Introduction

MELVIN I. UROFSKY

It is always our aim to provide our readers with a rich diversity of materials on the history of our nation's highest court, but I think this issue is one of the most diverse in my quarter-century as editor of the *Journal.* We have articles on legal strategy, the constitutional validation of the Union victory in the Civil War, the maneuverings that took a little-known lawyer from the heartland to the Supreme Court, the end of one of the most important eras in the Court's history, and how environmental concerns made their way into the volumes of *U.S. Reports.*

John Marshall, the *great* Chief Justice, is always ranked as one of the three most important persons to have sat on the high court, along with Oliver Wendell Holmes, Jr., and Louis Dembitz Brandeis. Scholars, myself included, consider the decisions handed down by Marshall in his thirty-four years on the bench to be the building blocks of our constitutional structure. Yet if one looks closely, the really important decisions took place in his first two decades, and of the opinions in his last years, the Cherokee cases stand almost alone. Professor William Davenport Mercer of the University of Tennessee suggests that if we look closely at the last years of the Marshall Court, we will see that circumstances—both of a personal and political nature—had changed dramatically from the heyday of *McCulloch* and *Gibbons.*

Two years ago the Society sponsored a lecture series on "Presidents and Their Cabinets," and due to a variety of circumstances, we were unable to print all of the lectures in the same issue. We now have the last of those lectures, the one on Salmon P. Chase, who served as Lincoln's Secretary of the Treasury, and then became Chief Justice to succeed Roger Taney. Professor Cynthia L. Nicoletti of the University of Virginia Law School reminds us that Chase's famous comment, that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states," which is now accepted as a foundational constitutional tenet, was not always so, especially in the years before *Texas v. White* (1869).

In the history of the First Amendment's Speech Clause, most historians see the infamous case of *Dennis v. United States* (1951) as an unfortunate stumble by the Court on the road from *Abrams v. United States* (1919) to *Brandenburg v. Ohio* (1969). In fact, the Court reversed itself in just six years in the *Yates* case. Why and

how this *volte-face* came about has been attributed to a number of causes—changes in the political environment and personnel changes on the bench being the two most common reasons given. Hayden Thorne, a doctoral student at Victoria University in Wellington, New Zealand, suggests another reason: a significant shift in legal strategy, which appealed to the sitting judges in both the trial and appellate courts far more than the effort of the *Dennis* attorneys to make it a political trial.

For environmentalists, no member of the Supreme Court is held in higher esteem than William O. Douglas, who made protecting our natural resources his chief extrajudicial activity. Many legal scholars mocked him when in dissent he suggested that trees and rivers ought to have legal standing so that they could challenge the depredations visited upon them by developers. Although trees may not yet have standing, the courts have proven more friendly to groups like the Sierra Club who, in a way, speak for the trees. The Hon. M. Margaret McKeown, a judge on the Court of Appeals for the Ninth Circuit, takes a fresh look at the case that included the Douglas dissent, *Sierra Club v. Morton* (1972), and has come up with new and interesting findings.

A number of years ago I had the privilege of interviewing Justice Harry A. Blackmun, and he rather self-deprecatingly referred to himself as "old number three," meaning that he had been Richard Nixon's third choice to replace Abe Fortas, after the Senate turned down his first two nominations. Melissa Nathanson, after a career as a practicing attorney, is now at work on a full-scale biography of Blackmun, and she tells us here what a strange web of events led not only to his appointment to the high court, but to his earlier nomination to the Court of Appeals for the Eighth Circuit by President Eisenhower. It was almost as if he had the luck to be standing on the right corner when the right bus came by.

So that is our smorgasbord for this issue —it is rich, it is diverse, and we hope that you will find it as interesting as we did. Enjoy!

The Last Days of the Marshall Court

WILLIAM DAVENPORT MERCER

Introduction

Consider this political issue from the first decade of the American republic: while the new Constitution required the President to update Congress on a periodic basis, it did not specify the etiquette required of Congress by way of a response. In the 1790s, when the capital resided in New York City and then Philadelphia, congressmen began traveling together as a procession to the President's residence to wait on the President and give their response. After the capital moved to the new District of Columbia in 1800, this custom was discontinued within one year, replaced by a courier.[1] Criticized as overly aristocratic and not befitting the representatives of a republic, the congressional procession came to an end because of the changing notions of deference exemplified politically by the transition from federalist to republican control of the government. Marching across marshy and unfinished Washington, D.C., however, also raised objections rooted more in practicality, annoyance, and the reality that the government had moved to a city that barely existed.

Similarly, when we examine the early history of the Supreme Court, we should likewise understand it not only as driven by legal doctrine or grand political ideology, but as an institution perpetuated by people living in a particular place in time. The Justices reacted to the death of loved ones, illness, and changing work conditions as much as they responded to political events or novel legal questions. We cannot neatly segment activities deemed political from those considered social, cultural, or even environmental.

While the Marshall Court was successful as a result of a membership filled with qualified jurists who had the good fortune to work together as a unit for over a decade, the convergence of three factors—personality, place, and timing—played as important a role. By the last five years of the Marshall Court, the circumstances surrounding all three had changed significantly. Chief Justice John Marshall was entering the final years of his life, beset by personal illness, preoccupied by the death of family and friends, and unable to maintain the accord seen in the Court's early years. Relatedly, Washington was no longer a city in its infancy; the enforced seclusion that initially aided in creating a unified court dissipated as the city and the government matured and its new members scattered. Finally, the country had moved away from

the Court's expansive vision of the constitutional order.

