law students to matriculate. In progressive counties and states, judges accepted motions to admit women attorneys to the bar.

Elsewhere, however, courts declined to extend bar privileges to women, using the dodges of the common law, statutes employing the pronoun "he," woman's proper place, and God's intentions. When Myra Bradwell challenged her exclusion from the practice of law, U.S. Supreme Court Justice Joseph Bradley, in a concurring opinion, rejected her claim of Fourteenth Amendment rights, declaring it "the law of the Creator" that woman's destiny should be limited to the "noble and benign offices of wife and mother."[6] In 1875, two years after the *Bradwell* decision, Wisconsin supreme court chief justice Edward Ryan also invoked Victorian mores in denying Lavinia Goodell's petition for state bar membership. He wrote that licensing her would mean "a sweeping revolution of social order." Nature had not, he argued, "tempered woman for juridical conflicts," and he believed that it would be "revolting" that "woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, illegitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies . . . with which the profession has to deal, and which go toward filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men . . . Reverence for all womanhood would suffer in the public spectacle of woman so instructed and so engaged."[7]

Ultimately, where women faced reasoning of this kind, they won bar privileges only by lobbying state legislatures or, in the case of the federal courts, Congress. In 1879, Goodell found relief from Ryan's ruling in the more democratic spirit of the Wisconsin legislature. In the same year, Congress passed the antidiscrimination legislation long lobbied for by Washington, D.C. attorney Lockwood, a bill that opened the entire federal bar to all qualified women lawyers.

What did the first generation of American women lawyers do with this hard-won professional privilege? Put succinctly, they did everything that law and custom did not prevent. The first generation was not invited into the developing areas of corporate and railroad law; they did not wear the black robes of a judge; and, although male lawyers filled the ranks of legislatures and foreign diplomatic missions, presidents refused to appoint women to diplomatic office just as the public refused to elect them to assemblies and senates.

The first generation did practice civil and criminal law, solo and in partnership, back office and courtroom. They were deeply involved in reform, lobbying extensively on the major cause issues of their day, including suffrage, temperance, race (where they were not always on the side of the angels), prison conditions, and international peace. They authored countless books, articles, and newspaper columns. They pursued parallel careers as lecturers. In 1876, Lockwood tried to open a law school for women in Washington, D.C.; twenty years later, lawyers Ellen Mussey and Emma Gillett succeeded. Several ventured into politics. Whatever they did, after each success, they reached higher—enlarging their law practices, writing more, lobbying more, seeking ways to use their knowledge of the law to shape and order their society.

Myra Bradwell of Chicago made her mark in two ways. As I have said, in 1873 she challenged the refusal of the supreme court of Illinois to admit her to its bar by appealing to the U.S. Supreme Court. The Justices of that Court ruled, 8 to 1, that Illinois had the right to control and regulate the practice of law, and that Bradwell was not protected by the Privileges and Immunities Clause of the recently ratified Fourteenth Amendment. This was, of course, a terrible setback for the women's rights movement in general and professional rights in particular, requiring thereafter that women attorneys lobby for antidiscrimination legislation before Congress and in countless state legislatures.

Bradwell was far more successful—a genius, really—in quite another endeavor. In 1868, she started the *Chicago Legal News*, an official reporter for the state of Illinois. According to Jane Friedman, her biographer, Bradwell had to obtain a special charter from the Illinois legislature under which she could operate as publisher and business manager "without the legal handicaps that ordinarily encumbered married women."[8]

She never practiced, even after Illinois admitted women lawyers to its bar. Instead, she built the publication of legal news, statutes, and appellate court reports (state and federal) and the printing of legal forms into a very profitable and respected business empire. At first, she capitalized on the lag time between the passage of laws and the Illinois government's publication of those laws. By reprinting the statutes, she saved lawyers and judges a trip to Springfield, the capital, to read the originals. In a particularly savvy move, she obtained from the legislature a special charter that made all laws printed in her newspaper "valid as 'evidence of the existence and contents of such laws before all courts in Illinois.'"[9] A number of nineteenth-century men built similar enterprises. Bradwell, however, distinguished herself by making this mainstream legal publication an important source of information about women professionals and the women's-rights movement—a tool, Friedman writes, with which to wage war "on the legal and social inequities of her day."[10]

Bradwell took great pleasure in writing about the women who established their own law practices. This included Lockwood, Goodell, and Ada Bittenbender, attorney for the Woman's Christian Temperance Union, as well as Mary Hall, Lelia Robinson, Clara Foltz, and Laura Gordon.

LAVINIA GOODELL

Lavinia Goodell, the target of Wisconsin judge Ryan's Victorian mores, grew up in Utica, New York. She spent her twenties working in publishing, often for her father, who edited an antislavery paper. In the early 1870s, having moved with her parents to Wisconsin, Goodell, perhaps knowing about Bradwell and the handful of other "first" women lawyers, made the decision to read law. She also began attending trials in her new hometown of Janesville. In 1874, she passed the bar exam. She was first hired by temperance women from a nearby community who were seeking an attorney with sufficient moxie to help in the prosecution of two businessmen said to be selling liquor on Sunday. Goodell succeeded in the local justice court. When the two convictions were appealed to the circuit court, she won against one defendant and sufficiently discouraged the other "that he gave up his business."[11] Equally important, she won praise for her courtroom skills from the judge and members of the local bar who had come to watch. A month later, she won a financial judgment for a male client, prompting the editor of the *Janesville Gazette* to report that she had "managed the case with considerable ease and ability."[12] Goodell had many female clients whose legal concerns often involved divorce proceedings or probate matters, and occasionally criminal charges such as shoplifting. She did not, however, consider herself a *woman's* lawyer, despite her interest in the inadequacies of the married women's property laws. Quite to the contrary, in 1875, after the county judge appointed her to represent two young men accused of robbing a store, she became deeply interested in male criminals and prison conditions. For the remaining five years of her short life, she threw herself into the additional work of penal reform and prisoner literacy. In a sage letter to her sister, she wrote, "The jails are schools of vice and crime . . . Jails and prisons could just as well be made schools of virtue . . . if the people chose to have it so and would give a very little thought to the subject."[13]

MARY HALL

Women began practicing law in several of the New England states in the early 1880s. In Connecticut, Mary Hall was admitted to the bar following what Matthew Berger, her biographer, describes as a (landmark) equal protection state court decision.[14] In preparing for a career in law, Hall had been given a copy of Kent's **Commentaries on American Law**—but no encouragement—by her attorney brother. She fared better in the chambers of John Hooker, Clerk of the Supreme Court of Errors and husband of prominent suffrage leader Isabella Beecher Hooker. John Hooker was a mentor with whom the young attorney later practiced.

