Introduction

Melvin I. Urofsky

Our lead article this issue is about a very famous case that never made it into *U.S. Reports*, the trial of Nicola Sacco and Bartolomeo Vanzetti for the robbery of the Slater & Morrill Shoe Company in South Braintree, Massachusetts, and the murder of two of the company's employees. Their trial before an extremely bigoted judge, their conviction more because they were anarchists than anything else, and the futile appeals made in their behalf made it the cause célèbre of the 1920s. We still get books every few years arguing that the two men were innocent of the crime, convicted only because of the Red Scare, or that there was sufficient evidence to prove them guilty. By current standards, the trial was a travesty, and with our current understanding of the constitutional rights of people charged with a crime, there is little doubt that the trial and conviction would have been thrown out by a modern appeals court.

Just because the case did not make it into the high court's annals does not, however, mean that the Supreme Court—or to be more precise, its members—did not get involved. Brad Snyder, professor of law at Georgetown University Law Center, looks at the roles played by then members of the Court as well as by a future Justice. Although both Holmes and Brandeis agreed that the trial had been unfair, at that time there were few precedents for the federal courts getting involved in state criminal trials. As Professor Snyder shows, even though Holmes and Brandeis could, by their strict interpretation of the Court's limits, do little for Sacco and Vanzetti, the trial and the publicity surrounding it did lead Holmes to change his mind on the limits of judicial intervention.

Whenever I go to the Supreme Court, I almost always spend time just wandering around the public halls, looking at portraits and busts, the paintings inside the courtroom itself as well as the sculpture on the external pediments. There are not many inscriptions, however. EQUAL JUSTICE UNDER LAW is carved above the front entrance, and JUSTICE THE GUARDIAN OF LIBERTY is below the East Pediment. There are no other inscriptions aside from two dedication panels. For anyone who has been to the

Harvard Law Library, with quotation after quotation on the walls, the difference is striking.

Matthew Hofstedt, the associate curator of the Supreme Court, tells us that the practice of carving inscriptions on public buildings dates back to antiquity, and Cass Gilbert, the architect of the Marble Palace, believed that both internal as well as external ornamentation should relate to the building's function, namely as the highest court of law in the land. Apparently, many quotes were gathered, and a number were actually put on placeholders. Yet in the end, as Mr. Hofstedt explains, only two were used.

Jonathan Lurie and I have been friends for many years, and we each have read manuscripts by the other. He read my book on dissent, and I read his two on Chief Justice Taft. Aside from enjoying Jon's take on Taft, as a scholar of the Court I also knew that the only existing biographies of Taft were seriously out of date. The Chief Justice had hoped that his good friend, Gus Karger, would write his biography. But Karger died before Taft. The "standard" one, more or less authorized by the Taft family, is from the pen of Henry F. Pringle, a man Taft did not know and had never met. It appears from Jon's research that the Taft family almost desperately wanted someone else, yet in the end, as he shows, Pringle prevailed.

I imagine that some of our members may remember the sensational trial of Dr. Sam Sheppard for the murder of his wife, Marilyn. If the Sacco and Vanzetti trial had been flawed by the prejudices of the judge and jurors, the Sheppard trial was equally marred by the presence of radio and television correspondents as well as by the hysteria drummed up by the Cleveland press. As Albert B. Lawrence, professor of law at Empire State College explains, by the time the Sheppard case reached the Marble Palace, the Justices had already ruled on three cases in which the failure of the judge to control the press had made a fair trial impossible. Just as there is still a question of whether the two Italian anarchists were guilty, so it remains unclear whether Sam Sheppard killed his wife.

The Supreme Court Historical Society holds Warren E. Burger near and dear to its heart. It is not a question of his jurisprudence, upon which there is a wide range of opinion, but because more than anyone else, Chief Justice Burger is the founder of the Society. Because his papers are currently sealed, while we have had books and articles on the "Burger Court" (including one from me), we have not had the kind of personal word portraits that we have of other members of the Court whose papers are open to scholars.

From time to time we do get reminiscences by people who knew the Chief Justice, and each one adds a little to the emerging portrait of Warren E. Burger as a person. Last year John Sexton, a former clerk to Burger, delivered the Society's annual lecture. Mr. Sexton, who served as president of New York University from 2002 to 2015, disagrees with what he terms the generally "unflattering" critique of Burger as a Justice and as a man. Like others who knew Burger personally, Mr. Sexton found him charming and interesting, and tells us why.

Last but certainly not least, we have D. Grier Stephenson's "Judicial Bookshelf." I have praised Grier so often for his work that I fear I may repeat myself, but I find it an extremely useful and often entertaining way to keep up with the literature on the Court.

As always, a wide variety of articles. Enjoy!

Sacco-Vanzetti and the Supreme Court

BRAD SNYDER

The title of this article, "Sacco-Vanzetti and the Supreme Court," is a bit confusing. Most people only vaguely remember who Sacco and Vanzetti were. A few may know that they were tried and convicted of a famous capital crime. And a few more may know that then–Harvard law professor Felix Frankfurter had something to do with the case. What almost no one knows is that several Justices of the Supreme Court heard last-minute pleas for a stay of execution. Or how Justice Oliver Wendell Holmes, Jr., used the case to change the way liberals think about race and the criminal justice system.

This article is derived from my book, **The House of Truth,** about a Dupont Circle political salon that its residents self-mockingly referred to as the House of Truth. Felix Frankfurter and the other people who lived in the house—which still stands at 1727 Nineteenth Street, N.W.—created a home for Taft Administration dissidents who wanted to reelect Theodore Roosevelt as President in 1912. Both Louis D. Brandeis and Holmes were regulars at the House. And in 1914 the people associated with the House founded the *New Republic* as an outlet for their ideas. They soon broke with Roosevelt and adopted Holmes as their intellectual hero. In the process, they created a liberal network that long outlasted the breakup of the political salon in 1919 and whose members played a critical role in the Sacco-Vanzetti case.[1]

At 3:00 p.m. on April 15, 1920, the scene on Pearl Street in South Braintree, Massachusetts was chaos. Two men shot and killed a paymaster and his security guard carrying two boxes that contained the Slater & Morrill Shoe Company's payroll of $15,778.51. An open touring car carrying three other men drove by, picked up the two men and the boxes, and fled the scene.

Two Italian anarchists—shoe factory worker Nicola Sacco and fish peddler Bartolomeo Vanzetti—were arrested twenty days later. Both men were armed—Sacco with a fully loaded, Colt automatic .32 caliber pistol and twenty-two extra cartridges, and Vanzetti with a fully loaded .38 caliber pistol and four shotgun shells.[2] During their

interrogation, they lied about their whereabouts on the day of the murders.[3] Their arrests came at the height of the Red Scare, the post-World War I fears of Communists and radical immigrants.

Represented by a radical defense lawyer, Sacco and Vanzetti were tried in a six-week trial in the summer of 1921 and convicted of the South Braintree robbery and murders. One person who observed the entire trial and could not believe that the men had been found guilty was Elizabeth Glendower Evans. Active in political and social causes since her husband's early death, Evans was a longtime friend of Brandeis and Frankfurter. Brandeis's children nicknamed her "Auntie Bee."[4]

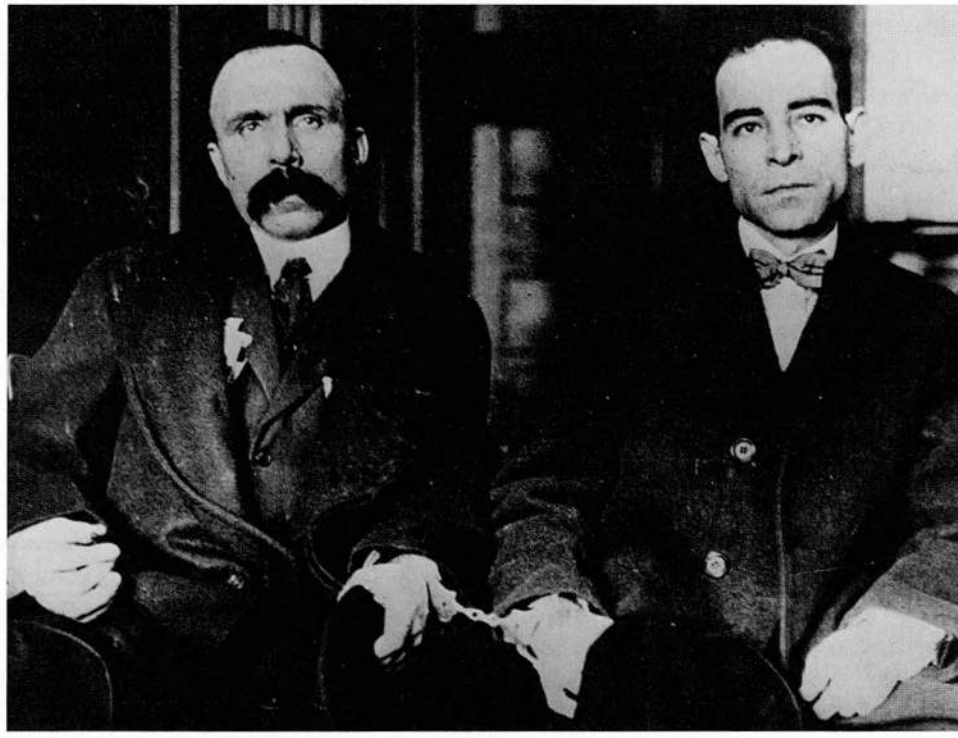
After the trial, Evans and Marion Frankfurter kept pestering Marion's husband, Felix, for his opinion about the case. Frankfurter, however, told Mrs. Evans that he had no opinion about the Sacco-Vanzetti trial because he had not read the record. He soon reconsidered. In 1923, one of the most respected lawyers in the city of Boston, William G. Thompson, agreed to represent the pair on appeal. In one of his motions, Thompson argued that the prosecution had deceived the jury with the testimony of its ballistics expert. At that point, Frankfurter read the entire record and transformed the case into a national cause célèbre and a litmus test for American liberalism.[5]

In October 1926, Frankfurter and his British graduate student Sylvester Gates wrote an unsigned *New Republic* article detailing the ways in which Sacco and Vanzetti had not received a fair trial. The article concluded: "The 2,000 pages of the record reveal the presence of other passions than that for justice, other tempers than the 'calmness of a cool mind.'"[6] In November 1926, Frankfurter and Gates began expanding the article. Their goal was to distill the 2,000-page trial transcript into prose that the average person could read and draw a conclusion as to the fairness of the proceedings. The resulting *Atlantic Monthly* article and book argued that the Massachusetts criminal justice system had failed.[7] There was only one problem, according to Frankfurter's critics: the article appeared in March 1927, with motions still pending before the Massachusetts Supreme Judicial Court.

One of those critics was an Associate Justice of the Supreme Court of the United States—James C. McReynolds. A notorious racist and anti-Semite, Justice McReynolds was cold to Brandeis and had been hostile to former colleagues Mahlon Pitney and John H. Clarke. "McR is a very extraordinary personality—what matters most to him are personal relations, the affections," Brandeis confided to Frankfurter. "He is a *Naturemensch*—he has very tender affections and correspondingly hates . . . He is a lonely person, has few real friends, is dilatory in his work."[8]

McReynolds was no friend of Frankfurter's. As Wilson's new Attorney General, McReynolds had clashed with Frankfurter in 1913 while sitting around the House of Truth's dinner table and debating whether the Attorney General should continue the Justice Department's civil service system.[9] Four years later, McReynolds had been hostile to Frankfurter during an oral argument about Oregon's maximum hour law.[10]

Shortly after Frankfurter's article appeared in the *Atlantic Monthly*, McReynolds wrote to the magazine's editor and publisher, Ellery Sedgwick, questioning the decision to publish the law professor's account of the case. "The purpose of the writer seems plain enough and harmonizes with what he has done in other times," McReynolds wrote. Sedgwick's defense of Frankfurter was tepid at best: "With many of Professor Frankfurter's activities," Sedgwick replied, "I have no personal sympathy. He is hot-headed, not always temperate, radical in his instincts, but upright, courageous, and able. I personally went through his article with great care."[11]



Shoe factory worker Nicola Sacco and fish peddler Bartolomeo Vanzetti were Italian-born anarchists arrested for armed robbery and murder at the height of the Red Scare. After several court appeals, they were electrocuted at Charlestown State Prison in 1927.

McReynolds was not mollified: "I must think your estimate of the writer of the article is very much too high & that this misleads you. Other performances by him indicate what lies in the back of his head." McReynolds was furious about "unsympathetic assaults upon the courts by men with crooked minds" and reasserted his faith in the Massachusetts courts and lack of faith in Frankfurter. "My faith in them cannot be shaken by the ill-natured flings from an exotic mind." McReynolds wanted to send a message to Sedgwick, a member of Old Boston society: "Perhaps I may venture to add that to me it is a really annoying thing to find such a man teaching American boys at Harvard. Do the responsible managers of the institution realize what the results will be, surely they cannot."[12]

The Massachusetts Supreme Judicial Court rejected all of Sacco's and Vanzetti's appeals.[13] Under Massachusetts law at the time, the state's highest court conducted a very limited review of criminal convictions. In fact, the initial appeals of all criminal cases were heard by the case's trial judge—in this case by Judge Webster Thayer. But this procedure was undermined by Thayer's biases and prejudices.

As the case shifted from the Massachusetts court system to petitions to Massachusetts Governor Alvan Fuller, Judge Thayer's extrajudicial comments became a focal point of the defense's case. The defense submitted five sworn affidavits from some of Boston's most upstanding citizens who had reported that during the trial Thayer had referred to the defendants as "those bastards down there" and their lawyers as "those damn fools." He boasted "[j]ust wait until you hear my charge" and referred to the defense's trial counsel, Fred H. Moore, as "that long-haired

anarchist." A few days later, more of Thayer's extrajudicial comments came to light. After denying Sacco and Vanzetti a new trial a few years earlier, the judge had told a Dartmouth College professor at a football game: "Did you see what I did to those anarchistic bastards the other day? I guess that will hold them for a while. Let them go to the Supreme Court now and see what they can get out of them."[14]

In response to the defense's petition, on June 1 Governor Fuller appointed a three-member advisory committee and stayed the July 10 execution pending the outcome of the committee's investigation. Each of the governor's appointees made Frankfurter and other supporters uneasy. But it was the committee chairman who really worried them —the self-appointed leader of Old Boston, Harvard President A. Lawrence Lowell. Lowell and Frankfurter had been archenemies since the Harvard president's efforts to impose a quota on Jewish undergraduates.

Nonetheless, the day that the governor announced the committee members, Frankfurter wired Walter Lippmann, his former House of Truth housemate and editorial page editor of the New York *World*, that Lowell was Sacco and Vanzetti's "only hope." Frankfurter maintained his optimism despite some unsettling developments. The Lowell Committee conducted its investigation and took testimony from witnesses in secret. To defense lawyer Thompson, Lowell displayed alarming "impatiences and lack of understanding and indifference" about the facts of the case. Lowell also refused to allow Thompson to watch the committee's two-hour interview with Judge Thayer and other witnesses. Governor Fuller's independent investigation was similarly secretive. Still Frankfurter believed that Lowell would not overlook Judge Thayer's bias during the trial. "I still have hope in him because it is inconceivable to me how, upon the facts, they can dare send Sacco and Vanzetti to the electric chair," he wrote Lippmann.[15]

At 9:10 p.m. on August 3, Sacco and Vanzetti were secretly transferred to the death house. That night, Governor Fuller announced that he would not intervene in the case and that the two men had received a fair trial. He based his written decision on his own independent investigation as well as the report of the Lowell Committee. The committee, which presented its findings to the governor on July 27, was unanimous. The Boston papers praised the governor's decision and considered the case closed.[16]

Frankfurter was not finished, but he worked behind the scenes. He knew he was a marked man. What he did not know was that the police were listening to his phone conversations. On August 1, the Massachusetts attorney general authorized the state police to wiretap Frankfurter's telephone "to procure official information" about the case. For the next several months, the police transcribed all of the Frankfurters' phone conversations from their summer home in Duxbury, Massachusetts.[17]

Frankfurter sprang into action on two fronts. First, he mobilized Lippmann and other liberal friends in law, politics, and the media from the House of Truth to educate public opinion about the case. Second, he found a new lawyer to replace the exhausted Sacco and Vanzetti defense team—Arthur D. Hill. The Paris-born son of a Harvard English professor, Hill had founded one of the city's most respected law firms, Hill, Barlow & Homans, and in 1909 had served as the Suffolk County district attorney. He was also briefly a member of the Harvard law faculty. Hill and Frankfurter were close friends, united by their love of Holmes, left-wing politics, and public service. Sacco-Vanzetti defense lawyer Herbert Ehrmann described the Boston Brahmin Hill and immigrant Jewish Frankfurter as "brothers under the skin."[18]

To Frankfurter's immense relief, Hill accepted the job of exhausting Sacco and Vanzetti's appeals. He refused to collect his

fee and asked only that the Sacco-Vanzetti Defense Committee pay his expenses and the fees of his two associates.[19] Hill started with the Massachusetts courts. On August 6, he filed a motion for a new trial and another motion to revoke the death sentences. Under Massachusetts law at the time, the state's chief justice designated Judge Thayer to hear the motions. During a two-and-a-half-hour hearing on Monday, August 8, Hill argued that Judge Thayer was too prejudiced to hear the motions and that they should be heard by another judge. Thayer, unsurprisingly, disagreed. He denied the new-trial motion and refused to revoke the death sentences. Hill appealed Thayer's rulings to the Massachusetts Supreme Judicial Court.[20]

Sacco and Vanzetti were supposed to die at midnight on Wednesday, August 10. That day, Hill refused to rest until he had exhausted every option to try to save them. All Hill needed was a stay of execution. At 12:23 p.m. that day, he arrived at the state house to make his case to Governor Fuller and his executive council to stay the executions so that Hill could exhaust Sacco's and Vanzetti's appeals in the state and federal courts. At 1:00 p.m., the executive council broke for lunch and was not scheduled to return until 3:30. Hill realized that neither the governor nor his executive council was going to see him and therefore that the stay of execution was in doubt.[21] With no assurances from the governor and the executions scheduled to take place in less than twelve hours, Hill knew what he had to do next—appeal for a writ of habeas corpus from his friend and mentor, Justice Holmes.

At the end of every Supreme Court term, the Justice and his wife, Fanny, retreated to his family's large Victorian house with its ivy-covered front porch, three chimneys, and a majestic view of Manchester Bay.[22] From June to September, he read philosophy and literature, watched the sailboats go by, and wrote letters to friends. Occasionally, he was interrupted by work—reading petitions for certiorari asking the Court to hear a case and entertaining stays of execution.

Shortly before 3:00 p.m. on August 10, 1927, two cars pulled into a gravel driveway off Hale Street in Beverly Farms, Massachusetts. Five men emerged, looking solemn and with a sense of purpose, armed only with a writ of habeas corpus. Hill had brought four lawyers with him, including former chief defense counsel Thompson. Together, Hill and Thompson intended to press Holmes for a writ of habeas corpus—an extraordinary remedy to challenge the fairness of Sacco's and Vanzetti's convictions. Short of granting the writ, Holmes could grant them a stay of execution. A single Justice could grant a stay so that, come October, the entire Court could consider hearing the case.

Holmes knew this day was coming. As early as May, he had suspected that the case would land on his doorstep. The papers had been rife with rumors since early August that defense counsel would appeal to him. His familiarity with the case came from a single source—reading Frankfurter's book.[23]

With good justification, Holmes suspected that Frankfurter was behind Hill's plea. The day that Hill had agreed to become chief counsel, Frankfurter wrote him a memorandum laying out the case against Judge Thayer. "The point is this, as I see it: An accused is not entitled to a wise judge, or a learned judge, or a wholly calm judge," Frankfurter wrote on August 6. "But, surely the essence of an Anglo-American trial, particularly in a capital case, implied a *judge*." Frankfurter believed that due process required "observance of the elementary decencies of Anglo-American criminal procedure." He proposed a strategy on appeal: to prove that Thayer had pre-judged the case, "manifested a rooted prejudice, and continued to hold it throughout all the proceedings that came before him."[24]

Both Hill and Frankfurter, longtime friends of the Justice and students of his opinions, knew that Holmes was the ideal

judge to hear these due process claims. In those days, the Supreme Court of the United States was extremely reluctant to interfere with state criminal trials. Yet Holmes had revealed his position that a state criminal trial could be so prejudicial and so unfair as to violate a defendant's right to due process. In his 1915 dissent in *Frank v. Mangum,* he had argued that the Jewish Atlanta pencil factory manager Leo Frank had not received a fair trial because the lynch mob outside the courthouse had made it impossible for the jury to acquit him.[25] Eight years later, Holmes vindicated his dissent in the *Frank* case with his majority opinion in *Moore v. Dempsey* about the mob-dominated sham trials of Arkansas sharecroppers, which led to their release from prison.[26] *Moore v. Dempsey* was Sacco's and Vanzetti's best hope.

Hill and Thompson planned to persuade Holmes that Judge Thayer's extrajudicial comments about the defendants and their lawyers and Thayer's conduct of the trial had been just as prejudicial as *Moore v. Dempsey*'s mob-dominated sham trials; that the trial before Judge Thayer was like having no judge at all; and that Sacco and Vanzetti, like the black sharecroppers on trial for their lives in Arkansas, had not been afforded due process of law.

When they arrived at Beverly Farms at 2:50 p.m., Holmes greeted them at the front door. The Justice, who had been alerted that they were coming, ushered the lawyers into the first-floor parlor.[27] For two-and-a-half hours, Hill and Thompson pressed their case. At age eighty-six, Holmes was as mentally sharp as ever but tired more easily. He let them have their say until he began to fade. At the end of the argument, he wrote his one-paragraph decision in longhand. After finishing, he was so exhausted that he declined to give any interviews and went straight to bed. At 6:30 p.m., a grim-faced Hill rushed out of Holmes's residence. Before racing back to Boston, he told a *Boston Post* reporter: "I know of no human power at this time that can save them."[28]

Later that night, Frankfurter received a phone call about Holmes's decision.

> "You know where the other Justice is?" Frankfurter asked.
>
> "No."
>
> "In Chatham. Phone 330."
>
> "330?"
>
> "Yes. You will be kind enough not to talk about this talk between us. Layman cannot sometimes appreciate."[29]

Back in Boston, the Sacco-Vanzetti Defense Committee was panicking. At 9:00 p.m., Sacco's wife, Rosina, collapsed at the committee's headquarters. Her husband was supposed to die in three hours. At the state prison in Charlestown, Warden William Hendry was preparing for the executions; 800 police officers stood guard with high-pressure fire hoses and machine guns. Sacco and Vanzetti waited in their death cells.[30]

Hill arrived at the State House and still could not find anyone to grant a stay of execution. Governor Fuller and his executive council were furious that Hill had circumvented their authority by appealing to the federal courts. Later that night, Hill pleaded with the governor and his executive council to grant a stay. Finally, at 11:27 p.m., thirty-three minutes before the executions were set to begin, Governor Fuller stayed them for twelve days until August 22.

Soon after Governor Fuller's announcement, Holmes's handwritten opinion was released to the press and shared the next day's headlines. Most newspapers printed it in full. Holmes refused to grant the writ not because he agreed or disagreed with Judge Thayer's conduct, but because the Justice felt that he lacked the power to grant it. Holmes's opinion did not mention *Moore v. Dempsey* and revealed little of his feelings about the

merits of the case. Yet during his discussion with Hill and Thompson, Holmes had distinguished between the lynch mob outside the courthouse in *Moore v. Dempsey* and a trial dominated by Judge Thayer's prejudices. Hill and Thompson argued "what was the difference whether the motive was fear or the prejudices alleged in this case." Holmes disagreed: "I said most differences are differences of degree, and I thought that the line must be drawn between external force, and prejudice—which could be alleged in every case."[31]

The night after his decision, Holmes declined police protection. A few days earlier, a postcard, "Free Sacco and Vanzetti," had arrived at the Supreme Court of the United States. "If there is any more trouble in our ranks," it said, "they are going to blow up some of you big boys."[32] In Washington, plainclothes officers guarded the homes of Justices and Cabinet members.[33] A neighbor volunteered to guard the Holmes's residence at Beverly Farms; the Justice declined. Letters poured in, one of them calling him a "monster of injustice." Newspapers carried rumors that Hill once again would appeal to Holmes to grant a stay of execution so that the entire Court would hear the case. "So I have no perfect peace," Holmes wrote.[34] He questioned why his friends Frankfurter and Harold Laski were so "stirred up" about the case and criticized his friends who had turned him into a national icon. "If justice was what the world is after, this case is not half so bad as those that are more or less familiar in the South," Holmes wrote to another overseas correspondent, Lewis Einstein. "But this world cares more for red than for black."[35] He was not just talking about the black sharecroppers in *Moore v. Dempsey*. For Holmes, the Sacco-Vanzetti case revealed the limits of his younger friends' liberalism and his own complex post-war views on race.

Although Holmes's record in race cases was poor compared with those of his judicial colleagues from 1902 to 1916, something happened to his views on race after the summer of 1919. The Red Scare and Red Summer of racial violence had made him more sensitive to the limits of government power. Beginning in October 1919, he had defended the free speech rights of antiwar radicals such as Jacob Abrams and other "poor and puny anonymities."[36] Less than four years later, he had safeguarded the due process rights of Frank Moore and other black Arkansas sharecroppers sentenced to death after mob-dominated sham trials. To be sure, in May 1927 he had issued one of the Court's most shameful decisions, *Buck v. Bell*, upholding Virginia's compulsory sterilization law.[37] Indeed, *Buck v. Bell* alarmed the *Chicago Defender*.[38] But two months earlier, he had written the Court's unanimous opinion in *Nixon v. Herndon*[39] striking down Texas's all-white Democratic primary on Fourteenth Amendment grounds, an opinion that delighted black leaders and that Holmes announced from the bench with "much joy."[40]

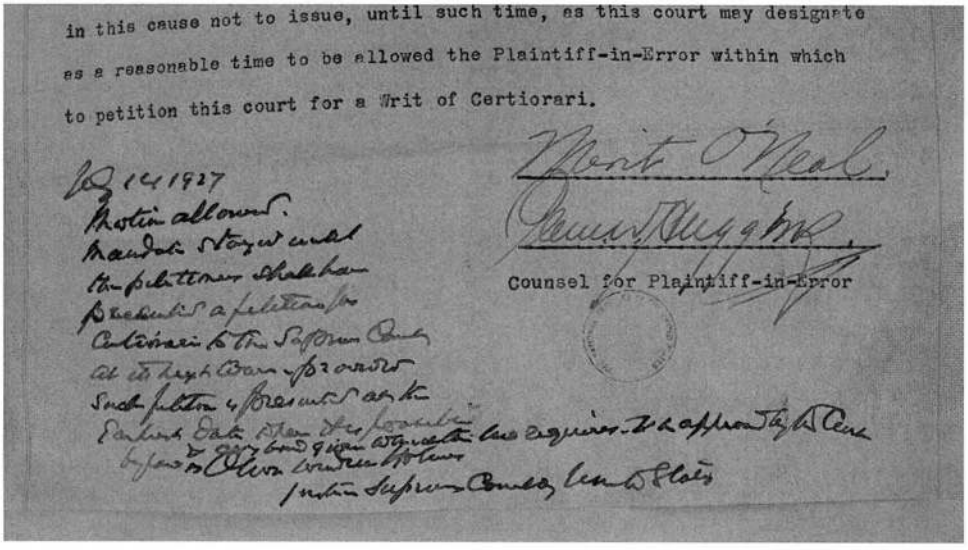
More than his 1923 decision in *Moore v. Dempsey* and the Texas primary case from the previous March were on Holmes's mind when he critiqued his friends about their obsession with Sacco and Vanzetti and lack of interest in issues of race. "Your last letter shows you stirred up like the rest of the world on the Sacco Vanzetti case," he wrote Harold Laski. "I cannot but ask myself why this so much greater interest in red than black. A thousand-fold worse cases of negroes come up from time to time, but the world does not worry over them. It is not a mere simple abstract love of justice that has moved people so much."[41]

Holmes's experience with the criminal justice system's unfairness toward African Americans was more immediate. Every summer at Beverly Farms, he received pleas from black men to stay their executions so that the Court could consider their certiorari petitions. The summer of 1927 was no different.

On July 15, 1927, Nathan Bard and Bunyan Fleming were scheduled to hang for the rape of a 16-year-old white girl, Nellie Catherine Breithaupt, during a robbery outside a country club in Madisonville, Kentucky. The small town, because of about a half-dozen similar sex crimes in the past ten days, was on edge.[42] The police arrested a white prostitute because of a photograph of her with a black man and letters that revealed she and another prostitute had been with black men.[43] The letters led police to three black suspects. One of the suspects confessed to being an accomplice and (after being given $2 to buy tobacco) implicated two other men in the rape—Bard, a coal miner, and Fleming, a chauffeur.[44]

Before the trial, the three men were imprisoned in Louisville for their safety and were scrambling to find counsel. Three days after their arrest, Bard and Fleming found themselves on trial for their lives. A black Louisville attorney from the city's NAACP branch had come to Madisonville to represent both men, but was "advised," along with the editor of a black Louisville newspaper, to leave town for their own safety.[45] The threat of a lynching hovered over the proceedings. Soldiers armed with machine guns stood guard in front of the jail and the courthouse, as well as in the hallway outside the courtroom.[46] Fleming's lawyer, a white Louisville attorney, was not allowed to speak to his client until fifteen to twenty minutes before trial and only in the presence of two court officers. Bard's lawyer, a black attorney from nearby Hopkinsville, was not allowed to speak to his client at all. The wife of one of the defendants was arrested and jailed until the end of the trial, and the other defendant's wife was also not allowed to attend the trial.[47] The defense attorneys did not file a motion for a change of venue because Kentucky law required them to get someone else to sign the motion and no one, white or black, dared sign it. An all-white jury convicted Fleming after deliberating for ten minutes; the next day, the jury convicted Bard in eight minutes.[48]

U.S. District Court Judge Charles I. Dawson, who held a two-day habeas corpus hearing, expressed deep concerns about the fairness of the trials because they were not


in this cause not to issue, until such time, as this court may designate as a reasonable time to be allowed the Plaintiff-in-Error within which to petition this court for a Writ of Certiorari.

Counsel for Plaintiff-in-Error

In 1927, Justice Holmes ordered a stay of execution in a Kentucky case against Nathan Bard and Bunyan Fleming, two African-American men accused of raping a white woman. Sacco's and Vanzetti's lawyers knew about the stay even though it failed to attract attention in the white press.

postponed or moved to another county, yet he denied Bard and Fleming's petition.[49] The Sixth Circuit Court of Appeals affirmed the trial judge's decision. On July 9, Brandeis granted a temporary stay of execution. At Beverly Farms, Bard's and Fleming's counsel sought a permanent stay.[50] When presented with the facts of the case, Holmes immediately recognized another potentially mob-dominated trial when he saw one. On July 14, the day before Bard and Fleming were supposed to die, Holmes scrawled at the bottom of the stay petition:

> Motion allowed. Mandate stayed until the petitioners shall have presented a petition for certiorari to the Supreme Court at its next term provided such petition is presented at the earliest date when it is possible by law & any bond given to question law requires it be approved by this Court.
>
> Oliver Wendell Holmes
>
> Justice Supreme Court of United States[51]

The black press, which had been covering the Bard and Fleming case for months, hailed Holmes's stay; most white newspapers barely noticed it.[52]

On August 20, two days before Sacco and Vanzetti's execution date, Hill and two attorneys set out for Beverly Farms, trailed by a carload of newspapermen. The attorneys knew all about Holmes's stay. They cited the Bard and Fleming case in their briefs submitted to the Justice before their second trip to Beverly Farms.[53] Holmes had given Bard and Fleming exactly what Sacco and Vanzetti wanted—a stay of execution until October so that the entire Supreme Court could vote to hear the case. The lawyers arrived at Holmes's doorstep at 2:30 p.m. At 4:30 p.m., Hill came outside and announced to the press that the application had been denied.[54]

This time, Holmes laid out his reasoning in a three-page, handwritten opinion that was reprinted in newspapers everywhere.[55] He remained persuaded that the prejudices and biases of Judge Thayer had not voided the trial because, as he wrote in his opinion, it had not been "invaded by an infuriated mob ready to lynch prisoner, counsel, and jury if there is not a prompt conviction." This was not a mob-dominated trial as in *Moore v. Dempsey* and as Bard's and Fleming's seemed to be. At best, Holmes argued in his opinion, Sacco's and Vanzetti's trial may have been "voidable" by the Massachusetts Supreme Judicial Court but not by him. Holmes argued that Supreme Court intervention in state criminal cases on due process grounds "is a power rarely exercised and I should not be doing my duty if I exercised it unless I thought there was a reasonable chance that the Court would entertain the application and ultimately reverse the judgment. This I can not bring myself to believe."[56]

Judge Thayer's prejudicial comments, discovered after the verdict and reviewed only by Thayer, did not sway Holmes. He argued to Hill that it would have been constitutional if the state of Massachusetts had refused to allow any appeals from the rulings of a single trial judge. He also rejected Hill's hypothetical of a "corruptly interested or insane" judge because that was not the case here. "I will not attempt to decide at what point a judgment might be held to be absolutely void on these grounds."[57]

Finally, Holmes refused to be influenced by the intense media scrutiny surrounding the Sacco-Vanzetti case. His opinion mentioned that, after his first opinion, he had received "many letters from people who seem to suppose that I have a general discretion to see that justice is done." He tried to explain that the role the Supreme Court plays in a federal system "is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that

justice requires me to cut red tape and to intervene." Almost as an aside, he added: "Far stronger cases than this have arisen with regard to the blacks when the Supreme Court has denied its power."[58]

Holmes was almost certainly alluding to the case of Bard and Fleming. He also may have been thinking about another case that summer in which he denied certiorari for two men facing execution.[59] And he was speaking to Frankfurter, Laski, and their liberal friends who cared "more for red than for black."

If there was a silver lining in Holmes's second Sacco-Vanzetti opinion, it was that he had explicitly permitted Hill and his colleagues to approach other Justices about a stay. The race to save Sacco and Vanzetti was on. Hill did not divulge to the waiting newspapermen where he was going next.

But Frankfurter knew exactly where he was headed. At 7:40 p.m. that night, he learned that Holmes had turned them down and that Hill was en route to Cape Cod to see Brandeis. "Don't dissuade him," Gardner Jackson of the Sacco-Vanzetti Defense Committee phoned Frankfurter. "Don't try to put any obstacles in his way. This is the only thing left to do... You go ahead and encourage him to try to do every damn thing."[60] Jackson did not know that twelve days earlier, Frankfurter had provided one of the lawyers with Brandeis's phone number in Chatham. Frankfurter did not discourage Hill, who recognized that Brandeis "may feel himself disqualified from sitting for reasons you can divine."[61]

Frankfurter himself refused to go to Chatham to encourage Brandeis to issue a stay. "I haven't the slightest idea what will happen tomorrow—what Brandeis will do with it," Frankfurter told the nonlawyer Jackson. "I would not be a bit surprised if he disqualified [himself] from sitting and nothing more could cinch it than for me to go down to Chatham. I can't say anything more."[62]

At 2 a.m., Hill and his fellow attorneys checked in at the Chatham Bars Inn.[63] After breakfast, the lawyers left to see Brandeis. Disqualified or not, Brandeis was Hill's best hope. He was the most liberal justice on the Court, more liberal than Holmes, and the most intellectually influential elder statesman at the House of Truth. Although the young men at the House of Truth loved and admired Holmes, they followed Brandeis's lead.