A focus on the very difficult last five years of the Marshall Court make it apparent that Marshall and his longtime judicial allies looked to their handiwork not with a sense of accomplishment but largely with a sense of resignation and an understanding that their body of work could soon be undone. In this way, much of the Marshall Court canon that we lionize today has a bit of a modern gloss to it. Of course, politics contributed to this denouement. If, however, we consider Aristotle's famous observation that man is a political animal, we can begin to collapse the artificial distinction between the personal and political that deems the former to reside in the unofficial domain of sentimentality and the latter to be official, and thus relevant. If we view politics as did Aristotle, as an essential attribute of man's existence and necessary to the development of his highest purpose, and the city as the place through which people can exercise these abilities in order to truly exist to the fullest degree, where the Justices lived, how they socialized, and who they loved and lost are important concerns.[2] In this respect, the new city of Washington was as important an actor in the Supreme Court narrative as the Justices themselves. Simply defining politics as the domain of legislatures and presidents, and of edicts and laws, will only tell part of the story.

Madeira and Good Conversation

Piloting the Supreme Court from 1801 until his death in 1835, John Marshall is naturally a focal point for historians. Scholars have long recognized, however, that even in its most powerful early decades, the Court was not uniform in its outlook or its decision making, as Marshall did not solely set its agenda or make its decisions.[3] We should not discount the talents of the many Justices who served on the high court for the first three decades of the nineteenth century. Nonetheless, while the Court's voice was not simply Marshall's, try to imagine it without him.

Marshall's thirty-four years as Chief Justice have long given historians the opportunity to classify his tenure into distinct eras; most consider the period between 1812 and 1823 as the Marshall Court's "golden age," with *McCulloch v. Maryland* in 1819 as the high-water mark of its influence.[4] In these years, we see as its most recognizable element the Court speaking with one voice, usually Marshall's, attributable to the Justices working together as a group. Much of this success was due to timing. While the Court was issuing decisions that concerned hotly contested matters, like the constitutionality of the Bank of the United States during a severe economic depression, the states' rights movement that took off in the 1820s had not yet begun to target the Court.[5] The rise of states' rights ideologies that culminated at the federal level with the ascension of Andrew Jackson to the presidency by the end of the decade made the nationalism of the Marshall Court seem not only anachronistic but dangerous to some. Indeed, foreign observers noted that the speeches in Congress during the 1831 session all seemed to share the common thread of opposing the federal government and trumpeting the supremacy of the speaker's state. English visitor Frances Trollope found their reasons puzzling, noting that

> every debate I listened to in the American Congress was upon one and the same subject, namely, the entire independence of each individual state, with regard to the federal government. ... I speak solely of the very singular effect of seeing man after man start eagerly to his feet, to declare that the greatest injury, the basest injustice, the most obnoxious tyranny that could be practised [sic] against the state of which he was a member, would be a vote of a few million dollars for the purpose of

> making their roads or canals; or for drainage; or, in short, for any purpose of improvement whatsoever.[6]

Marshall and his judicial brethren found themselves increasingly out of synch with many of the changes transforming the country. The Court's rulings sanctioned the move toward national markets, empowered corporations to undertake development, and kept states and localities from interfering in these national projects. At the same time, the Court itself was becoming increasingly isolated from the country. The democratic ethos that engulfed the United States after the War of 1812 was represented not just in the obvious places, such as the removal of property requirements for voting across the country. It also appeared in how Americans socialized, how they related to one another, and even how they dressed. Indeed, Marshall visually appeared as a relic from a rapidly passing generation. By the 1830s, cravats had disappeared, surpassed by replaceable white collars, while breeches and stockings were supplanted by pantaloons, or trousers. Men's fashion had changed so much that by the 1834 New York mayoral race, the term "silk stocking" had first been used against candidates to paint them negatively as pseudo-Federalists. In spite of these changes, Marshall's daily appearance had barely changed in decades: breeches, a long coat, waistcoat, cravat, stockings, and shoes fastened with silver buckles. This outfit remained almost entirely black, sans the white cravat, and was generally unkempt. He still kept his hair messily tied back, although by 1830 it had largely turned gray and begun to thin.[7]

The Marshall Court was successful for a number of reasons we can attribute to legal or political acumen. Relatedly, there was a consistency of membership that allowed the Justices to tackle constitutional issues that lesser courts could have mangled. Not coincidentally, the Justices remained the same for the eleven years of the Court's "golden age."[8] This consistency, coupled with Marshall's unique personality, produced the camaraderie essential for the Court's success. Appointed Chief Justice by John Adams, the last American President identified as a Federalist, Marshall managed to maintain a consensus of thought on the Court throughout much of his tenure despite the steady addition of Justices by Republican administrations. Notwithstanding that William Johnson, Gabriel Duvall, and Joseph Story had all been appointed by Republican Presidents, they came together for some of the Court's most profound accomplishments—upholding the constitutionality of the Bank of the United States in *McCulloch*, insulating corporate entities from state interference in *Dartmouth College v. Woodward*, and affirming the prerogative of the Federal Government to regulate interstate commerce in *Gibbons v. Ogden*.[9]

This cohesion is often attributed to particular traits of Marshall's personality. From his time as a young officer in the Revolutionary War through his service as Chief Justice, Marshall relied upon an easy sociability that was not instrumental, but part of his character. In many ways, the affability that allowed Marshall to create the necessary cohesion on the Court also allowed him to flourish as well. In this way, the political and personal are rarely separated so neatly. Unlike his cousin and longtime nemesis Thomas Jefferson, who was noted to use social gatherings to make political points, Marshall seemed to have genuinely enjoyed company.[10] Marshall in 1788 helped organize Richmond's earliest social club, known alternatively as the Quoits Club, after the horseshoe-style game he learned growing up in western Virginia and perfected playing with his men during his service in the war, or as the Barbecue Club, after the feasting and drinking that occupied the members' time when they were not pitching quoits. Remaining a member until his passing, Marshall helped concoct a semi-official drink for the group—a potent combination of brandy, rum, and his lifelong favorite,