Hall confined herself to office work, specializing in probate law. She nearly always refused to appear in court. She argued that "public sentiment would be much against a woman's speaking in court."[15] Her stance was much debated, and not infrequently deplored, by other women lawyers. The dispute, of course, centered on the propriety of public speaking and whether it would "unsex" a woman.

The purely professional issue was equally weighty: would women attorneys have an unfair advantage with all-male juries, thus putting in peril the very foundation of the American judicial system? Law professor Barbara Babcock writes of one (male) opposing counsel who held nothing back in stating just this fear: "Lady lawyers [are] dangerous to justice inasmuch as an impartial jury would be *impossible* when a lovely woman pleaded the case of the criminal."[16] Women lawyers would "produce the wrong results" by clouding the reasoning abilities of witnesses, juries, and even judges.[17]

CATHARINE WAUGH MCCULLOCH

Catharine McCulloch, married and eventually the mother of four, was one of the attorneys who found Hall's decision to hand court appearances off to male colleagues deeply disturbing. She was a member of the Equity Club, a women-lawyers correspondence group, and in 1888 she circulated a letter in which she stated, "Some bristling aggressive woman lawyer ought to stir up those slow moving people [who confine themselves to back office work] or Miss Hall had better come to Illinois where it is just as honorable for a woman to talk publicly to men as in private."[18]

McCulloch, born in the state of New York and transplanted to the Midwest, graduated in 1886 from Chicago's Union College of Law. She was not shy in criticizing Hall, nor was she reluctant to publish a tell-all account of the discrimination that she faced when, not yet married, she set out to find a legal position in the "Windy City."

> Many friends advised me to settle in Chicago and capture my share of the large fees floating about. So I decided to get a clerkship in some first class law firm . . . Other classmates were doing the same already and why not I? [X] gave me a list of good men and firms and wrote me personal letters to several. Armed with these and letters and recommendations from two Judges friends of mine and the College Professors I sallied forth to seek my fortune. I sailed out inflated with enthusiasm and confidence in my own abilities. I dragged myself back collapsed with chagrin and failure.
>
> Mr F. whose sister was a friend . . . had more clerks than he knew what to do with.
>
> Mr W. was glad to make my acquaintance but . . . [it] was the wrong season of the year to look for such a place.

> Mr J. preferred the help of his two sons and must also confess he disapproved of women stepping out of their true sphere, the home. This of course led to some discussion the nature of which you can no doubt imagine.
>
> Pompous Judge J. never knew of anyone who needed a clerk ... [and spoke] with his eyes still clinging to his newspaper.
>
> Bristly, bullet headed little Mr. B. exclaimed vehemently "I don't approve of women at the bar, they cant [sic] stand the racket. I would prefer to find a place for my daughter in someone's kitchen and I advise you to ... go home and take in sewing" ... I assured him it was not in default of having opportunities to enter kitchens that I wished to do law work ... inwardly reflecting that only when I had defeated that pettifogger in some illustrious lawsuit would he be fully answered. Take in sewing at 60 cents a dozen for fine shirts? No thank you. He can make shirts himself.[19]

McCulloch's experience suggests that large cities were not necessarily receptive to women attorneys.

McCulloch retreated to her hometown of Rockford. She rented a modest office, boarded with her parents until her marriage, and had some paying clients whose fees, she wrote, "kept her from debt."[20] The local male attorneys and court officials in this small town were friendly and helpful. In turn, she began a lifelong practice of assisting poor women who needed legal services. Writing another Equity Club letter in 1889, she said, "When the client is a poor woman who cannot afford to pay anything I call that a free dispensary case and rejoice that I had an opportunity to learn some new point there."[21]

In 1890, she married a local attorney and joined his practice, bringing in her own clients. She was active in suffrage and temperance. In 1888, she accepted nomination as the Prohibition party candidate for state's attorney and ran 200 votes ahead of the party ticket. In 1907, McCulloch was elected justice of the peace in Evanston, Illinois, the first woman to hold the position in that state. She used it to educate the public about women's abilities and to argue the case for woman suffrage (McCulloch had, of course, been elected by male voters). Florence E. Allen, the first woman to serve as a federal appeals judge (confirmed in 1934), is said to have told McCulloch that her election as justice of the peace encouraged Allen's own early bid for judicial office at the Court of Common Pleas.[22]

Boston, Massachusetts was no kinder to Lelia Robinson than Chicago had been to McCulloch. In 1881, Robinson, a talented journalist, graduated fourth in her Boston University Law School class. Like a number of first-generation women lawyers, she found that her admission to the bar was not automatic. During her first two years of practice, Robinson, like Hall in nearby Connecticut, chose office work, also believing that it would protect the interests of her clients to have male attorneys argue for her in court.[23]

Ironically, Robinson's conservative approach did not help her in building a practice. She had neither brother nor husband nor mentor to help. Boston was, she wrote, a city where people trusted their legal affairs to "gray hairs."[24] Lacking clients, she turned to the writing of a law book to occupy her time. She produced **Law Made Easy**, a volume for the lay public, who needed, she believed, to have a basic knowledge of the law written and summarized "in clear, simple language."[25] The book received high marks from lawyers and judges.

Legal writing, however, did not completely satisfy Robinson, who wanted a full

legal practice. With a promise from her parents and sister that they would join her, she moved to the West Coast, believing that in the Washington Territory, which had recently voted women suffrage as well as the right to serve on juries, she might find less conservative people. She arrived in Seattle with a letter of introduction from the wife of the president of the Northern Pacific Railroad and quickly found professional support.

Encouraged by local Judge Roger Sherman Greene and John Haines, a successful trial lawyer, Robinson learned trial advocacy. Greene appointed her counsel for a prisoner the first court term after she arrived.[26] Although fearful, she was pleased to discover a talent for this work and later wrote in an Equity Club letter that "the public . . . judges a woman lawyer as it does a man, largely by his success or non-success in court, and if one is never seen or heard there, one's abilities are a matter of serious doubt."[27] Robinson built a practice handling civil and criminal cases. A local newspaper reported that she "has been winning cases from the best lawyers of the Territory, and people now talk about making her a judge."[28]

Despite the welcome and her professional success, Robinson returned to Boston (her family had not joined her). She re-established her local practice, now doing trial work along with probate cases and women's-wage mediation.[29] Like McCulloch, she opened her office on Saturdays to women for free consultations. Hoping to educate women all over the country, she wrote a second book, **The Law of Husband and Wife**, at about the same time that she published her now well-known *Green Bag* article, "Women Lawyers in the United States."[30] When she died, at the age of forty-one, Robinson was writing a third book, **Wills and Inheritances**, and was deeply involved in her work for the Nationalist political movement, which drew on the utopian ideas of Edward Bellamy.