At 9:30 a.m. on August 21, Hill and three lawyers arrived at Brandeis's summer home in Chatham. Only the gabled roof was visible from the dirt road entrance. Dressed in knickers and a cap and having finished his breakfast, Brandeis was sitting on the front porch waiting for Hill and his colleagues to arrive.[64] They did not get past the front door. "I know what you are here for," Brandeis said, "and I can't take any action at all." Hill replied: "Let me tell you what we have to say." Brandeis refused. Hill insisted on having his say. Brandeis repeated that he was disqualifying himself. The entire conversation lasted three minutes.[65] He did not even write an opinion—Justices do not typically explain why they disqualify themselves from cases. To a *Boston Herald* reporter on hand, Hill cited Brandeis's "personal relations with some of the people interested in the case."[66]

Brandeis's personal connections to the case were indeed many. Elizabeth Glendower Evans ("Auntie Bee"), one of the largest contributors to the Sacco-Vanzetti Defense Fund, was practically a member of his family. During the Sacco-Vanzetti trial in 1921, she had put up Sacco's wife, Rosina, and their two children, Dante and Inez, in Brandeis's home in Dedham, not far from the jail where Sacco was being held.[67] Evans and Frankfurter had been staying at Brandeis's summer home in Chatham as late as mid-June 1927, and they likely discussed the case with the Justice at length.[68] Second, his wife Alice had donated money to the Sacco-Vanzetti Defense Fund in 1921. Both she and her eldest daughter Susan were personally invested in the case because of

their relationship with Evans.[69] Finally, there was Brandeis's "half brother, half son" relationship with Frankfurter, with whom Brandeis had been engaged in a running dialogue about the case at least since the October 1926 publication of Frankfurter's unsigned *New Republic* article.[70] In June 1927, the Justice had offered to supplement Frankfurter's income for the work on the Sacco-Vanzetti case in addition to funding his other pro bono activities. In early August, Brandeis wrote Frankfurter, lamenting the postponement of a summer visit to Chatham because of Sacco-Vanzetti and observing: "You & Auntie B. have played noble parts."[71] After turning down Hill and the other lawyers, Brandeis walked them to their car and spoke with them for a few minutes in a friendly way through the driver's side window. The engine was running, and before long they headed north, to the coast of Maine.[72]

If Brandeis turned them down, Hill and Frankfurter had already agreed that they would seek out the remaining liberal Justice on the Court, Harlan Fiske Stone. The problem for Hill was that Stone was at his summer home on Isle au Haut, an island off the Maine coast and unreachable by telephone or wire. As soon as Brandeis had turned him down, Hill instructed his co-counsel to find out the boat and ferry schedules. The last boat had left at 5:00 a.m.[73] Undeterred, Hill began driving to Rockland, the closest mainland town. At noon, Hill's co-counsel called Frankfurter from Plymouth. Frankfurter advised them to "skillfully weave in" New York and British cases from Frankfurter's book and to remind Stone that the evidence of Judge Thayer's prejudice

Justice Louis D. Brandeis (right) offered to supplement the income of his friend Felix Frankfurter (left), a Harvard law school professor, for his work on the Sacco-Vanzetti case in addition to funding his other pro bono activities.

After Sacco's and Vanzetti's lawyers were turned down by both Brandeis (right) and Holmes (center), they decided to approach the only remaining liberal Court member: Harlan Fiske Stone (left), who was at his summer house on an island in Maine. With the defendants' executions less than twenty-four hours away, defense attorney Arthur D. Hill took the ferry from Rockland to Stonington on Deer Isle, and then chartered a fishing boat to the even more remote Isle au Haut, a four-hour trip. After an hour and half conversation, Justice Stone denied the requested stay.

had not been available for seven years. Flattery was also important because Stone was "a vain man."[74]

Hill drove through Boston without stopping at his office. At 3:00 p.m., he telephoned his office, got stuck in bad traffic on the Newburyport Turnpike, and at 5:55 p.m. phoned again from Portsmouth, New Hampshire.[75] They finally arrived in Rockland "shortly before" 2 a.m.; Hill decided to get a few hours' sleep and to charter a fishing boat early the next morning.[76] Sacco's and Vanzetti's executions were less than twenty-four hours away. Hill barely slept. He took the ferry from Rockland to Stonington on Deer Isle, thirty-five nautical miles, and then chartered a fishing boat another eight miles to the even more remote Isle au Haut, a four-hour trip. He arrived at Stone's summer home at 9:00 a.m. and pleaded with the Justice for an hour and fifteen minutes. The answer, however, was the same. Stone issued a two-line order denying a stay and concurring with Holmes.[77] Hill made the four-hour boat trip back to the mainland. He called his office: "Nothing else could be done."[78] Exhausted, he spent the night in Portland, Maine.

With the clock ticking, new lawyers injected themselves into the case with the encouragement of the Sacco-Vanzetti Defense Committee.[79] Hill had filed a petition for certiorari with the clerk's office at the Supreme Court in Washington. The new lawyers were intent on finding a judge who would grant a stay so that the

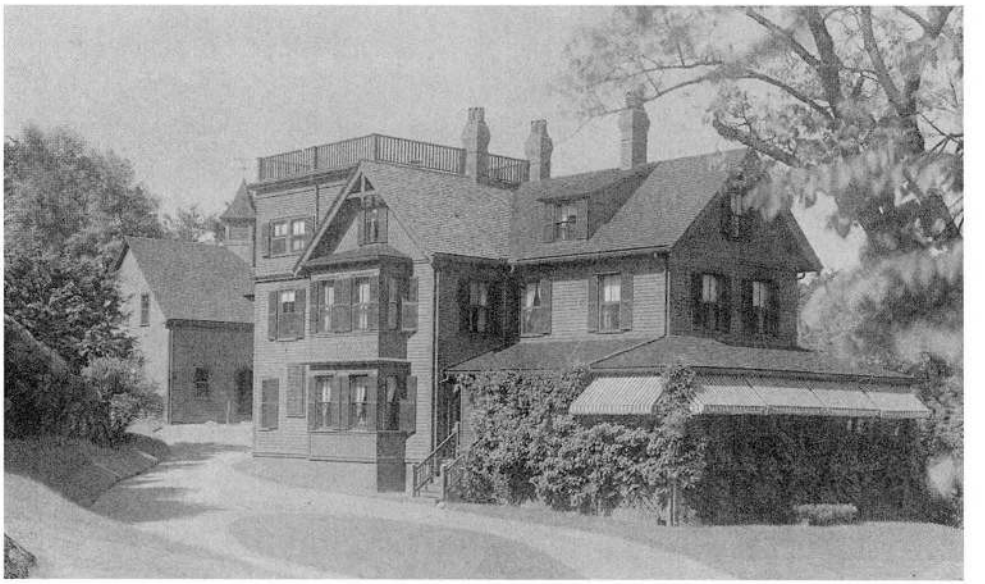
entire Court could consider hearing the case. They began trying things that Hill and Frankfurter had rejected as bad strategy. Michael Musmanno, a publicity-seeking Pittsburgh lawyer, repeatedly wired Chief Justice Taft at his summer home in Pointe-au-Pic in Quebec, Canada. At 9:00 p.m., Musmanno phoned the Chief Justice and offered to meet him at the U.S.-Canadian border; Taft refused because he agreed with Holmes.[80] Musmanno also wired President Coolidge in Rapid City, South Dakota, unsuccessfully tried to get the President on the phone, and offered to charter a plane there to argue that Coolidge should pardon Sacco and Vanzetti. Coolidge's aide refused: no federal crime had been committed, and the former Massachusetts governor was unlikely to interfere with the state's legal establishment. Besides, the President was leaving early the next morning for Yellowstone National Park.[81] At 9 p.m., three hours before the scheduled executions, four lawyers led by civil libertarian John Finerty returned to Beverly Farms. Justice Holmes again refused to grant a stay.[82] The lawyers also unsuccessfully sought stays from several lower court judges.

Before the executions, the Frankfurters had returned from Duxbury to Boston. With a sympathetic friend, they walked the streets of Beacon Hill past midnight and at 12:19 a.m. heard the news on the radio: "Sacco gone, Vanzetti going!" Marion Frankfurter "collapsed and would have fallen to the pavement if the two men had not caught her."[83] She sank into a depression that lasted many months. Her husband arranged for her to co-edit the Sacco-Vanzetti jailhouse letters for publication to help her recover and bring her back to life.[84] Indeed, Frankfurter had worked himself to the point of exhaustion. "To the end, you have done all that was possible for you," Brandeis wrote him. "And that all was more than would have [been] possible for any other person I know. But the end of S.V. is only the beginning 'They know not what they do.'"[85]

For several days after the executions, police guarded Holmes's summer residence at Beverly Farms. Frankfurter was disturbed by the news that the serenity of the Justice's summer vacation was being interrupted by nighttime guards.[86] Three times, Sacco and Vanzetti lawyers had sought stays of execution from Holmes, and three times he had turned them down. "Judge Holmes has steadily been the advocate on the bench of tolerance of liberal and even 'advanced' views," a *New York Times* editorial said. "He, if any Federal Judge, was indicated as the most hopeful recourse for the lawyers making their last gallant but desperate plea for the men condemned to death in Boston."[87]

Yet Holmes's views of the case were anything but liberal. He thought the *New Republic*'s August 31 editorial was "hysterical," welcomed news from his new secretary Arthur Sutherland, Jr., that Frankfurter's "general frame of mind is to drop the matter as finished," and considered "the row that has been made [over the case] idiotical... If justice is the interest why do they not talk about the infinitely worse cases of the blacks?" he wrote Laski. Although he agreed with Frankfurter's book, he believed all it showed was that "the case was tried in a hostile atmosphere. I doubt if anyone would say that there was no evidence warranting a conviction."[88] Holmes complained to Frankfurter about the *New Republic*'s fixation on reasonable doubt: "[I]t seems quite clear that this one is not due to abstract love of justice but to the undue prominence given to red opinions which interest more than black skins."[89]

The radical left angered Holmes with its criticism of his closest colleague on the Court. Brandeis was bombarded with "abusive letters."[90] The day after the executions, the Communist *Daily Worker* compared him to Pontius Pilate. Rejecting Brandeis's recusal because of his family's interest in the case as a



For several days after the executions, police guarded Justice Holmes's summer residence at Beverly Farms, shattering his tranquility. Holmes had turned down Sacco's and Vanzetti's lawyers all three times they had sought stays of execution from him.

"flimsy excuse," the *Daily Worker* accused him of being "part of the capitalist machine that intends to make an example of Sacco and Vanzetti . . . the dominant section of the American ruling class is intent on their death. And the 'liberal' Brandeis is going along. A Pilate has come to judgment."[91] Holmes's secretary Arthur Sutherland had seen the article in the New York newspaper's front window and reported the contents to his boss. "How can one respect that sort of thing?" Holmes asked his Socialist friend Laski. "It isn't a matter of reason, but simply shrieking because the world is not the kind of a world they want—a trouble that most of us feel in some way."[92]

Frankfurter enlisted the *New Republic*'s assistance in responding to Brandeis's critics. The magazine took Frankfurter's suggestion and published a one-paragraph editorial comparing Brandeis's ethics to Judge Thayer's.[93] Lippmann wrote Brandeis praising the Justice's decision to disqualify himself from hearing the Sacco-Vanzetti case as "the conception of what real disinterestedness in a judge ought to be."[94]

On October 22, the Court dismissed Sacco and Vanzetti's petition for certiorari as moot. They were already dead.

The Court, however, still held the lives of two black Kentucky men in its hands. Nathan Bard and Bunyan Fleming were alive thanks to stays of execution from Brandeis and Holmes. Yet the NAACP's National Legal Committee refused to take the lead in appealing the case to the Court. Committee member Louis Marshall read the record and did not find any issues to appeal because trial counsel had not moved to change the venue and had agreed to a one-day extension of time. A due process claim based on *Moore v. Dempsey*, according to Marshall, was not enough. Marshall did not want the NAACP's National Legal Committee to sponsor cases "in which there is not a fair fighting chance and which do not involve an important principle or some outstanding act of prejudice and injustice."[95] Though the NAACP donated $250 to the local Louisville branch's defense fund, the organization's experienced Supreme Court advocates—Marshall,

Moorfield Storey, and James Cobb—stayed on the sidelines.[96]

On November 21, the Court declined to hear the case. It did not matter that Bard and Fleming had been given two days to find lawyers; that Bard had not conferred with his counsel and Fleming did so for only fifteen to twenty minutes before trial; that the NAACP's Louisville counsel had been run out of town; that Bard's wife had been arrested and jailed so she could not testify on her husband's behalf; that armed state troopers had guarded the courthouse to prevent a lynching; or that the two men had been convicted by an all-white jury in ten minutes or less. The Court, as in most cases, did not say why it declined to hear the case. Not a single Justice voted to hear it.[97]

On December 2, 8,000 white people stood in the Hopkins County, Kentucky, jail yard, on fences, on nearby roof tops, on sheds, on telephone poles, and anywhere else they could find to watch Bard and Fleming hang.[98] Both men died professing their innocence. White newspapers buried the Bard and Fleming story.[99] Black newspapers made it front-page news. The black *Louisville Leader* attacked the white *Louisville Times*'s editorial analogizing the case to Sacco-Vanzetti because "there was as much difference between the Bard and Fleming case and that of Sacco and Vanzetti as between noon and midnight." The *Leader* observed that Bard and Fleming was an interracial rape case lasting several days without pretrial access to counsel and with the threat of a lynching hanging in the air and that Sacco-Vanzetti was a double-murder case that lasted months and an appeals process that lasted seven years. "In the next place Bard and Fleming were Negroes and Sacco and Vanzetti were white," the *Leader* continued. "This makes a big difference in Kentucky." The paper pointed to a case in Lexington where a white man accused of raping a black girl had been sent to an insane asylum. Nor did the NAACP play as big a role as the white newspaper alleged.[100] The NAACP's National Legal Committee had abandoned Bard and Fleming, who, unlike Sacco and Vanzetti, did not have first-rate counsel on appeal.

Holmes was right about Sacco and Vanzetti—the world did care more for red than for black. Though no racial egalitarian, he made overlooked contributions to the Court's role in protecting the Bill of Rights, voting rights, and the rights of minorities. In defending the right to fair criminal trials, he articulated a limit on government power as important and enduring as his free speech dissents. *Moore v. Dempsey* provided an opening, in extreme cases, to protect the due process rights of southern blacks. He continued to champion those rights with his second opinion denying a stay in the Sacco-Vanzetti case and his stay of execution for Bard and Fleming. In doing so, he helped show his liberal friends the role that the Supreme Court could play with regard to race and the criminal justice system. It would not be long before Frankfurter and other liberals began to accept Holmes's challenge.

ENDNOTES

[1] Brad Snyder, **The House of Truth: A Washington Political Salon and the Foundations of American Liberalism** (New York: Oxford University Press, 2017). On the *Sacco-Vanzetti* case, *see* chapters 24–25.

[2] 1 Sacco-Vanzetti Trial Transcript at 75, 77.

[3] 2 Sacco-Vanzetti Trial Transcript at 1726, 1731-32 (Vanzetti); at 1846, 1866, 1912 (Sacco).

[4] Harlan B. Phillips, ed., **Felix Frankfurter Reminisces** (New York: Reynal, 1960), p. 210; "A Fight for the Underdog, Elizabeth Glendower Evans," *Springfield Sunday Union and Republican*, May 8, 1932 in Felix Frankfurter Papers, Harvard Law School (hereinafter "FF-HLS"), Reel 33, 345-57.

[5] Phillips, **Felix Frankfurter Reminisces,** pp. 210, 212–13.

[6] "The Sacco-Vanzetti Case," *New Republic*, June 9, 1926, 77.

[7] Felix Frankfurter, **The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen** (Boston: Atlantic Monthly Press, 1927); Felix Frankfurter, "The Case of Sacco and Vanzetti," *Atlantic Monthly*, Mar. 1927: 409–32.

[8] "Brandeis-Frankfurter Conversations," July 3, 1923, at 18, Felix Frankfurter Papers, Library of Congress (hereinafter: "FF-LC"), Box 224, Folder "Conversations between L.D.B. and F.F."

[9] Joseph Alsop and Robert Kintner, **Men Around the President** (New York: Doubleday, 1939), p. 49, and Frankfurter Interview with Joseph Alsop, at 3-4, n.d., circa 1938, Joseph and Stewart Alsop Papers, Box 93, Folder 3. *See* FF to Stimson, April 16, 1913, FF-LC, Box 103, Folder "Stimson, Henry L. 1913" ("What a horde of office seekers is wearing away the strength and time of men like McReynolds—who let them!").

[10] **Felix Frankfurter Reminisces**, pp. 102–3.

[11] McReynolds to Sedgwick, circa March 23, 1927, at 1, Ellery Sedgwick Papers, Carton 4, Folder "Frankfurter, Felix nd–1927"; Sedgwick to McReynolds, March 23, 1927, at 2, *id.*

[12] McReynolds to Sedgwick, March 26, 1927, at 1–2, *id.*, Carton 7, Folder "McReynolds, James Clark."

[13] 5 Sacco-Vanzetti Trial Transcript at 4880; *Commonwealth v. Sacco*, 259 Mass. 128, 139–41 (Apr. 5, 1927).

[14] Vanzetti to Governor Fuller, May 3, 1927, 5 Sacco-Vanzetti Trial Transcript at 4910–23; *id.* at 4924, 4926, 4928; *id.* at 5065, 5418–19.

[15] FF to Lippmann, 7/12/1927, at 5, Walter Lippmann Papers, Reel 10, Box 10, Folder 428b.

[16] *Boston Herald*, August 3, 1927, 24, *Boston Herald*, August 4, 1927 & *Boston Evening Transcript*, August 4, 1927, in FF-LC, Box 247, Folder "Clippings V S-V Aug. 1-5, 1927."

[17] Attorney General Arthur K. Reading to Commissioner of Public Safety Gen. Alfred F. Foote, August 1, 1927, FF Wiretap Transcripts, FF-HLS, Pt. III, Reel 38, p. 392, Box 215, Folder 5. Reading also authorized wiretapping room 301 at the Hotel Bellevue in Boston, the headquarters of the Sacco-Vanzetti Defense Committee. Reading to Foote, August 8, 1927, *id.* at 393. Only the Frankfurter transcripts survive. State officials released them after fifty years. *New York Times*, September 13, 1977, 16; *New York Times*, September 15, 1977, 46.

[18] Herbert Ehrmann in **Felix Frankfurter: A Tribute** (Wallace Mendelson, ed., New York: Reynal, 1964), p. 93.

[19] FF to Arthur Hill, August 8, 1927, FFLC, Box 67, Folder "Hill, Arthur Dehon 1918–27; Hill to FF, October 20, 1927, *id.*, Hill to FF, October 8, 1927, at 1–2, *id.*; Hill to FF, October 6, 1927, *id.*

[20] 5 Sacco-Vanzetti Trial Transcript at 5428–30; *Boston Globe*, August 9, 1927, at 1.

[21] *Boston Evening Transcript*, August 10, 1927, 1, in FF-LC, Box 247, Folder "S-V VII Clippings August 10–16, 1927"; *Boston Post*, August 11, 1927, 12.

[22] Photo of Beverly Farms, September 20, 1928, Holmes Digital Suite, Harvard Law School, olvwork392157.

[23] Holmes to Lewis Einstein, May 19, 1927, **The Holmes-Einstein Letters** (James Bishop Peabody, ed., New York: Macmillan, 1964), p. 268; *Boston Globe*, August 6, 1927, 3; Holmes to FF, March 18, 1927, **Holmes and Frankfurter** (Robert M. Mennel & Christine L. Compston, eds., 1996), p. 211.

[24] Holmes to Harold Laski, August 18, 1927, 2, **Holmes-Laski Letters** (Mark DeWolfe Howe, ed., Cambridge, MA: Harvard University Press, 1953), p. 971; FF to Hill, August 6, 1927, at 1–2, FF-LC, Box 67, Folder "Hill, Arthur Dehon 1918–27" (emphasis in original).

[25] *Frank v. Mangum*, 237 U.S. 309, 345 (1915) (Holmes. J., dissenting).

[26] *Moore v. Dempsey*, 261 U.S. 86, 89–90 (1923).

[27] *Boston Post*, August 11, 1927, 12.

[28] *Id.* at 1.

[29] FF to Michael Musmanno, FF Wiretap Transcript, August 10, 1927, at 6, FF-HLS, Pt. III, Reel 38, at 404.

[30] *Boston Post*, August 11, 1927, 1.

[31] Holmes to Laski, August 18, 1927, 2 **Holmes-Laski Letters**, p. 971. On Holmes's handwritten opinion, *see* 5 Sacco-Vanzetti Trial Transcript at 5532.

[32] *Boston Globe*, August 6, 1927, 3.

[33] *New York Times*, August 7, 1927, 4.

[34] Holmes to Laski, August 18, 1927, 2 **Holmes-Laski Letters**, p. 971.

[35] Holmes to Einstein, August 14, 1927, **The Holmes-Einstein Letters,** p. 272.

[36] *Abrams v. U.S.*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

[37] *Buck v. Bell*, 274 U.S. 200, 207–8 (1927).

[38] *Chicago Defender*, June 30, 1927, A1.

[39] 273 U.S. 536, 541 (1927).

[40] Brandeis to FF, March 9, 1927, "**Half Brother, Half Son,**" eds. Melvin I. Urofsky & David W. Levy, (Norman: University of Oklahoma Press, 2002), p. 278.

[41] Holmes to Laski, August 24, 1927, 2 **Holmes-Laski Letters**, p. 974.

[42] *Bard v. Chilton* Record at 253 & *Bard v. Chilton* Brief at 46, NARA, U.S. Supreme Court Appellate Case Files, File Nos. 33017–18, RG 267, Box 8356.

[43] George C. Wright, **Racial Violence in Kentucky, 1865–1940** (Baton Rouge: Louisiana University Press, 1990), pp. 262-66.

[44] *Bard v. Chilton* Record at 383–87 (containing article from *Madisonville Messenger*, April 11, 1926); *Louisville News*, May 1, 1926, at 1, NAACP Records, Pt. I, Box G-76, Folder 8 Louisville, KY Jan.–Oct. 1926.

[45] *Bard v. Chilton* Record at 250, 262–63; William Warley to James Weldon Johnson, October 25, 1926, at 2, NAACP Records, Pt. I, Box G-76, Folder 8 Louisville, KY Jan.–Oct. 1926; *Louisville News*, April 24, 1926, 1, *id.*, Folder 10.

[46] *Bard v. Chilton* Record, at 412; *Chicago Defender*, 5/8/1926, 2.

[47] *Bard v. Chilton* Record at 246–47.

[48] *Id.* at 412; *Chicago Defender*, May 8, 1926, 2.

[49] *Bard v. Chilton* Brief at 58; *Louisville Leader*, April 30, 1927, 1, 8.

[50] G. P. Hughes to Walter White, July 15, 1927 tel. NAACP Records, Pt. I, Box G-76, Folder 11 Louisville, KY July–Dec. 1927 ("JUSTICE HOLMES GRANT STAY WILL HEAR CASE NEXT TERM SUPREME COURT"); Hughes to White, July 16, 1927 tel., *id.* ("ANSWERING TELEGRAM ATTORNEY WHO ARGUED BEFORE JUSTICE HOLMES HAS NOT RETURNED WILL FORWARD DETAILS WHEN HE COMES.").

[51] Handwritten order, July 14, 1927, *Bard v. Chilton*, NARA, U.S. Supreme Court Appellate Case Files, File Nos. 33017–18, RG 267, Box 8356.

[52] *Chicago Defender*, August 13, 1927, 4; New York *Amsterdam News*, August 10, 1927, 4; *Norfolk Journal & Guide*, August 6, 1927, 1; *Philadelphia Tribune*, July 28, 1927, 5.

[53] *New York Herald-Tribune*, August 21, 1927, 6.

[54] *Boston Post*, August 21, 1927, 10.

[55] Holmes Handwritten Denial, August 20, 1927, at 1–3, Holmes Papers, Box 69, Folder 10.

[56] 5 Sacco-Vanzetti Trial Transcript at 5516.

[57] *Id.* at 5517.

[58] *Id.* at 5516. Aside or not, Holmes's comment caught the eye of the *Chicago Defender*, the nation's leading black newspaper, as did his racial terminology. "We cannot rejoice wholeheartedly at what Justice Holmes said in this case because of the manner in which he said it," the *Defender* wrote. The editors rejected as "patronizing" the word "blacks" to describe a race of people: "We want to be known only as Americans—just Americans." *Chicago Defender*, August 27, 1927, A2.

[59] Holmes to FF, July 25, 1927, **Holmes and Frankfurter**, p. 215 ("I am taking life pretty leisurely although there are always letters to be answered and although I have gone over 30 odd *certioraris* for next term and have granted one and denied another application for a stay when men are to be executed forthwith."). The grant is Bard and Fleming. The denial I have not been able to pinpoint. It was probably the Louisiana capital murder case of Joe Genna and Molton Brasseaux, who were convicted of murdering a New Orleans man. Genna and Brasseaux filed their cert petitions on July 3. The Court officially denied cert on October 10. Nos. 347 & 351, 275 U.S. 522 (Oct. 10, 1927).

[60] Gardner Jackson to FF, FF Wiretap Transcript, August 20, 1927, at 15–16, FF-HLS, Pt. III, Reel 38, Box 215, Folder 6, at 517–18.

[61] Arthur Hill to FF, FF Wiretap Transcript, August 20, 1927, at 17, FF-HLS, Pt, III, Reel 38, at 519.

[62] Jackson to FF, FF Wiretap Transcript, August 21, 1927, at 2–3, FF-HLS, Pt. III, Box 215, Folder 7, Reel 38, at 529–30.

[63] *Boston Herald*, August 22, 1927, 1.

[64] *Id.*

[65] Louis Bernheimer to FF, FF Wiretap Transcript, August 21, 1927, noon, at 8, FF-HLS, Pt. III, Reel 38, at 538, Box 215, Folder 7. *See* Sherman to FF, August 21, 1927, noon, at 5, FF-HLS, Pt. III, Reel 38, at 532; Julian Mack to FF, August 21, 1927, 3:30 p.m., at 9, FF-HLS, Pt. III, Reel 38, at 539; *Boston Herald*, August 22, 1927, 1.

[66] *Boston Herald*, August 22, 1927, 1.

[67] *Boston Post*, August 22, 1927, 4; *Chicago Tribune*, August 12, 1921, 3.

[68] FF to Marion Frankfurter, June 12, 1927, at 2–3, FF-LC, Box 14, Folder "Marion D. Frankfurter 1927 #116."

[69] Mrs. Brandeis's donation was leaked to the *Boston American*. *See* Elizabeth Glendower Evans to Fred Moore, August 21, 1921, at 1, Sacco-Vanzetti Defense Committee, Boston Public Library, Box 13, Folder 10; Evans to Moore, September 4, 1921, *id.*, "Mrs. Brandeis Aids Sacco Defense Fund," *Boston American*, n.d., 1921, *id.*, Moore to Evans, September 6, 1921, *id.* (explaining he had given *Boston American* the defense fund's donor list, and the newspaper had chosen to publish Mrs. Brandeis's name). *See* New York *World*, August 22, 1927, 1 (noting that "both Mrs. Brandeis and Miss Susan Brandeis had discussed the case with friends who were sympathetic toward Sacco and Vanzetti.").

[70] Brandeis to FF, October 29, 1926, **"Half Brother, Half Son,"** p. 258.

[71] Brandeis to FF, August 5, 1927, *id.*, at 306. Some scholars have made much of this financial relationship. *See* Bruce Allen Murphy, **The Brandeis/Frankfurter Connection** (New York: Oxford University Press, 1982). Others claim the ethical charges have been grossly exaggerated. *See* Robert Cover, "The Framing of Justice Brandeis," *New Republic*, May 5, 1982, 17–18.

[72] *Boston Herald*, August 22, 1927, 1.

[73] *Boston Post*, August 22, 1927, 4.

[74] FF to Sherman, FF Wiretap Transcript, August 22, 1927, noon, at 6, FF-HLS, Pt. III, Reel 38, p. 533, Box 215, Folder 7.

[75] *Boston Post*, August 22, 1927, 4.

[76] *Boston Herald*, August 22, 1927, 1.

[77] 5 Sacco-Vanzetti Trial Transcript at 5517; *Boston Globe*, August 23, 1927, 9.

[78] *Boston Post*, August 23, 1927, 12.

[79] William A. Truslow, **Arthur D. Hill** (Boston: Hill & Barlow, 1996) (reprinting Hill diary entry, August 22, 1927), p. 17.

[80] William Howard Taft to Henry Taft, August 22, 1927, at 2–3, WHTP, Series 3, Reel 294; William Howard Taft to Musmanno, August 22, 1927, *id.*; three telegrams, two from Musmanno to Chief Justice Taft, August 21, 1927 & undated telegram, William Howard Taft Papers, Series 3, Reel 293; Michael A. Musmanno, **After Twelve Years** (New York: Alfred A. Knopf, 1939), pp. 351-54.

[81] Musmanno, **After Twelve Years**, pp. 347–51.

[82] Holmes to Lewis Einstein, September 11, 1927, **The Holmes-Einstein Letters**, p. 273; *Boston Herald*, August 23, 1927 7; *Boston Post*, August 23, 1927, 12.

[83] Matthew Josephson, "Profiles: Jurist-II," *New Yorker*, December 7, 1940, 46.

[84] Gardner Jackson, Columbia Oral History, at 295–97; Richard Polenberg, "Introduction," **The Letters of Sacco and Vanzetti** (New York: Penguin Classics, rev. ed., 2007), pp. xxi-xxv.

[85] Brandeis to FF, August 24, 1927, **"Half Brother, Half Son,"** p. 306.

[86] Thomas G. Corcoran to FF, September 10, 1927, at 1, Holmes Papers, John G. Palfrey Collection, Box 58, Folder 27 (informing Frankfurter that the night guard was leaving and "I'm really very sorry that I hurt you as I know I did by telling you about the guards and feeling of danger at all."). Mrs. Holmes requested the guards. Corcoran, *Rendezvous with Democracy*, Holmes D/2 at 23–24, Corcoran Papers, Box 586.

[87] *New York Times*, August 22, 1927, 16.

[88] Holmes to Laski, September 1, 1927, 2 **Holmes-Laski Letters**, p. 975.

[89] Holmes to FF, September 9, 1927, **Holmes and Frankfurter**, pp. 216–17.

[90] FF to Julian Mack, FF Wiretap Transcript, September 6, 1927, at 5, FF-HLS, Pt. III, Box 215, Folder 7, Reel 38, at 581.

[91] *Daily Worker*, August 23, 1927, 4.

[92] Holmes to Laski, September 1, 1927, 2 **Holmes-Laski Letters**, p. 976.

[93] *New Republic*, September 14, 1927, 83. *See* FF to Mack, FF Wiretap Transcript, September 6, 1927, at 5; Murphy, **The Brandeis/Frankfurter Connection**, p. 81.

[94] Lippmann to Brandeis, August 24, 1927, American Jewish Archives, Harry Barnard Papers, Folder "Brandeis, Louis D. 1921–29."

[95] Louis Marshall to James Weldon Johnson, July 14, 1927, at 2–4, Records of the National Association for the Advancement of Colored People, Branch Files, Pt. I, Box G-76, Folder 11 "Louisville, KY July–Dec. 1927."

[96] Walter White to Marshall, July 19, 1927, *id.*; White to G. P. Hughes, July 19, 1927, *id.*; Louisville Chapter to Johnson, July 27, 1927, *id.*

[97] Docket Book, 1927 Term, Justice Harlan Fiske Stone, *Bard v. Chilton & Fleming v. Chilton*, Nos. 565 & 566 (Cert. Denied, November 21, 1927), Office of the Curator, Supreme Court of the United States. Justice Sutherland was absent that day and did not vote.

[98] *Chicago Defender*, December 3, 1927, 1.

[99] New York *World*, November 26, 1927, NAACP Records, Pt. I, Box G-76, Folder 11 "Louisville, KY July–Dec. 1927."

[100] "The Times and the N.A.A.C.P.," *Louisville Leader*, n.d., NAACP Records, Pt. I, Box G-76, Folder 11 "Louisville, KY July–Dec. 1927" (commenting on "Somewhat Similar," *Louisville Times*, November 22, 1927, *id.*).

The Words Not Chiseled: Unused Inscriptions for the Supreme Court Building

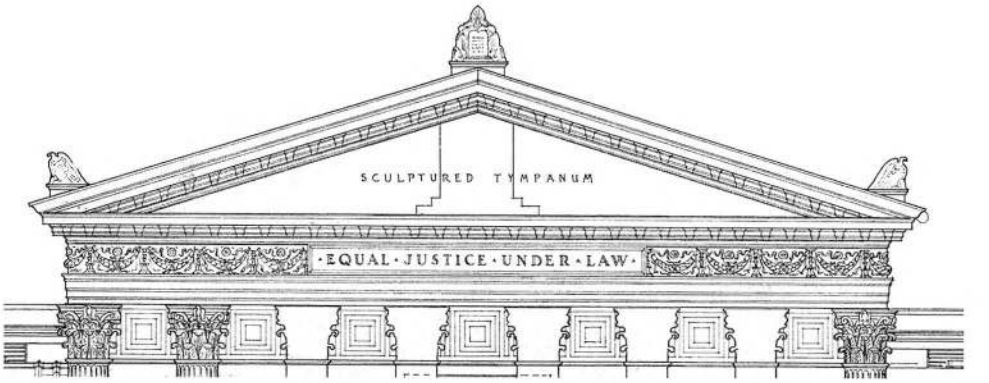
MATTHEW HOFSTEDT

"EQUAL JUSTICE UNDER LAW," the inscription carved above the entrance to the Supreme Court Building, has become an iconic phrase. It is one of only four inscriptions originally carved into the building's marble walls. The others are "JUSTICE THE GUARDIAN OF LIBERTY," found below the East Pediment, and the two dedication panels inside the first floor vestibule.[1] An examination of drawings and archival material relating to the building's design, however, reveals that almost fifty other inscriptions were planned for the building.[2] What follows is the story of the inscriptions and why most were never carved.