Madeira. This was no high tea of dainty finger sandwiches and powdered wigs, and Marshall was no dandy. Marshall astonished visitors to the club with his common touch. One young visitor noted that Marshall was quite simply drunk and pitching quoits while wolfing down mint juleps. To break ties, Marshall was known to get to his knees in the dirt to measure the correct distance of the quoit throws.[11] He spoke with a bit of a backcountry accent more in line with settlers in western Virginia than the tidewater gentry.[12] Charles Fenton Mercer once told a story about meeting a man serving as a state commissioner in western Virginia in the summer of 1812. The man was there to traverse the James River, presumably to uncover the best methods to remove the obstructions choking off navigation. Wearing bark around his ankles to ward off rattlesnake bites, sleeping on a bed of leaves and twigs, and making his own tea of sassafras, the man turned out to be John Marshall, who was also serving as the current Chief Justice of the Supreme Court.[13]

While men's fashions changed during his thirty-four years on the Court, Chief Justice Marshall (pictured here circa 1808) continued to wear the same black, unkempt outfit of breeches, a long coat, waistcoat, white cravat, stockings, shoes fastened with silver buckles, and with his hair messily tied back.

Washington City

The effectiveness of Marshall's personality on the success of the Court was unmistakably aided by the particular circumstances of holding court in Washington. For roughly two months each year, the Justices would return to the capital to hear cases before dispersing to attend to their circuit riding duties. Washington was still very much an aspirational city when the Supreme Court began its tenure there in 1801; historian Catherine Allgor described it as "more potential than place."[14] The optimism of the young nation was evident in its plans for structures that were more at home in classical Rome than along the swampy Potomac River. While the initial proposals for the federal capital included a Supreme Court building, a dedicated court structure was not realized until 1935.[15] During Marshall's term, the Court met most often in the basement of the Capitol building, although damage from the War of 1812 forced it into a private home for a time.[16] This rudimentary arrangement meant that there were no judges' offices or private chambers.[17] Indeed, the courtroom did not even provide a place for the Justices to change into their robes privately.[18] As a result, the boardinghouses the Justices occupied for their annual Washington sessions served as a hub for a myriad of professional and social activities; court business was done at the same location where the Justices ate, drank, and socialized. Given the blurring of professional and social lines in this way, it is easy to see how a personality as gregarious as Marshall's could draw seeming opponents into an esprit de corps.[19] The move to Washington was essential for building the camaraderie of the Court in ways that would have been difficult had the capital remained in the more cosmopolitan and livelier Philadelphia.[20]

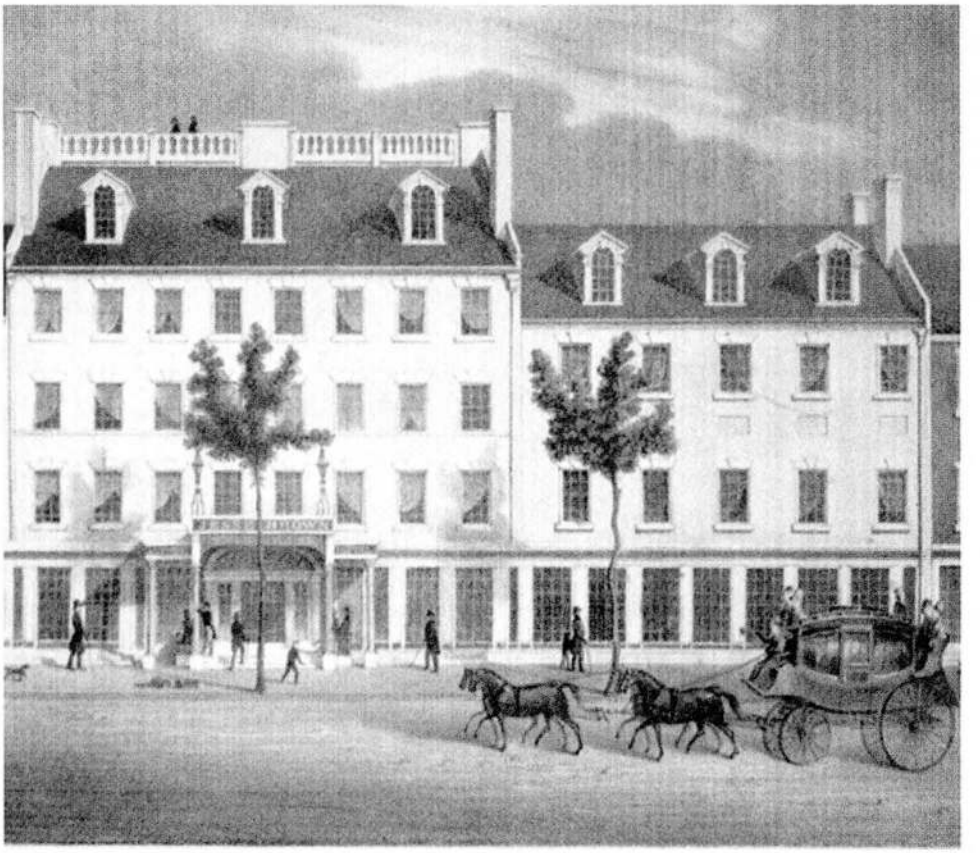
1830

While the Marshall Court had successfully weathered the political currents of the early