CLARA FOLTZ

Unlike Hall and Robinson, Clara Foltz and Lockwood never struggled with the question of trial advocacy. Perhaps, this was because they were women of considerable ego, attorneys who could not imagine pulling their clients down.

LAURA DE FORCE GORDON

With her friend and colleague Laura De Force Gordon, Foltz opened the California bar to

women and at the state supreme court argued successfully that Hastings Law School should not deny admission to women on the grounds of their sex. They attracted attention.

Yet Foltz, a plucky mother of five whose philandering husband had abandoned the family, appreciated the dilemma female trial advocacy presented to client and counselor. As Barbara Babcock, Foltz's biographer has written: "Many of her clients were criminal defendants, so desperate they would trust a female attorney or so poor the court appointed Foltz [the novice woman lawyer] to their cases."[31] And, indeed, in summation in a 1892 case, Foltz rhetorically asked the jury, "Do you think this poor innocent man would have applied to a woman to defend him if he had money to pay some distinguished male member of the bar?"[32] Elsewhere, Foltz wrote that male attorneys sometimes sent clients too poor to pay to her, making her office "a sort of rendezvous for the poor and the weak and the despairing."[33] Early in her career, Foltz was buoyed by the thought that with divorce cases, at least, there was "a chance of a fee if she could win a property settlement for the wife."[34] Throughout her career, Foltz maintained a general practice in civil and criminal courts and later practiced oil and gas law as well as mining law.

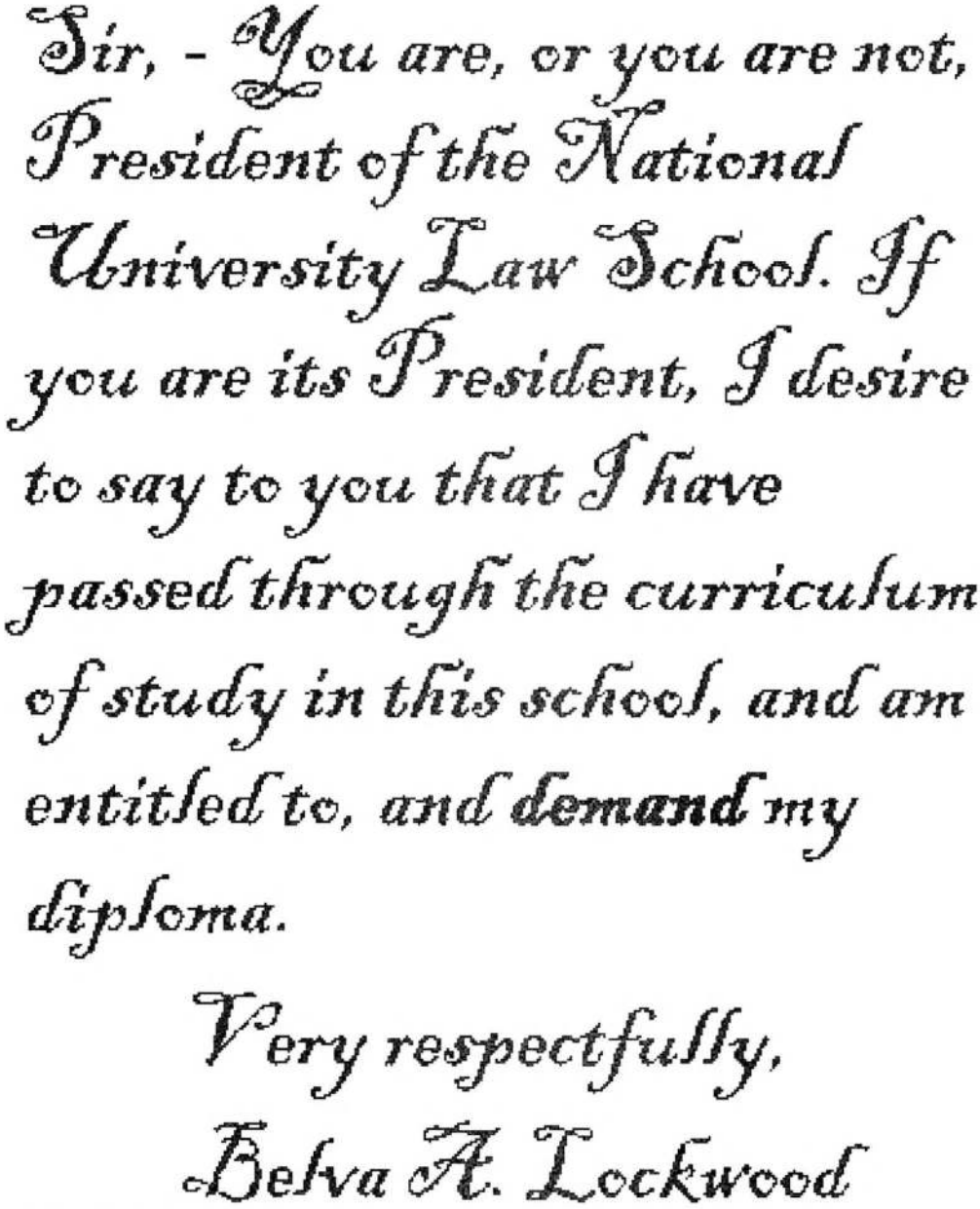
Foltz had fought to enter the profession of law and was, at her core, a reformer. She believed that women attorneys "should work to improve the administration of justice," and she made good on this belief by lobbying, beginning in 1890, for the idea of a public defender.[35] Babcock, on whose writings I am relying, concludes that the public defender idea was "formed from Foltz's experiences as a jury lawyer facing unfair prosecutors" and from her involvement with the suffrage and populist movements.[36] Foltz's public defender was "a capable jury lawyer, the equal of the public prosecutor in resources and respect . . . an oppositional figure to check and correct the district attorney . . . engag[ing] the law's presumption of innocence on a deep level."[37] It was a profoundly American vision of justice and fairness, only partially realized in Progressive-era judicial reform and the later U.S. Supreme Court decision in *Gideon v. Wainwright*.[38]

BELVA LOCKWOOD

We come, finally, to the life and career of Belva Lockwood. Born near Lockport, New York in the northwest of the state, Lockwood moved to Washington, D.C. months after the conclusion of the Civil War. She fought her way into the National University Law School, receiving her diploma in 1873 only after sending the pictured letter to President Ulysses S. Grant, the ex officio head of the institution.