The practice of carving inscriptions on important public buildings dates back to antiquity. Words were carved or painted onto buildings for a variety of reasons, most often for dedicatory or memorial purposes. Over time, inscriptions relating to the function of a building were incorporated into architectural designs, often using quotes to inform or inspire the viewer.[3] The Supreme Court Building's neoclassical revival design by architect Cass Gilbert (1859-1934) was influenced by the French Beaux-Arts architectural philosophy, which dominated American architecture following the 1893 World's Columbian Exposition.[4] Among the tenets of this approach was that ornamentation—including inscriptions—should relate to the function of the structure. The use of symbolic sculpture and inscriptions, therefore, formed a part of Gilbert's vision for the Supreme Court Building.[5]

The Main Inscriptions

The two exterior inscriptions mentioned earlier were obviously the most important because of their prominent locations. Gilbert and his drafting team used various placeholders during the early phases of the design process. A February 1929 drawing of the



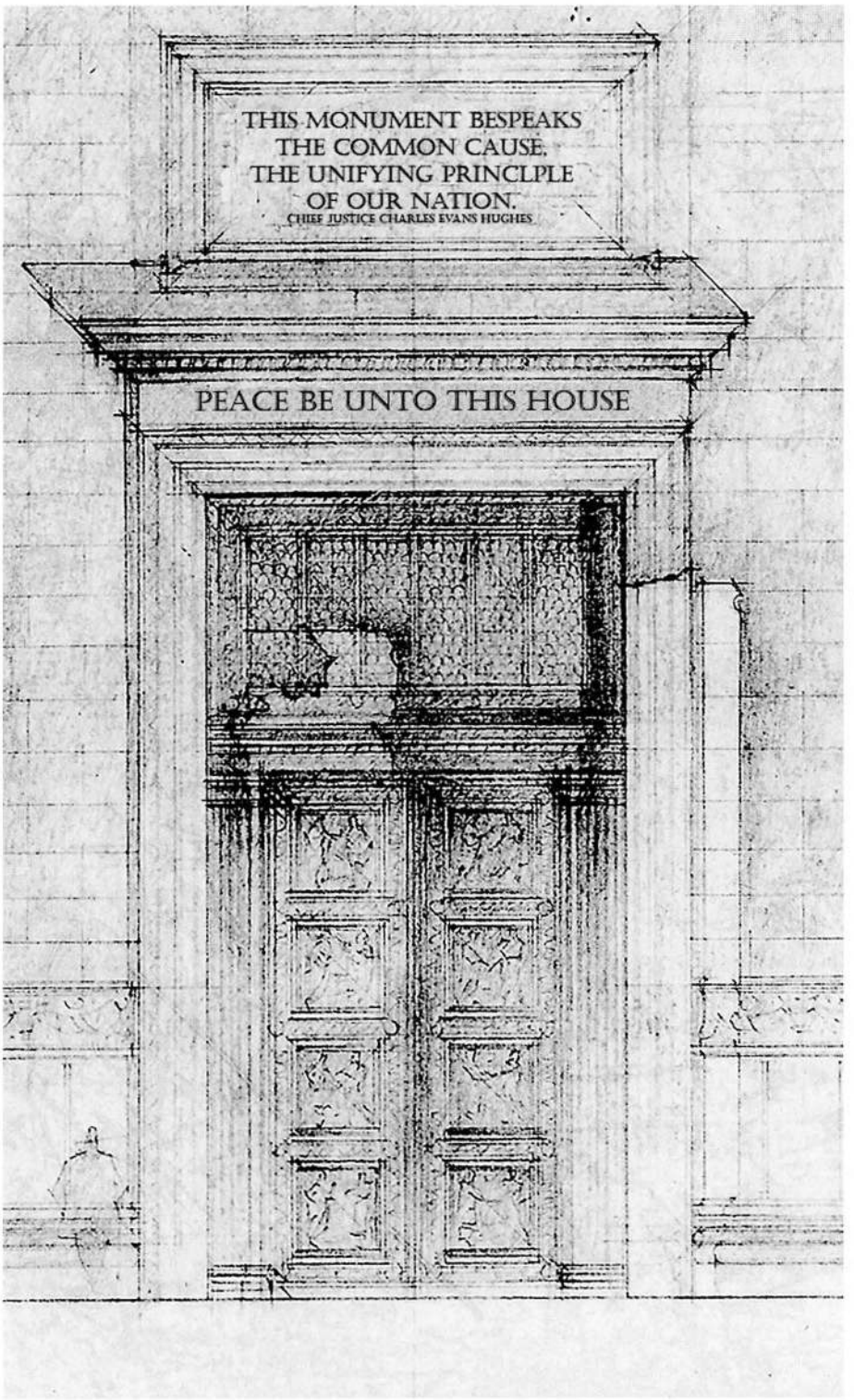
Detail of the West Pediment from Drawing #51, dated July 7, 1931. This is the earliest use of the phrase "Equal Justice Under Law" by Cass Gilbert's firm. The image has been digitally altered for clarity.

proposed building, as well as the original 1929 plaster model of the building, have "LEX ET JUSTITIA" (Law and Justice) in the space below both exterior pediments.[6] A year later, "EQUAL AND EXACT JUSTICE" appeared on a rendering of the West Portico, a phrase taken from Thomas Jefferson's First Inaugural Address.[7] The earliest appearance of the two inscriptions submitted by the architects is found on a drawing dated July 7, 1931.[8]

The phrase "Equal Justice Under Law" has often been attributed to Cass Gilbert, but it is not known if he personally coined the phrase; it may well have been one of the members of his drafting team who first wrote it down. In his 1982 article titled "Slogans to Fit the Occasion," Supreme Court Public Information Officer Barrett McGurn reviewed the history of the phrase "Equal Justice Under Law" and described several failed attempts to determine an exact source for the phrase soon after it appeared on the building.[9] In addition to those searches, some earlier Supreme Court opinions contain approximations too, such as "*equal* and impartial *justice under* the *law*" from *Caldwell v. Texas*, 137 U.S. 692 (1891) (emphasis added). Similar word combinations may also be found in speeches of future Chief Justices, including a 1916 presidential campaign speech by Charles Evans Hughes ("equal and exact Justice for all") and an academic lecture at the University of Rochester by William Howard Taft ("Liberty Under Law").[10] No evidence, however, suggests the Gilbert firm was aware of any of these opinions or speeches, therefore, any connection to the iconic inscription appears to be coincidental.[11]

Regardless of which member of the Gilbert team came up with the wording, recommendations for the main inscriptions were submitted on April 13, 1932, to David Lynn, the Architect of the Capitol.[12] Lynn forwarded them to Chief Justice Charles Evans Hughes, who was also the head of the United States Supreme Court Building Commission. Along the bottom of the letter Hughes wrote a note—now partially erased—that appears to read, "Caution as to [other] inscriptions."[13] Hughes understood that the words chosen for the Supreme Court Building needed to be carefully considered.

The Chief Justice shared the proposed portico inscriptions with Associate Justice Willis Van Devanter, the only other Justice serving on the Building Commission, along with a short handwritten note, "I rather prefer 'JUSTICE THE GUARDIAN OF LIBERTY.'" Van Devanter, never a man of too many words, replied "GOOD."[14] In his biography of Hughes, Merlo J. Pusey suggested that this exchange happened on the



Detail of a Study for the Main Entrance, Sketch #128, by draftsman J. T. Mohn, dated March 17, 1931. The recommended inscriptions have been digitally superimposed by the author.

Bench during a Court session.[15] The note is dated May 16, 1932, a day the Court sat, and it is written on stationery often used by Justices to pass notes to each other on the Bench. No documentation has been found to show that Hughes consulted with any other members of either the Court or the Building Commission.

With Van Devanter's concurrence, Hughes instructed Lynn to proceed with the inscriptions as amended. Lynn's acknowledgement stated, "This will also confirm instructions issued by you at an informal conference on May 21, 1932, that no Latin inscriptions be used in the Supreme Court Building and that all inscriptions be submitted to the U.S. Supreme Court Building Commission for approval."[16] The prohibition on the use of Latin may be what Hughes wanted to caution the architects about, but it may also indicate that Hughes wanted the words carved on the walls of the Supreme Court to be in English so they could be easily understood by the general public.

The Other Inscriptions

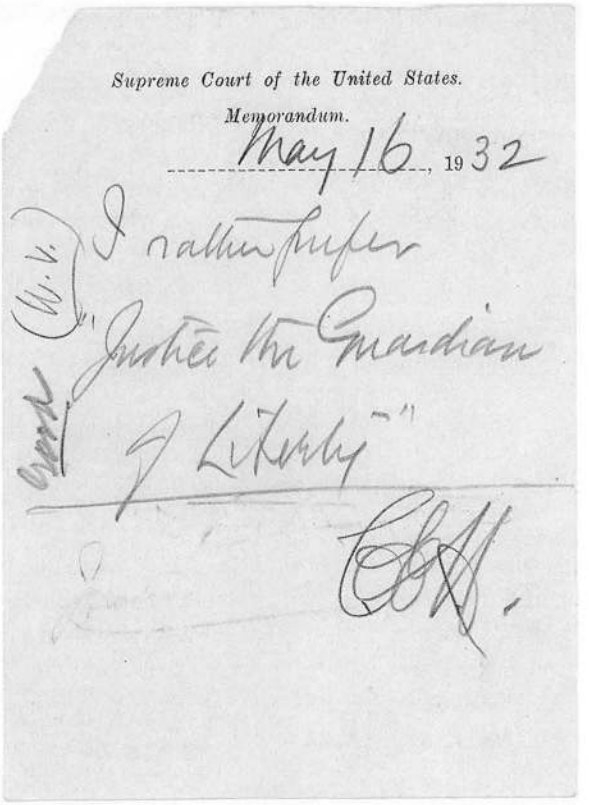
In his 1982 article, Barrett McGurn suggested that at this point Chief Justice Hughes put an end to the consideration of inscriptions, but the conversation about inscriptions continued for several months. The ultimate fate of the rest of the proposed inscriptions was caught up in a combination of several factors: pressure from the general contractor (The George A. Fuller Company) to keep the project moving forward, the need for the Building Commission to consider the inscriptions carefully and approve them, and finally, Hughes's interest in seeking ways to reduce the overall cost of the building.

By the early 1930s, the United States was in the midst of the Great Depression, and the Chief Justice asked the architects to scale back the design in areas that "would not affect the essential features of the building."[17] Cost saving measures included reducing the number of elevators and the amount of marble used in non-public spaces in the building. Omitting the carving of some inscriptions was a relatively easy change, and in June 1932, the exterior ones planned for the "four corners of the wings" and "in Frieze, Cornice, Courtyards 3 and 4" were omitted for a savings estimated at $500 (approximately $8,400 today).[18] Later, a 500-word inscription planned for the east terrace that may have been intended as a memorial tribute to the late Chief Justice William Howard Taft was omitted.[19]

By October, the Fuller Company was pushing to receive the list of approved inscriptions in order to have them carved at the marble shops before they were shipped to the building site. Gilbert, ever the perfectionist, wanted them to be carved in place so the proper scale of the lettering could be ascertained. "In the case of this particular building," he wrote to Lynn, "we consider the inscriptions an important detail of the design, especially in regard to the size and outline of the letters . . ."[20] At a meeting held on November 1, 1932, it was decided to carve the inscriptions in place, and therefore Gilbert continued to have his staff work on suitable inscriptions.

The development of the inscriptions list was apparently tasked to Charles A. Johnson, an MIT-trained architect. By December 12, 1932, he had compiled potential phrases with recommended placement in the building.[21] They included well-known legal maxims (with no attributed source) and quotations from famous judges, lawyers, and politicians. Gilbert almost certainly worked with Johnson in developing the list, and on January 3, 1933, he wrote to the Chief Justice,

> I have been asked to designate definitely several inscriptions on the Supreme Court . . . for example, over the entrance doorway and in the interior of the building and, while I have made certain selections,


Supreme Court of the United States.

Memorandum.

May 16, 1932

W. V. D. I rather prefer "Justice the Guardian of Liberty"

C. E. H.

Chief Justice Charles Evans Hughes shared the proposed portico inscriptions with Associate Justice Willis Van Devanter, the only other Justice serving on the Building Commission, along with this note, which he most likely passed while they were sitting on the Bench in the Courtroom.

> before naming them definitively I should like very much to submit them to you for your own approval.[22]

The two men met at the Chief Justice's residence on January 8, 1933, but this meeting, and several other "informal" conferences that included Justice Van Devanter and David Lynn, did not lead to any definitive determination on the inscriptions.[23]

The delay on approving the proposed inscriptions may be attributed to Hughes's cautious approach, but what exactly were the inscriptions being considered, and did they offer cause for concern? The list that follows is taken from the eight-page memo drafted by Johnson but it has been reorganized by location, then alphabetically. Capitalization and other punctuation from the original list have been maintained. When known, explanatory notes regarding sources follow in brackets, with the full quotation added to provide context where appropriate:

West Portico

Equal Justice under law.

[Phrase created by Cass Gilbert's firm.]

East Portico

Justice the guardian of liberty.

[Phrase created by Chief Justice Charles Evans Hughes, amending one submitted by Cass Gilbert's firm.]

Panel over Main Entrance Door, Main Entrance Portico

This monument bespeaks the common cause, the unifying principle of our nation.

[Charles Evans Hughes, Supreme Court Building Cornerstone-Laying Speech, October 13, 1932.]

Frieze over Entrance Door – Main Entrance Portico

Peace be unto this house.
—Luke

[Gospel of Luke, Chapter 10, Verse 5, "When you enter a house, first say, 'Peace to this house.' If someone who promotes peace is there, your peace will rest on them; if not, it will return to you."]

Top Panel over Entrance Door – Main Entrance Hall

By all means let us be loyal to great ideals.
—Theodore Roosevelt

[Theodore Roosevelt, Lafayette-Marne Day Address, delivered at the Aldermanic Chambers, City Hall, New York, September 6, 1918. "We Americans should abhor all wrongdoing to other nations. We ought always to act fairly and generously by other nations. But we must remember that our first duty is to be loyal and patriotic citizens of our own nation, of America. These two facts should always be in our minds in dealing with any proposal for a League of Nations. By all means let us be loyal to great ideals. But let us remember that unless we show common sense in action, loyalty in speech will amount to considerably less than nothing."]

Side Top Panel over Entrance Door – Main Entrance Hall

In the law there is equity.
—Legal Maxim

[Legal Maxims are general principles that do not come from a single attributable source.]

Justice is truth in action.
—Disraeli

[Benjamin Disraeli, Speech in the House of Commons re: Agricultural Distress, February 11, 1851. "I remember—the interruption of the hon. Gentleman reminds me of the words of a great writer, who said that "Grace was beauty in action." Sir, I say that justice is truth in action."]

Top Panel – Main Entrance Hall

A constitution is framed for ages to come.
—John Marshall

[Chief Justice John Marshall, Opinion in *Cohens v. Virginia*, 19 U.S. 264 (1821). "A Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."]

Be just and fear not.
—Shakespeare

[William Shakespeare, **Henry VIII**, 1623. Wolsey states, "Love thyself last: cherish those hearts that hate thee; / Corruption wins not more than honesty. / Still in thy right hand carry gentle peace, / To silence envious tongues. Be just, and fear not: / Let all the ends thou aim'st at, be thy country's, / Thy God's, and truth's; then if thou fall'st, O Cromwell, / Thou fall'st a blessed martyr!"]

Custom is not prejudicial to truth.
—Legal Maxim

Equity is justice.
—Legal Maxim

Experience by various acts makes law.
—Legal Maxim

Justice is obedience to the written law.
—Cicero

[Cicero, **On the Republic. On the Laws**. Book I. "There is only one justice, which constitutes the bond among humans, and which was established by the one law, which

is right reason in commands and prohibitions. The person who does not know it is unjust, whether the law has been written anywhere or not. And if justice is obedience to the written laws and institutions of a people, and if (as the [Epicureans] say) everything is to be measured by utility, then whoever thinks it will be advantageous to him will neglect the law and will break them if he can. The result is that there's no justice at all if it's not by nature, and the justice set up on the basis of utility is uprooted by that same utility.]

Justice is the idea of God, the ideal of man.
—Theodore Parker

[Theodore Parker, **Ten Sermons of Religion, No. III,** "Of Justice and the Conscience," 1852. "Justice is the idea of God, the ideal of man, the rule of conduct writ in the nature of mankind."]

Justice is the object of government.
—Alexander Hamilton

[Alexander Hamilton, **Federalist Paper, No. 51.** "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit."]

Laws are the very bulwarks of liberty.
—J. G. Holland

[Josiah Gilbert Holland, **Gold-Foil: Hammered from Popular Proverbs,** 1860, under pseudonym Timothy Titcomb. "Laws are the very bulwarks of liberty. They define every man's rights, and stand between and defend individual liberties of all men."]

Law is good if men use it lawfully.
—I Timothy 1:8.

[I Timothy 1:8, King James Version. "But we know that the law is good, if a man use it lawfully."]

Law is the science of what is good and just.
—Legal Maxim

Laws were made for the safety of citizens.
—Legal Maxim

Let right be done though the heavens fall.
—Legal Maxim

Mercy seasons justice.
—Shakespeare

[William Shakespeare, **The Merchant of Venice,** Act IV, Scene I. Portia in a long speech to Shylock, "And earthly power doth then show likest God's / When mercy seasons justice."]

Nothing can prevail against truth.
—Legal Maxim

Right cannot die out.
—Legal Maxim

Temper justice with mercy.
—Milton

[John Milton, **Paradise Lost, Book X,** 1667, Line 77. "Yet I shall temper so Justice with mercy, as may illustrate most Them full satisfy'd, and thee appease."]

The custom of a nation is the law of that nation.
—Legal Maxim

The law is perfection of reason.
—Sir Edward Coke

[William Coke, **Institutes of the Laws of England,** 1628. "For reason is the life of the law; nay the common law itself is nothing else but reason,· · ·The law, which is perfection of reason."]

The laws of nature are unchangeable.
—Legal Maxim

(Handwritten Alternate: Get wisdom, get understanding, forget it not.—Proverbs.)

The people's safety is the law of God.
—James Otis

[Reportedly a title of a pamphlet written by James Otis as noted in a poem written upon his death.]

The reason of law is the soul of law.
—Legal Maxim

The welfare of the people is supreme law.
—Legal Maxim

We are to judge by the laws, not by examples.
—Legal Maxim

What is just and right is the law of laws.
—Hob. 224

[Hobart's English King's Bench Reports, 224. Quoting a legal maxim, "*Aequum et bonum, est lex legume.*"]

Where there is a right there is a remedy.
—Legal Maxim

Panels – Main Entrance Hall

I have considered the first organization of the judicial department as essential to the happiness of our country and the stability of its political future.
—George Washington

[George Washington to Edmund Randolph, September 28, 1789. "Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its political system—hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern."]

If the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.
—John Marshall

[Chief Justice John Marshall, Opinion in *Marbury v. Madison*, 5 U.S. 137 (1803).]

Justice is the great interest of man on earth. It is the ligament which holds civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race.
—Daniel Webster

[Daniel Webster, Speech titled "Mr. Justice Story," September 12, 1845, at a meeting of the Suffolk Bar, in the Circuit Court Room, Boston.]

No free government, or the blessings of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality and virtue; and by a frequent recurrence to fundamental principles.—Patrick Henry [George Mason]

[This quote, the 15th Article of the Virginia Declaration of Rights, has often been misattributed (as it was here) to Patrick Henry but was actually drafted by George Mason in 1776.]

That the United States form for many, and for most important purposes a single nation, has not yet been denied. In war we are one people. In making peace we are one people. In all commercial relations, we are one and the same people.
—John Marshall

[Chief Justice John Marshall, Opinion in *Cohens v. Virginia*, 19 U.S. 264 (1821).]

The constitution and the laws made in pursuance thereof are supreme; that they control the constitution and the laws of the respective states, and cannot be controlled by them.
—John Marshall

[Chief Justice John Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819).]

Frieze over Door to Supreme Court Room

The true administration of justice is the firmest pillar of good government.
—George Washington

[George Washington to Edmund Randolph, September 28, 1789. In 2009, the word "true" was noticed to be incorrect and is written as "due" by Washington. The phrase was used on the 1927 Guy Lowell designed courthouse at Foley Square.]

Frieze – Supreme Court Room

~~I will make justice the line and righteousness the plummet. – Isa. 28:17.~~

[This entry, from Isaiah 28:17, is struck out on memo, possibly by Cass Gilbert.]

Justice is the constant effort to render to every man his due.
—Justinian

[Book I, "Of Justice and Law," **Institutes of Justinian**, part of the **Corpus Juris Civilis**.]

Law is the embodiment of the moral sentiment of the People.
—Gladstone [Blackstone]

[The attribution to Gladstone is probably a typographical error as this quotation is usually attributed to Sir William Blackstone.]

The practice of the judges is the interpreter of the laws.
—Legal Maxim

Thy justice is justice for ever and thy law is the truth.
—Ps. 119: 142

[Psalms 119:142, this version where "justice" is used rather than "righteousness" can be traced to the Douay-Rheims translation of the Bible. The King James Version reads, "Thy righteousness is an everlasting righteousness, and Thy law is the truth."]

Frieze – Entrance Hall – Room 144

(Author's Note: For those familiar with the Court building, this is the first floor hallway leading to what today are referred to as the East and West Conference Rooms.)

Good laws make it easier to do right and harder to do wrong.
—Gladstone

[Attributed to William E. Gladstone, English politician 1809-1898.]

Justice truly preventing is better than severely punishing.
—Legal Maxim

No virtue is so truly great as justice.
—Jos. Addison

[Joseph Addison's **Essays, Moral and Humorous,** "Justice," 1839. "There is no virtue so truly great and godlike as justice."]

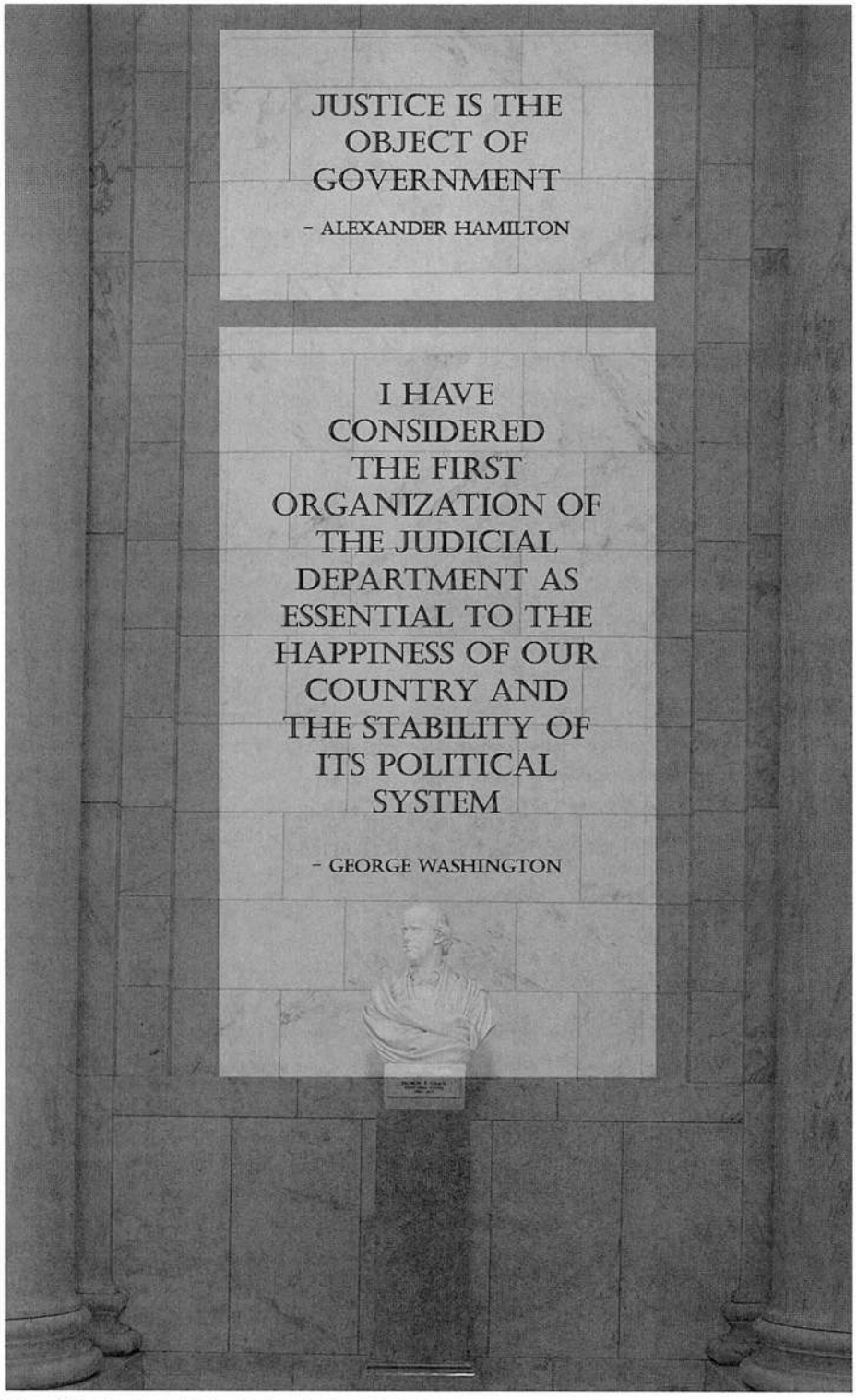
Truth by whomsoever pronounced is from God.
—Legal Maxim

A carbon copy of the December 12 list also has "Wisdom is better than strength – 4:16 Ecclesiastes" written in what appears to be Cass Gilbert's hand, along with two pages from another carbon copy of the same memo organized by location. Some additional quotes that were apparently under consideration include:

"There is no right to strike against the public safety by anyone, at anytime, anywhere."
—Calvin Coolidge

"Not to help justice in her need would be an impiety."
—Plato

"The foundation and the principle of all our actions must be based upon truth and justice."
—Demosthenes



Marble wall in the Great Hall with inscriptions digitally superimposed by the author. There would have been over twenty-five inscriptions throughout the space, significantly altering its character.

"The foundation of justice is good faith."
—Cicero

"Right cannot be where justice is not."
—Cicero

"Justice is the end of law, and law is the work of the ruler, and the ruler is the likeness of God that orders all things."
—Plutarch

"It is in justice that the ordering of society is centered."
—Aristotle

"Let none dream, though at starting he run well, / That he outrunneth justice, e'er he touch / The very goal and gain the bourn of life."
—Euripides

"Law is a covenant and a kind of surety between honorable men, but it has no power to make the population at large upright and honorable."
—Aristotle

"Whoso strict rights bestows alike on citizen and foreigner, nor swerves a hair's breadth from the path of justice, his city prospers and his people flourish."
—Hesiod

"For 'mongst men I see / That justice brings, in time, / all things to light."
—Euripides

The Words Not Chiseled

Chief Justice Hughes's cautious approach to the inscriptions, and the subsequent delay in approving them, suggests there was some debate over what words and messages were appropriate for the walls of the Supreme Court Building. No documents relating to the discussion of this topic have been found, but parallels may be drawn from remarks regarding another feature of the building's ornamentation: the sculptural program. Throughout his correspondence with the sculptors working on the Supreme Court project, Gilbert emphasized that the overarching goal was for them to faithfully carry out his vision for the building's classical design. In other words, the ornamentation should not interfere with the design by seeming out of place or by being overly distracting.

Gilbert captured the nature of this task in a letter he sent to sculptor Robert I. Aitken, who was creating the tympanum sculpture for the West Pediment:

> I expect a masterpiece from you! A composition that will be worthy of the great Supreme Court—stately, serene, calm, well balanced and yet vital and interesting. I don't care very much what the figures mean, I assume of course that they may mean something or convey certain symbolism—but what I do care about is the composition, the design, the arrangement, the balance, the relief of the various planes and the sculpture as sculpture. Who cares a hang whether a figure represents virtue, courage, vice or wisdom as long as it fits its place in the design?[24]

For Gilbert's Supreme Court Building, ornamentation was secondary to the architecture and needed to conform to his sense of the Court's image: stately, dignified and serene, but still interesting. Gilbert was a bit more direct about how he got this result in a letter to David Lynn in regard to the approval of sculptural models,

> We hope that the Commission will be pleased with the designs of the sculptors for they have worked along conservative lines presenting

Inscriptions alone were used along the frieze in the courtroom for the Supreme Court of Appeals of West Virginia (above), but the same space is blank in the Supreme Court of the United States (below), which was also designed by architect Cass Gilbert. The sculptural panels, by Adolph Weinman, provide visual information connecting the room with the history of law.

> subjects that we consider non-controversial and entirely acceptable for such a dignified work.[25]

This language implies that purposeful choices were made to ensure that the sculpture would not be objectionable, and it illuminates how the ornamentation, including inscriptions, was being developed—along non-controversial lines that would not distract from the dignity of the Court.

Returning to the inscriptions, it seems that, for the most part, the list of recommendations conforms to the same general requirements, especially within an early-1930s context. The delays and multiple conferences about the inscriptions, however, suggest those choices may not have been as non-controversial as perhaps Gilbert hoped. While the discussion over inscriptions proceeded, the general contractors continued to pressure for direction so that work could proceed. Anticipating that most, if not all, of the inscriptions would eventually be omitted, Gilbert's pragmatic side led him to recommend on February 28, 1933, that all of the interior marble inscriptions be omitted "for the present." The tone of the letter suggests Gilbert held out hope that the postponement "will give the Commission an opportunity for full consideration of the subject" and any approved inscriptions could still be cut in the future.[26] Subsequently, change orders were issued omitting the remaining interior inscriptions; this helped to reduce the overall cost of the project by an estimated $1,582 (approximately $26,700 today).[27]

Unfortunately, Cass Gilbert would not have further opportunity to raise the question of the inscriptions with the Building Commission. He died in England on May 17, 1934, during his annual trip to Europe. His longtime associate, John R. Rockart, and son, Cass Gilbert, Jr., took over completion of the Supreme Court project, and there is no documentation that either man ever revisited the inscriptions. Without the senior Gilbert's influence, the postponed consideration of the inscriptions was forgotten. Chief Justice Hughes opened the Court's first Term in its new building on October 7, 1935, and four years later, the United States Supreme Court Building Commission was officially disbanded.

The "Present Wordlessness"

Chief Justice Hughes's apparent concern over which inscriptions were chosen left Cass Gilbert with little choice but to move on to complete what would become his last, great project. The result, what McGurn referred to in 1982 as the "present wordlessness" of the building, became the accepted appearance of the Supreme Court Building. Without the additional inscriptions, the building has an uncluttered aesthetic in which architectural lines and spaces are uninterrupted with words; but at the same time it can yield an unfinished feel that one critic called "a cold, abstract, almost anonymous beauty [that] is lacking in that power which comes from a more direct expression of purpose."[28] Adding the inscriptions would have made the building's connections to the law more explicit, but just how would it have impacted one's experience of the building?

While a final decision on the proposed inscriptions by Chief Justice Hughes and the Building Commission may have resulted in a somewhat different list, it is an interesting exercise to imagine how the words would be seen by a visitor moving through the building: a sort of historic "virtual" tour. Starting on the front plaza, the majestic procession Gilbert created would be similar to its appearance today, with EQUAL JUSTICE UNDER LAW still setting the tone for the rest of the building. The imposing tympanum sculpture by Robert I. Aitken, highlighted by *Liberty Enthroned*, and James E. Fraser's legally themed statues would still retain their intended effect, signifying the building as a

place where laws are considered and judgments made. At the top of the staircase, surrounded by the forest of massive columns, the visitor could pause to reflect on the words high above the main entrance: "This monument bespeaks the common cause, the unifying principle of our nation" from Chief Justice Hughes's speech at the building's cornerstone-laying ceremony, and just below, the simple blessing, "Peace Be Unto This House."[29]

In the vestibule, the two dedicatory panels remind visitors that they are in the Supreme Court Building and document who was responsible for its creation, important information because there is nothing on the building's exterior identifying it as the Supreme Court of the United States. Next, the visitor enters the Great Hall. Here the building maintains its authority through its monumentality—a scale that can be overwhelming—but all around would have been quotes and inscriptions that reinforced the themes of law and justice introduced earlier. The walk down the Great Hall towards the Courtroom would have included an almost ritualistic repetition of short quotes about justice, punctuated with longer ones from George Washington, John Marshall, and Daniel Webster, providing a quick civics lesson linking the building to its purpose as a courthouse.

Without the inscriptions, the Great Hall does not fully link the West Portico experience with that of the Courtroom. Wordless, it is a space that could be almost anywhere—a train station, a museum, or perhaps even a post office.[30] The space may also be missing another ornamental element —conceptual sketches of the space show full-length statues in the niches that would have made direct connections to the law.[31] (Since the early 1970s, busts of the former Chief Justices have been placed in these niches and on pedestals and perform this function.) And while the Great Hall may be a missed opportunity in Beaux-Arts ornamentation, the wordless space does succeed architecturally by emphasizing the eventual destination—the Courtroom. The splash of color from the red curtains is perfectly framed at the far end of the space, drawing the visitor's attention to the most important space in the building.

Continuing on the virtual tour leads one to the Courtroom door, where two long quotes would have run down the curving walls to either side, and an apt quotation from George Washington might catch the visitor's eye over the door: "The true administration of justice is the firmest pillar of good government." And once seated in the Courtroom, the visitor would have seen four inscriptions below the frieze panels sculpted by Adolph A. Weinman:

> "Justice is the constant effort to render to every man his due."
>
> "Law is the embodiment of the moral sentiment of the People."
>
> "The practice of the judges is the interpreter of the laws."
>
> "Thy justice is justice for ever and thy law is the truth."[32]

The lack of inscriptions in the Courtroom is not as significant an omission as it is in the Great Hall; the room still succeeds as the impressive, Roman-inspired courtroom it is designed to be. The Bench and other furnishings along with the sculptural panels by Adolph Weinman high above the room provide the visual information that indicates this is clearly a court of law. For comparison, inscriptions alone were used in the courtroom for the Supreme Court of Appeals of West Virginia, also designed by Gilbert. The spaces are very similar, but the additional story to accommodate Weinman's panels, with their procession of great lawgivers and allegories of law and justice, provides a more compelling connection to the law than the words alone.[33]

In summary, there is little doubt that the quotations considered for the building would have helped the architecture "speak" about law, justice, and the role of the Supreme Court. And had Cass Gilbert lived, he may well have convinced Chief Justice Hughes and the Building Commission to approve a set of inscriptions for the building. The Supreme Court, however, is a place where words and their meanings are debated and not necessarily carved in stone. The wordlessness, therefore, may have been a fortuitous accident because it left one simple yet powerful message: "Equal Justice Under Law."

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ENDNOTES

[1] The dedication panels list construction dates and people associated with the building's creation. A wall installed on the ground floor in the mid-1980s with quotes from landmark Supreme Court cases is not included for the purposes of this article because it was added fifty years after the building was opened.

[2] List of Proposed Inscriptions, Cass Gilbert Collection, Box 1, Folder 1, Office of the Curator, Supreme Court of the United States. Placeholder inscriptions are found on several drawings.

[3] In an essay on the work of English architect Owen Jones, Carol Flores narrowed the use of inscriptions to three useful categories: informative, aesthetic, and emblematic. Carol Flores, "Engaging the Mind's Eye," *Journal of the Society of Architectural Historians*, 60 (No. 2, June 2001) 158-179.

[4] *See* Paul Spencer Byard, "Representing American Justice: The United States Supreme Court," Chapter 19, **Cass Gilbert: Life and Work** (2001), pp. 272-287, for more on Gilbert's design and the Beaux-Arts influence. Other chapters in this book offer insights into Gilbert's work and its significance.

[5] Gilbert incorporated over fifty inscriptions in his first major commission, the Minnesota State Capitol (1905), and they appear in many of his other buildings.

[6] Preliminary Drawing for Supreme Court Building, Cass Gilbert, Architect, drawn by John T. Cronin, February 20, 1929, Cass Gilbert Collection, Office of the Curator, Supreme Court of the United States.

[7] Cass Gilbert Collection, PR21, New-York Historical Society, 1930 drawing of West Elevation, Acc. 87.17.07. Jefferson's inaugural address reads, "Equal and exact justice to all men, of whatever state or persuasion, religious or political . . ."

[8] Supreme Court Drawings #51 dated July 7, 1931. Copies are located in the Architect of the Capitol Records Management Office, Supreme Court Drawing Collection, and the Cass Gilbert Collection, New-York Historical Society, PR21, Rolled Drawings.

[9] Barrett McGurn, "Slogans to Fit the Occasion," 1982 *Yearbook* (antecedent of *Journal of Supreme Court History*), pp. 104-108. McGurn may have confused the two Gilberts in his article because he stated Cass Gilbert, Jr. (the architect's son) and John R. Rockart were the source of the inscription, which is incorrect.

[10] Charles Evans Hughes, campaign speech at Fisk University, 1916, The Appeal (Saint Paul, MN), Volume 32, No. 45, p. 2, November 4, 1916; William Howard Taft, "Liberty Under Law: An Interpretation of the Principles of our Constitutional Government," Yale University Press, New Haven, 1922.