republic, in its final five years, from 1830 to 1835, the Court faced perhaps its most insurmountable challenges. Much of the turmoil faced by the Court in these final five years can be traced to the election of Andrew Jackson in 1828. Joining Marshall on the Court during the election year were Joseph Story (Massachusetts), William Johnson (South Carolina), Gabriel Duvall (Maryland), Smith Thompson (New York), and Bushrod Washington (Virginia). With the exception of Thompson, these Justices had served together as one group since Story's appointment in 1812. The seeds of the breakup were nonetheless evident. Longtime ally Brockholst Livingston (New York) died in office in 1823. Appointed by Jefferson in 1807 and noted as a staunch anti-Federalist in his politics, Livingston nonetheless joined the Marshall orbit. Noted to possess a friendly and approachable manner, Livingston likely converted to Marshall's viewpoints in part because of the latter's sociability. [21] Tapped to replace Livingston in 1824, Smith Thompson proved less amenable to the consensus fostered by Marshall, especially as it related to Thompson's more restrictive readings of the commerce clause than the Marshall Court accepted.[22] Nonetheless, Thompson understood the camaraderie required by his membership on the Court. He sold the home he purchased in Washington during his tenure as Secretary of the Navy and joined his new brethren at Brown's Indian Queen Hotel.[23] Robert Trimble replaced nineteen-year member and fellow Kentuckian Thomas Todd after Todd's death in 1826, but Trimble was in ill health and passed away in August 1828 after only two terms.[24] The death of longtime friend Bushrod Washington in November of 1829 hit the hardest. Washington was the only member of the Court with more seniority than Marshall, having been appointed by John Adams in 1799. He and Marshall had quite similar backgrounds; both were Virginians, fought in the Revolution, studied law with George Wythe at William and Mary, practiced law in Richmond, and served in the Virginia Convention that ratified the Constitution.[25]

Marshall exhibited great hesitancy about returning to Washington for the 1830 term; he considered Congress's recent attempt to limit the Court's jurisdiction a constitutional crisis. More important, Marshall was facing this challenge with a Court whose personal dynamics were changing in ways that upset the unwritten customs carefully developed over the last three decades. To make this more difficult still, Marshall was also attending to a Court that was in the process of a Jacksonian overhaul. Replacing Bushrod Washington that January was Henry Baldwin of Pennsylvania, while Robert Trimble's seat was filled by John McLean of Ohio.[26] If Thompson represented the start of a transformation of the traditional dynamic of the Marshall Court, the additional appointments of Baldwin and McLean began its collapse.

McLean was elevated to the Court by President Jackson from his position as Postmaster General so the administration could control lucrative postal service appointments.[27] Jackson's predecessor, John Quincy Adams, had likewise soured on McLean. Although McLean denied Adams's accusation that he used his position as postmaster to attend more to patronage than efficient governance, the President remained unmoved, confiding to his diary that McLean was no more than a slick double-dealer. Citing scripture, Adams characterized McLean as one whose "words are smoother than butter, but war is in his heart."[28] While scholars have since defended McLean from Adams's critique regarding mismanagement of the post office, the jab about double-dealing seemed to stick.[29] After taking his seat on the bench, McLean continued to engage in politics; his personal correspondence is rife with letters regarding national politics and political intrigue, while the political establishment routinely gossiped about his political loyalties and his chances of success in obtaining the presidency.[30] The



Marshall arranged for the Justices to lodge together at various boardinghouses for three decades, but by 1830 they had settled on Brown's Indian Queen Hotel (above). Brown's was located on Pennsylvania Avenue and served as a social hub for the city of Washington.

worst-kept-secret nature of McLean's political aspirations must have vexed Marshall, who, by the Adams/Jackson contest of 1828, had not voted in an election for the presidency for over twenty years, and throughout his career had made public showings of his obligation as a judge to steer clear of formal politics.[31]

In addition to continuing his political activities, McLean upset the customs of the Court by failing to integrate into the boardinghouse culture. Having served as postmaster since his appointment by President Monroe in 1823, McLean already had a separate house in D.C., where he lived with his family, and thus he never resided with the other Justices. This deviation also signaled to William Johnson that it was finally time to leave the boardinghouse, away from the pull of Marshall. Without McLean and Johnson, the boardinghouse culture that had existed since the move to Washington began to collapse. In contrast, at least during his first term in 1830, it appeared that Baldwin would mesh well with the existing ethos and culture of the Court. Indeed, Marshall and Story were initially quite pleased, and Baldwin seemed to fit in well during this first year.[32]

1831

The Justices returned to Washington in January for the 1831 term under ominous circumstances. On January 24, 1831, James Buchanan, then a representative from Pennsylvania, unsuccessfully pushed a bill to

repeal Section 25 of the Judiciary Act of 1789, the clause that gave the Supreme Court the authority to hear appeals from state courts. Indeed, national legislators like Buchanan had taken up what had been a state *cause célèbre* since the 1821 decision in *Cohens v. Virginia*, when the Court had accepted jurisdiction of an appeal from a conviction for violation of a state criminal statute. Although the Justices ruled in favor of Virginia, the Court's assertion that it had the right to hear such an appeal from a state court struck Virginia as an affront to its sovereignty. Equally ominous, Buchanan had also served as a manager in the House impeachment of Federal Judge James H. Peck the year before. Peck's trial before the Senate occurred at the same time Buchanan's repeal bill made its way through the House. While Peck was found not guilty by the Senate, he was the first federal judge charged with impeachment since Samuel Chase was tried and acquitted in 1805.[33]