Thanks to the docket books and case files kept by the National Archives in Washington and to the fact that Lockwood was a publicity hound, we know a great deal about her law practice.

She worked out of offices in downtown Washington, just off Pennsylvania Avenue and near to the then-bustling commercial district of 7th Street. She maintained a solo practice. Initially, her elderly second husband Ezekiel, a notary, sat nearby, at the ready to put his seal and signature on documents. Even before his death in 1877, Lockwood had also brought her surviving daughter Lura and a young niece into the business as office manager and clerk. They


Sir, - You are, or you are not, President of the National University Law School. If you are its President, I desire to say to you that I have passed through the curriculum of study in this school, and am entitled to, and **demand** my diploma.

Very respectfully,

Belva A. Lockwood

Lockwood's Letter to President Grant

helped with a clientele of laborers, tradesmen, small property owners, veterans, an occasional lady in distress—and, late in Lockwood's career, members of the Eastern Cherokee Band of Indians.

Lockwood ran an office not unlike that of local male attorneys with small practices. The docket books show her handling "note" and "damages" actions, "ejectments," creditor's bills, injunctions, and annulment of deeds. As with many other first-generation women lawyers, divorce and probate filings constituted the bread and butter of Lockwood's professional work: days after being admitted to the D.C. bar, she filed a "Bill for Divorce." She represented dozens of criminal defendants. They were charged with virtually every category of crime, from mail fraud and forgery to burglary and murder. She won "not guilty" decisions in many of these jury

38

Supreme Court U.S. October Term, 1876.

No.

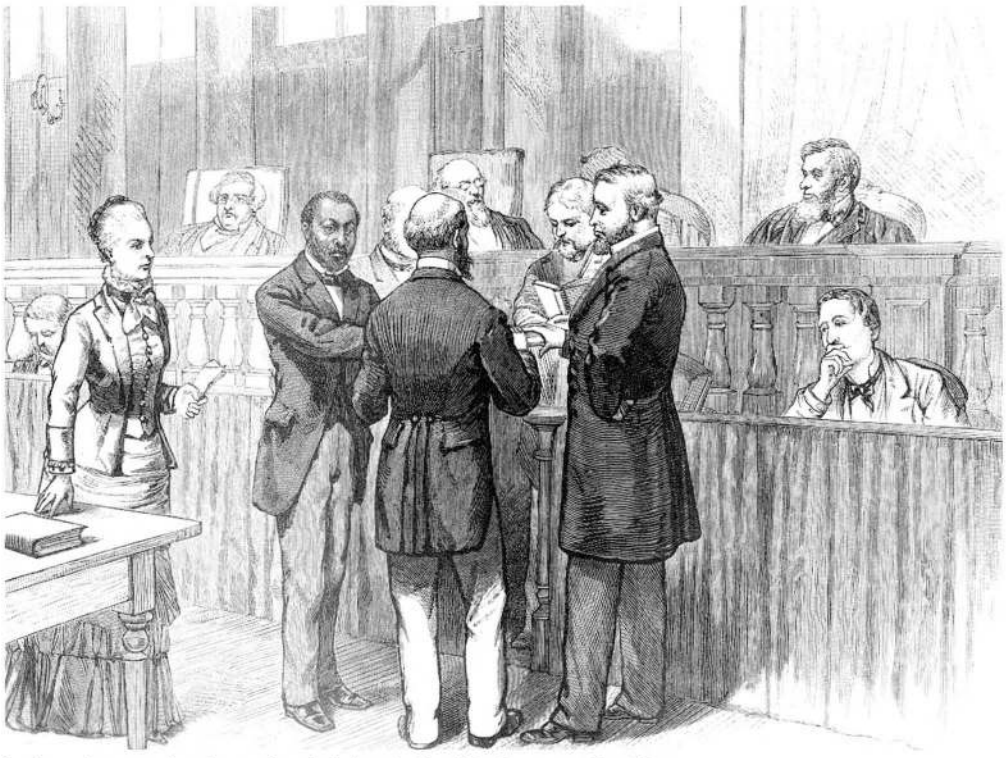
In re

vs Mrs. Lockwood

Nov 6 Ms. for ad
denied
announced

	Aye	Nay
Justice Hunt,		/
" Bradley,		/
" Strong,		/
" Field,		/
" Davis,	/	
" Miller,	/	
" Swayne,		/
" Clifford,		/
Chief Justice,	/	

November 1876 Supreme Court vote against admission of Lockwood to the Supreme Court bar.



Lockwood sponsoring Lowery's admission to the U.S. Supreme Court Bar

trials. Ezekiel introduced her to guardianship work and to the business of veterans' pension claims. Just as some of the early women attorneys in the West pursued work in natural-resources law, her residence in the nation's capital encouraged her specialization in patent filings and claims against the government.

In order to have an equal opportunity to serve clients in the area of claims against the United States government, Lockwood contested with the federal courts, in particular the U.S. Court of Claims and the Supreme Court. In 1874, the justices of the Court of Claims refused to admit her to its bar. Fighting for bar privileges and in order to open the entire federal bar to qualified women attorneys, she lobbied Congress, and in 1876 she endured an unsuccessful motion to admit her to the U.S. Supreme Court bar. Finally, on March 3, 1879, following arm-twisting in the House and Senate—what Lockwood called an "unconscionable" deal of lobbying in which nothing was "too daring"—Congress enacted the anti-discrimination legislation that led the Supreme Court to admit her to its bar.[39] A.G. Riddle, a former Congressman, attorney, and man of letters who had motioned her admission in 1876, was again her sponsor in 1879.

Pictured here is the record of the Supreme Court's vote against Lockwood in 1876. Pictured next is an illustration published a year after her admission that depicts the Supreme Court chamber in this period. Lockwood is shown sponsoring the admission of the first Southern African-American lawyer to the Supreme Court bar, Samuel Lowery.

The five years that Lockwood had to wait for federal bar privileges limited her career, although to what degree it is not possible to know. While she contested Congress and the courts, she continued her local practice. Like all of the women I have discussed tonight, she also engaged in reform work—in her case, the fight for woman suffrage, women's educational and employment rights, and international peace.