[11] Chief Justice Melville W. Fuller wrote, " . . . but no state can deprive particular persons or classes of persons of equal and impartial justice under the law." Elizabeth Cabraser. "The Essentials of Democratic Mass Litigation," *Columbia Journal of Law & Social Problems*, 45, pp. 499-500 (2012).

[12] Cass Gilbert Collection, PR 21, New-York Historical Society, Series I, Subseries II, Bound Volume 260, pp. 74-75.

[13] Letter from David Lynn to Chief Justice Hughes, May 2, 1932, Supreme Court Building Collection, Box 10, Folder 1, Office of the Curator, Supreme Court of the United States. Hughes's daughter, Elizabeth, presented her father's file on the phrase "Equal Justice Under Law," which contained this memo to the Court's Marshal in 1950.

[14] Original Note from Chief Justice Hughes to Justice Willis Van Devanter, Supreme Court Building Collection, Box 10, Folder 1, Office of the Curator, Supreme Court of the United States.

[15] Merlo J. Pusey, *Charles Evans Hughes*, (Columbia University Press, 1963), Vol. II, p. 689.

[16] Copy of Memoranda, May 10, 1932, and May 23, 1932, between Chief Justice Hughes and David Lynn, Research File, "Inscriptions," Office of the Curator, Supreme Court of the United States.

[17] Phrase used in various memos and reports, Supreme Court Building Collection, Office of the Curator, Supreme Court of the United States.

[18] Copy of memo in Cass Gilbert Collection #214, Series 7, Box 74, Archives Center, National Museum of American History.

[19] No proposed inscriptions for these locations have been located, but a photograph of Sketch #115 shows a study for the East Elevation and the placeholder inscription mentions Taft along with a profile medallion. Accession Number 2001.24.8.14, Office of the Curator, Supreme Court of the United States.

[20] Cass Gilbert to David Lynn, October 28, 1932. Cass Gilbert Collection, PR 21, New-York Historical Society, Series I Project Files U.S. Supreme Court, Box 459 Reports, Folder 6, Reports Nov to Dec 1932.

[21] Cass Gilbert Collection, Box 1, Folder 1, Office of the Curator, Supreme Court of the United States. To date, no earlier drafts of the inscription list have been discovered. The list is initialed CAJ and Johnson is the only known Gilbert employee with those initials. Johnson had joined Gilbert's firm around 1914 but left in 1922 to open an architectural office in Peekskill, NY, with Frederick G. Stickel, a designer who also worked for Gilbert. The firm was short-lived and both returned to Gilbert's office by the late 1920s only to depart again in the early 1930s.

[22] Cass Gilbert Collection, PR 21, New-York Historical Society, Series I, Subseries II, Bound Volume, Letter Press, Dec. 26, 1932 to May 8, 1933, Letter from Gilbert to Hughes, January 3, 1933, p. 24.

[23] Cass Gilbert Calendar, PR 21, New-York Historical Society, Series I, Subseries VI, Calendars, Box 608, Folder 1.

[24] Gilbert to Aitken, July 19, 1932, as transcribed by Cass Gilbert, Jr., May 27, 1936, Supreme Court Building Collection, Box 10, Folder 1, Office of the Curator, Supreme Court of the United States.

[25] Cass Gilbert Collection, PR 21, New-York Historical Society, Series I, Subseries II, Bound Volume, Letter Press, Dec. 26, 1932 to May 8, 1933, Letter from Gilbert to Lynn, February 8, 1933, p. 230.

[26] Copy of Memoranda from Cass Gilbert to David Lynn, February 28, 1933. Archives Center, National Museum of American History, Cass Gilbert Collection #214, Series 7, Box 74.

[27] Cost savings estimate from memo, Cass Gilbert Collection, PR 21, New-York Historical Society, Box 447, Correspondence–David Lynn, January 1933.

[28] Washington City and Capital, Federal Writers' Project, Works Progress Administration, American Guide Series, Washington, 1937, G.P.O., Washington, DC, "United States Supreme Court" pp. 249-262.

[29] Since 2010, visitors have been unable to enter the building by the main staircase for security purposes, but may still depart the building through the doors and experience the architectural procession.

[30] See the main lobby of the Washington City Post Office (1914), now the National Postal Museum.

[31] Cass Gilbert Collection, PR 21, New-York Historical Society,

[32] "Boni Judicis Est Ampliare Jurisdictionem (Good Justice Is Broad Justice)" is seen on "Perspective Drawing of Courtroom" by J. Floyd Yewell, undated, Cass Gilbert Collection, Office of the Curator, Supreme Court of the United States.

[33] There is no evidence that Weinman's designs were meant to accompany any specific inscriptions. Papers of Adolph Weinman, Archives of American Art, copies in Office of the Curator, Supreme Court of the United States.

Chief Justice Taft and Henry Pringle: How Pringle Came to Write *The Life and Times of William Howard Taft* (1939)

JONATHAN LURIE

At the outset of this story, a famous quote from Robert Burns comes to mind:

> "The best laid schemes of mice and men gang aft a-gley;
>
> An lea'e us nought but grief and pain for promis'd joy."

I.

When he relinquished the presidency early in March 1913, William Howard Taft probably gave little thought to writing some sort of memoir.[1] By nature not an introspective man, had he considered such an option, he would have had to confront the fact that his presidency had been a source of much stress and unpleasant turmoil, culminating in the worst defeat suffered thus far by an incumbent. Not without reason had his good friend and confident Gus Karger allegedly referred to him as America's "best liked and best licked" chief executive. Moreover, although Taft was a formidable correspondent and preserved nearly everything he wrote, it was not with the intention of writing an account of his own career, one of remarkable scope. Rather, he saved and documented material about his life experiences so that someone else could write a suitable biography. Taft had already decided just who that individual would be. Only one who knew Taft as few had known him could describe him in such terms as had Gus Karger.

Indeed, Karger and Taft were friends of long standing. A German-Jewish immigrant, for almost twenty-five years Gustav Karger had been the Washington correspondent for the Cincinnati *Times-Star*, one of the major Midwest newspapers and owned by Charles P. Taft, Will's oldest brother. Apparently quite

popular among Washington reporters, Gus had been elected and re-elected president of the National Press Club during World War I. Especially in the Wilson era (1913-1921), Karger and Taft exchanged frequent and candid commentary on political issues of the day.[2] As will be seen, Taft never intended that the Taft-Karger correspondence would be published; nor has it. Rather, he assumed that Karger would distill the gist of their communications into some sort of biography, to be written at a later date. By 1924, more than a thousand letters, telegrams, and other materials had been accumulated by Karger.[3]

Late in October, Karger informed Taft that he would have to undergo surgery for gallstones.[4] Two days later, Taft replied with some comments that in retrospect seem both prescient and poignant. "The truth is, Gus," Taft observed, "that you are getting to a time in life when you ought to observe precaution." Offering himself as a case in point, he added that

> you have a better chance than I because you are not so old as I. When I think of the traveling that I did all over this country between 1914 and 1921, I wonder that I lasted long enough to be where I am, and that I survived, without marked evidence of deterioration, three very hard years in this Court. Be warned by my example.[5]

But Taft's warning came too late. Barely two weeks later, he informed his son Robert that "Gus Karger's life is ebbing out. He has made a great struggle for a week, but he has had to succumb."[6] Apparently, much more than gallstones had affected him. Karger's imminent passing "makes me sad, very sad. I don't know anybody outside of the family who has been more faithful to Charley and to me than Gus has been . . . He is just now at the summit of his powers, with long experience, and it is a sad thing to have him taken at this time . . ." On November 18, Gus Karger died. Taft was one of the pallbearers. But he retained more than just fond memories of his loyal confidante. There remained the matter of his correspondence with Karger, and what was to be done with the extensive collection of letters between them.

For the moment, Taft put the matter of any biography aside. In truth, "many of my friends are gone, and I have reached a time of life when I must expect it . . . I shall miss him much. He was constant whenever I needed anything in which he could help, and . . . was with me at times when it was a great strain, full of sympathy and loyalty. I shall greatly mourn him."[7] Writing to his son Robert about two months after Karger's death, Taft recalled that "I had counted on him as in a way my literary executor, and that adds to the grief I had over his death." As to the letters and what was to become of them, he added that "there is a good deal of impromptu criticism of individuals which would make publication of the letters most inadvisable. I write you this just to keep you aware of the situation, because among you, some one—perhaps Helen [Taft's second child]—could add a little to history after I am gone."[8] That Taft was troubled by the "situation" is clear from a later letter to Helen.

He reiterated his earlier point that "I had no present purpose in writing any Memoirs . . . unless I live a great deal longer than I think I shall." His work on the Court "would preclude my doing anything of that kind now." Yet Taft and Karger had exchanged candid assessments of men and events of still recent memory. "All I hope to do is to withhold publication . . . for a very long time."[9] But "now I have a complication in the matter which troubles me." Apparently, Alfred Karger "has literary ambitions and is doing some writing for the *Times Star*." He and his mother had visited with Charles Taft, the Chief's youngest son and then a Cincinnati attorney. Alfred had informed him that "he thought the letters were worth $100,000." Charley had in turn alerted his father.

When Gus Karger died in November 1924, William Howard Taft (pictured outside the funeral home) served as a pallbearer for his close friend and loyal confidante. "There is a good deal of impromptu criticism of individuals which would make publication of the letters most inadvisable," said Taft about whether to publish his extensive correspondence with Karger, who had been the Washington correspondent for the Cincinnati *Times-Star.*

The Chief Justice suspected that when Mrs. Karger had all the letters copied, "for she is copying them," she proposes "to come to me . . . with respect to the matter."[10]

Meanwhile, Taft harkened back yet again to the fact that "I would have been glad to have Gus act as my biographer." He hoped and assumed that he might outlive me[,] and was such a good writer that he could easily have constructed a readable "and presentable volume." But that was then, and now his death had intervened. "Now that he is gone, there would be great difficulty in piecing together the letters they have, and indeed they only cover the time of my correspondence with Gus while I was in New Haven between 1913 and 1921. From Taft's perspective, "they are letters probably that ought not to be published at all, because they are merely comments on current events, written in the haste of dictation in answer to letters written in the same way."[11]

Under such circumstances, one's judgment "is not considered and is apt to be most superficial." His letters might have been useful to Karger, but "they are not contemporaneous with any of the events which ought to figure prominently in [any] memoirs of mine." What most troubled Taft "is the strictures that I may have yielded to in dealing with men than active in affairs which the ordinary publisher of sensational tendencies would regard as valuable for exploitation, a subject matter which I would most anxiously wish to suppress."[12] Having examined and quoted from a number of these letters, located in the Cincinnati Historical Society, this author can readily understand Taft's concern about their future publication.[13] He, more than Karger, appears to have

been both blunt and candid, especially in his comments concerning Louis Brandeis's nomination to the Supreme Court (1916) as well as Woodrow Wilson, Henry Cabot Lodge and the Senate rejection of the Versailles Treaty (1919-1920).

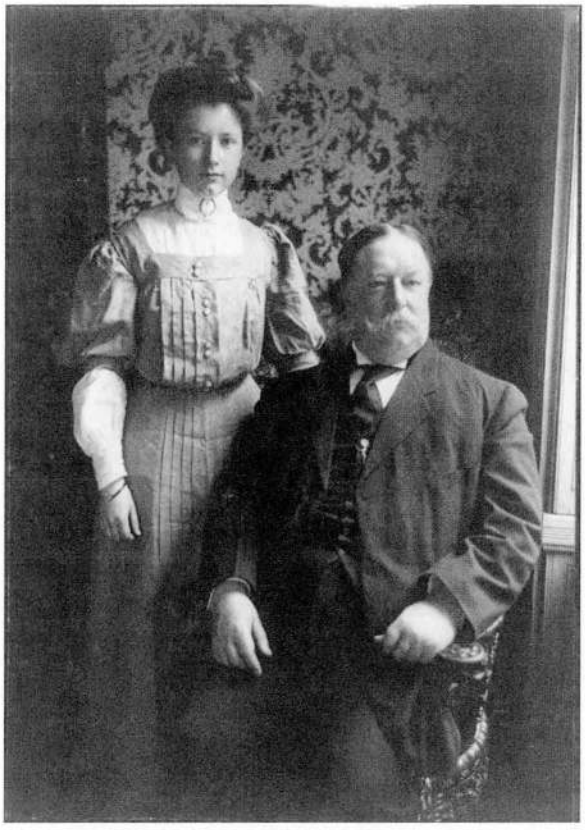
The matter of what to do with the "Gus and Will" correspondence apparently remained unresolved during the final years of Taft's life. Approximately two months after he died, his oldest son Robert recalled that "after Gus Karger's death my father was very much upset by hearing that Mrs. Karger and [her son] were discussing the sale of his letters." As Chief Justice, Taft "had several interviews with Mrs. Karger and told her that he would file suit if she attempted to publish the letters. He made some offer to her, the exact amount of which I do not know."[14] The spectacle of the widow of his close associate defending herself in a lawsuit filed by the Chief Justice of the United States probably did not appeal to Mrs. Karger, who took no further action until after Taft's death.

On May 17, 1930, Robert Taft received a "personal and private" letter from David Lawrence, a well-known editor and columnist and probably best remembered today as the founder of *U.S. News and World Reports*. He informed Taft that Mrs. Gus Karger had "telephoned me, and asked me whether I would be interested in syndicating some material she had, namely, letters written by your father" to her late husband.[15] She further stated that "it was Mr. Taft's understanding with Mr. Karger that the letters would be published after death." Mrs. Karger did not indicate whose death was significant in this matter. But it made no difference to Robert Taft.

He replied to Lawrence that "the letters were not intended to be published either before or after his [father's] death, and I do not see that his death makes any difference in the legal situation." Although Taft had not yet seen the letters, he did not think that they would be very valuable "except insofar as they might contain opinions of living men, which the family would not care to have published." Indeed, he added. "I am afraid that the only matter which would give value to these particular letters is the very matter which we do not care to have published." Finally, Taft informed Lawrence that "we are naturally contemplating the preparation of a biography," and "almost anyone we selected would object to any general publication of letters prior to the preparation of the biography, and prior to his having the chance of going over everything." Thus, "I am inclined to think, therefore that we would not care to have any letters published."

Mrs. Karger had also contacted an employee in the Washington office of the *Chicago Daily News,* Leroy Vernon, who proposed that he undertake to have the entire correspondence copied. Upon completion, he observed to Taft, "I am to take a copy to you to discover what you and your family would consent to have used at this time. Thereafter, I am to go to the *Daily News* and find out what the residue is worth for purposes of possible publication."[16] Taft acquiesced only in the copying, which was completed by October, 1930.[17] Vernon gave Robert Taft a set of the letters, of which he had heard but never seen. He hoped to work out "an amicable agreement whereby the Taft family, the Kargers and the *Daily News* should all be satisfied before anything was do." By the end of July 1931, the younger Taft had read them and now considered the Karger-Vernon proposal that after "some editing on our part," the material would be "published as a syndicated serial . . . with the proceeds to be "divided between the *News* and Mrs. Karger, "and that the original letters be delivered to us."[18] Robert Taft rejected the proposition.

He explained to Vernon that "the opinions expressed both on people and affairs, are casual and not intended to be a considered conclusion." Certainly his father never intended that they be published. "He was writing to an intimate friend, and



Less than a month after William Howard Taft's death, his daughter Helen Manning (pictured with her father) received a proposal from historian Allan Nevins to commission a short biography of the late Chief Justice. A historian teaching at Bryn Mawr College, Manning undertook the initial screening of possible candidates while her brothers, Charles and Robert, were busy with their legal practices.

expressing his views from day to day, without the slightest intention or belief that they would ever reach the eyes of the public." He had assumed that Karger would write his biography." and of course "the letters would have been of some assistance to him in doing so, but, knowing Gus as he did, it never would have occurred to him to suppose that Gus would publish the letters."[19] Yet there was an additional reason for Robert Taft's decision.

"The letters reflect very seriously on many persons who are still living and on others who have died but whose immediate families are still living. The publication of this kind of matter would create a very bad feeling, which is entirely unnecessary."[20] It can be argued, he added, that "by editing we can remove all of the objectionable matter. I believe that we would want to cut out the very things which are most interesting and valuable from a publicity standpoint, and I am sure that our action would not meet with the approval of the publisher." Indeed, "by the time we cut out the things which we would want to be cut out, I feel that the remainder would probably satisfy neither yourselves nor ourselves."[21] There, apparently, the Karger saga ended, but even as Robert Taft had worked his way towards a decision concerning the letters, the three Taft children plus Helen's husband, Fred Manning, were engaged in identifying a possible biographer of their father's life. This task was not without its difficulties.

II.

Less than a month after William Howard Taft's death, his daughter Helen Manning

received a letter from Allan Nevins, already ensconced in the History Department at Columbia University. Nevins proposed that his series, "American Political Leaders," include a short biography of the late Chief Justice. Of the three Taft children, only Helen as well as her husband, Fred Manning, can be said to have been academics. Holding a doctorate in history from Yale, in 1930 Helen was in the midst of a lengthy career at Bryn Mawr, where she was then acting president. Her husband Fred was a member of the History Department at nearby Swarthmore College. With Charles and Robert busily engaged in legal practice, of necessity Helen —joined by Fred—undertook the initial screening of possible candidates.

Thus, within a week of receiving the letter from Nevins, Helen responded that the only question that arose concerned "whether it is wise to have such a brief volume prepared before we have made our plans for a much longer biography which may be regarded as the authoritative treatment of the subject." She added further that "the amount of material on the life of my father is so great that it might be difficult for anyone wishing to prepare a short volume to make a satisfactory selection."[22] It soon became clear that Nevins might be more helpful in suggesting other possible biographers rather than producing such a work himself. But before this could happen, Charles Taft received a letter from an individual who—although no one knew it in 1930—would ultimately write the lengthy biography envisioned by Taft's children. The letter to Charles, vacationing in Europe at the time, was forwarded to Robert. It came from one Henry F. Pringle. A veteran of WWI and a graduate of Cornell University, by 1930 Pringle had established himself in New York as a semi-muckraking journalist. He had come to the attention of the Theodore Roosevelt family, who invited Pringle to write a biography of the "Rough Rider," with unlimited access to the Roosevelt papers in the Library of Congress up to 1909. This project was in its final stages in 1930, and it was this subject, not any proposal concerning a book on Taft, that had prompted his letter to Charles. Since 1928, he wrote, "I have been at work on a biography of [TR] and naturally an important part of the story is the break with your father in 1912. Let me assure you that the book is to be strictly impartial and that my chief purpose is to get at facts."[23]

With intriguing understatement, Pringle added that

> it seems to me that there may be in your possession certain letters which would throw light on those troubled days....In all probability you intend on getting out a collection of the letters, and I do not want to infringe on that. It did occur to me, however, that the papers your father left might include one or two letters which would make his position more clear."

Two days later, Robert Taft replied to Pringle with a dismissive note of barely two sentences.

> We are making some arrangement for the preparation of a biography of my father...and I rather doubt if we would wish to interfere with this work in any way by the publication of other letters. I think you will find in the newspapers of the time a good many statements which probably would answer your purpose.[24]

Pringle would, however, not be deterred. "I do not want to seem importunate," he replied, "and I certainly have no intention of intruding on your own preparations with respect to the biography that you are to have written." However, "may I point out that Roosevelt's story has been fully told and that of your father not at all... The fact was that your father, being president, could not reply to the accusations made by Roosevelt who

was in private life, and therefore his side of the story was hardly told at all."[25] Pringle added that he wished to examine several letters between Taft and TR relevant to their rupture of relations that was to come. If Robert Taft so desired, "I shall refrain from quoting from any of them." His purpose was to gain "historical accuracy" as well as "justice to your father."[26] Taft immediately wrote not to Pringle but to Charles Hilles, President Taft's former secretary. "I thought perhaps you could tell me whether you know anything about Mr. Pringle and what [h]is book on Roosevelt is likely to be."[27]

Meanwhile, Helen and Fred Manning sought to identify a suitable biographer. Early in January 1931, Helen wrote to her older brother that "we have . . . gathered a good deal of information but none of it I fear [is] very encouraging." Her attention had been called by Robert Hutchins—president of the University of Chicago—to an associate professor at the University of Illinois. James G. Randall "wrote a book called **Constitutional Problems under Lincoln.** It seems to me a very dull book and to indicate the type of mind which would make a dull biographer."[28] Less than a week later, Fred dispatched a lengthy letter to his brother-in-law.

He informed Taft that he had canvassed various candidates discussed over the summer, and two difficulties had become very clear. In the first place, all of them "find the matter of living for a considerable time in Washington formidable, as of course any one tied up in academic life must." Of greater importance was the fact that "there is no one of them who really appeals to us, either from his recommendations or from his books. Some know law and no history; some the other way around; none of them ever knew your father; most of them write damned stodgy prose."[29]

Of the two possible candidates positively recommended to the Mannings, one would be tied up for the next two to five years; the other one was, again, James G, Randall, who, it turns out, went on to a very distinguished career as an American historian.

> Randall knows that he has been suggested . . . but to us he appears to be a very dull person, as you can tell for yourself if you push very far into his book on constitutional [problems] under Lincoln. The book was written to be a thesis, and Helen and I, God knows, have every reason to be charitable about Ph.D. productions. But if he hasn't a dull mind as well as a dull style, all indications fail.[30]

Other possibilities mentioned to Robert Taft included Samuel Elliot Morrison—"distrusted by Helen"; Howard McBain—"highly distrusted by me"; James Truslow Adams —"who probably wouldn't do it anyway"; and Avery O. Craven, who, like Randall, would go on to become a highly respected scholar on the Civil War era.

About a year after he had first contacted Robert Taft, Henry Pringle wrote to him once again in June, 1931. Since his original letter, Pringle had been granted permission by the Roosevelt Estate to view and to "quote from his papers through March, 1909. Having been able to obtain copies of several letters from Taft to TR written in 1910, he wanted "to make as emphatic a plea as I can that you will let me use the letters." In his opinion, the break between the two men "was based on personalities and not on issues." It became important therefore, that relevant evidence concerning Taft's career as President be made available." I ask you very earnestly, therefore, that you permit its quotation in full and not ask me to paraphrase it in any way."[31] He further informed Taft that Harcourt, Brace & Company would be publishing his book in the fall of 1931. This time, Taft acquiesced.[32]

Meanwhile, the quest to identify a suitable biographer continued. For a time, it seemed that James Truslow Adams and Samuel Elliot Morrison were the front-runners. Helen

Manning wrote of Morrison that he "is the only other historian I know of who could be trusted completely to make the biography good reading." Further, "Fred thinks that Morrison is much more accurate in his work, and has a better background in recent American history." Yet Helen believed that "as a character he is distinctly unsympathetic with a very large slice of cold roast Boston and that if there were any difference of opinion as to how the biography should be written, we would not find him very amenable to criticism."[33]

On April 18, Helen and Robert wrote to each other. Their letters apparently crossed, and neither appears to have been aware of what the other wrote. "I am afraid," Helen observed, "that Adams is out." I "think the difficulty is [sic] with Adams that most of his ideas on the subject of present day conditions are not very sound. I don't mean by that that he is radical; I think the difficulty rather is that he tends to be somewhat lyrical."[34] Presumably, Manning meant that Adams seemed more inclined to emphasize style rather than substance. It is interesting to note that independently Robert came to the same conclusion.

Robert concluded that "I rather doubt if he [Adams] is the man we want. I do not see how his attitude could be very sympathetic, and he also is a painter of the impressionistic school. I do not think that kind of a life can do justice to Papa, because I think it will require a much more detailed examination and setting forth of letters, conversations, and minor situations."[35] Robert added that his wife, Martha, "has just finished Pringle's **Life of Roosevelt,** and on the whole she is quite favorably impressed." Taft had not yet read it, "but I think it is more the kind of writing that would be desirable . . . Do you know anything about him?[36] By the summer of 1932, the Taft family had become well aware of him, in part because, shortly after this letter, he received the Pulitzer Prize for his study of TR.

Before the Taft children learned much more about Pringle, Fred Manning had spent a week examining the Taft papers housed, as they still are, in the Library of Congress. On August 10, he sent a long letter to Robert outlining his concerns that a biographer might encounter in their use. Noting the well-known "Life and Times" approach, he cautioned that "few biographers can resist writing out their own theory of the Times to bring out the Life."[37] Moreover, "any biographer of your father will be unusually tempted into historical digression," all the more as the several facets of Taft's career "seem to call for so much explanation." In such a work once completed, and checked with the sources in our collections,

> there will be pitifully little space left for your father and his personality. But . . . is there anything more important for us to give the public than a volume which will present an accurate picture of that personality, as we know it? I am sure that no one who knew TR well, whose picture was as vivid as that which Pringle conveys, and who knew your father, ever felt that historical documents were necessary to explain the break.

Manning, on examining the letters in the Taft Papers, stated that "anyone who can write well and who has a flair for presenting a personality, could give us a good book. I suspect that a good journalist with historical leanings might do a much better job than any historian I know."

Fred Manning was referring, indirectly, to Pringle. In due course, he stated that "I find the Pringle **Roosevelt** far better than I had anticipated . . . [I]t is good reading, and it seems to me really to give the sort of picture of a personality that I have had in mind for our own problem. Shall we look him up?" To be sure, at this point one could not be certain that Pringle's personality would lead to an acceptable working relationship with the Taft family. "But the only historian proper for whom I have much respect, Sam Morrison, has (for most people) as unpleasant

a personality as they make them." Be that as it may, "we would be delighted to write to Pringle, or look him up in New York." Manning concluded his extended letter with a sort of P.S. "It turns out that Pringle is an intimate friend of one of my closest western friends and it would be very easy for me to get in touch informally."[38]

Apparently Manning did so, and Helen picks up the story in a hand-written letter to Robert late in January 1933. Pringle and Manning met in New York, and the author of the Roosevelt biography "is very much interested in the [Taft] biography." Moreover, "he could probably make the arrangements to finance it himself."[39] Further, Pringle "would want a free hand, of course, in what he would say." On the other hand, "I imagine that he would be willing to have us make whatever reservations we wanted to with regard to the papers." Of some importance to Helen, "Fred was very favorably impressed with Pringle. I think myself [that] he would write a more interesting biography than any one else we have discussed. Whether we should feel it was completely fair and fully enough informed on the legal side is another matter."[40]

Robert informed Helen that his younger brother had also met Pringle, "getting the same generally favorable impression which Fred got." However, "I still feel somewhat doubtful about Pringle, because he seems to be a bit flippant, and I do not feel entirely certain that he would be thorough." On the other hand, his reporting experience makes him "an excellent man in the gathering of material from people who knew Papa or corresponded with him," and such material "might be entirely lost unless action is taken fairly promptly."[41] Barely a week later, the Taft children heard from their uncle, Henry W. Taft, the late Chief Justice's younger brother and the Taft named in the Wall Street law firm of Cadwalader, Wickersham, and Taft. He had serious reservations about Pringle.

Henry wrote to his nephew Charley that "the journalistic style is the thing I am inclined to steer away from; indeed, I am inclined to think that the book I have in mind might be more or less dull reading . . . "[42] The biography of his brother "should be more of a history of achievement than a picture of personality." The Pringle approach "is rather foreign to what I had in mind, but undoubtedly there would be produced a popular book."[43] On February 27, Henry expanded on his point in a five-page letter to Robert Taft, amplifying his concerns. He had finished Pringle's **Life of Roosevelt,** and commented on its "distinctly journalistic style."

"I am bound to say," Henry Taft noted, "that that style is one in which Roosevelt himself frequently indulged, and it is not unnatural for a biographer in painting the picture to use the same kind of brush work." But "such a style in a serious biography of your father, would be inappropriate and would produce an atmosphere in which both his personal character and his achievements in public life, . . . would be pushed into the background."[44] In truth, "Roosevelt was a super politician; he loved political intrigues and triumphs." But "these things your father disliked." In his case, "they should be subordinated to the important facts of his character and accomplishments," and, more seriously, the late president's brother doubted Pringle's ability to undertake such a task.[45]

After identifying a number of mistakes in Pringle's book, Taft added that "Pringle has not the kind of a historical method that ought to be adopted in writing a biography of your father. I think, he conceded, that "he might make a very interesting book, and that it would sell far better than the kind I would like to have written." Henry Taft desired an author who could deal "with the numerous matters in which your father was active." Of course, literary skill would be desirable.

> If one author can be found who would combine that quality with a

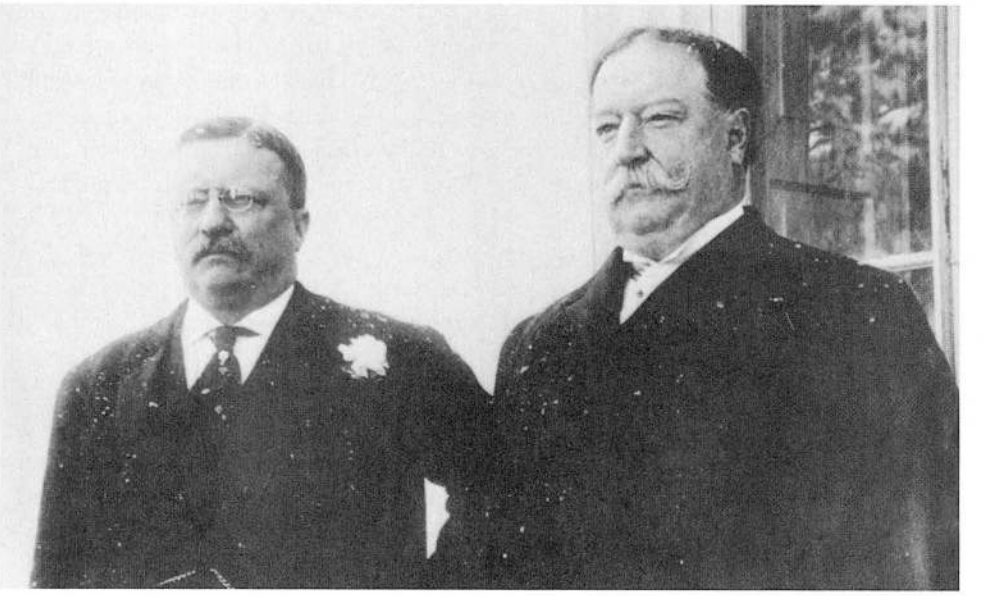
> sufficient understanding as a publicist, to deal with what your father did as Governor of the Philippines, in the Cabinet, and as President, and also do justice to him in relation to his judicial career, of course, such a man should be selected. I am not sure that such a man exists.[46]

Taft mentioned a few well-known authors to his nephew, including the late Albert Beveridge, author of a major biography of John Marshall, and Charles Warren, who had written a massive study of the Supreme Court. Both books had received the Pulitzer Prize. Warren does not appear to have been considered by the Taft children.

III.

As will be seen, the Taft children considered their uncle's comments with some care, even though they apparently found them unpersuasive. There may have been a sort of generation gap at play here, with the younger children displaying a viewpoint different from that of Henry W. Taft, now in his 70s. Less than a month after receiving the letter from his uncle, on March 28 Robert wrote to Pringle and informed him that "my sister, my brother and myself are anxious that you undertake the work, and we are willing that the preface state that the manuscript has not been read in its final form by the Taft family."[47] On the other hand, "we would like to reserve the right to veto the publication of expressions in the [Taft] letters which express critical opinions of other persons, when in our judgment those expressions are casual and not fully considered." Further, "we would like to stipulate that the whole manuscript in its preliminary form be submitted to us, so that we could call your attention to matters which perhaps had not been fully considered."[48]

Taft's children were not concerned "that a biography of my father be written without criticism, but only that the problems which he faced "be approached from a sympathetic point of view." Robert Taft realized that "your views are somewhat on the Democratic side, but there really was no fundamental difference



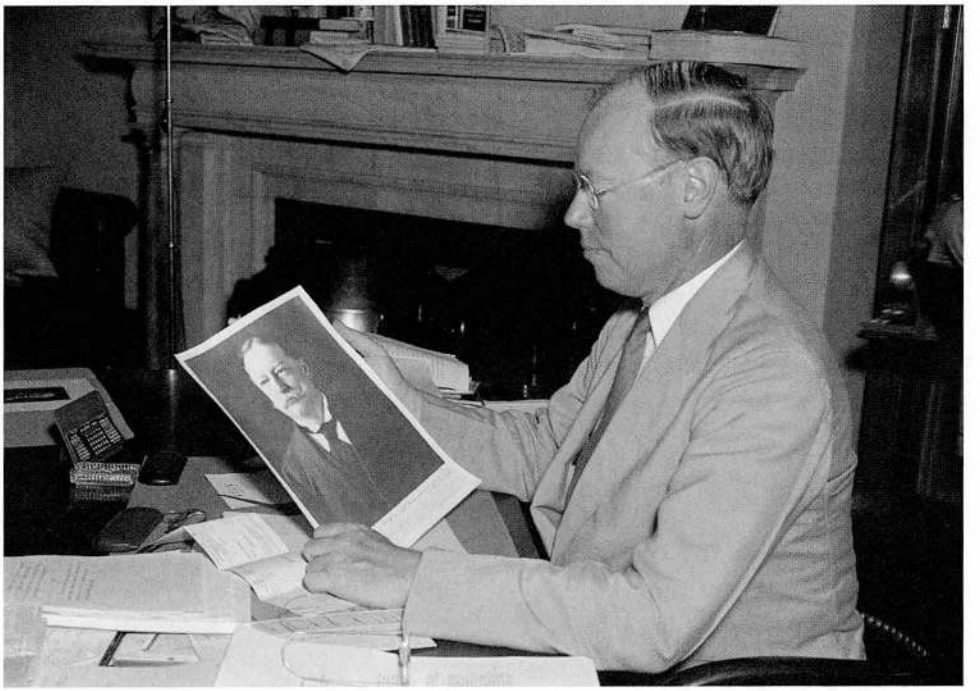
In 1930, Henry Pringle wrote to Robert Taft to inquire about correspondence between his father, William Howard Taft (right, in 1909), and Theodore Roosevelt (left). "I have been at work on a biography of [TR] and naturally an important part of the story is the break with your father in 1912," he wrote.

between the two parties during the [Taft presidency] except the tariff." Moreover, "I have no doubt [that] you would be willing to admit that there are sincere advocates in principle of a protective system. My father's views were not extreme on that subject."[49] (The son was correct in his recollection. As President, his father found himself stymied by the Congressional Republican leadership, who effectively blocked reduction of the tariff to the level urged by Taft.[50]) But Robert was not content merely to indicate his concerns to Pringle. In the contract between him and the Taft heirs, signed on April 28, 1933, the following sentence appears:

> The owners shall have the right to require the exclusion . . . of quotations from the correspondence expressing critical opinions of other persons, where the owners believe such opinions to be at variance with William H. Taft's mature judgment; but this in no way limits the right of the author to state in his own language the opinion of . . . Taft regarding such persons, and it is mutually agreed that in no case shall a wrong interpretation of . . . Taft's views toward any person be given.[51]

Pringle appears to have accepted this and other similar provisions that are found in the contract. Although both parties envisioned a two-year term of research and writing, in fact the contract was extended several times by mutual agreement, and the final product was not published until 1939.