Heading home to Richmond following the 1831 term, Marshall had only a few weeks before he needed to head out on circuit to hear cases. Although the journey was always arduous, this time the prospect of making the trip was much worse. That spring, Marshall began to feel intense pain, making walking difficult and urination unbearable. In addition to the discomfort, the lack of mobility took away an activity that had been part of his daily routine for as long as anyone could remember. Marshall was an early riser; in Washington, he spent this time taking long walks before most of the other Justices were even out of bed. These walks may have benefitted Marshall's analysis of the cases before the Court that day, not to mention the positive impacts on his overall mental outlook. They also helped him with relationships, as, for example, Marshall was known to walk with fellow early riser John Quincy Adams. Even more so than these benefits, this daily exercise was part of his personality. Earlier that year, the Chief Justice was spotted walking to the Court on a uniquely cold day with an unbuttoned coat and without a hat.[34] Much like his fondness for good wine and easy conversation, walking was part of his authentic nature that helped him pilot the Court through its most difficult days. The loss of this mobility, along with the acute pain, made the remainder of 1831 quite difficult. His wife Polly gave him a specially designed cushion to help his long and bumpy 150-plus-mile ride to Raleigh in May to attend to his circuit-riding obligations.[35]

Tired of the pain, limited mobility, and the side effects of the various medications he ingested to deal with what his doctor in Richmond accurately diagnosed as bladder stones, Marshall revised his will and immediately set out for medical treatment in Philadelphia that September.[36] Once in Philadelphia, Marshall saw Dr. Philip Syng Physick, an eminent surgeon who, like Marshall, was in the twilight of his career. Indeed, like Marshall, Dr. Physick was also a bit of a throwback to the last century, as he continued to powder his graying hair and pull it back into a queue, a style more reminiscent of the revolutionary generation. Tied to the table and lacking anesthesia, Marshall survived a tortuous procedure in which Dr. Physick removed hundreds of small particles from his bladder.[37]

After convalescing for several weeks in Philadelphia, Marshall was able to return to Richmond for his duties on the circuit court by the end of November.[38] There, Marshall was faced with perhaps the most daunting challenge of all, the rapidly declining health of his wife Mary, known better to generations of historians as "my dearest Polly," as he affectionately referred to her in three decades of correspondence. Polly did not travel with her husband to Philadelphia, as her own health concerns prevented the trip. Indeed, Polly had long been fragile, both physically and emotionally. While she and John had six children survive to adulthood,

they lost four in succession between 1789 and 1792. These traumas left Polly with a sense of melancholy for the rest of her life. Marshall's personal life was defined by Polly's frailty; Marshall accepted her permanent delicate state and played a bigger role in the parenting of their remaining children. He also doted on her, writing scores of letters during his absences, showering her with gifts, and going to great lengths to compensate for her frail nerves. Shortly after Marshall's return to Richmond, Polly fell gravely ill. For most of December, she was unable to leave her bed. On Christmas Day, Polly died.[39]

Polly's death was devastating. Indeed, death and illness seemed to shadow the Court that year, as old friends and loved ones passed on. Former President James Monroe died that July 4; together Marshall and Monroe attended school, fought a revolution, and served in the Virginia House of Delegates, and both went on to national prominence. More so, they were similar in temperament, as they used to frequent taverns to drink, play cards, and shoot billiards when court was out of session in Richmond. They were similar even stylistically, as Monroe was one also of the few, like Marshall, who continued the tradition of dressing in a fashion similar to that of the eighteenth century.[40]

Story also had his own loss earlier that May, when his ten-year-old daughter Louisa succumbed to disease. The correspondence between Marshall and Story is heartbreaking. Seeking to comfort Story, Marshall dredged up the memories of his four lost children buried underneath four decades of grief: "You ask me if Mrs. Marshall and myself have ever lost a child. We have lost four—three of them bidding fairer for health and life than any that have survived them. One, a daughter about six or seven was brought fresh to our minds by what you say of yours. She was one of the most fascinating children I ever saw." Calling forth this memory opened even more painful recollections, as Marshall continued, that his daughter Mary "was followed within a fortnight by a brother whose death was attended by a circumstance we can never forget." Marshall then explained the subsequent death of his son John James, a horrifying scenario in which Marshall had convinced Polly to leave the room when it appeared John James had passed but instead had remained breathing.[41] While Marshall recovered from these losses in a professional sense, consider, however, that this letter to Story was written by a man in his seventy-sixth year, in nearly constant pain from bladder stones, and who was now remembering these events that haunted him, losses from which Polly would never quite recover. This correspondence to Story required him to revisit the moment that altered the remainder of their lives together.

While Marshall was awaiting surgery in Philadelphia, the members of the bar created a committee to host a dinner for him in his honor. Although he turned down the invitation because of his health, the committee then sought to commission a portrait of the Chief Justice. Despite anticipating an agonizing operation, Marshall very patiently walked to Henry Inman's studio to sit for the portrait. In many ways, this episode encapsulates much of what Marshall was facing in the final years. He sought to use the Court to maintain his vision of the ideal constitutional order but had passed into the phase of life where many praised him as if he had already retired from the fight. Within a few months, newspapers began printing rumors that Marshall intended to resign at the end of the 1832 term.[42] More important, the Court would decide a case that would compromise its authority altogether.

1832

Marshall returned to Washington just a few weeks after Polly's death.[43] Marshall

and Story were not alone in illness and loss in 1831. William Johnson visited Raleigh that year only to become seriously ill and spend the fall and winter in North Carolina convalescing. When the Justices returned to Washington, Johnson would not be among them and would miss the entire 1832 term. Moreover, before the Justices dispersed at the end of the 1831 term, the conversation at the boardinghouse turned to plans for the next year. The camaraderie seen by Henry Baldwin in 1830 was fast dissipating as he grew increasingly erratic. While fellow new arrival John McLean was often distant, Baldwin would ultimately prove affirmatively disruptive. Not only had he further fragmented the Court's practice of issuing unitary opinions, dissenting at least five times in 1831 alone, but he began to upset the very fabric of the Court's unity.[44]