Lockwood's plans and proposals were often bold and before their time. In 1876,

with several other women, she incorporated a school called the Women's National University, to provide women, in a "nonhostile" environment, "a thorough knowledge of Science, law, Divinity and Medicine."[40]

ELLEN SPENCER MUSSEY AND EMMA GILLETT

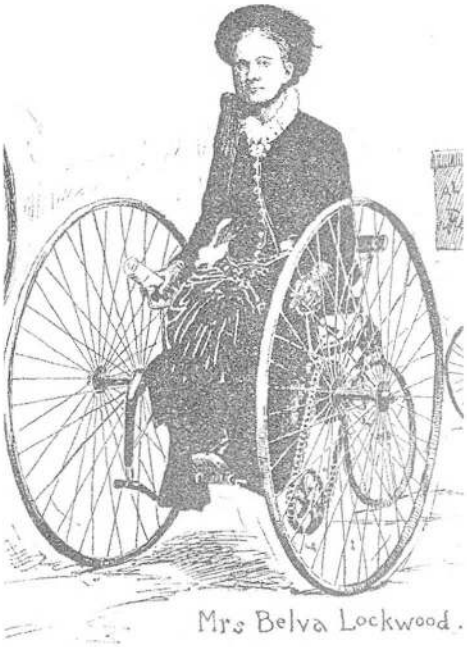
The project did not succeed, but in 1896, Washington, D.C. attorneys Ellen Spencer Mussey and Emma Gillett—the latter a Lockwood protégé—started the Washington College of Law, which merged in 1949 with American University.

Docket books and newspaper reports suggest that Lockwood's law practice was most robust in the ten or twelve years after she was admitted to the D.C. bar. In this period, on her new bicycle delivering briefs, in addition to her bread-and-butter work, she represented several ladies in distress.

Mary Jane Nichols became Lockwood's client in 1875. Nichols had cared for the children of John Barber until, she alleged, he raped her (several times) and she became pregnant. No criminal charges were brought. Despite this, Lockwood filed a civil lawsuit asking for $10,000 in damages. The civil law of seduction was in flux. Lockwood invoked a recent decision "that under the common law a person whose rights have been violated, is not obligated to stand helplessly by and see his private rights merged in the crime against the public."[41] Lockwood and opposing counsel lobbed pleas and amended declarations for a year and a half. The record suggests an out-of-court settlement.

The case of client Louisa Wallace, a former slave, provided a different set of circumstances. At the age of forty-seven, Wallace was indicted for infanticide several days after the death of her newborn son. Lockwood handled Wallace's defense with co-counsel James Redington. It is probable that the court appointed them, but we have no record of this. Deliberating less than two hours, the all-male jury, rejecting the defense's contention that the child had been stillborn, found Wallace guilty but urged executive commutation of the stipulated sentence, death by hanging.

Lockwood immediately filed motions to have the verdict set aside and for a new trial, citing technical irregularities and lack of "sufficient and satisfying evidence." A new trial was granted, with Lockwood and *two* male attorneys now defending Wallace. The defense contended that the government needed to show



Lockwood delivering briefs on her bicycle

Cartoon knocking Lockwood's presidential candidacy

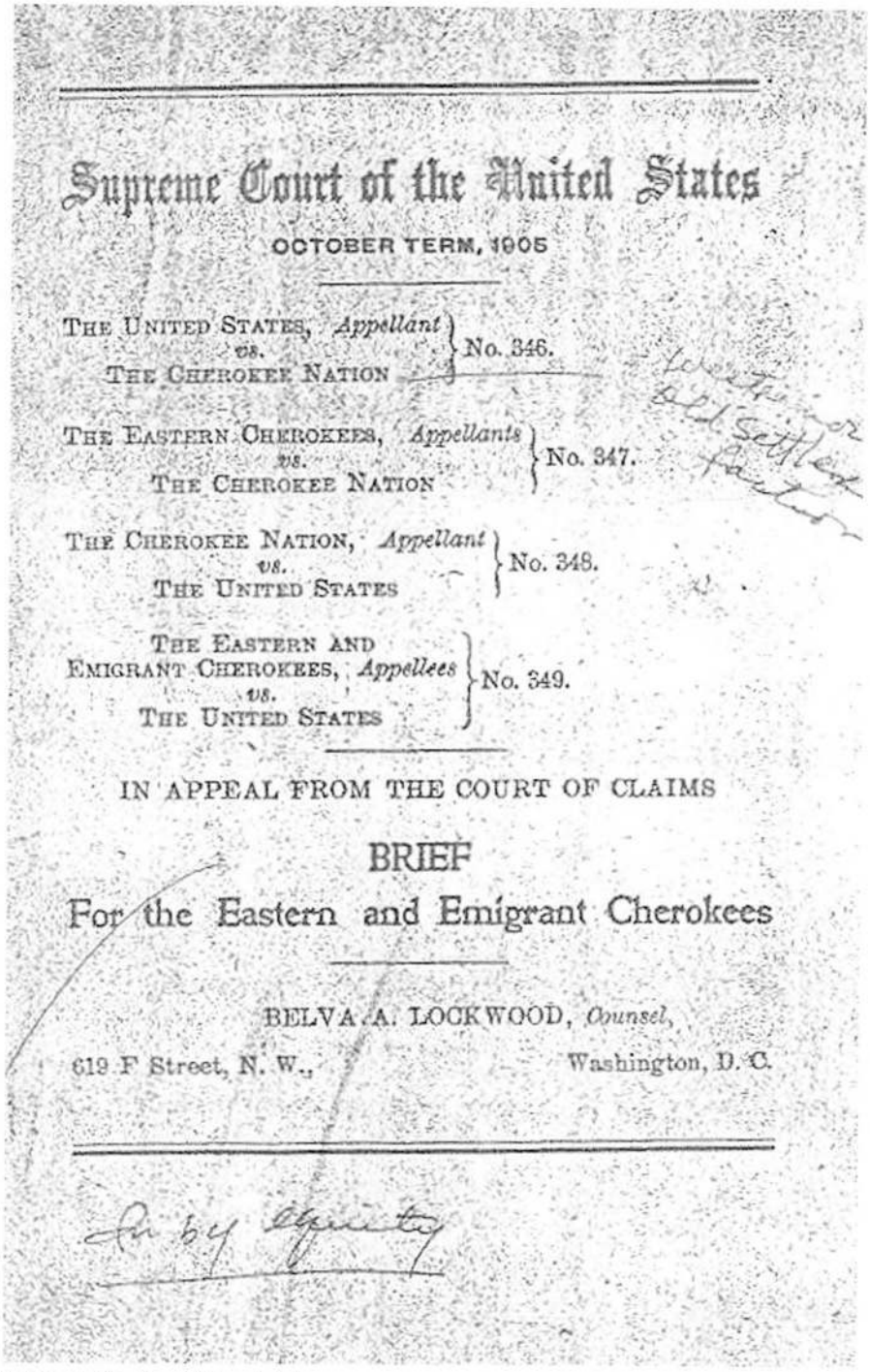
that the child was capable of "independent life" and had come to its death by willful and intentional neglect. Again, the all-male jury found Wallace guilty. In sentencing Wallace, the presiding judge rejected the jurors' recommendation of executive clemency (ten years' imprisonment rather than hanging) and specifically berated the women of Washington for not attending the trial and acknowledging what he labeled the "rudest barbarism" of infanticide. There is a story to be explored in the Wallace case about poverty, public health, foundling asylums, and abandoned mothers.[42]

In the nineteenth century, the law posed difficult, often impossible hurdles for women wishing justice, wronged in sexual relations with men. A civil action for seduction became popular among women after the Civil War. So did lawsuits for breach of promise of marriage. They were small but important legal weapons used to equalize the bargaining power of women, and Lockwood, enmeshed in women's rights, undoubtedly saw them as instruments to be used in unraveling patriarchy. Lockwood handled several such cases, in one suing the son of a U.S. Senator and in another bringing suit against U.S. Senator Ben Hill, a powerful representative from Georgia! (No wimp, our Belva.)