It is interesting to observe that Robert waited until after the three Taft heirs had signed the contract with Pringle to inform his uncle Henry of their decision, likely because they were fully aware that he did not concur in it. "I think I ought to write," he wrote, "to explain the reasons that have led us to that conclusion," appreciating full well your "feeling that he is not equal to the task." In a lengthy paragraph, he detailed the efforts of



Robert Taft (viewing a photo of his father in 1940) read the manuscript as he was just beginning what would be a three-term Senate career. He worried that many items in his father's biography "will be used without explanation of the context" and might harm him politically.

the Taft children over a three-year period "to find someone both competent and willing to write a biography." Finding one perspective author with the first prerequisite but not the second was unacceptable. He detailed prior conversations with Allan Nevins and related how Helen and Fred Manning had followed up on so many of his suggestions. His purpose in going over "this history [is] to show that we have made a very complete canvass of the field of possible biographers."[52]

Adding that Fred, Helen, and himself "would be in a good position to eliminate any such mistakes" as Henry had identified in the TR biography, Robert emphasized Pringle's qualifications to his uncle. "He got the Pulitzer prize for biography . . . and I have a letter from [Allan] Nevins in which he says regarding Pringle: 'You could not have found a better man. I think his book on Roosevelt is a model of what a political biography should be.'" Moreover, Robert "was anxious to get someone who would be sympathetic with my father's point of view, and with the reasonably conservative attitude of the Republican Party." In particular, he objected to

> the orthodox progressive view that the Republicans were allied with big business, and that Roosevelt and Wilson represented the triumph of true progress. Pringle's point of view seems to me rather free from political bias, and particularly free from any Progressive bias, which is the most important matter in the writing of this biography.[53] [In fact, as will be seen, Robert Taft later concluded that Pringle was far from free of any Progressive bias.]
>
> Of additional importance to Robert was the fact that Mr. Pringle has expressed himself as being entirely willing to accept advice and assistance . . . I am very sorry indeed that our choice did not meet with your approval, but I hope very much that you will meet Mr. Pringle and help us get the kind of biography which we all want. You can be of the greatest assistance to him . . .[54]

Whether or not Pringle produced such a biography would be known only later.

Of the Taft children, only Taft's son-in-law, Fred Manning, had taken the time to go through the papers, including the letters to Mrs. Taft, and the presidential letter books. An enthusiastic proponent of hiring Pringle, after the contract had been signed, Manning could not resist a few words of welcome and of warning to the biographer-elect:.

> Many of the [Taft] papers are dull, deadly dull; the old gent was in several ways a dullish person, given to prolixity, occasionally to pomposity. Reading his letters and reading T.R.'s are very different experiences. But I have nothing to take back. I did not . . . find him dull; I found him baffling, irritating, and charming . . . T.R. or his like might be, in a way, easy; this old gent is a challenge to all you have. Especially, perhaps, in the way he draws to a focus aspects of the...America which were [sic] being transformed in his own day, all but forgotten now . . . Good luck to you![55]

IV.

For the next six years, Henry Pringle labored on his biography of Taft. The Taft papers contained, according to him "at a conservative estimate . . . nearly 500,000 letters and documents."[56] With the aid of two assistants hired by the Taft heirs, Pringle worked his way through the mass of manuscripts. In due time, drafts of chapters were completed in what would become a two-volume biography. In accordance with a prior agreement, the drafts were sent to the two

surviving Taft brothers and his children. To some extent, both Horace, but to a much greater extent Robert, found what they perceived to be flaws in Pringle's chapters. From 1933 through 1939, it appears that Robert Taft's views of his late father differed from those of the writer he had selected to write the biography. With Pringle a Democrat and New Deal supporter, and Robert a conservative son of a conservative father, one is not surprised at such a development.

In conversation with Taft in 1937, Pringle had suggested that the *West Coast Hotel v. Parrish* decision "was in fact a victory for my father's position in the *Adkins* case."[57] "I think it is fair to say also," he added, that Chief Justice Taft's decision for a unanimous court in *United Mine Workers v. Coronado Coal Co.*, was the basis for the recent holding in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[58] "I doubt myself if he would have gone as far as the Wagner Act decision goes, but he certainly went a good deal further than the more conservative justices."[59] The essence of such interchanges would be repeated during the next two years, with Robert Taft seeking to cast his father's career in a more positive light than that reflected in Pringle's drafts.

One month later, Robert Taft wrote to his uncle Horace about a "substantial criticism" concerning Pringle's draft chapters thus far. He had "represented my father as too conservative. He did not seem to me to distinguish between conservatism in his view of American forms of government, and conservatism in the Wall Street sense of defending property and big business. Of course this is a common failing of journalists and historians, and it is not easy to criticize or correct." Pringle, added Robert Taft, "seemed to be perfectly willing to consider this larger criticism when I was prepared to make it more fully."[60] That could not come until Taft had the opportunity to read the complete first draft of Pringle's chapters.

But Robert Taft had another concern. Like most biographers, Pringle was drawn to the occasional burst of candor with which sometimes Taft had leavened his letters, especially in correspondence with his wife. Thus Pringle quoted a comment by Taft concerning Congressman Nicholas Longworth in 1905. An Ohio Republican and later speaker of the House, Longworth married Alice Roosevelt in 1906. The year before, both Roosevelt and Longworth had been part of a group accompanying Taft to the Philippines, and Taft had been scandalized by the socializing between the two. He had written about it to Helen. When Pringle submitted a number of chapters to Robert Taft in 1938, Longworth had been dead for seven years, but Alice was very much alive. "With regard to Nick and Alice, I do not quite know what Alice's reaction would be, but she is an intimate friend, and I certainly would not like to have her blame us for permitting this publication."[61] Pringle did delete the late president's 1905 comments concerning Longworth and Alice Roosevelt. As will be seen, Robert Taft's concern about his father's contemporaries who were still living when the Pringle volumes were published in 1939 did not diminish.

By 1938, Pringle had completed much of his biography, and Robert Taft had examined enough of the chapters to have very mixed feelings about the work. In May, he sent Pringle a five-page critique replete with some generalizations about the book, as well as specific objections based on the first fifteen chapters. In the first place, he took issue with "a good deal of emphasis on lethargy and procrastination," and "the suggestion of indolence which seems to me to run through at least the early chapters."[62] Moreover, he objected to Pringle's comments about an 1890 decision his father had rendered as an Ohio Superior Court Judge. It involved a secondary boycott during a strike, a practice Taft consistently denounced throughout his entire judicial career. His son "certainly sees

no justification for the statements that [Judge Taft's] reasoning is hard to follow, or that the "decision did much to befog the labor issue."[63]

Taft further criticized Pringle in quoting the admittedly extreme views that Taft expressed to his wife in 1894 concerning the Pullman strikers, "without presenting at all the general point of view held by a very large number of Americans throughout the country at that time." Indeed,

> I do not think you distinguish clearly enough . . . between the attitude of mind which considers that the whole future of civilization depends on the rule of law in an ordered society, and one which sympathizes with the big bankers of Wall Street and the reactionary heads of small industrial concerns. I am inclined to think the majority of the people of this country still agree with the first point of view, which was my father's.

Not until the very end of his letter did Robert Taft hit on the real basis for his dissatisfaction with Pringle, an admitted supporter of Franklin D. Roosevelt and the New Deal: "You will see from my remarks that I hardly agree with the New Deal position on a good many issues." Much of Pringle's treatment of Taft did not trouble his son. "It does seem to me, however, that the judgment of a man's character and actions should be based on the ideas existing at the time he is living, and not in the light of economic or political ideas developed very much later, even if those ideas are correct." He would "appreciate it tremendously if you would try to understand my point of view on this question . . . I am sure that if you follow some of my suggestions, it will improve the book from your own standpoint as well as from that of the Taft family."[64] Robert reiterated this point in a letter to his uncle Horace. "My criticism of it [Pringle's manuscript] is that Pringle is too much of a New Dealer, and tries to interpret people's motives and positions in the light of ideas which did not exist at the time."[65]

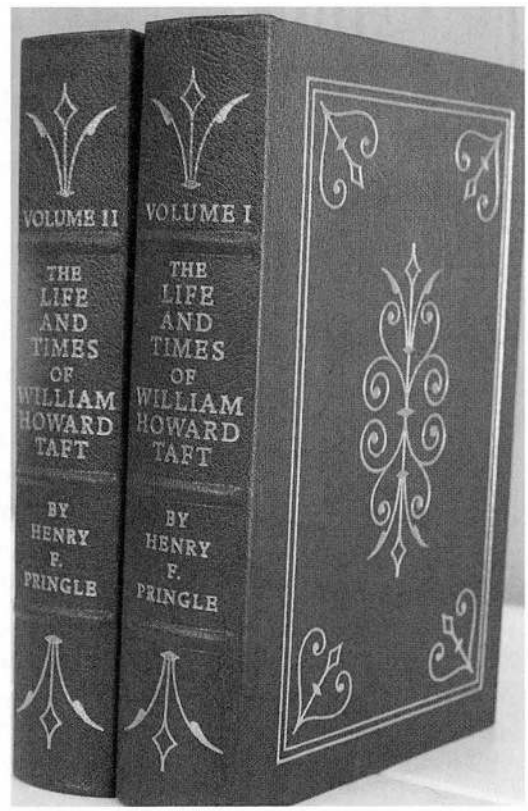
By June 1939, Robert Taft was getting irritated at still not having the opportunity to read the complete Pringle manuscript. He wanted to "get some idea of the entire picture, and submit any criticism which that picture may suggest."[66] With publication scheduled late in 1939, Taft fully realized that the closer the manuscript came to publication, the fewer would be any opportunities for him to urge changes upon Pringle that could be. Further, he "vented" to his brother-in-law Fred Manning that "the more I think of it, the more I regret that we gave the job to someone who insists on interpreting my father's actions in the light of a New Deal, which no one knew anything about at the time."[67] Finally, while on vacation in Canada, Robert was able to read the entire book in page proofs, and on August 31 he sent "Henry" a four-page single-spaced letter in which he listed, once again, all that he thought not appropriate for the final volumes.

Taft began by calling the book "a great success," and "extremely interesting." Yet, "I regret the publication at the present time." Just at the beginning of his senatorial career, one which lasted until his death in 1953, he was well aware that "while it cannot be used against me reasonably," in truth "political attacks pay little attention to reasonableness, and many things will be used without explanation of the context or . . . reference to the same subject in other parts of the book." Taft instructed Pringle once again that the preface should make clear "that the family, in the interest of historical accuracy, gave you full access to letters and memoranda without assuming any responsibility for what is published."[68]

Moreover, "my own entrance into politics has brought me into direct contact with many of those still living to whom my father refers," and "direct quotations of more or less insulting remarks made in private letters are

going to be embarrassing to me personally and create personal enmities no matter how unreasonable." I have come to see, he added, "how touchy many of [our] prominent citizens are—and I rather question the good taste myself of publishing private attacks on living people . . . "[69] He had in mind Pringle's use of Taft comments concerning the bitter-enders, as the fight over Wilson's League of Nations wound down in 1919. Taft had noted the "ponderous Websterian language and lack of stamina" of Senator William Borah, as well as the "emptiness and sly partisanship" of Senator Fred Hale, both of "whom I see every day in the Senate." Robert reminded Pringle that "my father was very much worked up over the attitude of the bitter enders, and expressed opinions which I am sure in many cases went beyond his later considered judgment."[70] He voiced similar objections about Taft's "scathing reference" to Justice James C. McReynolds, "even though we may all think it true."[71] Taft, according to Pringle had described McReynolds as "selfish, [and] prejudiced . . . who seems to delight in making others uncomfortable . . . He has a continual grouch . . . "[72]

Although he had produced a two-volume biography of more than 1,100 pages, Pringle had discussed Chief Justice Taft's time on the Supreme Court in little more than one tenth of his book. A few reasons for this imbalance may be suggested. In terms of his life and multiple careers, Taft's time on the High Court was relatively brief, coming at the end of many other experiences. Further, Pringle was neither a lawyer nor trained in legal history. Thus he was more comfortable exploring Taft as President or Governor General of the Philippines. It is not surprising



Although he produced a two-volume biography of more than 1,100 pages, Pringle discussed Chief Justice Taft's time on the Supreme Court in little more than one tenth of his book.

that Robert Taft, first in his class at Harvard Law School, found some flaws in his treatment of Taft and his Court.

"There seems to me," he wrote, "too much of an inclination to set up Holmes [and] Brandeis . . . as arbiters of the correct point of view, and to imply that where they disagree with my father, he must be wrong. Sometimes he was wrong, and sometimes they were wrong." Again, perhaps revealing his inherent hostility to the New Deal era, Robert added that "their view has prevailed more often today, but whether it has not practically destroyed the Constitution as intended is at least open to [a] serious difference of opinion." Here Taft reflected his ongoing devotion to classical legal thought that had long been espoused by his father, and appeared to be in virtual eclipse by 1939.[73] After reading Pringle's book, Taft looked in vain, he felt, "for any sympathy with my father's fundamental belief that the judges must enforce the Constitution whether they like it or not . . . [as well as] to give any consideration to the idea that perhaps his fundamental belief was right."

The same general criticism, he added,

> might be made of [your] lack of sympathy or understanding of his firm conviction—perhaps the strongest of all the beliefs that moved him —that law enforcement, law and order was the first essential of civilization. He believed that if respect and compliance with law was ever broken down, it would destroy all the benefits of civilization, including those of workmen as well as everyone else. This is the key to his violent feeling about the Pullman strike—also to his violent feelings against the Wets . . . "

The Chief Justice's whole basis in the Prohibition cases was "law enforcement," and not "the unpopularity of the law." If, he asked Pringle, and perhaps having in mind the famous Olmstead dissents by Holmes and Brandeis, "wire tapping had arisen in a case of murder, do you suppose Holmes would have been so violent?"[74] His father "thought not. As a matter of fact, I suppose every detective department in the world taps wires, and public opinion would support them against a criminal gang. My father could see no difference between the enforcement of one law and another."[75]

Taft hoped that Pringle would give serious consideration to his suggestions and criticisms "and not reject them simply because it is late and the publisher [is] pressing." Pringle replied that "when you read the book you will find, I think, that most of your suggested changes have been made, even though we had to do it in page proof and it was a long and difficult job." He declined, however, to remove the Taft comments about Borah and Hale, and the nasty references to McReynolds remained in the book as well. "Please believe that I gave the most serious [consideration] to the few which, in all conscience, I felt should stand."[76]

Two days before Pringle replied to Robert Taft, he received a letter from William Allen White, long-time editor and owner of the *Emporia Gazette* and a close friend of both TR and Taft. By September 7, White had read Pringle's entire text in page proof, presumably sent him by the publisher. In enthusiasm that does not appear to have been shared by some Taft family members, White wrote:

> I have been at it three days and nights. I read every line and didn't skip. It was like walking backwards out of the past again. What a picture you have created. I was afraid that the book would be a family biography but you have made a real man, understandable, loved, walk out of

> your pages. And with it all you have not flinched at any weaknesses.[77]

In his letter, White also recalled that he had tried in vain to persuade Taft of the need to keep peace with both the dominant faction of the Republican party AND the restless and restive progressive faction. Taft had responded "White, I can't be a Roosevelt. I can't do things the way he does them. It just isn't me. I am not built that way," to which White added "And I knew it, of course, as well as he."[78]

Inevitably reviews of the book appeared, and, while they were uniformly favorable to Pringle—although not without a caveat here and there—they were less favorable to his subject. Two such examples conclude this article. It is very appropriate that one of them be from Allan Nevins, who had been of great service to the Taft children as they searched for a biographer. Nevins had informed Robert Taft that "you could not find a better man" than Pringle to write the book.

Now Nevins wrote of Pringle's subject "it was commonly believed that Taft's strength lay eminently in his judicial cast of mind, and that he was therefore ideally fitted for the Chief Justiceship . . . The lay public held a confident faith...that he occupied that post to perfection." Indeed, throughout his many careers, observers had "generally analyzed his character as that of a man colossally good-natured and uncombative, very kindly, distinctly pliable, and with a large magnanimity in his outlook; incapable of hatred, rancor, or waspishness." Yet nearly all these views were "entirely mistaken." In fact, according to Nevins, Pringle had found that as chief executive, Taft "had no political sense, no flair for party leadership, no capacity to rally public sentiment. He loathed politics, and he always bungled it." Nevins adds that "when the tide ran against him, he made matters worse by giving rein to his resentments, hatreds, and obstinancies; for this supposedly pliable and amiable man could be one of the best haters of his day, one of the most mulish of men." These conclusions were "luminously" demonstrated in Pringle's two volumes.[79]

The other review selected for brief summary here came from Mark De Wolfe Howe, about to begin what would be a very distinguished career at Harvard Law School. His review appeared in the 1940 *Harvard Law Review*, a journal for which Chief Justice Taft had little use and less respect. Yet Howe produced the most insightful and perceptive review of the approximately half-dozen which this author examined. Like Nevins, Howe praised Pringle's "wholly admirable and exhaustive biography." He also commented on Taft's "extraordinarily varied career as a public servant." But

> experience seems to have done virtually nothing to diminish the uneasy fear of change which lay behind the cheerful surface. In the persistence of that fear may lie the explanation of Taft's mediocrity, the reason why, despite his unique familiarity with problems of government, he never achieved the distinction of statesmanship.

Howe further observed that the "limitations in Taft's character which prevented his great gifts from making him a great man were probably shared by the dominant people of that time." The "warm heart of Taft, his patient industry, his sympathy for individuals, his thoroughly shrewd intelligence" all represented qualities "which should have made his contribution to American life something of permanent importance." Indeed,

> his virtues were so many and so appealing that his failure to achieve greatness is almost a tragic story. Mr. Pringle has not attempted to find a formula in which the tragedy may be phrased, but he has so skillfully

> selected and sifted his materials that the explanation of Taft's failure is there for those who care to find it. In the last analysis,

Howe concluded, "it seems to be in the crippling fear of change which so warped intelligence and sympathy that understanding and imagination were destroyed."[80]

In my opinion, Howe was absolutely correct in his assessment both of William Howard Taft and of Pringle's book. In retrospect, Taft's son Robert, while making his requests for numerous changes and deletions in Pringle's manuscript as described above, may have suspected what Howe specifically stated concerning his father's career. But be that as it may. Although Robert Taft threatened to write a long critique of Pringle's biography, if he did this author was unable to locate it. Meanwhile, Pringle's two volumes remain widely available, reflecting as Robert Taft correctly concluded, a sympathy for the New Deal era, and appreciation for what appeared to be the decline of the conservative jurisprudence to which his father had been so devoted.

ENDNOTES

[1] This article is based upon an examination of several collections among the Taft family manuscripts located mainly in the Library of Congress and studied while researching my two books on the era of William Howard Taft. I am grateful to Jeff Flannery of the Library of Congress, as well as to Clare Cushman and Steve Wasby of this *Journal* for their insightful copy editing.

[2] I have quoted from a number of them in my previous book on Taft. *See especially* the second half of Jonathan Lurie, **William Howard Taft: The Travails of a Progressive Conservative** (New York: Cambridge University Press, 2012).

[3] Gus was held in high regard not only by William H. Taft. In 1922, Charles Taft presented his Washington correspondent with a check for $5,000.00. Such generosity may not have been extended to other writers on Taft's paper, because Karger was instructed "to say nothing about this matter to anybody." Gustav Karger Papers, Box 1, folder 1, September 20, 1922, Cincinnati Historical Society.

[4] Taft to Karger, Box 2, folder 77, October 29, 1924.

[5] Taft to Karger, folder 80, October 31, 1924. For reasons that remain unclear, Taft chose not to reveal to Karger that he had already suffered one heart attack earlier in 1924. He was all too well aware of his "marked deterioration," even though he chose not to mention it to Karger. At the time of Karger's death, Taft had barely five years of his own life remaining.

[6] Robert A. Taft Papers, LOC, Box 15, November 16, 1924. The oldest of Taft's three children, even before his father's death in March, 1930 Robert Taft had attained marked success as an Ohio attorney and a prominent Republican politician. First in his class at prep school, Yale, and Harvard Law School where he edited the *Harvard Law Review*, in 1938 Robert won the first of three elections to the United States Senate, and—popularly identified as "Mr. Republican"—served until his death from pancreatic cancer in 1953.

[7] Robert Taft Papers, Box 15, November 16, 1924.

[8] *Ibid.*, January 25, 1925. The "situation" Taft referred to was the ultimate fate of the Taft-Karger correspondence. Besides what Taft had described as a good deal of valuable historical material, Mrs. Karger and her son, Alfred, saw the letters as a potential source of revenue, a point of which Taft was well aware.

[9] Helen Taft Manning Papers, LOC, Box 1, November 15, 1925.

[10] Manning Papers, November 15, 1925.

[11] *Ibid.*

[12] As will be seen, however, it fell to Robert Taft to solve the matter of the Taft-Karger letters after their father's death on March 8,1930.

[13] *See* Lurie, **William Howard Taft: The Travails of a Progressive Conservative**.

[14] Robert Taft to David Lawrence, Robert Taft Papers, LOC, Box 13, May 22, 1930.

[15] *Ibid.*, May 17, 1930.

[16] *Ibid.*

[17] Robert Taft Papers, June 17, Box 13, 1930.

[18] *Ibid.*

[19] *Ibid.*

[20] As noted above, a complete set of the Taft-Karger correspondence can be found in the Cincinnati Historical Society, where I examined many of the letters, and was permitted to copy and quote extensively from them. From the perspective of 1930, one can readily understand why Robert Taft objected to their publication.

[21] *Ibid.*

[22] *See* Robert Taft Papers, Box 13, April 11, 1930, for Manning's reply to Nevins.

[23] Robert Taft Papers, Box 13, July 14, 1930, wherein Pringle's letter to Charles Taft is filed.

[24] *Ibid.*, July 16, 1930.

[25] *Ibid.*, July 25, 1930.

[26] *Ibid.*

[27] *Ibid.*, July 29, 1930. Although no reply from Hilles was located, there is no doubt that, by mid 1930, Robert Taft was aware of Henry Pringle.
[28] *Ibid.*, Box 13, January 6, 1931.
[29] *Ibid.*, January 11, 1931. Anyone involved in a search to fill an academic position in history might well be struck by the fact that, while modern technology has made gathering of information easier, the difficulties cited by the Mannings have remained constant over time.
[30] *Ibid.* He published major works on Lincoln, was the president of the American Historical Association, and was awarded the Bancroft Prize by Columbia University in 1956.
[31] Robert Taft Papers, June 15, 1931.
[32] *Ibid.*, July 23, 1931.
[33] Robert Taft Papers, March 24, 1931.
[34] *Ibid.*, Box 13, April 18, 1932.
[35] *Ibid.*, April 18, 1932.
[36] *Ibid.*
[37] *Ibid.*, August 10, 1932.
[38] *Ibid.*
[39] Robert Taft Papers, January 29, 1933, where Helen's letter is filed.
[40] *Ibid.*
[41] Robert Taft Papers, Box 13, February 6, 1933.
[42] Charles P. Taft Papers, February 15, 1933.
[43] *Ibid.*
[44] Robert Taft Papers, February 27, 1933.
[45] *Ibid.*
[46] *Ibid.*
[47] Robert Taft Papers, Box 13, March 25, 1933.
[48] *Ibid.*
[49] *Ibid.*
[50] *See* Lurie, **William Howard Taft: The Travails of a Progressive Conservative**, pp. 103-108.
[51] Robert Taft Papers, Box 13, April 28, 1939.
[52] *Ibid.*, May 2, 1933.
[53] *Ibid.*
[54] *Ibid.*
[55] Henry Pringle Papers, LOC., Box 28, August 6, 1933,
[56] Pringle, **Life and Times of William Howard Taft**, Vol. 2, 1081.
[57] *See West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which in effect overruled *Adkins v. Children's Hospital*, 261 U.S.525 (1923).
[58] Robert Taft Papers, May 11, 1937. *See United Mine Workers. v. Coronado Coal Co.*, 259 U.S. 344 (1922), and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).
[59] On the important role Justice Brandeis played in persuading Taft (and through him the rest of the Court) to find for the union in the Coronado case, *see* Melvin Urofsky, **Brandeis: A Life** (New York: Pantheon Books, 2009), pp. 605-607.
[60] Robert Taft Papers, Box 13, June 11, 1937. Robert added that apparently all the immediate Taft family would be in Murray Bay, Canada (the vacation home of the Tafts for many years). He had "asked Mr. and Mrs. Pringle to come up and make a visit, and I had a letter tentatively accepting, so we may be able to gang up on him . . ."
[61] *Ibid.*, March 4, 1938.
[62] Robert Taft Papers, Box 13, May 30, 1938.
[63] Although untrained in law, Pringle declined to alter his assessment of Taft's decision, *See* Henry Pringle, **The Life and Times of William Howard Taft,** (New York: Holt, Rinehart and Winston, 1939), vol. 1, p. 105.
[64] *Ibid.*
[65] Robert Taft Papers, Box 13, December 21, 1938.
[66] *Ibid.*, June 21, 1939.
[67] Robert Taft Papers, June 21, 1939.
[68] Copy in Robert Taft Papers, Box 13, August 31, 1929.
[69] Taft had already confronted these issues when dealing with the ultimate fate of the Taft-Karger letters, discussed in the first part of this essay.
[70] Pringle, p. 943; Robert Taft Papers, August 31, 1939.
[71] Taft, *ibid.* "I think the other members of the court would also criticize the ta[s]te of this quote while McReynolds is alive and still a member of the court."
[72] Pringle, 971.
[73] *See* Urofsky, **Brandeis: A Life,** 592-617.
[74] *Olmstead v. United States*, 277 U.S. 438 (1928).
[75] Robert Taft Papers, August 31, 1939.
[76] Robert Taft Papers, September 9, 1939; Pringle, p. 971.
[77] Pringle Papers, LOC, September 7, 1939.
[78] *Ibid.*
[79] All quotes in this paragraph from Allan Nevins, "A Spirited Biography," *Yale Review* 29 (1940): 380-383.
[80] All quotes in this paragraph are from Howe's book review in *Harvard Law Review*, 53 (1940): 505-507.

A Murder that Mattered: Sam Sheppard, the Supreme Court, and Free Press/Fair Trial

ALBERT B. LAWRENCE

In 1954, Bay Village, Ohio, was a quiet, developing suburb west of Cleveland on the shore of Lake Erie.[1] It was the kind of safe town where residents left doors unlocked and didn't hesitate to leave their young children alone for a few hours.[2] The village's largest employer was the Bay View Hospital, and among its most prominent citizens were the family that owned it, Dr. Richard A. Sheppard and his three sons, Richard, Stephen and Sam, all osteopaths. They also had a private practice in a nearby clinic.[3]

The youngest of the brothers, Samuel Holmes Sheppard, had grown up in the leafy suburb of Cleveland Heights. In 1954, he was not yet thirty years old, but he was the hospital's chief neurosurgeon and was in charge of the emergency room. All of the Sheppards lived near the mansion that the father had converted to a 110-bed hospital in 1948. Sam, his wife, Marilyn, and their seven-year-old son, Samuel Reese Sheppard, known as "Chip," occupied a lakefront home about a mile from the hospital. They were expecting a second child in five months.[4]

On Independence Day, 1954, the peace and calm of the small village was shattered by reports of a murder. Dr. Sam, as he was known in the community, summoned a neighbor, the village's mayor, with the alarming news that Marilyn had been killed. She was found in a second-floor bedroom, partially dressed, her face bloodied by about two-dozen gashes across her head. Sam told police he had fallen asleep in the downstairs living room the night before, heard Marilyn call his name and ran upstairs, where he was hit by an unknown assailant. When he came to, he ran downstairs and saw a darkened figure of a man, chased him outside and down about thirty wooden steps to the lakeshore, where Sam was knocked out again. When he regained consciousness a second time, the sun was rising and his lower extremities were washing in the surf of the lake, he claimed.[5] When his brother, Stephen, arrived, he was

concerned that Sam might be in shock and might have a broken neck, and he immediately drove Sam to the family hospital in a private car, shunning the emergency medical personnel that were standing by.[6]

An autopsy indicated that Marilyn had struggled with her assailant. She had been cut thirty-five times, her nose broken, her skull fractured and her eyelids swollen shut. A male fetus was removed from her uterus. Homicide was ruled the cause of death.[7]

News Coverage of the Murder and Investigation

The sensational murder was front-page news the next day in all three Cleveland papers. Photographers managed a picture of Sam in his hospital room, and the publicity-friendly coroner, Dr. Samuel Gerber, allowed representatives of the *Cleveland Press* and *Plain Dealer* inside the Sheppard home to photograph the crime scene only a few hours after the murder was discovered.[8] Coverage was initially sympathetic to the Sheppards, but things soon turned ugly.[9] Even though the police chief had not objected, local newspapers became suspicious when they learned from a prosecutor that Sam had been rushed to the hospital by his brother. When the family hired a lawyer, they became even more dubious.[10] Stephen Sheppard recalled in a memoir of the case that, two days after the murder, "We were subjected to a noisy, jostling, semi-good-natured, semi-hostile, babbling engulfment by newspaper photographers and reporters. The photographers pointed their lenses at us and popped their flashbulbs while the reporters—men and women—crowded around us with shouted questions and flying pencils."[11] Soon, it became a national story, and "men and women all over the United States were saying the same thing: 'Sheppard did it himself!'—a judgment based largely upon information disseminated by Ohio newspapers, television reports, and radio broadcasts," according to one chronicler of the case.[12] Sam was questioned for more than fifty hours by police and the coroner, yet "media accounts charged that he had refused to discuss the murder with police and that his powerful family continued to shield him from public accountability."[13] When Sam twice refused, on the advice of his attorney, to take a lie detector test, it was reported on page one of the *Plain Dealer*.[14] Circulation numbers for the local press soared "as they fanned public opinion to a near lynch-mob frenzy against the most convenient suspect."[15] One critic of the press later observed, "The first law of the circulation manager, then, is: crime makes news and crime news makes readers."[16]

The *Cleveland Press* had thirty reporters working on the story.[17] Its editor of twenty-seven years, Louis B. Seltzer,[18] began demanding action in escalating editorials titled, "The Finger of Suspicion,"[19] "Getting Away with Murder,"[20] and "Why Isn't Sam Sheppard in Jail."[21] On July 28, the paper referred to Sam as "a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases . . ."[22] One critic of the paper's heated coverage suggested, "If the *Cleveland Press* had been judge and jury, as indeed it tried to be, Sam Sheppard would at that moment have been sitting in a gas chamber, inhaling deeply."[23] Seltzer later defended the paper's interest in the story in a memoir that he wrote about his years as editor: "I was convinced that a conspiracy existed to defeat the ends of justice, and that it would affect adversely the whole law-enforcement machinery of the County if it were permitted to succeed."[24]

By July 22, the *Plain Dealer* was joining the editorial fray: "It is high time that strenuous action be taken in the Sheppard murder case," its editors demanded. The Cleveland police should be brought in to assist the locals, they said.

> There has, in our opinion, been a noticeable lack of cooperation on the part of the dead woman's husband, Dr. Samuel M. [*sic*] Sheppard, who has refused to take a lie detector test, and who yesterday rejected proposals that he submit to a "truth serum" test . . . It is clear, now, that, because of the social prominence of the Sheppard family in the community, and friendships between [*sic*] the principals in the case and the law enforcement bodies of Bay Village, kid gloves were used throughout all preliminary investigations.[25]

A federal appellate court later called the coverage "shameful journalism."[26] After local papers demanded that the investigation be turned over to the Cleveland police, the village council immediately voted to do so. After Seltzer's demand for an inquest, Dr. Gerber immediately ordered one.[27]

The Sheppards were impotent in staunching the bad press. "From the start Sam and the Sheppard family had bad press relations. The lawyers wouldn't let Sam talk to reporters, so the newspapers retaliated by insinuating that he had good reason not to talk, and must be skulking behind the façade of family and legal advisers because he had something to hide,"[28] according to Paul Holmes, who covered the case for a Chicago paper and later wrote two books about it.

On July 22, Gerber questioned Sam Sheppard for another six hours.[29] Sheppard's lawyer, William J. Corrigan, was ejected from the proceeding, amid the cheers of spectators, after he demanded that the court reporter indicate that the inquest was

In 1954, young neurosurgeon Samuel Holmes Sheppard was accused of murdering his wife, Marilyn, in their lakefront home (above) in Bay View, a Cleveland suburb. Although he maintained that she was murdered by an intruder, Sheppard was convicted of second degree murder amidst a media storm.

"something like a hippodrome."[30] Gerber himself was hugged and kissed by women in the audience.[31] A week later, Seltzer's page-one editorial demanded, "Quit Stalling—Bring Him In,"[32] and that night, Sam was arrested and charged with murder.[33]

Arrest and Trial

An angry crowd, shouting "murderer, murderer," and a mob of reporters were on hand for Sam's arrest at his father's home at 10:30 in the evening on July 30.[34] At his arraignment the next morning, similar crowds appeared. He was arraigned without counsel and jailed.[35] Citing "old heads in the homicide field," the *Plain Dealer* story that reported the arraignment pointed to what it called "chips of fact" that Sam would need to explain, including blood on his hands and the fact that there was no sign of a struggle or tears in Marilyn's night clothes.[36]

Leading to the trial, coverage continued to cast doubt on Sam and the story he told of the murder. An unidentified close relative was quoted in one story as maintaining that Sheppard had asked Marilyn for a divorce in 1950 so that he could marry another woman.[37] Police passed on to the press revelations about Sam's associations with other women,[38] including an affair with a medical lab technician named Susan Hayes. The *Plain Dealer* tracked her down, describing her as a "slender, well-built love rival to Marilyn" who had "admitted to intimacies with Dr. Sheppard . . ."[39] Authorities also revealed that a palm print they had found in the home was not that of an intruder but of the Sheppard's young son, Chip. The prosecutor gloated that the defense could no longer claim that there was a stranger in the house. The identification of Chip's print "blocked out the last shred of a clew [*sic*] that could have proved that anyone but the victim, Dr. Sheppard, and the dog, KoKo, were in the home," he told reporters.[40]

Tops In Sports
Followers Of All Sports, Look First To THE TIMES!

THE ERIE DAILY TIMES

Western Pa. Weather: Low 30-34 Tonight, Light Snow, Milder Thursday.

VOL. XVLII, NO. 254 ERIE, PA., WEDNESDAY, DECEMBER 22, 1954 32 PAGES 5 CENTS

5 STAR ★★★★★ FINAL

SEEK RETRIAL FOR SHEPPARD

★ ★ ★ ★ ★ ★

'Fire Dem Boss Logan', E-R-I-E Group Demands

Consider Pulakos As Mayor

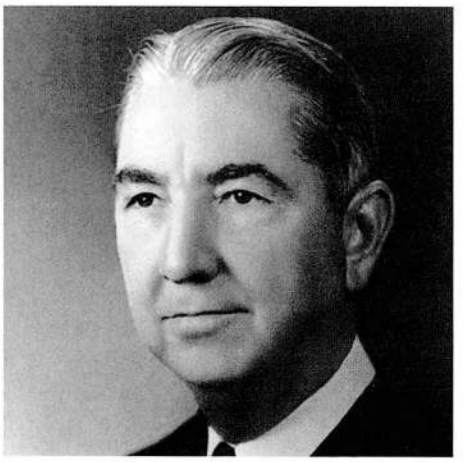
Defense Will File Motion Next Week; Irked By Verdict

When the case was appealed in 1964, District Court Judge Carl A. Weinman called the trial "a mockery of justice" and ordered Sheppard released on bond pending a new trial. The case was a classic "trial by newspaper," Weinman wrote, in which the Cleveland *Press*, among others, acted as "accuser, judge and jury."