The previous year, Baldwin told Marshall that he did not want to reside at the Court's current boardinghouse.[45] A white four-story structure rechristened in 1820 as Brown's Indian Queen Hotel after Jesse Brown had adorned the front of the hotel with a large rendering of Pocahontas, the boardinghouse was located on Pennsylvania Avenue, the thoroughfare intended to connect the Capitol building with the White House.[46] Although the poplar trees planted along Pennsylvania Avenue during the Jefferson administration would have been coming in nicely, the Indian Queen often benefitted more from its position as a hotel in a new city with few other options.[47] Maybe it was the unfinished road that ran in front of the hotel; the road was not macadamized until 1832. Possibly Baldwin knew this and did not want to reside at the hotel while all the noise and construction took place.[48] Marshall relented and agreed to let Baldwin find new quarters; Baldwin did nothing on his end, leaving Marshall to scramble to find accommodations for the 1832 term.[49] Marshall found lodging about two miles from the Capitol building for himself, Duvall, Story, Thompson, and Baldwin with Tench Ringgold, the long-serving Marshal of the District of Columbia recently forced out by Jackson.[50]

Returning to Washington not only meant a new living situation but a fundamentally different session for all the Justices. Marshall was faced with two months away from Richmond, but this time there would be no letters to Polly. Story would return fresh from the loss of his daughter. Johnson would never make it to Washington because of his illness. By this time, Duvall, though only three years older than Marshall, was largely dependent on the Chief Justice during their time in Washington. As Duvall was almost entirely hearing-impaired, Marshall took it upon himself to make sure that Duvall lived with them, writing to Story that "Brother Duval must be with us or he will be unable to attend consultations."[51]

In the midst of these changes, the Court decided the third of three cases that implicated not only the fate of native peoples in the United States and the balance of power between the states and the Federal government, but even the power of the Court itself. In 1802, the state of Georgia deeded its western land claims to the Federal government. In return, the United States agreed to extinguish all native land claims within the state.[52] Twenty-five years later, the Cherokee Nation remained in the northwest portion of the state. Georgia hoped that Andrew Jackson would be more sympathetic to its position, so shortly after his election in 1828, the state annexed the Cherokee lands, but it deferred enforcement until June 1, 1830. Georgia bet right; four days before the law was set to take effect, Jackson signed into law the Federal Indian Removal Act, which provided for the relocation of the five civilized tribes of the southeast to west of the Mississippi.[53] The Cherokees turned to the federal courts to force the U.S. government to uphold its specific treaty obligations against the state of Georgia.

Marshall and the Court had seen the confrontation between Georgia and the Cherokees coming for several years. In December 1830, Marshall summoned Georgia to appear before the Supreme Court for its death sentence against a Cherokee man accused of killing another Cherokee on Cherokee land. While Georgia proceeded against the defendant under an expansive view of its own jurisdiction, at the same time it refused to recognize the Court's jurisdiction to review its claimed authority. To make matters worse, Georgia ostentatiously executed the prisoner two days after it received Marshall's order. Newspapers took notice, many speculating not only whether Marshall would punish Georgia but also whether he even had the power to do so.[54]

Three days later, the Cherokees served their federal petition for an injunction on the Georgia governor to stop the state from claiming Cherokee land; this landed on the Court's docket during its 1831 term. While in *Cherokee Nation v. Georgia* (1831), Marshall ruled against the Cherokees as not possessing the attributes of sovereignty that would constitute them as a "foreign state" and thus allow them to use the federal courts pursuant to Article III of the Constitution, he did indicate that he would be amenable to hearing the dispute once this jurisdictional hurdle was cleared.[55] After Georgia arrested two northern missionaries for living among the Cherokees without the state-mandated license and sentenced them to four years of hard labor, that moment had arrived.[56] Marshall had followed Jackson's navigation of the Indian Removal Act through Congress and was concerned.[57] In *Worcester v. Georgia* (1832), Marshall finally had a chance to weigh in on Georgia's actions. On the morning of March 3, 1832, Marshall read in court the majority opinion in the case. His voice frail, Marshall read aloud from several unbound sheets of paper, some torn, most scribbled upon. For close to an hour, Marshall rebuked Georgia on all counts, holding that their laws over the Cherokee Nation were null and void.[58] And then ... nothing.

Racing to the Georgia courthouse with a copy of Marshall's decision, local counsel for the Cherokees intended to secure the missionaries' release. The judge refused to release the prisoners or even admit the decision into evidence and instead quickly adjourned court so he could travel to the former Cherokee lands to hear cases now that Georgia claimed jurisdiction.[59] For his part, Jackson continued to move forward with his plans to relocate the five civilized tribes to west of the Mississippi. Believing that "[t]he decision of the supreme court has fell still born," he did not fall for what some historians believe was Marshall's re-election year trap: enforcing the order would anger his southern supporters, while refusing to do so would reinforce his image in the north as more of a king than the president of a republic.[60] Jackson rightly interpreted that this was not a problem, as the intended conundrum presumed that a shared appreciation of the supremacy of the Court's decisions outweighed the actions of a popular President. Jackson simply continued his removal plan without regard for the Court's decision.

Marshall was unable to react to this political challenge to the Court with the same success he had shown in the past. Perhaps not coincidentally, the two Justices who did not reside with the others at the boardinghouse—McLean and Baldwin—did not join the majority opinion. Baldwin dissented, while McLean wrote a separate concurring opinion that played it safe by ruling that Georgia was in violation of Federal treaties but then leaving a significant invitation for the state to act if the Cherokees were later viewed as incapable of governing themselves.[61] The Court invalidated the convictions of the missionaries, but it did not specifically order Georgia to take any definite action before the Court ended its

1832 session in mid-March.[62] This omission meant that Georgia was not immediately in violation of a federal court order and would allow the state to adopt the position that there was technically no order for Jackson to enforce. Moreover, at the same time that the press began reporting Jackson's intention to do nothing to enforce *Worcester*, Marshall was still quibbling with the clerk of court over the exact citations to place in the reported case, although the decision was quickly becoming a dead letter. The Court would have to wait until its 1833 term to take up the matter again.[63]

A lifelong devotee of long walks, Marshall had a hard time in 1831 when his health declined. His wife, Polly (above), gave him a specially designed cushion to ease the pain during the long and bumpy rides to attend to his circuit court obligations.