In 1884, Lockwood made the decision to campaign as a candidate for President. After a dozen years practicing law, she was looking to a larger stage. She ran for the office for a variety of reasons:

- She had a strong ego, was restless, and imagined the campaign as something of a lark (she had a high opinion of herself but also was a woman of humor);
- To make an ironic statement about the ongoing rejection of woman suffrage at major party conventions;
- To endorse publisher Marietta Stow's message that running for office could be an act of empowerment for women;

- And perhaps out of the frustration of knowing that, because of sex discrimination, an appropriate government position—say, district attorney, agency head, or judge—would never be offered to her.



Supreme Court of the United States

OCTOBER TERM, 1905

THE UNITED STATES, *Appellant*
vs.
THE CHEROKEE NATION } No. 346.

THE EASTERN CHEROKEES, *Appellants*
vs.
THE CHEROKEE NATION } No. 347.

THE CHEROKEE NATION, *Appellant*
vs.
THE UNITED STATES } No. 348.

THE EASTERN AND EMIGRANT CHEROKEES, *Appellees*
vs.
THE UNITED STATES } No. 349.

IN APPEAL FROM THE COURT OF CLAIMS

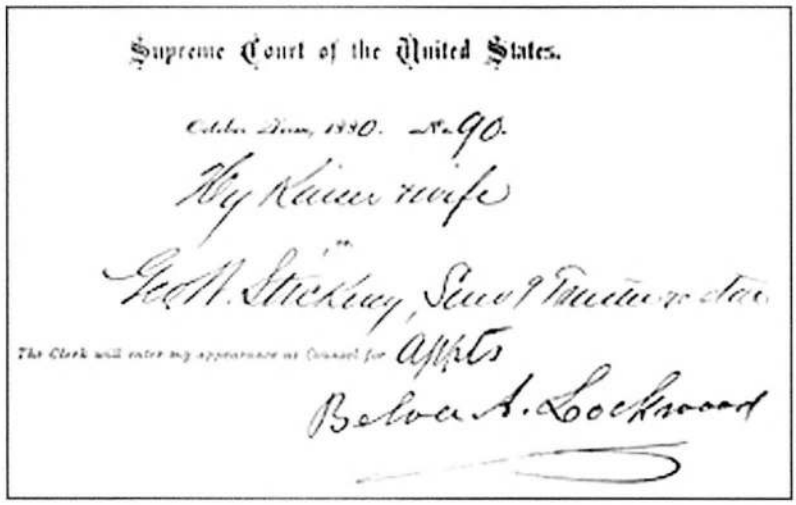
BRIEF

For the Eastern and Emigrant Cherokees

BELVA A. LOCKWOOD, *Counsel*,

619 F Street, N. W., Washington, D. C.

United States v. Cherokee Nations brief


Supreme Court of the United States.

October Term, 1880. No. 90.

Ex parte Kaiser et al.

vs.

Geo. H. Stickney, Sheriff, &c.

The Clerk will enter my appearance as Counsel for Appts

Belva A. Lockwood

Lockwood argued *Kaiser v. Stickney* before the Supreme Court in 1880.

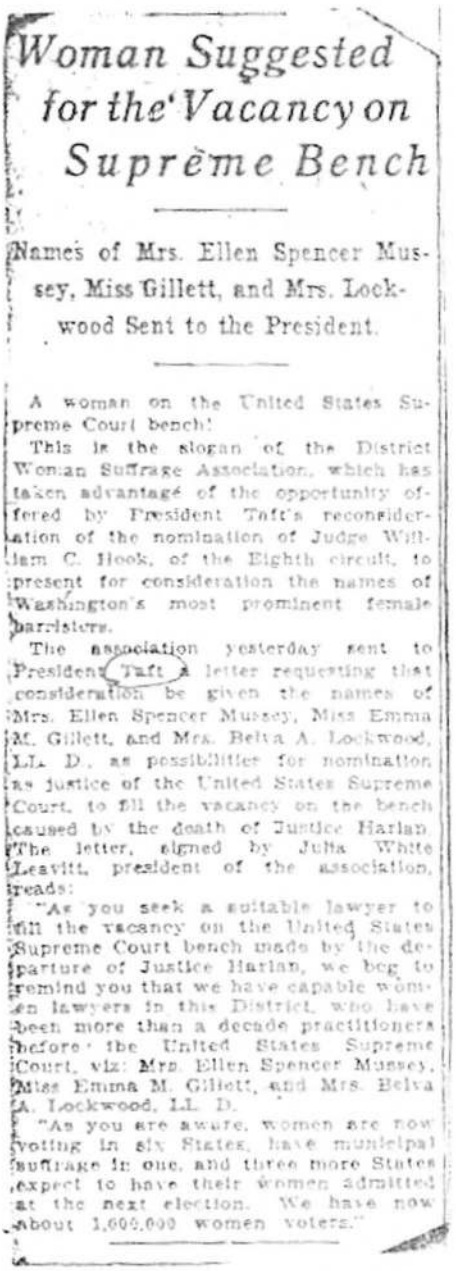
In 1884, photographs were not yet used in newspapers. Cartoons remain one of the ways of seeing how nineteenth-century political candidates were represented to the public. Many cartoons depict candidate Lockwood and serve as evidence that her campaigning was noticed and also, by my reckoning, that she was treated as one of the boys.

Lockwood's campaign began with rallies in nearby Maryland and downtown Washington, after which she made it national in scope despite the lack of a real political party behind her—or a party treasury. Employing a clever business model, she funded her cross-country electioneering by offering herself as a public lecturer, appearing at churches, civic halls, and country fairs. We know, of course, that she did not win.