The new medium of television fueled interest in the case as the trial approached in October. About sixty journalists assembled for the trial, about half of them from out of town. The case quickly supplanted the Lindbergh baby kidnapping as the "trial of the century"—the first case "driven by television news and celebrity journalists," according to reporter James Neff.[41] Judge Edward J. Blythin, seventy, a former Cleveland mayor, assigned reporters the first four rows of the 52-by-21-foot courtroom. Few of the remaining 200 seats were left for the general public.[42] A long table was set up inside the bar for representatives of the news media. "The movement of reporters in and out of the courtroom caused frequent confusion and disruption of the trial" and "constant commotion within the bar," the Supreme Court later noted.[43] Television and newspaper photographers were prohibited from taking pictures in the courtroom while court was in session,[44] but outside the courtroom television, newspaper and motion picture cameras were ubiquitous, and outside the courthouse they captured images of the participants as they entered and left the building. They also photographed prospective jurors. This continued throughout the nine-week trial.[45] "In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life," a state judge later remarked.[46] Another called it a "carnival atmosphere which continued throughout the trial,"[47] and the Supreme Court eventually concluded that "bedlam reigned at the courthouse during the trial."[48]

Corrigan, the defense lawyer, moved for a change of venue because of the prejudicial pre-trial publicity, but Judge Blythin wouldn't grant it, he said, until or unless it proved impossible to seat a jury.[49] Jury selection took nearly two weeks. Seventy-five persons were on the venire of prospective jurors. All three Cleveland papers published their names and addresses—"an extremely unusual if not unprecedented action," according to Paul Holmes.[50] "As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors," the Supreme Court later noted.[51] Fourteen people were excused because they admitted to forming opinions about the case.[52] A total of forty-eight prospects were dismissed before a jury of seven men and five women was seated. Only one denied ever hearing about the case,[53] and five of those seated acknowledged that they had read a great deal about the murder.[54] One man admitted that, when he learned that he was being called for jury duty, he read as much about the case in the newspapers as he could so that he could be well-informed about the case.[55] Once the jury was seated, Corrigan again moved for a change of venue, but the judge, satisfied that they had jurors that promised to be impartial, ruled that the trial would proceed.[56]

The trial lasted forty-three days.[57] Pictures of the jurors appeared in the Cleveland papers more than forty times during the trial.[58] Jurors were not sequestered until it was time to deliberate.[59] In the midst of the trial, Walter Winchell broadcast a radio



In *Sheppard v. Maxwell* (1966) the Supreme Court of the United States released Sheppard and ordered a retrial. Writing for the Court, Justice Tom Clark held that when prejudicial publicity presents a "reasonable likelihood" of a threat to a fair trial, a judge should consider a continuance or a change of venue.

program about a New York woman who claimed she was Sam's mistress and the mother of his child. Two jurors acknowledged that they heard the broadcast, but they assured the judge that they would not be influenced by the report.[60] In his summation, Corrigan told the jurors, "You have an opportunity to turn back the tide—to tell the people of the nation—of the world—that the constitutional right to a fair trial still lives."[61] But, on December 21, after eighteen ballots and four days of deliberation, the jury convicted Sheppard of Murder, Second Degree.[62] Judge Blythin denied a motion for re-trial, concluding that no fairer trial could be had anywhere in the country.[63] He sentenced Sheppard to life imprisonment.[64]

Appeals

Years later, author James Neff interviewed five of the surviving jurors. All maintained that they had felt Sheppard's motive for the murder was multiple marital affairs, even though evidence of only one, with Susan Hayes, had been presented at trial. "Clearly, the jury had been contaminated by press accounts before the trial and perhaps during it," Neff concluded.[65] The Ohio courts took note on appeal: "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals," proclaimed the state supreme court. "Throughout the pre-indictment investigation, the legal skirmishes and the nine-week trial, circulation conscious [*sic*] editors catered to the insatiable interest of the American public in the bizarre." Nonetheless, the court concluded that Judge Blythin had not abused his discretion in refusing to grant a change of venue.[66] The Supreme Court of the United States denied certiorari in 1956. Justice Felix Frankfurter attached a rare memorandum to make clear that the "denial of [Sheppard's] petition in no wise implies that this Court approves the decision of the Supreme Court of Ohio" and that it "means only that for one reason or another this case did not commend itself to at least four members of the Court."[67]

Seven years into his lifetime sentence, Sam met a new lawyer with only a year's experience at the bar, F. Lee Bailey. Bailey had read Paul Holmes's first book on the Sheppard trial and was incensed by what he saw as an injustice. He persuaded Holmes to introduce him to Sam's brothers, and they hired him to wage another appeal of Sam's sentence.[68] Bailey sought a writ of habeas corpus in federal court, alleging a violation of Sam's constitutional rights on a number of grounds, including that prejudicial publicity had denied him a fair trial and that Judge Blythin had refused to sequester the jurors and failed to properly warn them to disregard publicity during the trial.[69] On July 15, 1964, for the first time in the long history of the case, a judge agreed. District Court Judge Carl A. Weinman called the trial "a mockery of justice" and ordered Sheppard released on bond pending a new trial. "This Court now holds that the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions of and instructions of the trial judge," Judge Weinman concluded.[70] The case was a classic "trial by newspaper" in which the *Cleveland Press*, in particular, acted as "accuser, judge and jury."[71] The following May, however, the Sixth Circuit held Sam's release "improvident," reversed Judge Weinman's decision, and ordered Sheppard returned to prison.[72]

Supreme Court of the United States

As television emerged as a ubiquitous feature in American homes and newspapers fought to maintain circulation numbers in the

1960s, the Warren Court had examined three cases involving the tensions between protecting a free press and ensuring criminal defendants a fair trial.

In *Irvin v. Dowd* in 1961, the Court reversed the conviction of an Indiana man who had been sentenced to death after a trial tainted by hyperbolic news coverage in which authorities had declared that he had confessed to six murders, even though he had been indicted and tried for only one. The trial judge dismissed 280 jurors for cause. Of the twelve ultimately seated, eight conceded that they had preconceived notions of the defendant's guilt, although they assured the judge they could put those opinions aside and evaluate the case on the evidence presented. The Court held that some circumstances can make the community so hostile to a defendant as to make it inherently impossible to secure a fair trial. Jurors need not be totally ignorant of the facts and issues in a criminal case, the Court wrote in an opinion by Justice Tom C. Clark. Ordinarily, it is sufficient that they attest that they can set aside their preconceptions and judge the case on the evidence they are given. But every defendant is entitled to a fair trial "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies,"[73] Justice Clark wrote, and courts should consider whether pretrial publicity so infected the mood of the community as to make it unlikely that those prejudices could really be ignored. In the *Irvin* case, there had been a "barrage" of newspaper and broadcast coverage concerning the defendant's purported confession, prior criminal record, lack of remorse, and other factors, which established clear and convincing evidence of prejudice throughout the community, the Court said. "No doubt each juror was sincere when he said that he would be fair and impartial to [Irvin], but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight."[74] This seemed to work against Judge Blythin's decision in *Sheppard* to order a change of venue only if he couldn't find twelve jurors to say they could sit impartially in his court.

Two years after *Irvin*, the Court reversed the conviction of a Louisiana man, Wilbert Rideau, because the local television station had broadcast three times a jailhouse "interview" with the local sheriff in which Rideau confessed to a bank robbery, kidnapping, and murder. It was estimated that between 24,000 and 53,000 persons viewed each of the broadcasts in the community of 150,000 residents. Only three of the seated jurors, however, acknowledged seeing the confession. Nonetheless, the Supreme Court called it a "spectacle" that essentially "*was* Rideau's trial"[75] (emphasis in original). The actual trial could only then constitute "a hollow formality," the majority said in an opinion by Justice Potter Stewart. Justice Tom Clark, joined by Justice John Marshall Harlan, dissented, distinguishing *Rideau* from his decision in *Irvin.* Justice Clark noted that only three jurors acknowledged seeing the broadcast, and none of them expressed any preconception about guilt, and they assured the trial court that they could be impartial. Citing the general rule he had set forth in *Irvin*, the Justice insisted a pledge of impartiality by a juror should not be "lightly discarded." There was insufficient evidence in this case, Justice Clark concluded, that the community had been so infected by hostility to the defendant as to make the trial unfair.[76]

The third of the pre-*Sheppard* decisions was the most celebrated. It involved a Texas financier, Billie Sol Estes, who claimed connections with President Lyndon B. Johnson.[77] His indictment and trial on swindling charges drew national publicity. The *Estes* decision had the greatest potential impact on the courtroom conditions during the *Sheppard* trial. This time, Justice Clark, a Texas native, was back in the majority, and he wrote the opinion. The *Estes* trial was moved

500 miles from its original venue, but the trial judge allowed television of both the trial and a two-day pre-trial hearing, creating a courtroom that was "not one of that judicial serenity and calm to which (Estes) was entitled."[78] The Supreme Court was especially critical of the situation during the pre-trial hearing in which twelve cameramen were allowed to take still and motion pictures, wires ran throughout the courtroom, and the proceedings were disrupted. Such an atmosphere "may well set the community opinion as to guilt or innocence," the Court maintained.[79] In language that he would later paraphrase in *Sheppard*, Justice Clark wrote,

> The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.[80]

The press should not have unlimited access to the courtroom; the fundamental concern must be the proper administration of justice. The Court went so far as to imply that the televising of courtroom proceedings was inherently unconstitutional for the "conscious or unconscious effect that this may have on the juror's judgment."[81] No actual prejudice need be shown. The mere probability that prejudice would result from publicity would be sufficient, the Court ruled.[82]

Estes was handed down in June 1965. In November, the Court granted Bailey's motion for certiorari in *Sheppard*,[83] and the young lawyer argued his first case before the Justices on February 28, 1966.[84] In a decision on June 6—again written by Justice Clark—the Court held for Sheppard. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field," the Court began. "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[85] Thus, he said, while the Court is reluctant to limit freedom of the press, this liberty cannot be allowed to impair the right to a fair trial.[86] In the *Sheppard* case, before a jury was empaneled, Judge Blythin should have considered motions to change the venue or postpone the trial. "For months the virulent publicity about Sheppard and the murder had made the case notorious," the Court noted.[87] No determination of actual prejudice need be shown, said the Court, which suggested a new standard: when prejudicial publicity presents a "reasonable likelihood" of a threat to a fair trial, a judge should consider a continuance or a change of venue. If the trial proceeds, the judge should raise, *sua sponte* if necessary, the question of whether the jury should be sequestered during the proceeding and order a new trial if he determines that publicity affected the final verdict.[88]

Instead, in *Sheppard,* jurors were set free to "go their separate ways outside the courtroom, without adequate directions not to read or listen to anything concerning the case," Justice Clark said. Moreover, the judge should have insulated them from reporters and photographers. Thus, they were cast into the role of celebrities and exposed to "expressions of opinion from both cranks and friends."[89] Judge Blythin lost control of his courtroom under the pressure of publicity. Reporters should not have been allowed inside the bar, subjecting the proceeding to compromised evidence and the jury to "distractions, intrusions or influences."[90]

> From the very inception of the proceedings the judge announced

> that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence.[91]

Continuing, Clark wrote that Judge Blythin should have employed stricter rules governing the use of the courtroom by the news media, including limiting the number of those allowed there when it became evident that they would disrupt the trial and ordering them earlier not to handle trial exhibits during recesses. He should have insulated witnesses from the press and endeavored to keep police officers, witnesses, and counsel for both the prosecution and defense from releasing information to the press, including evidence that was never offered or was inadmissible, such as Sheppard's refusal to take a lie detector test.[92] "The exclusion of such evidence in court is rendered meaningless when news media make it available to the public," the Court noted,[93] suggesting that the judge might even have gone so far as to request city and county officials to regulate by legislation the dissemination of information by their employees.[94] When counsel and the press collaborate to disclose inadmissible prejudicial information, such behavior is "highly censurable and worthy of disciplinary measures," the Court proclaimed.[95] When the defense raised questions about the accuracy of information being published about the trial testimony, the judge should have admonished reporters to check the accuracy of their stories, and he could have warned them that it was improper to publish information that was not introduced into evidence at the trial.[96]

In reviewing the trial court's decision, appellate courts must make their own determinations concerning the effects of prejudicial publicity on the fairness of the trial.[97] Thus, the Court took issue with the deference the Ohio courts gave Judge Blythin's discretionary decisions concerning whether publicity required a change of venue or a new trial. "Due process requires that the accused receive a trial by an impartial jury free from outside influences," Justice Clark's decision insisted. "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."[98]

The Sixth Circuit decision was reversed and the case remanded to the District Court with instructions to release Sheppard unless the state sought a new trial. Justice Hugo L. Black dissented without opinion.[99]

"The ruling was felt immediately by nearly every criminal court, district attorney and prosecutor in the nation," one writer later commented. "Some crime reporters wondered whether free-booting 'circus trials' were doomed to go the way of vaudeville and tent circuses."[100]

Free Press/Fair Trial Protections

Together, *Estes* and *Sheppard* motivated both the press and the bar to reconsider their relationship with respect to free press and fair trial issues. After the assassination of President John F. Kennedy in 1963 and the crush of news coverage that ensued, including the live national television broadcast of his alleged assassin, Lee Harvey Oswald, the President's Commission on the Assassination, chaired by Chief Justice Earl Warren, recommended promulgation of a code of professional ethics for the news media and ethical standards by the bar and state and local governments in order to "bring about a proper balance between the right of the public to be kept informed and

the right of the individual to a fair and impartial trial."[101]

The American Bar Association took up the charge in studies financed by three foundations. Part III of its report, released in October 1966, ultimately followed the suggestions of the Supreme Court in *Sheppard*.[102] The report of the Committee on Fair Trial and Free Press noted that *Sheppard*'s dictates would require greater efforts by trial courts to ensure fair criminal trials. It recommended that, in any case in which there is a "reasonable likelihood" that prejudicial publicity might compromise a defendant's right to a fair trial:

- A judge should grant a motion to close any pretrial hearing, although a record should be kept and released to the public upon completion of the trial.[103]
- A judge should grant a motion for continuance or a change of venue, even before attempts to empanel a jury and without the need for affidavits of individuals from the community, as then required by some states. This spoke to Judge Blythin's denial of a change of venue until and unless it could be shown that no jury could be empaneled in Cuyahoga County. "Qualified opinion surveys shall be admissible" to show prejudice. No actual prejudice need be shown.[104]
- In considering whether a prospective juror should be disqualified for prejudice, both the juror's attestations concerning neutrality and the level of exposure to publicity should be taken into account.
- A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

The Supreme Court appeared to be applying this standard in *Sheppard*, the committee's commentary noted.[105]

- Either party or the judge, *sua sponte,* should move to sequester the jury if prejudicial material during the trial would be "likely" to come to the attention of jurors.[106]
- The judge should instruct all parties and witnesses not to make statements outside of court, as suggested in the *Sheppard* decision, and even sequester witnesses, if necessary.[107]
- If the jury is not sequestered, the judge should grant a defense motion to exclude the public from the trial unless there is no "substantial likelihood" of interference with the defendant's fair trial rights because of the dissemination of information. Again, a record should be made and publicly released at the conclusion of the case.[108]
- The judge should direct jurors to ignore news reports concerning the case and tell them why he is doing so, and he should remind them of this admonition every subsequent day of the trial. Again, the commentary cited the Court's conclusion in *Sheppard* that Judge Blythin's admonitions were inadequate.[109]
- The judge should set aside the verdict and order a new trial if there is "substantial likelihood" that it was influenced by any juror's exposure to extrajudicial communications.[110]

Sheppard also prompted the press to some self-examination.[111] The case aroused the conscience of the press at the time, according to Clifton Daniel, then managing editor of *The New York Times*: "I have never known the profession, collectively, to pay more serious attention to any ethical, legal or moral question or to study it more conscientiously." Some newspapers promulgated their own codes for trial and crime coverage, and others showed "good intentions," without committing anything to paper, Daniel

reported. "They are clearly more responsive to admonitions from the bench and bar and clearly more restrained in their reporting of crime news than ever before."[112] The Supreme Court's decision "landed on the news industry with a crash, jangling the nerves of editors who wondered if the rules were changing," according to James Neff.[113]

The case also became one studied in law schools on the jurisprudence of free press and fair trial.[114]

Aftermath

After the Supreme Court's decision, Sam Sheppard was tried a second time and acquitted.[115] F. Lee Bailey persuaded him not to testify because Sam's physical condition was deteriorating from the abuse of alcohol and pills.[116] In the second trial:

> All photographers were ordered to stay outside the Cuyahoga County Courthouse. The reporters who were privileged to cover the trial officially were barred from securing information other than what they could gather in the small courtroom. Interviews of the principals were banned, and the press was forbidden to go behind the bar railings. No telephone or teletype machines were permitted to be installed, no recording machines were allowed in the courtroom, and no sketches of the trial were to be made in the courthouse during the proceedings, recesses, or adjournments.

The press was allocated only fourteen seats in the courtroom, compared to the nearly 200 in the original trial. Jurors heard fewer than half the number of witnesses of the first trial and were sequestered during the entire two weeks it took to hear the evidence.[117] During the trial, Sam worked on an autobiography, **Endure and Conquer**.[118]

Sheppard's mother, Ethel, had shot herself on January 7, 1955, shortly after the first trial. His father died eleven days later of stomach cancer aggravated by the strains of Marilyn's murder and Sam's trial. Marilyn's father, Thomas S. Reese, also died by his own hand in 1963.[119] Sam remarried twice but lived less than four years after his acquittal. Suffering from liver disease, he died on April 6, 1970, at the age of forty-six. The coroner's report referred to "self medication,"[120] and Sam's lawyer recounted that the cause of death was an overdose of pills.[121] During the 1960s, an ABC-TV drama, "The Fugitive," had become popular, depicting a midwestern doctor who was falsely accused of murdering his wife and, having managed to escape, hunted relentlessly for the real killer.[122] In the 1990s, with the case extending into a fourth decade, Sam Reese Sheppard brought an unsuccessful civil lawsuit on behalf of his father's estate, seeking compensation for the doctor's wrongful imprisonment. He had his father's body exhumed to try to obtain genetic evidence that his father was not guilty.[123] The lakeside home where Marilyn was murdered was demolished by new owners in 1993.[124]

If there is a legal legacy of the protracted and sordid case, it is that the Constitution's fair-trial provisions can be used to reverse a conviction tainted by prejudicial publicity.[125] In the end, "Sam Sheppard neither endured nor conquered except inadvertently, in helping to define the fair trial law for news media in many parts of the United States. This is perhaps his greatest legacy," in the words of one author. "The delicate proper balance, as the liberal court expressed it, between a defendant's right to a fair trial and the right of a free press in a democracy is still an issue . . ."[126]

ENDNOTES

[1] Louis B. Selzer, **The Years Were Good** (1956), p. 268; Paul Holmes, **The Sheppard Murder Case** (1961) p. 9.

[2] James Neff, **The Wrong Man: The Final Verdict on the Dr. Sam Sheppard Murder Case**, pp. 3-4, 6, 10 (2001).
[3] Stephen Sheppard, **My Brother's Keeper** (1964), pp. 8-9; F. Lee Bailey, **The Defense Never Rests** (1971) p. 68; Neff, **The Wrong Man**, pp. 10, 23-24.
[4] Neff, **The Wrong Man** pp. 3, 5, 7, 23, 49; Walter L. Hixson, **Murder, Culture and Injustice: Four Sensational Cases in American History** (2001), p. 132; Bailey, *ibid.* at 68; Sheppard, *ibid.* at 8-9.
[5] Neff, **The Wrong Man,** pp. 7-9; Holmes, **The Sheppard Murder Case**, p. 9.
[6] Neff, **The Wrong Man,** pp. 10-11.
[7] *Ibid.* at 18-19.
[8] *Ibid.* at 12, 22; Jack DeSario and William D. Mason, **Dr. Sam Sheppard on Trial (2003)**, p. 194.
[9] Neff, **The Wrong Man**, p. 23; Hixson, **Murder,** p. 141.
[10] Jack H. Pollack, **Dr. Sam: An American Tragedy** (1972) p. 12; Neff, **The Wrong Man**, pp. 25-28; Holmes, **The Sheppard Murder Case**, p. 28; *Sheppard v. Maxwell,* 384 U.S. 333, 338 (1966).
[11] Sheppard, **My Brother's Keeper**, p. 62.
[12] Pollack, **Dr. Sam,** pp. 13-14.
[13] Hixson, **Murder**, p. 142.
[14] "Doctor Calls Second Lie Test Refusal Final," Cleveland *Plain Dealer*, July 11, 1954.
[15] Pollack, **Dr. Sam,** p. 18.
[16] Howard Felsher, **The Press in the Jury Box** (1966), p. 100.
[17] Donald M. Gilmor, **Free Press and Fair Trial** (1966), p. 2.
[18] Pollack, **Dr. Sam**, p. 22; Neff, **The Wrong Man**, pp. 56-57.
[19] July 16, 1954, quoted in *Sheppard v. Maxwell,* 231 F. Supp. 37, 47 (S.D.Ohio 1964).
[20] July 20, 1954, quoted *ibid.* at 48.
[21] July 30, 1954, quoted in *Sheppard v. Maxwell,* 384 U.S. at 53-54.
[22] Quoted in *Sheppard v. Maxwell,* 384 U.S. at 341.
[23] Felsher, **The Press in the Jury Box**, p. 76.
[24] Seltzer, **The Years Were Good**, p. 270.
[25] "Get That Killer," Cleveland *Plain Dealer,* July 22, 1954.
[26] *Sheppard v. Maxwell,* 346 F.2d 707, 711 (6th Circ. 1965).
[27] Seltzer, **The Years Were Good**, p. 272- 273.
[28] Holmes, **The Sheppard Murder Case**, p. 46; Neff, **The Wrong Man,** pp. 214-15; Paul Holmes, **Retrial, Murder and Dr. Sam Sheppard** (1966).
[29] Hixson, **Murder**, p. 142.
[30] "Corrigan Ejected Amid Cheers," Cleveland *Plain Dealer*, July 27, 1954.
[31] *Sheppard v. Maxwell,* 384 U.S. at 340.
[32] *Cleveland Press*, July 30, 1954, quoted in *Sheppard v. Maxwell* at 341.
[33] Seltzer, **The Years Were Good**, p. 275; "Doctor Arrested and Jailed; Denies Guilt at Arraignment," Cleveland *Plain Dealer*, July 31, 1954.
[34] Neff, **The Wrong Man**, p. 102.
[35] Holmes, **The Sheppard Murder Case**, p. 57.
[36] "Doctor Arrested and Jailed; Denies Guilt at Arraignment," Cleveland *Plain Dealer*, July 31, 1954.
[37] "Victim's Kin Hits Actions of Sheppard," Cleveland *Plain Dealer*, Aug. 9, 1954.
[38] Holmes, **The Sheppard Murder Case**, pp. 58-59.
[39] "Weighs Move to Arrest Doctor," July 29, 1954; Neff, **The Wrong Man**, pp. 61-63, 75, 98-99; *Sheppard v. Maxwell,* 239 F. Supp. at 40.
[40] "Palm Print Hunt Ends – It's Chip's," Cleveland *Plain Dealer*, Aug. 19, 1954.
[41] **The Wrong Man**, p. xi, 118, 120; "'Big Names' to Be at Murder Trial," Cleveland *Plain Dealer,* Oct. 18, 1954.
[42] Neff, **The Wrong Man**, p. 122; Holmes, **The Sheppard Murder Case**, pp. 4, 62; Pollack, **Dr. Sam**, p. 27. Blythin became mayor in 1941 when his political mentor, Harold H. Burton, was elected to the United States Senate. Burton became a Justice of the Supreme Court of the United States in 1945, nominated by President Harry S Truman. ("Final Rites for Blythin to be Monday," Cleveland *Plain Dealer,* Feb. 15, 1958; "Harold H. Burton Is Dead at 76," *New York Times,* Oct. 29, 1964.)
[43] *Sheppard v. Maxwell,* 384 U.S. at 343, 355.
[44] *Sheppard v. Maxwell,* 346 F.2d at 724.
[45] *Sheppard v. Maxwell,* 384 U.S. at 343-44.
[46] *State v. Sheppard,* 165 Ohio St. 293, 294 (1956).
[47] *Sheppard v. Maxwell,* 231 F. Supp. at 63.
[48] *Sheppard v. Maxwell,* 384 U.S. at 355.
[49] Neff, **The Wrong Man,** p. 124.
[50] **The Sheppard Murder Case**, p. 68; "12 Tentative Jurors Seated," Cleveland *Plain Dealer*, Oct. 23, 1954.
[51] *Sheppard v. Maxwell,* 384 U.S. at 342.
[52] *State v. Sheppard,* 165 Ohio St. at 296.
[53] Holmes, **The Sheppard Murder Case,** pp. 74, 76.
[54] Hixson, **Murder,** pp. 146-47.
[55] Felsher, **The Press in the Jury Box**, p. 40.
[56] Neff, **The Wrong Man,** p. 126.
[57] *Ibid.* at 164.
[58] *Sheppard v. Maxwell,* 384 U.S. at 345.
[59] *Sheppard v. Maxwell,* 231 F. Supp. at 62.
[60] Pollack, **Dr. Sam,** p. 49; *Sheppard v. Maxwell,* 231 F. Supp.at 62; Neff, **The Wrong Man,** pp. 151-52.
[61] *Quoted in* Holmes, **The Sheppard Murder Case,** p. 197.
[62] Neff, **The Wrong Man,** pp. 164-65.
[63] Holmes, **The Sheppard Murder Case,** pp. 211-12.
[64] *Sheppard v. Maxwell,* 231 F. Supp. at 40.
[65] **The Wrong Man,** pp. 166-67.
[66] *State v. Sheppard,* 165 Ohio St. at 294, 296-97.
[67] *Sheppard v. Ohio,* 352 U.S. 910, 911.

[68] Bailey, **The Defense Never Rests**, pp. 67, 76-77.
[69] *Ibid.* at 80-81; *Sheppard v. Maxwell,* 231 F. Supp. at 41.
[70] *Ibid.* at 60, 71, 72.
[71] *Ibid.* at 63.
[72] *Sheppard v. Maxwell,* 346 F.2d at 710.
[73] 366 U.S. 717, 722.
[74] *Ibid.* at 728.
[75] *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).
[76] *Ibid.* at 727-33.
[77] "Billie Sol Estes, Texas Con Man Whose Fall Shook Up Washington, Dies at 88," *The New York Times*, May 14, 2013.
[78] *Estes v. Texas*, 381 U.S. 532, 536 (1965).
[79] *Ibid.* at 536.
[80] *Ibid.* at 539.
[81] *Ibid.* at 545.
[82] *Ibid.* at 542-43.
[83] *Sheppard v. Maxwell,* 382 U.S. 916 (1966).
[84] Bailey, **The Defense Never Rests,** p. 99.
[85] *Sheppard v. Maxwell,* 384 U.S. at 350.
[86] *Ibid.* at 350.
[87] *Ibid.* at 354.
[88] *Ibid.* at 363.
[89] *Ibid.* at 353.
[90] *Ibid.* at 355.
[91] *Ibid.* at 357-58.
[92] *Ibid.* at 358-60.
[93] *Ibid.* at 360.
[94] *Ibid.* at 362.
[95] *Ibid.* at 363.
[96] *Ibid.* at 360, 362.
[97] *Ibid.* at 362-63.
[98] *Ibid.* at 362.
[99] *Ibid.* at 363.
[100] Pollack, **Dr. Sam**, pp. 167-68.
[101] **Report of the President's Commission on the Assassination of President John F. Kennedy** (1964), p. 242.
[102] Paul C. Reardon and Clifton Daniel, **Fair Trial and Free Press** (1968), pp. 11, 17, 20.
[103] American Bar Association Advisory Committee on Fair Trial and Free Press, **Standards Relating to Fair Trial and Free Press** (1968), pp. 112-13.
[104] *Ibid.* at 119, 125.
[105] *Ibid.* at 130-31, 134.
[106] *Ibid.* at 138.
[107] *Ibid.* at 138, 142-43.
[108] *Ibid.* at 139.
[109] *Ibid.* at 139, 143.
[110] *Ibid.* at 147.
[111] Gilmor, **Free Press and Fair Trial**, pp. 3-4.
[112] Reardon and Daniel, **Fair Trial and Free Press**, pp. 45-47.
[113] Neff, **The Wrong Man**, p. 243.
[114] Pollack, **Dr. Sam**, p. 239.
[115] Neff, **The Wrong Man**, pp. 246-281; Holmes, **Retrial**.
[116] Bailey, **The Defense Never Rests**, p. 104.
[117] Pollack, **Dr. Sam**, pp. 175, 177-78; Neff, **The Wrong Man**, p. 279.
[118] Neff, **The Wrong Man**, p. 269.
[119] Sheppard, **My Brother's Keeper**, pp. 194-95, 198, 284; Neff, p. 23.
[120] Neff, p. 289.
[121] Bailey, **The Defense Never Rests**, p. 113.
[122] Neff, **The Wrong Man**, p. 234.
[123] *Ibid.* at 323-24, 334, 378.
[124] DeSario and Mason, **Dr. Sam Sheppard**, p. 44.
[125] Gilmor, **Free Press and Fair Trial**, p. 117.
[126] Pollack, **Dr. Sam**, p. xii.

Chief Justice Warren E. Burger, the Court, and the Nation

JOHN SEXTON

Editor's Note: The Annual Supreme Court Historical Society Lecture was delivered by New York University President Emeritus John Sexton on June 5, 2017, at the Supreme Court. It is presented here with only minor edits.

Harold Leventhal, David Bazelon, Warren E. Burger. Three very different judges; three different and special men. Nearly forty years ago, I was privileged to serve each as his law clerk. Nobody, including me, would have predicted Chief Justice Burger would have selected me. My references were an all-star list of his critics: Derrick Bell, Alan Dershowitz, Arthur Miller, Alan Morrison, and Larry Tribe. Ordinarily, the Chief did not interview final candidates. A committee, chaired by the legendary Charlie Hobbs, culled the field to a list of eight. The Chief then chose his four clerks from the paper record. The day I met with the committee, I was clerking for Judge Leventhal. To my delight, the committee told me I would be on the list. Then, on November 20, Judge Leventhal died suddenly; by the following week, I was a Bazelon clerk. The animosity between Judge Bazelon and the Chief was widely known; I called Charlie suggesting that he withdraw my name and add another realistic candidate. He replied: "Please don't stereotype the Chief Justice." That warning proved to be an important lesson.

And so it was that on New Year's Day 1980, Chief Justice Burger interviewed me for well over an hour. I was an older candidate, nearly forty at the time; I had a family. He wanted to know about my wife Lisa, who was working at the Carter White House; he wanted to know about my son Jed, then eleven. But he also wanted to know what I thought of a recently published book, **The Brethren**. And, we spent a good bit of time talking about the insanity defense. Then he asked: "What would those professors who recommended you think if you clerked for me?" Three days later he called, saying: "I know you are going through some tough times; so I wanted to tell you as soon as I made up my mind." I never asked how he knew that my mother was in the last weeks of

her fight with cancer, but I came to understand that the thoughtfulness he showed in that call was a hallmark of the way he dealt with people.

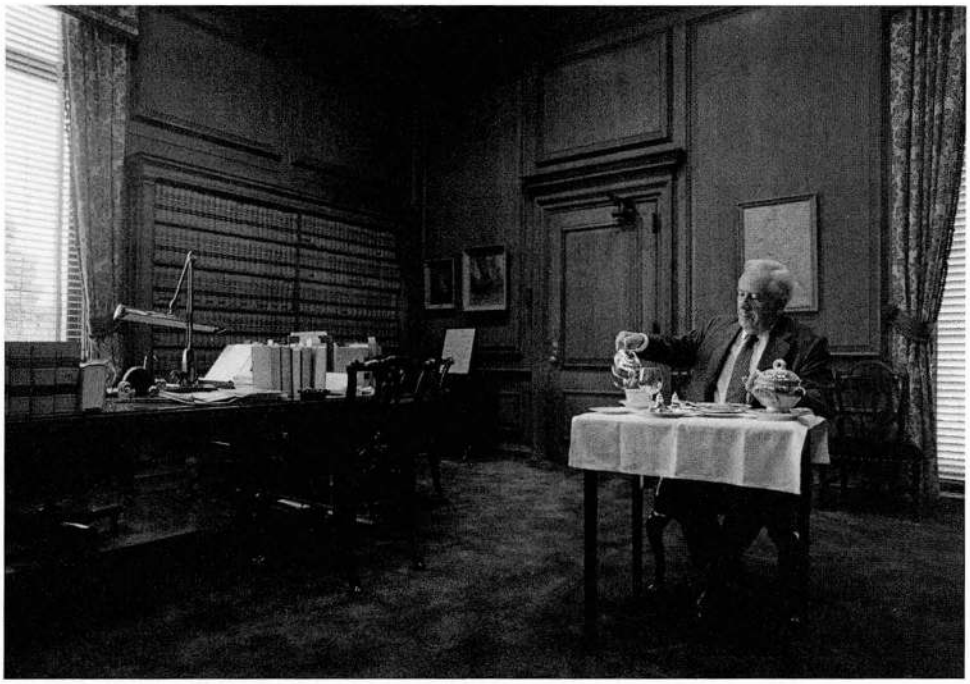
Literally dozens of books and hundreds of law review articles have been written about the Burger Court, the Chief Justice himself, and various of the decisions made during his time. An ambitious recent book by Michael Graetz and Linda Greenhouse gives an account of the broad doctrinal trends that emerged during those years;[1] it surely would be required reading in any course I taught on this subject, along with the very good review of it by Alan Morrison in the *Journal of Legal Education*.[2] And there also would be books on the syllabus by my NYU colleague, the late Bernard Schwartz: **Swann's Way** and his **Unpublished Opinions of the Burger Court**.[3]

From a reading or re-reading of the vast library of material that now is available, it is fair to say that, taken as a whole, a consensus view emerges about the Burger Court and Warren Burger himself. The two are related, but they are not the same. The former is a label for the collective work over a generation of a dozen Justices in various combinations of nine; the latter is a single actor in the larger picture who exercised certain influence but had no capacity to insist that his views be accepted by the other Justices. I will not attempt to add anything to subjects exhaustively covered by the existing library of sources. However, I do want to offer a brief summary of what I take from those readings. The Burger Court is seen, in most areas, as a doctrinal bridge from the Warren Court to the Rehnquist Court. It is credited with very few doctrinal breakthroughs, although most concede that it made progress on the rights of women. The core doctrines of the Warren Court were not reversed, as Richard Nixon had promised they would be; indeed, in many areas, the Burger Court undertook the difficult work of giving life to those broad principles of the Warren Court in the more difficult context of second-generation cases. In some areas, there surely was retrenchment, but not reversal.

The consensus critique of Warren Burger is, in many respects, unflattering. Generally, Chief Justice Burger himself is given high marks for caring, far more than Earl Warren, about the state of the judiciary and of the legal profession. Beyond devoting his own time and energy, he created the Institute for Court Management, the Institute of Judicial Administration and, of course, this Society. His involvement with the National Center for State Courts was unprecedented. His annual reports on the State of the Judiciary made very clear his belief that he was the nation's chief judicial officer. For all of this, he is applauded. There, in the consensus view, the credit ends. When it comes to his oeuvre as a Justice, he is criticized for lacking a judicial philosophy. He is lambasted for ambiguity in discussing cases at the Conference after argument; indeed, some commentators go so far as to accuse him of miscounting his vote so as to control the assignment of the majority opinion. And, finally he is indicted as aloof, pompous, and self-important.

That having been said, it is notable that there is a counter-narrative that arises, as far as I can tell *una voce*, from sources who, though not unbiased, were privileged to have an intimate view of the Chief, both as a judge and as a person: his law clerks. A senior member of this legion, Robert Fabrikant, has chronicled a clerk's view of the Chief in this *Journal*.[4] And reports from the Chief's law clerks, including distinguished judges and eminent law professors, abound. I speak from that space.