The wait proved excruciating. While every day of 1832 had slowly crystalized the reality that the President was leaving the Court ever more humiliated and exposed, news from South Carolina, of the State's nullification of federal law, portended problems for the Union itself. While the immediate focus of South Carolina's objection was the 1828 federal tariffs, the source of the rage was largely attributable to the cratering price of cotton, the state's signature export over the last decade.[64] By November, South Carolina nullifiers met in convention and passed the Nullification Ordinance, which declared among other things that both the 1828 and 1832 compromise tariffs were void within the state after February 1, 1833, and that any attempt to enforce the tariff would result in South Carolina's declaring itself as an independent state.[65]

Indeed, for much of the rest of the year, Marshall remained alternatively anxious and resigned about the upcoming 1833 term. Sitting at his desk in Richmond on Christmas day of 1832, the one-year anniversary of Polly's death, Marshall expressed his reservations to Joseph Story. Marshall began by congratulating Story on the imminent release of his *Commentaries on the Constitution.* Although the *Commentaries* signaled that Story was gearing up to fight for the Court's legacy in promoting the interests of a strong federal nation, Marshall grew more resigned. In light of the growing unrest over the federal tariff, Marshall was hesitant over Virginia's response and openly feared for dismemberment of his home state over South Carolina's real plan to form a "southern confederacy."[66]

1833

The Court returned to hear its first oral arguments for the 1833 session on January 15.[67] Only one day earlier, the Georgia missionaries accepted a pardon offered by the governor.[68] The case was officially moot, although the indignity of Georgia's ignoring the *Worcester* order would remain. More pressing, on January 16, Jackson sought the approval of Congress for the use of military force against South Carolina.[69]

In the midst of these dual crises, the Marshall Court heard its last constitutional case. Arising from a dispute in which two

Baltimore wharf owners brought an action against the city for taking their property without compensation, a violation of the Fifth Amendment, *Barron v. Baltimore* represented what was the Court's final opportunity to shape constitutional law.[70] Facing Georgia's disregard of its *Worcester* order from the year before and in the midst of an ever-worsening constitutional crisis in which South Carolina threatened secession over obedience to federal law, the Court had to decide a particularly thorny question: Were the states obligated to follow the Bill of Rights?

While this issue was resolved in the twentieth century when the Court began its process of selectively incorporating the provisions of the Bill of Rights against the states through the Fourteenth Amendment, at the time it was an open question. Many courts routinely applied the liberties contained in the Bill of Rights against state action, as their inclusion in the Constitution was largely treated as unconnected to the question of whether the Bill of Rights was meant to apply to the states. Rather, most courts viewed these liberties—the right to possess firearms, the right against double jeopardy, and the right to compensation for takings of private property, for example—as emanating from extra-constitutional sources like the common law or natural right. Their inclusion in the Bill of Rights was not thought to provide the right; instead, written documents like the federal or many state constitutions simply recognized that the right existed.[71]

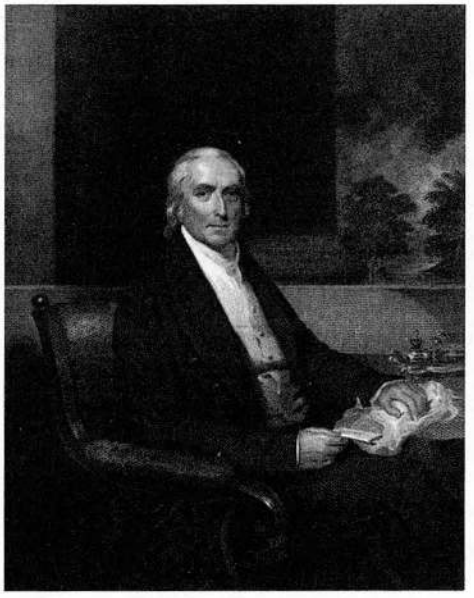
Regardless, Marshall found in favor of the city of Baltimore and against the wharf owners by viewing the dispute primarily as a matter of jurisdiction. As the Bill of Rights was only meant to bind the new federal government, he posited, the prohibition against takings could not be used against the state of Maryland. In so doing, Marshall viewed this right as emanating from the Constitution instead of a liberty found in generations of the common law, natural right, or even specifically recognized as a fundamental principle of all free governments dating to Magna Carta in 1215. Thus, after a career of fortifying federal power, the Marshall Court ended its constitutional jurisprudence on a note that many scholars have thought largely out of tune.[72]

We must, however, consider the specific context. If we return to the snowy Saturday morning of February 16, when the Justices trudged to the Capitol building to issue the decision in *Barron*, there was much more before the Court than a question of payment for a wharf.[73] Instead, Washington society was enthralled by the drama taking place in the Senate, where John C. Calhoun was in the middle of a two-day oration defending the actions of his state and attacking the administration's request to Congress to collect the revenue, better known as the Force Bill.[74] Beginning on Friday and continuing into Saturday morning, Calhoun spared no hyperbole in his attacks, accusing the proposed law of authorizing a massacre of South Carolinians.[75] When Calhoun finally ceded the floor, Daniel Webster of Massachusetts immediately rebutted Calhoun's charges that the states created the Union through a constitutional compact and that as a result South Carolina retained its sovereignty to determine whether to follow laws it deemed unconstitutional.[76] Before enthralled standing-room-only galleries, the Senate chamber erupted with accusations equating political positions with support for violence, slaughter, and revolution. For two days, Calhoun and Webster debated nothing less than the very basis of the Union itself.