Lockwood continued to want a larger stage and a second career. For reasons of intellect, money, or politics, many of the women lawyers of the first generation maintained two careers: Robinson wrote books and articles; Ada Bittenbender gave many years of full-time service to the Woman's Christian Temperance Union; Hall ran a Connecticut charity for poor boys; Mussey and Gillett built their law school; and Kate Stoneman, who opened the New York State bar to women, taught school and worked feverishly for the cause of women's suffrage in that state (and possibly never practiced law). After the 1884 election, Lockwood launched herself as a paid lecturer, criss-crossing the country for many years while also maintaining a law practice that increasingly handled only pension claims and patents.

She had one very big case left in her, however. By now you know that, if Belva Lockwood was anything, she was tenacious. She also had a mile-high ego. In representing the Eastern Cherokee Band of Indians, she drew upon both.

Lockwood began representing the Eastern Band of Cherokee Indians in 1875. She collaborated with Cherokee James Taylor, who had been sent to Washington to win U.S. recognition of the Eastern Cherokee tribe and, when recognition was granted, to press treaty-based monetary claims against the United States. Essentially, in 1875, and for thirty years until she won at the Supreme Court, Lockwood argued that the citizens of the Eastern Band, although geographically separated from the Cherokee Nation (West), were equal tribal members of



Woman Suggested for the Vacancy on Supreme Bench

Names of Mrs. Ellen Spencer Mussey, Miss Gillett, and Mrs. Lockwood Sent to the President.

A woman on the United States Supreme Court bench!

This is the slogan of the District Woman Suffrage Association, which has taken advantage of the opportunity offered by President Taft's reconsideration of the nomination of Judge William C. Hook, of the Eighth circuit, to present for consideration the names of Washington's most prominent female barristers.

The association yesterday sent to President Taft a letter requesting that consideration be given the names of Mrs. Ellen Spencer Mussey, Miss Emma M. Gillett, and Mrs. Belva A. Lockwood, LL. D., as possibilities for nomination as justice of the United States Supreme Court, to fill the vacancy on the bench caused by the death of Justice Harlan. The letter, signed by Julia White Leavitt, president of the association, reads:

"As you seek a suitable lawyer to fill the vacancy on the United States Supreme Court bench made by the departure of Justice Harlan, we beg to remind you that we have capable women lawyers in this District, who have been more than a decade practitioners before the United States Supreme Court, viz: Mrs. Ellen Spencer Mussey, Miss Emma M. Gillett, and Mrs. Belva A. Lockwood, LL. D.

"As you are aware, women are now voting in six States, have municipal suffrage in one, and three more States expect to have their women admitted at the next election. We have now about 1,000,000 women voters."

District Woman Suffrage Association suggested President Taft appoint a woman to the Supreme Court in 1912.

the Cherokee Nation and must be given an equal share of disputed fees as well as proceeds from land sales, past and present.

The case and Lockwood's representation were tied to tribal politics and acts of Congress. These twisted, and turned and sometimes stalled until 1901, when Congress authorized the Cherokee to bring a finding-of-fact case at the Court of Claims. Lockwood and Taylor saw this as the opening they had long sought, and Lockwood jumped in by filing a motion to intervene in the case already under way—a motion that the Court of Claims allowed.

On January 16, 1906, Lockwood, who had first argued before the Supreme Court in the 1880 execution-of-deed case of *Kaiser v. Stickney*,[43] presented her clients' appeal. She was seventy-five years old. Three months later, in a unanimous decision, the Court ruled for the Cherokee, affirming a one-million-dollar award plus interest—five million dollars in all.[44] Lockwood was ecstatic. She wrote to a woman friend, "[The judgment] gives me a great reputation as a lawyer, which will help all women, and will give me eventually money enough . . . to make my old age comfortable." It did not entirely work out that way, but that is a tale for another day.

The first generation of U.S. women lawyers was smart, bold, and defiant. Its members were charming and argumentative. They debated whether to wear their hats in court as well as fundamental questions of service and professional identity. Would pro bono work be their ruin? (The women divided on this point.) Should they be "*lady* lawyers" or simply *lawyers?* Was a contingent-fee case worth the risk? And was there any way around the fact that male attorneys had a far easier time "making the acquaintance" of businessmen in clubs, businesses, and public places? Even the shyest members of this first generation were women of considerable spirit, women who believed that the profession of law would find a place for them.

The question, of course, was what place that would be. The first-generation women lawyers who lived into the twentieth century saw that change had come most quickly in the early years of their fight to join the profession. By 1900, women attorneys did not find it

Women members of the New York Court of Appeals

difficult to join the bar, although a number of law schools were still closed to them. However, once admitted to the bar, most women lawyers at the turn of the century continued to find themselves limited to modest solo or family practices. The federal government would not recruit women attorneys for a number of years. Tycoons and CEOs also maintained their conservative ways. In 1914, when Susan Brandeis, daughter of soon-to-be U.S. Supreme Court Justice Louis Brandeis, announced her desire to study law, her father bluntly replied, "As a

woman attorney you will be shut out of the profitable work involving important business transactions."[45]

Similarly, the United States was not ready for women judges, although women reformers and attorneys lobbied for the nomination of a woman to the U.S. Supreme Court as early as 1912 after the death of Justice John Marshall Harlan.

The first generation, then, provided, as Justice Ruth Ginsburg so aptly reminds us, the shoulders upon which subsequent generations of U.S. women lawyers have stood as they struggle to expand the place and contributions of women attorneys. The struggle may not be over—but imagine, for a moment, what Belva Lockwood and her contemporaries would have made of pictures like this one of the women members of the New York Court of Appeals: Chief Judge Judith Kaye with Judges Susan Read, Victoria Graffeo, and Carmen Ciparick.

ENDNOTES

[1]Editor's note: This lecture was delivered at the Association of the Bar of the City of New York on October 27, 2008. It was sponsored by the Supreme Court Historical Society, partnering with the Historical Society of the Courts of the State of New York and Friends of John Jay Homestead, Inc.

[2]Ellen A. Martin, "Admission of Women to the Bar," 1 *Chicago Law Times* 76 (1887), available at http://www.law.stanford.edu/library/womenslegalhistory/articles/chicago-times.pdf (last accessed Mar. 15, 2010).

[3]The 1890 U.S. Census indicated that there were more than 200 American women attorneys in the U.S. (the same census revealed 89,000 male attorneys). U.S. Bureau of the Census, **The Eleventh Census of the United States: 1890** (Washington, D.C., 1897), vol. 1, p. 304. In 1880, the number had been seventy-five. U.S. Bureau of the Census, **The Tenth Census of the United States: 1880** (Washington D.C., 1883), vol. 1, p. 744.