I can report authoritatively only about my own experience. Notwithstanding scores of conversations with others who clerked for the Chief Justice both before and after me, I have not heard of anyone who clerked for Burger who would offer serious disagreement with the view I will offer here. Such a dissenter may exist, but I do not know of such



The author, who clerked for Warren E. Burger during the 1980 Term, recalls that when it came to drafting an opinion, the Chief initiated the process with what he called his "thoughts while shaving," messages he would dictate (often overnight) outlining the approach he saw as appropriate for the first draft, including his analysis of the various arguments and relevant cases. Above, Burger lunches in Chambers.

a person. Indeed, given my pedigree, you well might have expected me to be that dissenter. I must add that, as a scholar, I have not been reluctant to disagree with the Chief Justice, even when he was alive. For example, my colleague Samuel Estreicher and I argued against the Chief's proposal for an intermediate Court of Appeals which would sit below only the U.S. Supreme Court; he thought that allowing Justices to refer cases to this new court would alleviate what he saw as the excess workload of the Supreme Court. In a 1,200-page law review article and an accompanying book,[5] we argued that the Chief had misdiagnosed as a problem of capacity what was really a problem of selectivity. The point is: I am no shill for Chief Justice Burger. Nonetheless, I wish to say that the consensus view at the least misses elements of the Chief Justice's record that carry important lessons on the Court and its role in society. The very first bench memo I produced for Chief Justice Burger dealt with a California decision striking down, as an equal protection violation, a statutory rape law that applied only to males.[6] Two years before, the Chief Justice had dissented from the denial of certiorari in a similar case, indicating that he would have granted and reversed summarily. In the first paragraph of my memo, I noted his prior position, but I went on to urge that he change his mind.

I remember his invitation to discuss the memo. "Why don't we talk about the case you say I got wrong?" he asked, as he drew my memo from the top drawer of his desk. On the front page he had inscribed with a felt tip pen what seemed to be a huge zero covering nearly the entire sheet. "See that?" he asked, pointing to the zero. "As I read these memos, I put question marks where I disagree." He flipped through the pages of my memo, revealing a dozen question marks. Then, he continued: "The more I disagree, the bigger

the question mark. That," he said, pointing to the zero on the front page, "is the period at the bottom of the question mark." Then, with a big smile, he added, "Let me hear you make your case." Three hours and many arguments later, he asked: "Any more to say?" When I said, "No," he announced, "Well, I'm where I started, but now I'm ready for my debate with Justice Brennan at conference." In the end, his view prevailed.

The day after the equal protection case was argued, the Court took up the case on which I had written my second bench memo, a case involving what was for the Chief Justice a fraught issue: television cameras in courtrooms.[7] Florida had begun to allow such coverage of criminal trials. The defendants contested their conviction on the grounds that the coverage had deprived them of a fair trial. This time, we spent less than a half hour discussing my memo. I had argued that no prejudice had occurred. He thought the Florida program was a very bad idea, bound to undermine the dignity of the courts. Still, he listened with care to both the arguments, probing each but not rejecting them. In the end, he said he would think about it. After Conference on Wednesday, he summoned me to his office. "The vote in the TV case was unanimous," he said. Relieved, not least because I knew he had rejected my recommendation in the equal protection case, I replied: "Thank you, sir, I am glad you saw it the same way I did." To which he responded: "What makes you think it was unanimous your way?" Then, flashing that smile again, he said: "It might be enjoyable to work on that opinion together." We did, and it was. He cared about making us feel comfortable with him.

One other example. The Chief knew that I was interested in the Religion Clauses, so I wasn't surprised when he told me that he wanted us to work together on a religious liberty case.[8] The case presented a familiar pattern: the denial of unemployment benefits to a claimant who had refused to accept an assignment because in his view his religion forbid him to do so. The outcome seemed to be dictated clearly by a nearly twenty-year old precedent, *Sherbert v. Verner*, which often had been cited by the Court as articulating the basic test for adherence to the Free Exercise Clause.[9] The only twist in the case was that a coreligionist of the claimant had accepted the assignment, asserting that the religion did not forbid doing so. The Court settled the issue with one sentence: "Courts are not arbiters of scriptural interpretation." Having settled that point, the opinion concluded, as it had in *Sherbert*, that the First Amendment required that the claimant receive the benefits. There was something notable about this case, however, something that could not be known to even the most careful external observers of the Court. In the seventies, as the Court gave its attention to an increasing number of Religion Clause cases, it became apparent to those who followed the jurisprudence in this area that a serious tension was developing between the Court's Establishment Clause doctrine and its Free Exercise Clause doctrine. As the Chief Justice and I worked on the case, I suggested an opportunity to propose a grand theory reconciling this tension; indeed, in one of the drafts I returned to him, I offered a twenty-page Section IV that, in my view, did just that. It was a magnum opus by a novice. When the draft came back to me, each of those pages had a felt-tip pen's slash from left to right across the entire page—twenty pages slashed from the draft. Then, a closing note: "All of this must go. Were it not for *Sherbert* and the many cases following it, I would deny the claim here. But we are bound in this Court by our precedents, even those with which we disagree strongly. Redo the Section with a simple quote from *Sherbert*." And that is how the opinion went to the Court. This was not a headline case or a bold statement of the importance of stare decisis along the lines of the dramatic opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood*

Chief Justice Burger's chair from the Supreme Court Bench was manufactured in the Supreme Court carpenter shop. His leather briefcase is shown in the background in this replica of his office.

v. Casey,[10] but it taught me how deeply the Chief Justice felt the moral authority of the Court was connected to the channel of thought—sometimes quite broad, but sometimes narrow—created by prior decisions of the Court.

When it came to drafting an opinion, the Chief initiated the process with what he called his "thoughts while shaving," messages he would dictate (often overnight) outlining the approach he saw as appropriate for the first draft, including his analysis of the various arguments and relevant cases. We then would do triple-spaced drafts with wide margins, to allow him ample space for writing comments with that ever-present felt-tipped pen. Every draft of every opinion was analyzed—Chief Justice and clerk, side by side. What became clear in these sessions was that the Chief was quite adept at engaging in legal analysis of the sort favored by law professors and immortalized in the legendary Hart and Sachs materials on legal process. He believed that the text and history offer discernible indicators that, if not mathematically precise, serve to channel reasoning in cases, that precedents provide guidance to judges as they decide cases, and that there are boundaries that confine the exercise of judicial power and deprive judges of a policy maker's discretion, even as they issue decisions that have policy implications. Although he possessed the ability to engage in what he called "writing opinions that read like law review articles," he made a firm, deliberate choice not to do so. He preferred, in most circumstances, a more vernacular style, grounded in his view of the precedents, but not characterized by close exegesis of them. This, no doubt, did not elevate his stature with academic critics. My

assessment of his capacities in this regard, utterly at odds as it is with conventional wisdom about his mastery of a judge's craft, is one widely shared among the Chief's clerks. For example, Judge Alex Kozinski, who clerked for him several years before I did, has written:

> What perhaps was most surprising to me when I joined the Chief Justice's staff was the open-mindedness he brought to the judicial decision making process. I had expected to find a man set in his ways, with a ready answer for whatever case might come along. I learned to the contrary. I found a man willing to listen to and anxious to hear the views of young lawyers a third his age and with a tiny fraction of his legal and life experience.[11]

I would be remiss if I closed this section without highlighting the close relationship that could develop between the Chief Justice and his law clerks. I offer this material not only because it may explain in part why we think so well of him, but also because it is so at odds with the received view of him as aloof, pompous, and self-important. I remember how he volunteered to call the Mayo Clinic when he found out that Lisa, my wife, suffered from daily migraine headaches. I remember how, on a day the Court was closed to the public, he took the time to take my eleven-year-old son Jed on a personal tour of the Court. When we got to the Great Hall just outside the Courtroom, where the busts of the former Chief Justices are kept, he told Jed stories about each one. I remember how, whenever any of my friends or family came to the Court, he would visit with them in the Conference Room. Once, when a group of my friends seemed uncomfortable that they had dressed in jeans for what turned out to be a surprise Saturday audience with the Chief Justice, the Chief spontaneously volunteered (without mentioning what they were wearing) that he had not worn his jeans to the Court that day because he had to rush from the Court to a dinner party. I had never seen the Chief in jeans.

And, I remember how he helped me through a diet that took off thirty pounds, although I think he fibbed a bit about the pounds that he, as my pacer, was "losing." No matter how busy he was, the Chief invariably was sensitive to what was going on in our lives. He always asked after our health when we seemed tired; he always checked on our spirits when we seemed down; and he always worried that we were taking too much time from our families for Court work. Looking back, I recall what a judge on the D.C. Circuit said to me when he heard I was going to clerk for the Chief: "You'll like him. I always respected the warm, close relationship he had with his clerks while he was here." That judge was right.

We now come to the point where I connect these tales to some possible lessons. I will not try to defend particular aspects of the Chief Justice's judicial work. In some areas, I could do so easily. In other areas, my assessment would be less favorable, sometimes harsh. In all, however, I think that Justice John Paul Stevens got it right when he wrote just a few years ago, "Warren Burger's contributions to the law in the years after I joined the Court have not been fully appreciated."[12] Rather than playing law professor, I will highlight what I think the Chief Justice himself would consider the most vital lesson for our time: the particular importance today of the Court's role in our society and the fragile nature of the Court's ability to perform its role, dependent as it is on the institution's hard-won moral authority. It is thirty years since the Chief Justice stepped aside to oversee the celebration of the Constitution's 200th birthday and over twenty years since his death. I often wonder how he would assess the state of our union today. Fear, uncertainty, distrust, anger: four words that he would not have used to describe America or its people. Yet, they are often

used to describe America these days. I think he would be disappointed—and worried. Twenty-five years ago, the brilliant social commentator Albert Hirschman warned that he saw coming a time when most Americans would experience what he called "the massive, stubborn and exasperating otherness of others . . . The unsettling experience of being shut off, not just from opinions, but from the entire life experience of large numbers of one's contemporaries."[13] He predicted a systematic lack of communication between groups of citizens who would become walled off from each other. In the end, he said, "each group will at some point ask about the other, in utter puzzlement and often with mutual revulsion, 'How did they get to be that way?'"[14] Twenty-five years later, his description fits.

Moreover, even as this process unfolds, there are ominous signs that knowledge and serious thought are being devalued. Political views have become religious creeds—at best untestable in civil discourse, and sometimes at odds with observable reality. We have developed an allergy to the hard, intellectual work of dealing with nuance and complexity. We yearn for simple answers. And, as our attention spans shrink and we face a barrage of undifferentiated information, many retreat into feedback loops in which their sources of information simply confirm views already held. This leads to an equation of fact and opinion and the reduction of argument to assertion, untested by argument in the public square. Many inhabit islands of fact, faux facts, and political creeds. A poll taken shortly after the Russian invasion of Crimea revealed that, though less than twenty percent of those polled could identify Crimea on a map, and the median responder was off by nearly 2,000 miles (some placing it in Latin America), virtually all of those polled were willing to express a view on whether or not United States intervention was a good idea. And support for intervention rose in direct correlation to greater ignorance of the proper location.[15] Today, marshaling a case to persuade those who start from a different position is a lost art. Honoring what is right in the other side's argument is considered foolish. It is hard to convince anyone of anything he or she doesn't already believe. We live in a "coliseum culture" that reduces discourse to combat—pitting simplistic and bipolar viewpoints against each other in a battle of slogans. Nearly fifty years ago, Chief Justice Burger warned, "When men shout and shriek or call names, we witness the end of rational thought process, if not the beginning of blows and combat."[16] We have gone far beyond his worst nightmare. Not surprisingly, these developments have brought us to the point where large numbers of our fellow citizens simply do not trust our leaders or our institutions. This culture of distrust amplifies the ability of the demagogues to propagate conspiracy theories, eviscerating the fabric of society. From the denial of scientific consensus to the propagation of fictions about immigrants, a corrosive rhetoric has entered our national conversation. Some might argue that Chief Justice Burger would not be in high dudgeon over these developments. In my view, they would be wrong; but a reasonable person could make that assessment of him. However, it is beyond cavil that he would have rushed to the ramparts had he lived to see the concomitant frontal attack on the role of law and the courts that is occurring.

It started a generation ago. Just two years after Chief Justice Burger's death, one political strategist advised clients that "in the coming battle," it would be "almost impossible to go too far [in] demonizing lawyers."[17] His polling suggested that "attacking lawyers is a cheap applause line," so he urged his clients to "resort to ridicule when making points."[18] At his core, Chief Justice Burger believed deeply in the institutions targeted by these attacks. He believed in an America based on law and forged by lawyers; for him, law was the principal means by which we have been able to knit one nation

out of a people whose dominant characteristic always has been diversity. He believed that lawyers and judges are charged with the special role of interpreting our laws and our Constitution, and in enforcing the values they embrace. He understood, however, that the capacity of lawyers and judges to fulfill this duty depends upon the moral power of the courts—and especially the Supreme Court.

Because he held these beliefs, the Chief Justice devoted much of his life to building the moral authority of the Court. In a book he wrote for laymen, he highlighted "how the Supreme Court has given life to the Constitution."[19] And he carefully nurtured a film project to tell the story of the Supreme Court through four cases decided by Chief Justice John Marshall.[20]

In the end, he did advance the moral authority of the Court, the judiciary, the law, and lawyers. One signature moment came when he and his colleagues (four of whom, including him, had been appointed by President Nixon) issued a ruling, unanimously, against the President's interest.[21] In the words of Justice John Paul Stevens, "Burger's opinion for the Court in *United States v. Nixon* may well have done more to inspire the confidence in the work of judges that is the backbone of the rule of law than any other decision in the history of the Court."[22] Some would say that the Chief Justice's belief in institutions and even his deep devotion to the Constitution were naive. Indeed, even as the Chief began work on the Bicentennial, Justice Thurgood Marshall warned against euphoria, noting the sins of the Framers enshrined in the Three-Fifths Compromise.[23] The Chief, whose quiet but effective work on improving the status of black people in the halls of the Court itself was documented last year by Robert Fabrikant,[24] understood that argument. But he felt, nonetheless, that the high principles contained in the document not only deserved celebration but required it.

The Chief knew that moral power is fragile and must be nurtured. He would be alarmed if he knew that there has been an erosion of the vital capital he hoped to build and that the public's faith in the judiciary and even in the Court itself has declined. A Gallup poll taken a few months before *Bush v. Gore* indicated that sixty-two percent of our people believed the Court was doing a good job; today that number is forty-four-percent.[25] Some suggest that this decreased public admiration for the Court is attributable at least in part to the much lower view that the public has of government overall. If they are right, and the Court is primarily the victim of the greater dysfunction in, and contempt for, government in general, it only connects more intimately the trends I have noted. I guarantee that Chief Justice Burger would be alarmed.

And here is how, in my view, what I have said so far would come together for the Chief Justice. Against a backdrop of a growing allergy to nuance and complexity and the emergence of a coliseum society, he would argue that the Court—especially the Court—must stand ever stronger as a testament to the power of thought and reason. And, make no mistake about it, he would emphasize that the Court derives enormous moral power from the honesty and transparency of the dialogic processes as seen in the reasoned debate within its published work. Sometimes we forget the remarkable nature of the Court's institutional commitment to thought. I am hard pressed to think of any institution, other than the Court and courts like it, that exercises real power, day in and day out, but which imposes upon itself, voluntarily, an obligation to explain fully in writing the reasoning behind its decisions. Indeed, at the time it issues its decision, the Court publishes simultaneously all of the concurring or dissenting views as well. There may be other institutions that both exercise power and commit to such a rigorous process; if they exist, they have escaped my attention.

I take it as a given that, were he alive today, the Chief Justice would be arguing that the Court remains a paradigm of the power of

thought, and he would be urging his fellow citizens to follow the Court's example in facing the great issues of the day. I think, were he still able to address the Court, he would urge that it take care to exemplify the best of the Court's traditional commitment to intellectual rigor and fidelity to principle—rather than ideology. And, I think he would argue that, if it did so, the Court thereby would light a pathway for our nation—not just in its formal role as trusted arbiter of law but also as a model for our leaders and our people. In this context, the Chief Justice surely would be wary of signs of ideological capture or an unwillingness to work collegially in the pursuit of an application of the Constitution's great principles. At a recent judicial conference, one member of the Court was heard to say that, in a way, spending a year with eight Justices on the Court created the positive outcome of greater conversation among the Justices, more openness to understanding differing viewpoints, and a willingness to find areas of consensus in developing decisions.[26] The Chief Justice, who was often an exemplar of such behavior, would wish that the Court would model this behavior even as a ninth Justice has been added.

Academic studies have shown a meaningful correlation between the party of the President who appointed a Justice (or judge) and the way the Justice (or judge) appointed votes on certain sets of cases. Listing names like Warren, Brennan, Blackmun, Stevens, and Souter does not gainsay the general point: Of course it is true that elections matter in this regard. That said, the data do not show that the political background of a Justice is dispositive. Indeed, there is evidence in the same literature that there is often agreement in cases notwithstanding the political background of Justices (or judges) where precedents push to a result. My earlier story about the Chief Justice's decision in the Free Exercise case shows that the Chief was among those who followed precedent, even where he disagreed. What the Chief Justice expected and would expect from the Court is principled, reasoned decision-making based upon the hard, intellectual work of legal reasoning, not upon ideology or political belief. Though my observation may not be consistent with the consensus view, I can attest that he held himself to that standard.

A specific instance where I saw him do just that involved a First Amendment challenge to a federal requirement that television networks provide time to candidates for federal office.[27] A divided panel of the Court of Appeals had upheld the requirement, with the majority opinion written by the Chief's longstanding and bitter adversary, David Bazelon. At the Conference of the Justices after oral argument, the vote was 5-4 to reverse, with the Chief Justice in the majority. No doubt reveling the prospect of overturning an opinion by his bête noire, he assigned the task of writing the Court's opinion to himself. The next day, his "thoughts while shaving" arrived and the drafting process began. As the days went by, the clerk working with him on the opinion would report to the rest of us that the Chief was struggling with the case, saying that his initial view of it was "just not writing." Every scholar knows this battle: a thought, initially experienced as brilliant, often does not satisfy the rigorous demand of text, where every logical step must be clear and must lead forward. After several weeks of debate in chambers, the Chief sent a memo to the eight other Justices informing them that he had changed his view, that the vote now was 5-4 to affirm, and that he would continue to draft the majority opinion, now for the opposite result. After he circulated his draft to the Court and the dissent was considered, one other Justice switched his view from reverse to affirm. The final count, 6-3, was true testament to principled legal reasoning.

The Chief Justice's insistence that the arguments leading to an exercise of power by the Court "write well" is a celebration of thought for which few would credit him. Moreover, it highlights his commitment to the Court as a sanctuary of thought and as a

model for other elements of society. Today, adherence to this view of the Court is pivotal to its role as a champion in our society. Of course, the Court should not be asked to bear this burden alone. I fully understand that universities, where I have spent my professional life, like the Court, must stand as champions in this battle. Like the Court, they deal, at their essence with the nuances and complexities of the difficult issues of the day. Like the Court, we must protect them against capture by those who would reduce us to dogmatism and demagoguery. Today, these sacred institutions will be challenged to avoid the devaluation of thought and the collapse of genuine dialogue. It will not be easy to find an antidote to the powerful forces at work; yet, we all must go the ramparts for this cause. It might surprise many that Chief Justice Burger would have led us there; it does not surprise me or others who worked at his side.

ENDNOTES

[1] Michael J.Graetz and Linda Greenhouse, **The Burger Court and the Rise of the Judicial Right** (2016).

[2] Alan Morrison, "Book Review," 66 *J. Legal Educ.* 653 (2017).

[3] Bernard Schwartz, **Swann's Way** (1986); Bernard Schwartz, **Unpublished Opinions of the Burger Court** (1988).

[4] Robert Fabrikant, "Remembering Warren E. Burger," 40 *Journal of Supreme Court History*, 203 (2015).

[5] Samuel Estreicher and John Sexton, "A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study," 59 *N.Y.U. L. Rev.* 677, 681-1944 (1984); Samuel Estreicher and John Sexton, **Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial** (1986).

[6] *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

[7] *Chandler v. Florida*, 449 U.S. 560 (1981).

[8] *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981).

[9] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[10] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[11] Alex Kozinski, "A Tribute to Chief Justice Warren E. Burger," 100 *Harv. L. Rev.* 975 (1987).

[12] John Paul Stevens, **Five Chiefs: A Supreme Court Memoir** (2011), p. 142.

[13] Albert Hirschman, **The Rhetoric of Reaction** (1991), p. ix.

[14] *Id.* p. x.

[15] Kyle Dropp, Joshua D. Kertzer, and Thomas Zeitoff, "The Less Americans Know about Ukraine's Location, the More They Want the U.S. to Intervene," *Washington Post*, April 7, 2014, available at https://www.washingtonpost.com/news/monkeycage/wp/2014/04/07/the-less-americans-know-about-ukraines-location-the-more-they want-u-s-to-intervene/?utm_term=.addd3dccc1d4.

[16] "The Necessity for Civility," an address delivered by Chief Justice Warren E. Burger to the opening session of the meeting of the American Law Institute in Washington, D.C. on May 18, 1971.

[17] **The Language of the 21st Century**, Luntz Research Companies (1997).

[18] *Id.*

[19] Warren E. Burger, **It is So Ordered: A Constitution Unfolds** (1995), p. vii.

[20] *Equal Justice Under Law: Dramatizations of Historic Decisions from the Courtroom of America's Great Chief Justice John Marshall*, produced by the Judicial Conference of the United States for the American Revolution Bicentennial (1976).

[21] *United States v. Nixon*, 418 U.S. 683 (1974).

[22] John Paul Stevens, **Five Chiefs**, p. 114.

[23] "The Bicentennial Speech," an address delivered by Justice Thurgood Marshall in Maui, Hawaii, on May 6, 1987, available at http://thurgoodmarshall.com/thebicentennial-speech.

[24] Robert Fabrikant, "From Warren to Burger: Race Relations Inside the Court," 43 *Mitchell Hamline Law Review Sua Sponte* 1 (2017).

[25] Americans Approval of Supreme Court Steady at 44%, Gallup Poll available at http://www.gallup.com/poll/178067/americans-approval-supreme-court-steady.aspx.

[26] Ross Brevin, "With Court at Full Strength, Alito Foresees Less Conservative Compromise With Liberal Bloc," *Wall Street Journal*, April 21, 2017, available at https://blogs.wsj.com/washwire/2017/04/21/with-court-at-full-strength-alito-foreseesmore-aggressive-conservative-majority/.

[27] *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981).

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

I.

"The Supreme Court," insisted Alpheus Thomas Mason and William M. Beaney nearly four decades ago, "has always consisted largely of politicians, appointed by politicians, confirmed by politicians, all in furtherance of controversial political objectives. [Since] John Marshall the Court has been the guardian of some particular interest and the promoter of preferred values."[1] This first sentence in the introduction to the sixth edition of the authors' text and casebook on American constitutional law, however, did not go unchallenged. As Professor Mason explained to the author of this review essay some months after Prentice Hall published the new edition in January 1978, Justice Lewis F. Powell, Jr., had taken issue with the claim, letting the book's senior author know that the Justice considered himself a judge, not a politician. Justice Powell's mild admonishment may have said as much about the general public's regard for politics and politicians as it did about the Justice.

Mason and Beaney's assessment joined the long-running conversation among students of the Court as to whether or to what degree the Supreme Court is or should be a majoritarian or countermajoritarian institution, that is, whether the Court should bend with or against the tides of public opinion. And in that calculation, certainly the President's role in appointing Justices must figure prominently. However, to the degree that the opportunities for nominations are sporadic or reduced, so is the opportunity for different faces, interpretative approaches and values to be added to the Bench, a reality compounded by infrequent and irregular vacancies on the High Bench.

Within those confines, recent Supreme Court appointments suggest a clear career path in that most recent Presidents have overwhelmingly preferred nominees who are themselves sitting judges or who at least have had experience as a judge, a practice which seems to discount Justice Felix Frankfurter's unequivocal, if self-approving, assertion over a half-century ago that "the correlation between prior judicial experience and fitness for the Supreme Court is zero,"[2] a statement he made as a rejoinder to those who—at a time of heightened judicial activism —had insisted that judicial experience be a qualification for nominees to the Court.

A Justice's pre-Court experience figured prominently on an occasion shortly after Solicitor General Elena Kagan joined the Court in 2010. In a classroom of thirty undergraduates, this essay's author distributed a table that listed the name of each of the sitting members of the Court, along with the date of the appointment of each, age at the time of nomination, the appointing President, name of the Justice each had replaced, and the position held at the time of nomination. I then asked my students for comment about anything on the table that struck them as noteworthy.

Reactions varied considerably. Several noted the presence of three women. A few remarked that the Court of 2010 was the handiwork of five Presidents. Two thought some of the Justices seemed very old. Only one found it significant that all but Elena Kagan reached the High Bench from one of the U.S. Courts of Appeals. Their assumption —in a baseball analogy—was that if one wants to pitch and bat at Wrigley Field, the player must first pitch and bat in the minor leagues. Indeed, in the judicial context, that assumption seems to have been held by most recent Presidents. Moreover, had the table been constructed to reflect the Court before Justice John Paul Stevens's departure and Justice Kagan's arrival, it would have depicted a Bench where *every* Justice stepped to the top from one of the courts of appeals. Furthermore, Justice Sandra Day O'Connor's retirement—she had come to the Supreme Court from the Arizona Court of Appeals—and Justice Samuel A. Alito's arrival created an unprecedented situation: for the first time since the federal courts of appeals were created in 1891, every Justice had seen prior judicial service at that level, most often on the Court of Appeals for the District of Columbia Circuit.

Moreover, even the failed presidential selections of recent decades overwhelmingly involved sitting judges: Judge John Parker, Justice Abe Fortas, Judge Homer Thornberry, Judge Clement Haynsworth, Judge Harrold Carswell, Judge Robert Bork, and Judge Douglas Ginsburg. Among failed Court prospects since 1930, Harriet Miers in 2005 remains the only non-judge in the group. Moreover, between Fortas in 1965 and Kagan in 2010, William H. Rehnquist (1971), Lewis F. Powell (1971) and Miers were the only Supreme Court nominees without judicial experience.[3]

Yet the Court of 2010 and the Court of 2018 are decidedly atypical of many courts of the past, where there are abundant examples of rosters composed heavily or even largely of individuals who had never previously sat as a judge. For example, consider the Court of 1963 when John Kennedy was President and Earl Warren was Chief Justice. Without question, the career paths of the Justices of 1963 were very different from today's Court. If one discounts Hugo Black's brief service as a minor police court magistrate in Birmingham, Alabama, only three of the Justices reached the Court with any judicial experience. One had experience on a state supreme court and two on the federal courts of appeals. Alongside that trio are one governor (who had also been a major party nominee for Vice President), two cabinet department heads, one U.S. senator, and the chair of a federal independent regulatory agency.

Nominations to the High Court in recent decades thus suggest at least three models of judicial selection: the judicial, the political, and the hybrid. With the judicial model, a President looks principally or even exclusively to those who have been a judge, especially a judge on one of the federal benches. The prospective nominee would thus be expected to have a record of decisions and opinions, giving the President, Senators, interest groups, and the general public indicators not only as to the nominee's legal views but insights into considerations such as quality of mind and general familiarity with federal judicial business. Such matters would be particularly important during the

confirmation stage of the appointment process, when the nominee is expected to provide learned and thoughtful responses to questions posed by members of the Judiciary Committee, in what has become a multi-day oral examination. Alternatively, the President might look for a lawyer who has had experience at high levels of public affairs, including but not limited to elected offices. Minus a paper trail of judicial opinions, the nominee would nonetheless have a readily visible record of public service that might prove an asset in the confirmation process. Then again, a President might choose an amalgam that combines both judicial and non-judicial experience in public affairs, thus drawing on the strengths of the other two models.[4]

In this respect, President Ronald Reagan's successful nomination of Sandra Day O'Connor in 1981 following Justice Potter Stewart's retirement reflected the hybrid model of judicial selection in a way that remains noteworthy. Confirmed 99–0 by a Senate that was in Republican hands for the first time since 1955, she not only become the first woman to sit on the Supreme Court, but also the first Justice since William J. Brennan was appointed in 1956 to have had experience as a state judge, and—perhaps more significantly—the first since Stewart's predecessor Justice Harold Burton, named by President Harry Truman in 1945, to have served as a state legislator. The latter fact alone placed her in rare company among recent nominees in that she had faced voters in an election. Indeed, as of early 2018, none of the eleven Justices appointed since O'Connor has had that kind of pre-Court political experience.

Ironically, just as the Bench of 2010, when Justice Kagan arrived, differed so sharply in career paths from the Bench of 1963, when Arthur Goldberg was junior Justice, today's Court, lacking as it does a member with first-hand experience in electoral politics, stands in contrast to many preceding Courts when it was hardly novel to find members who had been judged at the ballot box. For example, as depicted below, of the 113 Justices to date, approximately half (fifty-seven) held one or more elective offices of some kind in addition to their service on the Court. (The numbers add up to more than fifty-seven because, of the fifty-seven who had electoral experience, about half (twenty-eight) had held more than one elective position at some point in their pre-Court career.)[5]

Governor: 5
Member of U.S. House of Representatives: 14
Member of U.S. Senate: 5
Member of state legislature: 39
Other: 9

This breadth of non-judicial public service is both remarkable and significant. At the very least, such service, whether at the local, state or national level, may have had much to do with shaping the particular Justice's appointment process itself. Such experience would allow an individual to gain the visibility, record of accomplishments, and contacts that ultimately might enter into a President's decision to place that person's name in nomination. Moreover, for a given period of Supreme Court history, the varieties of political participation have helped to assure the presence of someone on the Bench who had been intimately acquainted with the world of electoral politics. Especially as the Court began to confront numerous cases in the mid-twentieth century and beyond challenging various voting practices and arrangements, the presence (or absence) of such first-hand familiarity and the perspective it potentially lends to judicial deliberations might well influence the outcome of a case, aside from what might be gleaned from the case record, oral argument, and a keen eye on current events. Thus, even as the Supreme Court sits at the pinnacle of the nation's legal system, it has also retained direct links with

its political institutions, as recent books about the Court illustrate so well.

II.

The variety of judicial as well as non-judicial public service with an electoral dimension is handily illustrated by James Moore Wayne of Georgia, the third of President Andrew Jackson's seven appointments to the Supreme Court. Moore is now the subject of **"Our Good and Faithful Servant"** by Joel McMahon, who teaches history at Georgia's Kennesaw State University.[6] McMahon's work is the first book-length study of Wayne to be published since Alexander Lawrence's volume three-quarters of a century ago.[7] McMahon's book will be of interest not only to students of the Court but to anyone interested in the history of political parties as well as in southern and especially Georgia history. Commissioned in early January 1835, the twenty-fourth Justice had received enthusiastic Senate endorsement just two days after his nomination. Yet he served only briefly with Chief Justice John Marshall, whose death came six months later on July 6, 1835, not in 1836, as McMahon reports.[8]

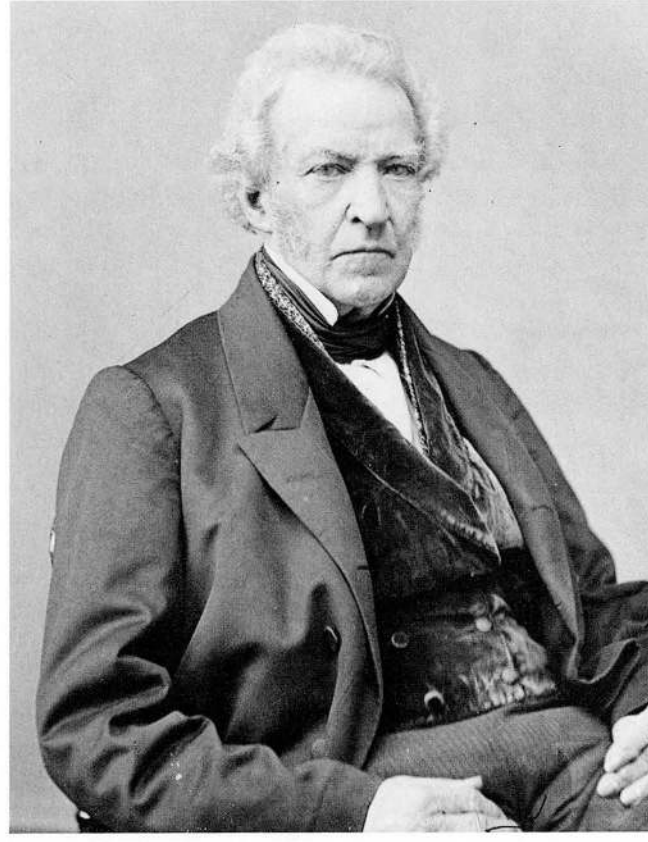
Our Good and Faithful Servant (the familiar title phrase is borrowed from the King James version of the Bible)[9] is biographical in its scope, yet it is not a judicial biography in the traditional sense. To be sure, its focus is clearly on Wayne, but the author's larger concern is one suggested by the subtitle of the book: **James Moore Wayne and Southern Unionism**. Accordingly, the reader should think of the volume as a functional biography, where Wayne's life becomes a vehicle to explore historical phenomena of "loyalty, union, and disunion" in the context of Wayne's "particular brand of unionism . . . so as to illuminate the reasons Georgia cast its lot with the states that formed the Confederacy in 1861."[10] Throughout, the author uses Wayne to illustrate a pro-Union sentiment that existed within Georgia that was strong, but not strong enough.

This concern in turn leads McMahon to explore the culture, economy, and politics that culminated nonetheless in the state's decision to secede. From that outcome, it was only a short hop for the author to consider the counter-factual question of whether, had Georgia *not* seceded, a vigorous confederacy would have taken shape at all, given Georgia's keystone-like geographical location in the southern United States. Moreover, had a vigorous Confederacy not taken shape, it is then reasonable for one to suppose that any resulting resort to arms would have been well below the scale of the cataclysm that actually ensued. Helpful for the reader, some of the individuals and physical sites that figure prominently in McMahon's analysis are depicted on some thirteen unnumbered pages preceding the first chapter. Also helpful is the twenty-seven-page unannotated bibliography, although the volume would be more useful with an index longer than one of only three pages.

Among all Justices to date, Wayne remains distinctive in several ways. First, his pre-Court background ranks him among the most electorally active individuals who have achieved a seat on the Court. Elected mayor of Savannah, Georgia, he later served in the state legislature and was also elected as a delegate to the state's constitutional convention, where he was unanimously chosen as President. (In this latter respect, his service paralleled that of Chief Justice Marshall, who was a delegate to Virginia's convention of 1829-1830.) Wayne's first term in the U. S. House of Representatives coincided with Andrew Jackson's arrival in the White House. Indeed, he remains the only person to have been appointed to the Court while also serving as a member of the House.[11] Service on the Superior Court of Georgia (a regional trial court of general jurisdiction) preceded his election to Congress. However, contrary to two accounts,[12]

Wayne never served on the Supreme Court of Georgia. Although the state's constitution of 1798 provided for a supreme court, the legislature did not pass an enabling act until 1845, well after Wayne was ensconced at the High Court. (Conflicts in interpretation of state law that resulted among the various superior courts across Georgia were supposed to be resolved at occasional conferences among the judges.)[13]

Wayne's public life, accomplishments, and reputation were already sufficiently established that he was mentioned as a possible successor to Andrew Jackson in 1836. After Democrats instead nominated Jackson's Vice President Martin Van Buren, Justice Wayne—in sharp contrast to today's expectations and standards for the federal judiciary—"vigorously campaigned for the New Yorker."[14] Talk of Wayne for the White House resurfaced in 1856, as Democrat Thomas Hart Benton, former U.S. Senator and Representative from Missouri, promoted Wayne "over his own son-in-law and ultimate Republican standard bearer John C. Fremont. Benton thought it should be 'some such man as Justice Wayne of Georgia, as the man unconnected with the slavery contest, who ought to be taken up by the people for the Presidency.'"[15] In the tumultuous and fateful election year of 1860, Wayne's name was floated as a compromise Democratic candidate for President. Even deep in the war, several urged President Abraham Lincoln to consider Wayne—who had already become "the first justice to move his family into a



***"Our Good and Faithful Servant": James Moore Wayne and Southern Unionism*, by Joel McMahon, is not a traditional judicial biography of the Georgia Justice. Instead, the author uses Justice Wayne to illustrate a pro-Union sentiment that existed within Georgia. Wayne served on the Supreme Court for thirty-two years (1835-1867).**

private residence in Washington"[16]—as a possible successor to Roger Brooke Taney after the fifth Chief Justice died in the capital on October 12, 1864, as a conciliatory, if far-fetched, step designed to entice a few seceded states to return to the Union.[17]

Second, in the spring of 1861, Wayne and Justices John Catron and John A. Campbell found themselves in a unique situation, one encountered by no previous—and thankfully no later—member of the Court, as their home states that also were included within their circuit assignments joined the Confederate States of America. While Justice Campbell resigned and became an assistant secretary of war for the Confederacy, both Catron and Wayne remained as active members of the Court until their deaths in 1865 and 1867, respectively. Justice Catron even attempted to hold circuit court in situations where his personal safety was put at risk. (Should Mercer University Press send McMahon's book to a second printing, the author should correct the misstatement that Catron resigned his seat on the Court "once the Civil War began.")[18]

Indeed, Wayne's strong Unionism highlighted a pair of loyalty related ironies, at least with respect to his family. His father, Richard C. Wayne, was banished from South Carolina at the time of the Revolution for having remained loyal to the Crown. At the outset of the Civil War, Justice Wayne, having decided to remain in Washington, was labeled an "alien enemy"[19] in Georgia and had much of his property in Georgia confiscated. His son, Henry C. Wayne, an officer in the United States Army for twenty-five years, resigned his commission and became adjutant and inspector-general of Georgia and for a time held the rank of brigadier general. McMahon relates what must have been an awkward and emotion-laden scene when Henry C. Wayne stopped to visit his parents in Washington on route from New York to Georgia after his home state seceded. As he bade mother and father farewell, he asked for and received money for the rest of his journey. Yet the younger Wayne remained loyal to his father, if also indirectly to himself, in that he was able successfully to intervene with Confederate President Jefferson Davis (who had been the Wayne's neighbor in Washington) to have much of his father's confiscated property in Georgia reinstated.[20] This restoration of property appears to have occurred before 1863, when Justice Wayne cast an essential supporting vote in the Prize Cases,[21] in which the Court upheld, 5–4, the legality of President Lincoln's naval blockade of southern ports beginning in April 1861.

Third, Wayne was the first Georgian appointed to the Court, although the author is incorrect in stating that, of the Court's full roster, "only two were from Georgia."[22] Aside from Justice Clarence Thomas, who, as the author notes, like Wayne came from the Savannah area, Wayne's colleague Justice Campbell was born in Washington, Georgia; post–Civil War Justice L. Q. C. Lamar was born in Eatonton, Georgia; and Taft-appointee Justice Joseph R. Lamar was born in Cedar Grove, Georgia. Yet, of this quintet, only Wayne and the Lamar cousins can accurately be said to have grown their professional legal roots in Georgia.

Fourth, while geography or one's home state or region has sometimes been a factor in a President's decision in selecting a nominee, it mattered in Wayne's case in a more unusual way. For Andrew Jackson, perhaps the decisive fact pointing to Wayne was not so much that he was from Georgia as that he was *not* from South Carolina. The Court vacancy that Wayne filled resulted from the death in 1834 of Justice William Johnson, Jr., in 1804 the first of President Thomas Jefferson's Supreme Court appointments. By the 1830s, the custom had become well-ingrained that Presidents appointed Supreme Court Justices from within the circuit to which the predecessor Justice had been assigned, a policy necessitated by the requirement imposed by Congress in 1789 that Justices, along with the respective U. S. district judge, would

comprise the U.S. circuit court for a particular judicial district. The result was that Justices spent far more time each year holding circuit court (and traveling throughout the circuit) than sitting as the Supreme Court in Washington. Accordingly, because Johnson, a South Carolinian, was assigned to the Sixth Circuit, which encompassed both South Carolina and Georgia, the clear expectation was that Johnson's successor would be named from the Sixth Circuit. However, President Jackson's difficulties with South Carolinians over the tariff and nullification made it a near certainty that Johnson's successor would not come from South Carolina. That prospect then dictated selection of a Georgian.

Fifth, Wayne's tenure of thirty-two years places him among the institution's longest-serving members. Indeed, he is ranked ninth on the list. Yet, as Jeffrey Toobin cautioned barely a decade ago, even "three decades does not guarantee that a justice will leave much of a legacy. Forgotten justices like Justice M. Wayne . . . illustrate that longevity and obscurity can coexist."[23] Although Wayne was certainly not obscure in his own era, his life and career are nonetheless demonstrations that even a person important at the time can fade into insignificance, an outcome that McMahon sees as the product of several forces. Chief among them is that Wayne has lingered "outside the mainstream of historical inquiry." This status has meant that he has "long been overshadowed by Georgia's more famous political players, giants such as Alexander Stephens, the vice president of the Confederacy; Robert Toombs, Confederate secretary of state and Confederate general; Howell Cobb, the first president (provisional) of the Confederacy; and Joseph Brown, Georgia's controversial wartime governor." Although Wayne "stood long in the shadow of these political giants after the Civil War, evidence suggests that during the antebellum period many of Georgia's political leaders stood on Wayne's shoulders to develop their varied political ideologies and cultivate their own political careers." Nonetheless, even though the author believes strongly in Wayne's significance, his "significant contributions to Georgia and the nation elude the historical account."[24]

Moreover, even though Wayne was a contributing member of the Court from roughly the end of the Marshall era through and past the Chief Justiceship of Roger Taney, he did not author a single opinion for the majority in a case that has achieved and retained true landmark status, at least in the view of modern Court scholars. To be sure, Wayne participated in deciding an ample number of important cases, but it is not his name that is indelibly linked with them.

In a similar vein, it may matter that Wayne was simply on the Court at an unpropitious time. That is, with his tenure falling between 1835 and 1867, he was a colleague of notables such as Taney, Justice Joseph Story, and even Salmon Chase who have attracted more scholarly attention. Other lesser known Justices during the same period have long endured a similar inattention that only more recently has begun to be rectified with publication of biographies on Justice John McKinley and Philip Barbour.[25]

Finally, the absence of a large cache of non-legal primary materials may well have made other individuals more inviting as subjects of productive scholarly pursuit. As the author explains,

> Sources in Wayne's own hand, such as letters, receipts of exchange, and other correspondence, are infuriatingly scarce, because his wife allegedly burned all her husband's personal papers upon his death. Why she would destroy the important artifacts of a man of major state and national importance, and who served as president of the Georgia Historical Society for thirty years, defies explanation. Such an act is as suggestive as it is enticing.[26]

Despite such handicaps as would plague any researcher, McMahon was able to draw upon sufficient secondary material and the primary sources of other figures to present a rich portrait of the political side of Wayne's life at a critical point in his state's and nation's history. Yet in doing so, he manages, with a careful selection of cases, not to neglect the Justice's judicial work.

Few readers will dispute the author's conclusion that the most significant pre-war case in which Wayne participated was *Scott v. Sanford*,[27] most widely known then and today simply as the Dred Scott Case, which when announced, sent "shockwaves through the nation."[28] At one level, the litigation involved efforts by a man to obtain his and his family's freedom from slavery as well as back pay for services rendered. At another level, the litigation became a vehicle for resolution of an issue that divided the land: Congress's power over slavery in the territories. At both levels, the litigation failed.

The case involved three questions that might be, but did not necessarily all have to be, addressed. First, was Scott's status settled by Missouri law, under which he had already been declared to be a slave? Second, was Scott a citizen of the United States, for the purpose of maintaining a suit in federal court against a citizen of another state? Third, what was the effect on his status as a slave of his sojourn in territory declared free by the Missouri Compromise? If the Court decided one or the other of the first two questions against Scott, there would then be no need to answer the third.

After reargument, the Court seemed to have agreed to focus on the first question alone, with Justice Samuel Nelson assigned the task of writing the opinion. Several Justices, however, wanted the decision to do more, "to quiet all agitation on the question of slavery in the Territories," as Justice Benjamin R. Curtis explained later.[29] Boldness displaced caution as necessity seemed to dictate a wider swathe.

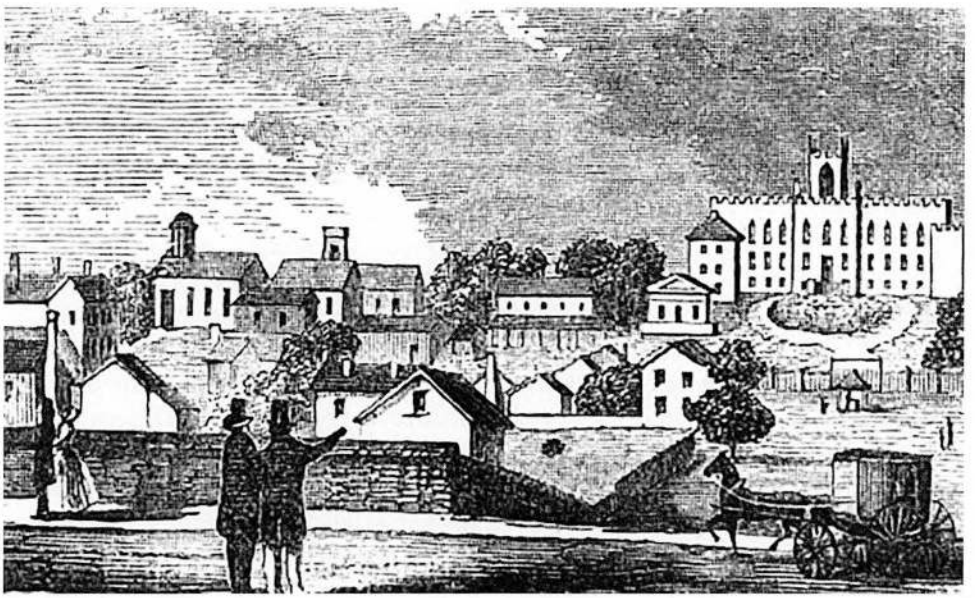
Nine Justices filed nine opinions, with seven (Taney, Peter V. Daniel, Wayne, Catron, Samuel Nelson, Robert Grier, and Campbell) holding for Sanford and two (John McLean and Curtis) for Scott. (While, after John Marshall became Chief Justice, submission of individual opinions by all Justices has been unusual, the author may be correct "that *Dred Scott* was the only case in Supreme Court history in which all justices wrote separate, lengthy opinions either in dissent or concurrence"[30] only if one overlooks the Pentagon Papers Case[31] of 1971 where, in addition to the per curiam opinion, nine Justices filed individual opinions, either concurring or dissenting.) Traditionally viewed as the majority opinion,[32] Chief Justice Taney's addressed all three questions. First, while a state might grant citizenship to blacks, they were not and were not intended to be citizens of the United States within the meaning of the Constitution and so could not press a suit in federal court. The circuit court therefore had no jurisdiction in Scott's suit. Second, Scott was a slave because he had never been free. The provision of the Missouri Compromise of 1820 banning slavery in certain areas was unconstitutional because of the absence of language in the Constitution granting Congress authority to prohibit slavery in the territories and because the law interfered with rights of property the Constitution protected by the due process clause of the Fifth Amendment. Last, and almost as an afterthought, whatever the status of slaves in a free state or territory, once they returned to a slave state, their status depended on the law of that state. And Missouri had decided that Scott was a slave.

If Taney's answer to the first question and attendant commentary has long been a stain on his reputation, it would be difficult to exaggerate the significance of the second part of the Chief Justice's opinion. McMahon reports that Wayne helped "Taney craft his opinion," and "discouraged" the Chief Justice "from making his comments about the rights

and status of 'the Negro.'"[33] Wayne's own opinion indicated his view of the importance of the case and perhaps some reluctance in deciding it.

> The court neither sought nor made the case. It was brought to us in the course of that administration of the laws which Congress has enacted, for the review of cases from the Circuit Courts by the Supreme Court. In our action upon it, we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be and as the States of the Union and the people of those States intended it should be when they ratified the Constitution of the United States. The case involves private rights of value, and constitutional principles of the highest importance about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision. It would certainly be a subject of regret that the conclusions of the court have not been assented to by all of its members if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance.[34]

For McMahon, Wayne's goal was not "to perpetuate slavery, advance popular sovereignty, or support states' rights." Rather, he believed that "if the Court did not weigh in firmly in *Dred Scott*, then the circuit courts would usurp power from the Supreme Court, a possibility Wayne wanted to eliminate."[35] The author's contention is that Wayne was



One chapter of Peter Fish's new book, *Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1836-1861*, is entitled "Justice Wayne on Circuit," and describes how the circuit court in Georgia met at Milledgeville, then the centrally located state capital, and at Savannah. There was no direct train service between Milledgeville (pictured) and Savannah, making travel arduous for Justice Wayne.

deeply concerned about cases "in the South whose juries, influenced by fear of an upturned social order, rendered verdicts based not on the law, but on their views of the legitimacy of the law itself," a point that McMahon illustrates with discussion of a circuit court case involving the schooner *Wanderer,* captured off the coast of South Carolina while engaged in the illegal trans-Atlantic slave trade. Presiding over the case in Charleston in 1859, Wayne

> gave the lengthy and stern instructions to what he believed was a prejudiced jury . . . predisposed to acquit the accused South Carolinians. Commenting on the overwhelming evidence showing the guilt of the slavers, Wayne said to the jury: "Should you have good cause for thinking that any persons are introducing negroes or mulattoes into the United States in violation of the act of Congress, then laws and courts give you official and moral support in the execution of the laws."[36]

> Perhaps such determination formed the basis of Chief Justice Salmon Chase's memorial assessment of Wayne, that he "was a sincere and honest patriot. Let us constantly follow his example."[37]

III.

For contemporary students of the Court, one of the greater obstacles in understanding the work of Justices in the early and middle nineteenth century is the circuit court dimension to their judicial duties, a requirement that remained until the abolition of circuit riding in 1891. Whether a Justice journeyed by carriage, stagecoach, or boat, riding circuit was burdensome and sometimes physically hazardous. Accommodations were rarely ideal. Even travel by rail did not become routine and widely available until mid-century or later in the more remote places. Not only were the distances long and conveyances often slow, but each Justice paid his expenses out of his own salary. Overall, the rigors must have tested devotion to Court and country.

Happily, a fuller appreciation of this aspect of a Justice's and a district judge's life in the southeastern United States has been made possible by the research and writing of Peter Graham Fish, emeritus professor of political science and law at North Carolina's Duke University. Students of the federal courts have long been familiar with **The Politics of Federal Judicial Administration,** published in 1973. That pioneering study by Professor Fish has much more recently been augmented by a more regionally focused work, the first volume of which was published in 2002 as **Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1789-1835**. That volume has now been supplemented by a second, **Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1836-1861**, with a highly descriptive Foreword by William B. Traxler, Chief Judge of the United States Court of Appeals for the Fourth Circuit.[38]

It would be difficult to exaggerate both the scope and depth of this most recent volume in terms of the quantity of information and analysis it contains. With more than 730 generously illustrated pages arrayed in a hardbound large-scale 8×11 format, the presentation is hefty and encyclopedic. Organized in eight distinct sections, the book traces the antebellum development and performance of the federal judiciary across the mid-Atlantic and Carolina regions during approximately the quarter century before the Civil War. Charts packed with data explain a variety of sub-topics, including the politics of circuit and court organization as well as the selection and compensation of

the district judges, court workloads, and administration. The reader finds ample evidence of the sweep of issues that arose in litigation involving patents and various maritime interests including those of contracts, labor, bankruptcy, and transportation in the waning age of sail and the beginnings of steam power technology. Such matters are augmented by subjects ranging from murder and mail robbery to the Atlantic slave trade and fugitive slaves. Given its contents, Fish's book is surely in the must-consult category, not only for students of the Court but also for historians and anyone interested in the federal judicial process.

The volume nicely complements McMahon's on Justice Wayne, given the Justice's assignment to the Sixth Circuit that initially encompassed South Carolina and Georgia. In particular, Fish's chapter eleven, entitled "Palmetto State Beehive: Atlantic Slave Traders in the Dock," reviews cases and issues that were important in **"Good and Faithful Servant."** Indeed, chapter ten of Part III of Fish's book is entitled "Justice Wayne on Circuit," a judicial territory that by 1842 had been enlarged to include North Carolina. According to Fish, the circuit court in Georgia met at Milledgeville, then the centrally located state capital, and at Savannah.

> That the Milledgeville seat faded as a place of court likely owes much to its inaccessibility. The Central Railroad provided only partial rail service to the state capital during the 1850s and the road's 152 miles line from Savannah to Emmitt necessitated at the later point a stage coach connection to Milledgeville until railroad construction linked that former terminus to the state capital by 1860. Travel from Milledgeville to Columbia [S.C.] in the 1850s proved even more arduous. The Georgia Railroad operated service 143 miles from Milledgeville to Augusta at which point Wayne would have had two options: travel by stagecoach eighty miles to Columbia across the Savannah River at Hamburg, South Carolina or the South Carolina Railroad from or to Charleston and change at Branchville for Columbia via Orangeburg, a distance of 142 miles.[39]

Prior to railroad construction, the "faithful Justice annually presided at the two terms of the circuit court in South Carolina during the 1830s, reaching Charleston and Columbia, as he reported, 'altogether by land, and without the facilities of steamboats or railroads.'"[40] For trips from and to North Carolina the Justice could travel

> by steamboat 161.5 miles from Wilmington to Charleston or 106 miles to and from his Georgia home in Savannah to Charleston by the same means. A new day dawned . . . on April 24, 1860 when a thirteen gun salute welcomed the inaugural nine hour ninety mile intercity slave-built rail line from Charleston's not then bridged Ashley River to the banks of the Savannah River.[41]

Clearly, circuit duty was for neither the fainthearted nor the infirm.

IV.

When James Wayne in 1815 took his seat the first time in the Georgia legislature, there were perhaps still some senior members whose public service dated to the 1790s. If so, part of the socialization or acculturalization he may well have experienced and received would have included stories and the lore about Georgia's Yazoo land sale of 1795, the political uproar that followed, and the legislature's revocation of the sale in 1796, by which time parcels had been sold to third-parties and investors, mainly in

New England. During his several interludes of private practice between 1810 and 1824 before becoming a superior court judge, Wayne surely became acquainted with the litigation that followed the legislative annulment in 1796 that led to the U.S. Supreme Court's decision in *Fletcher v. Peck*[42] that invalidated the rescinding legislation.

Even by modern-day standards, the Yazoo deal must truly have been the land grab of that century and perhaps of the one to follow. The acreage in question, which the state conveyed to four land companies for $500,000, as a way purportedly of recouping frontier defense expenditures, encompassed the land between the Chattahoochee and Mississippi rivers, roughly the territory comprising the present-day states of Alabama and Mississippi, land then occupied by four tribes of Native Americans: the Choctaw, Chickasaw, Creek, and Cherokee. Alone among those original states with western lands, Georgia had not ceded its claims to the United States before 1789, and would not do so until 1802, when it received $1,250,000, far above its original sale price to the land companies. "Yazoo" itself derives from the name of the river that flows into the Mississippi at Vicksburg.

These political and commercial shenanigans as well as *Fletcher v. Peck* itself are now the subject of **The Great Yazoo Lands Sale**, by Charles F. Hobson, co-editor of the Papers of John Marshall at the College of William and Mary.[43] His study is the first book-length treatment of the case since publication of Morrison Waite biographer C. Peter Magrath's **Yazoo: Law and Politics in the Young Republic** in 1966. Hobson's contribution is among the most recent to appear in the Landmark Law Cases & American Society Series. Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, this succession of case studies now claims some five dozen titles, almost all of them treating decisions by the United States Supreme Court. The Kansas series fits comfortably into and has substantially enlarged and enriched an established scholarly category that has been part of literature on the judicial process for more than five decades.[44]

Hobson's addition adheres to the organization and pursues the objectives of most of the other books in the Kansas series. Like later titles, his volume helpfully includes a thorough bibliographical essay, and a detailed chronology, the latter essential for any case study, particularly one as complex as Yazoo. Yet also like all of them, his contribution sadly lacks footnotes or endnotes. (While footnotes or endnotes are not usually important for classroom use, to which the principal marketing thrust for the Kansas series is directed, their presence would greatly aid use of the bibliographical essay for general readers and scholars, with probably no loss of appeal to either a classroom or wider audience.)

Any review essay should focus on the book in hand, but some word is also in order about the author, in that Dr. Hobson, through career-long scholarship, probably knows more about the Great Chief Justice than any other living person in that for decades he has involved himself with Marshall's life and work in a way and to a degree that many might have difficulty fathoming.[45]

Hobson places his examination of *Fletcher v. Peck* within the context of "vested rights," one of the two key components of what Edward Corwin more than a century ago called "the basic doctrine of American constitutional law."[46] According to this way of thinking, rights conferred on an individual by law, particularly those involving possession and enjoyment of property, were to be regarded as inviolable, subject to restriction only under the most compelling circumstances.

For Hobson, the Court's decision in the Yazoo case has retained landmark status primarily for four reasons. First, Chief Justice Marshall's opinion for the majority (Justice

Johnson dissented in part,[47] and Justices Samuel Chase and William Cushing did not participate) marked the first time that the Supreme Court struck down a state statute because it conflicted with the United States Constitution. However, this occasion was not the first time the Justices had invalidated a state law, an action first taken in 1796 that in *Ware v. Hylton*,[48] which held that a Virginia statute, contrary to the argument advanced by attorney John Marshall, conflicted with a *treaty* of the United States.

Second, the constitutional basis of the decision was the first time the Court had interpreted and applied the provision in section 10 of Article I of the Constitution declaring "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." The majority accepted the position advanced by the aggrieved investors that the state's repealing law had impaired the kind of contract the clause was intended to protect.

Third, *Calder v. Bull*[49] in 1798 had already indicated that the Court was unwilling to use the other potentially broad significant restriction on state lawmaking in section 10, the ex post facto clause, which Marshall referred to in his Yazoo opinion as "a bill of rights for the people of each state."[50] After *Calder*'s minimization of the ex post facto clause, Marshall's reliance on the contracts clause in the Yazoo case launched that provision on a trajectory that shortly made it a major limitation on the state police power for much of the nineteenth century, until after ratification of the Fourteenth Amendment in 1868.

Finally, especially because *Fletcher v. Peck* came down at a time—just seven years after *Marbury v. Madison*[51]—when thinking about judicial review and its place in the political system was still very much in flux, Hobson believes that Marshall's opinion may have had its more lasting impact in helping to solidify thinking on the source of judicial authority to invalidate legislation. That is, in applying limitations, Marshall helped to answer the question whether the Court was

David G. Dalin's book *Jewish Justices of the Supreme Court* examines the lives of the eight Jewish members of the Court. Arthur Goldberg, shown above being sworn in as U.S. Ambassador to the United Nations in 1965, invited his fellow Justices to Passover Seders he and his wife, Dorothy (at left), hosted at home.

to consider extra-constitutional principles or only the Constitution itself.[52]

Calder v. Bull, after all, had revealed a fissure on precisely this question. While the Court in that case found no conflict between the ex post facto clause and the Connecticut statute in question, and while no Justice expressed doubt that the Court *could* invalidate the law, there was a division on the Bench as to the *source* of limitations properly to be applied. For Justice Chase, there

> are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power . . . An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[53]

For Justice James Iredell, however,

> [if] the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[54]

Hobson believes that Marshall's emphasis on the words of the Constitution in his opinion helped to ground judicial review more on the Iredell than the Chase side of the divide, although near the end of his opinion, Marshall did reveal some equivocation on precisely this point, as he wrote that "the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States."[55]

V.

Some twenty-four years before publication of Charles Hobson's book, the Supreme Court Historical Society published a special edition of the *Journal of Supreme Court History* entitled "The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas."[56] Edited by Jennifer M. Lowe, it contained a preface by Justice Stephen G. Breyer, an introduction by Justice Ruth Bader Ginsburg, a foreword by Sheldon S. Cohen, and five biographical articles, by five scholars including the author of this essay, on Justices Louis D. Brandeis, Benjamin N. Cardozo, Felix Frankfurter, Justice Arthur J. Goldberg, and Justice Abe Fortas.

The Lowe collection has now been supplemented by **Jewish Justices of the Supreme Court,** by Rabbi David G. Dalin, a historian who has held visiting, teaching, and/or research positions at George Washington University, Jewish Theological Seminary, Stanford University, and Princeton University.[57] His book is extensively researched, documented, and handsomely illustrated as well with some thirty-eight photographs. In contrast to the Lowe collection, in which multiple scholars contributed the articles, Dalin has authored all the chapters. There are two on Justice Brandeis, two on Justice Frankfurter, and one each on Justices Cardozo, Goldberg, and Fortas. A final chapter treats Justices Ginsburg, Breyer, and Kagan. Except for the dual chapters on Brandeis and Frankfurter, where the material in each is divided between pre-Court and Court years, each chapter contains an

introduction, a biographical overview, an account of the Justice's appointment, and an analysis of the individual's judicial career.

Of particular interest is Dalin's first or introductory chapter, entitled "Before Brandeis: Presidents, Presidential Appointments, and America's Jews, 1813-1912." Here the reader learns that but for the quirks of partisan politics, Judah P. Benjamin, not Louis D. Brandeis, would today be remembered as the first Jewish Justice. Benjamin was elected to the U.S. Senate from Louisiana in 1852, but before he took his seat, outgoing President Millard Fillmore nominated him to fill the vacancy on the Supreme Court created by the death of Justice John McKinley. Democrats, however, were unenthusiastic about a nominee from a lame-duck Whig, and McKinley's seat was instead eventually filled by Franklin Pierce's nominee John A. Campbell.[58] It is in the same chapter that one learns that the first Jew appointed to the federal courts was Julian William Mack, a New Yorker, named by President William Howard Taft in 1910 and confirmed in 1911.[59]

The subset of Justices that forms the core of Dalin's book raises a methodological question that the author does not address: Aside from religious or ethnic interest, what purpose is served by examining this or any particular subgroup of the Court's membership, a roster that could be sorted in any number of ways? One might examine those Justices whose professional training was to "read law" rather than to attend a law school. Similarly, one might compare those whose legal education had been at Yale with those who studied at Harvard. Some scholars examine the legacies of the appointees of particular Presidents, while others focus on Justices during the tenure of a particular Chief Justice.[60] Alternatively, one might examine those whose professional pre-Court years were spent mainly in a certain region such as New England or the West or in a particular state such as Massachusetts or Illinois. To return to religion, one might look at Presbyterians or Roman Catholics, and so on.

In Lowe's 1994 collection, Justice Ginsburg's "Introduction" to the essays on five Jewish Justices indirectly addressed methodology and offered a rationale for such parsing by posing two questions: "In what sense might it be said that their religious heritage links these jurists? Is there something detectably distinctive about the way Jewish judges and lawyers approach the law?"[61] Noting the age-old connection between Judaism and law, Justice Ginsburg seemed to answer her own questions by referring to "what the late Fifth Circuit Judge Alvin Rubin described as 'a distinctive medley of views influenced by differences in biology, cultural impact and life experience.' In this sense the Jewish Justices have indeed enriched our system of justice."[62] To his credit, Dalin in his essays has offered much in the way of rich perspective for anyone who pursues Justice Ginsburg's questions in greater depth.

Common to Dalin's book and the contributions of McMahon, Fish, and Hobson is a particular view of the Court: Almost since the institution's beginnings in 1789, the Justices have served the people of the United States not only in an essential conflict-resolution role but also equally importantly as a collective conscience and touchstone in attempting to articulate and apply the foundations and basic values of the republic.

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

DALIN, DAVID G. **Jewish Justices of the Supreme Court: From Brandeis to Kagan.** (Waltham, MA: Brandeis University Press, 2017). Pp. xliii, 350. ISBN: 978-1-61168-238-0, cloth.

FISH, PETER GRAHAM. **Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1836-1861.** (Durham, NC: Carolina Academic Press, 2015). Pp. xxxi, 734. ISBN: 978-1-61163-601-7, cloth.

HOBSON, CHARLES F. **The Great Yazoo Land Sale: the Case of *Fletcher v. Peck*.** (Lawrence, KS: University Press of Kanas, 2016). Pp. xiii, 230. ISBN: 978-0-7006-2331-0-3, paper.

MCMAHON, JOEL. **"Our Good and Faithful Servant": James Moore Wayne and Georgia Unionism.** (Macon, GA: Mercer University Press, 2017). Pp. 249. ISBN: 978-0-88146-606-5, cloth.

ENDNOTES

[1] Alpheus Thomas Mason and William M. Beaney, **American Constitutional Law: Introductory Essays and Selected Cases**, 6th edition (1978), p. xiii.

[2] Felix Frankfurter, "The Supreme Court in the Mirror of Justices," 105 *University of Pennsylvania Law Review* 781, 795 (1957).

[3] Judge Ginsburg withdrew his name from consideration before the nomination became official, and in the case of Ms. Miers, President George W. Bush withdrew the nomination. Thus, in neither case were hearings held in the Senate.

[4] *See* Lee Epstein, Jack Knight, and Andrew D. Martin, "The Norm of Prior Judicial Experience and Its Consequences for the U. S. Supreme Court," 91 *California Law Review* 903 (2003).

[5] Data are drawn from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, **The Supreme Court Compendium**, (2d ed., 2007), pp. 284-95, and from the database maintained by the Federal Judicial Center, https://www.fjc.gov/history/judges, last accessed on January 12, 2018.

[6] Joel McMahon, **"Our Good and Faithful Servant"** (2017), hereafter cited as McMahon.

[7] Alexander A. Lawrence, **James Moore Wayne: Southern Unionist** (1943).

[8] McMahon, p. 10. Among the better short treatments of Justice Wayne is an undergraduate thesis by Matthew Kamens, "Justice Wayne and the Judicial Function (1971), in the Library of Franklin & Marshall College, KF8745 .W33 K2.

[9] Matthew 25:21. Similar and sometimes identical phrasing is found in other translations as well.

[10] McMahon, pp. 3, 8.

[11] Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, **The Supreme Court Compendium**, p. 12.

[12] Charles Warren, **The Supreme in United States History** (rev. ed. 1922), vol. I, p. 795. Henry J. Abraham, **Justices, Presidents, and Senators** (5th ed., 2008), p. 80.

[13] Mason W. Stephenson and D. Grier Stephenson, Jr., "'To Protect and Defend': Joseph Henry Lumpkin, the Supreme Court of Georgia, and Slavery," 25 *Emory Law Journal* 579, 580, n.2 (1976).

[14] McMahon, p. 12.

[15] *Id.*

[16] Abraham, **Justices, Presidents, and Senators**, p. 80.

[17] McMahon, pp. 12, 13.

[18] *Id.*, p. 15.

[19] *Id.*, p. 112.

[20] *Id.*

[21] 67 U. S. (2 Black) 635 (1863).

[22] McMahon, p. 1.

[23] Jeffrey Toobin, **The Nine: Inside the Secret World of the Supreme Court** (2008), p. 24.

[24] McMahon, 13.

[25] See Steven P. Brown, **John McKinley and the Antebellum Supreme Court** (2012) and William S. Belko, **Philip Pendleton Barbour in Jacksonian America** (2016).

[26] McMahon, p. 15.

[27] 60 U. S. (19 Howard) 393(1857).

[28] McMahon, p. 179.

[29] Benjamin R. Curtis, ed., **The Life and Writings of Benjamin Robbins Curtis, LL.D.**, (1879), vol. I, p. 236.

[30] McMahon, p. 180.

[31] *New York Times Co. v. United States,* 403 U. S. 713 (1971).

[32] The other six members of the majority did not all agree with Taney on all points of his opinion. Nelson's opinion basically adhered to the original plan by addressing only the first question.

[33] McMahon, p. 180.

[34] 60 U. S. at 455, Wayne, J., concurring.

[35] McMahon, p. 180.

[36] *Id.*, p. 181.

[37] "Memorial to Honorable James M. Wayne," 73 U. S. ix (1867).

[38] Peter Graham Fish, **Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1836-1861** (2015). Hereafter cited as Fish.

[39] *Id.*, p. 207.

[40] *Id.*, p. 206.

[41] *Id.*, p. 207.

[42] 10 U. S. (6 Cranch) 87 (1810).

[43] Charles F. Hobson: **The Great Yazoo Lands Sale** (2016), hereafter cited as Hobson.

[44] *For example, see* Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (1959) and C. Herman Pritchett and

Alan F. Westin, eds., **The Third Branch of Government: 8 Cases in Constitutional Politics** (1963).

[45] In particular *see* Hobson, **The Great Chief Justice** (1996).

[46] Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," 12 *Michigan Law Review* 247, 247 (1914).

[47] Donald G. Morgan, **Justice William Johnson: The First Dissenter** (1954), pp. 210-14.

[48] 3 U. S. (3 Dallas) 199 (1796).

[49] 3 U. S. (3 Dallas) 386 (1798).

[50] 10 U. S. at 138.

[51] 5 U. S. (1 Cranch) 137 (1803).

[52] Hobson, **The Great Yazoo Lands Sale**, p. 1.

[53] 3 U. S. at 388.

[54] *Id.*, 399.

[55] 10 U. S. at 139.

[56] "The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas, A Special Edition of the *Journal of Supreme Court History*, Jennifer M. Lowe, ed. (1994).

[57] David G. Dalin, **Jewish Justices of the Supreme Court** (2017), hereafter cited as Dalin.

[58] *Id.*, pp. 8-10.

[59] Dalin writes that Mack's appointment was to the "U. S. District Court of Appeals." *Id.*, 17, 20. However, the Federal Judicial Center's biographical database indicates that the appointment was first to the "U.S. Circuit Courts for the Seventh Circuit" and then, with elimination of the circuit courts, to the U. S. Court of Appeals for the Seventh Circuit and later to the U. S. Court of Appeals for the Sixth and Second Circuits. *See* https://www.fjc.gov/history/judges/mack-julian-william (last accessed on January 9, 2018.)

[60] *See* Earl M. Maltz, **The Coming of the Nixon Court** (2016); C. Herman Pritchett, **The Roosevelt Court** (1948); C. Herman Pritchett, **Civil Liberties and the Vinson Court** (1954).

[61] "The Jewish Justices of the Supreme Court Revisited" 3.

[62] *Id.*

Contributors

Matthew Hofstedt is Associate Curator, Supreme Court of the United States.

Albert B. Lawrence is Professor and Coordinator of Criminal Justice at Empire State College in Saratoga Springs, New York.

Jonathon Lurie is History Professor Emeritus, Rutgers University.

John Sexton is President Emeritus of New York University.

Brad Snyder is a professor of law at Georgetown University Law Center.

D. Grier Stephenson, Jr. is the Charles A. Dana Professor of Government at Franklin & Marshall College, Emeritus.

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Cover: Detail of conceptual drawing of the Courtroom digitally altered by Matthew Hofstedt to highlight the location of the proposed inscriptions. The draftsman, J. Floyd Yewell, used Latin phrases, which may have caused Chief Justice Charles Evans Hughes to state that no Latin inscriptions were to be used.
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