[4]Jill Norgren, **Belva Lockwood: The Woman Who Would be President** (NY: NYU Press, 2007), p. 196, n8.

[5]The best report of the meeting and talks appears in the *Chicago Legal News*: August 5, 1893, p. 421; August 12, p. 427; and August 26, pp. 447–48, 450–1. Fourteen women speakers are listed in the program.

[6]*Bradwell v. Illinois*, 83 U.S. 130 (1872) (J. Bradley, concurring).

[7]*In the Matter of the Motion to admit Miss Lavinia Goodell*, 39 Wisc. 232 (1875). Note that Ryan, ironically, does not shy away from listing "the nameless catalogue of indecencies."

[8]Jane M. Friedman, **America's First Woman: The Biography of Myra Bradwell** (Buffalo, NY: Prometheus Books, 1993), p. 77.

[9]*Id.*, p. 79.

[10]*Id.*, p. 91.

[11]Catherine B. Cleary, "Lavinia Goodell, First Woman Lawyer in Wisconsin," 74 *Wisconsin Magazine of History* 243 (Summer 1991), p. 252.

[12]Quoted in *id.*, p. 253.

[13]*Id.*, p. 263.

[14]Matthew G. Berger, "Mary Hall: The Decision and the Lawyer," 79 Connecticut Bar Journal 29 (2005) p. 29.

[15]Letter from Catharine Waugh (McCulloch) to the Equity Club, May 2, 1888, in Virginia Drachman, **Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890** (Ann Arbor: University of Michigan Press, 1993), p. 136.

[16]Barbara Allen Babcock, "Women Defenders in the West,"1 *Nevada Law Journal* 1 (Spring 2001), pp. 2–3.

[17]*Id.*, p. 3; Berger, p. 47.

[18]Letter from Catharine Waugh (McCulloch) to the Equity Club, May 2, 1888, in Drachman, p. 136.

[19]Catharine G. Waugh, "Women as Law Clerks," pp. 1–2, available at http://pds.lib.harvard.edu/pds/view/2581380 (last visited April 5, 2010).

[20]Julia Wilson, "Catharine Waugh McCulloch: Attorney, Suffragist, and Justice of the Peace," p. 6, available at http://www.law.stanford.edu/library/womenslegalhistory/papers/McCullochCGW-Wilson.pdf (last visited Mar. 15, 2010).

[21]Letter from Catharine Waugh (McCulloch) to the Equity Club, April 26, 1889, in Drachman, p. 174.

[22]Wilson, p. 16.

[23]Sarah Killingsworth, "Lelia Robinson," p. 8, available at http://www.law.stanford.edu/library/womenslegalhistory/papers/RobinsonL-Killingsworth.pdf (last visited Mar. 15, 2010).

[24]Letter from Lelia Robinson to the Equity Club, April 7, 1888, in Drachman, p.125.

[25]Killingsworth, p. 7.

[26]*Id.*, p. 9.

[27]Robinson to the Equity Club, April 7, 1888, in Drachman, p. 120.

[28]Mary Nicol, "Lelia Robinson Sawtelle: A Second Look," p. 21, available at http://www.law.stanford.edu/library/womenslegalhistory/papers/RobinsonL-Nicol.pdf (last visited Mar. 15, 2010).

[29]Killingsworth, p. 12; Nicol, p. 26.

[30]Lelia J. Robinson, "Women Lawyers in the United States," 2 *Green Bag* 10 (1890), available at http://www.law.stanford.edu/library/womenslegalhistory/articles/greenbagreal.pdf (last visited Mar. 15, 2010).

[31]Barbara Babcock, private communication to author ("Introduction to Clara Foltz biography," p. 1).

[32]Barbara Babcock, "Inventing the Public Defender," 43 *American Criminal Law Review* 1267 (Fall 2006), p. 1280.

[33]Babcock, "Women Defenders in the West," p. 7.

[34]Babcock, "Inventing the Public Defender," p. 1281.

[35]*Id.*, p. 1296.

[36]*Id.*, p. 1270.

[37]*Id.*, pp. 1267, 1270–71.

[38]*Gideon v. Wainwright*, 372 U.S. 335 (1963).

[39]Norgren, p. 82.

[40]Earlier, in 1873, Lockwood had sent President Grant and members of Congress a plan for a gender-integrated national university.

[41]Norgren, p. 99.

[42]Norgren, p. 100–102.

[43]*Kaiser v. Stickney*, 131 U.S. CLXXXVII Appx. (1889: "Cases Omitted").

[44]*U.S. v. Cherokee Nation*, 202 U.S. 101 (1906).

[45]Letter, Louis D. Brandeis to Susan Brandeis, Nov. 10, 1914, in Melvin I. Urofsky, **Louis D. Brandeis: A Life** (New York: Pantheon, 2009), pp. 844–45, n509.

Contributors

Jeffrey L. Amestoy is a retired chief justice of the Supreme Court of Vermont and a Fellow at the Center for Public Leadership at the Harvard Kennedy School.

Myron H. Bright is a judge on the U.S. Court of Appeals for the Eighth Circuit since 1968. His chambers are in Fargo, North Dakota.

Heather Gerken is the J. Skelly Wright Professor at Yale Law School.

Stefanie A. Lepore graduated from George Washington Law School in 2009 and is currently an associate at Vinson & Elkins.

Jill Norgren is a professor emerita of government at John Jay College of Criminal Justice and the Graduate Center, the City University of New York. She is the author of **Belva Lockwood** (2007) and the forthcoming **Rebels at the Bar**.

Sandra Day O'Connor served as an Associate Justice of the U.S. Supreme Court from 1981 to 2006.

Polly J. Price is a professor of law and the associate dean of faculty at Emory University School of Law.

Kermit Roosevelt teaches law at the University of Pennsylvania.

Illustrations

All images are from the Library of Congress except as listed below:
Page 2, Collection of the Supreme Court of the United States. Photograph by Lois Long.
Page 5, Collection of the Supreme Court of the United States. Photograph by Lois Long.
Page 8, Collection of the Supreme Court of the United States. Photograph by Lois Long.
Pages 26–29, Courtesy of Myron Bright
Page 40, Office of the Solicitor General
Page 55, Courtesy of Polly Price

Page 78 (top), Courtesy of Hastings Law School
Page 83 (top), Courtesy Washington College of Law
Page 88, Courtesy of Judge Kaye

Cover: David Souter in 2006. Photo by Mathew Cavanaugh, cpt/Corbis

Erratum:

On page 277 of the previous issue, Professor Morgan's description of *Jones v. Opelika* was incorrect. The case was decided in 1942 and the Witnesses lost 5–4.