That same Saturday morning, John Marshall and his brethren also headed to the Capitol building. Instead of following the crowds to the Senate, they headed downstairs to the small basement room directly underneath, where the Court resided. The Court occupied a simple space under the Senate: its lack of natural light and low ceilings not only

reminded many observers more of a cellar than a courtroom, but in many ways the space mirrored the Court's still very aspirational importance.[77] In the midst of the constitutional crisis playing out upstairs, Marshall released the Court's decision absolving the states from having to follow the Constitution as it related to individual rights.

The decision makes more sense when we consider it in light of Marshall's concern over not just the nullification crisis but the continued existence of the Union itself, a fear that had consumed him for the last several years. The Court was not insulated from the storm raging directly above it; Marshall had followed Webster's arguments and highly approved of them.[78] The state sovereignty backlash the Court had endured over the course of the 1820s seemed to escalate precipitously in the last few years. Georgia had refused to recognize the Court's jurisdiction a year earlier; New York had followed its lead and similarly refused to recognize the Court's authority to hear a boundary dispute case brought by New Jersey.[79] South Carolina was now taking this argument a dangerous step further. Indeed, Marshall had been preoccupied with the escalating showdown between South Carolina and the federal government; he had carried on correspondence with Story since the year before where he fretted that southern politicians were "determined to risk all the consequences of dismemberment."[80] Even after the dispute formally wound down in March 1833 with the passage of a compromise tariff, his fears continued.[81]



Dubbed "the father of American surgery," Philip Syng Physick removed hundreds of kidney stones from Marshall. The Philadelphia physician was unable, however, to provide a cure for the enlarged liver that led to the Chief Justice's death in 1835.

Closer to home, by November 1833, Marshall's long-term project to redeem his son John from a lifetime of bad habits and squandered opportunities had ended when John Jr. succumbed to alcoholism at age thirty-five; Marshall arranged to take care of John's widowed wife and three children.[82] That same month, Marshall commiserated with Story about what seemed like their never-ending search for stable housing in Washington. Frustratingly, although Baldwin began the Court on its search for alternate lodgings away from Brown's Hotel, Baldwin's increasingly erratic behavior caused him to miss the 1833 term entirely.[83] Tench Ringgold was leaving the city and could no longer house the Justices as he had for the last two terms.[84] By the end of the year, the Court was still without a residence, and Gabriel Duvall was scouring D.C. for something suitable. True to form, Marshall was amenable to even taking the small room if necessary.[85] He was concerned about finding accommodations only for himself, Duvall, and Story. Baldwin missed the 1833 term and McLean never resided with his brethren. In addition, Smith Thompson's wife passed away in September of 1833. As no one had heard from Thompson since, it was not clear whether he would join them next year.[86]

Marshall attempted to keep up old routines. Back in Richmond, he continued his attendance at the Quoits club, attending Saturday barbeques as he could; they were

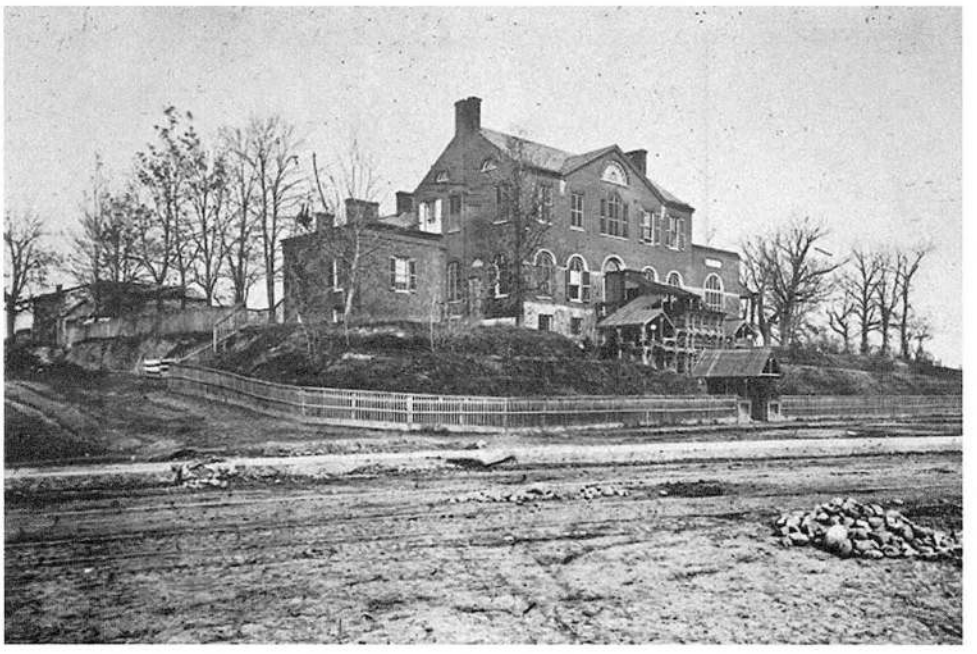
still held under the same oaks at a nearby spring. Marshall and his friends would pitch quoits and drink hard punch and mint juleps before sharing the barbeque on a single table under a tent. [87] No doubt the company of his few remaining friends with whom he founded the club would prove fortifying, notwithstanding the absence of most of his peers.

1834

Arriving in Washington for the 1834 term, the remaining Justices who still resided together—Marshall, Story, and Duvall—unpacked and greeted each other at a boardinghouse owned by Mrs. R. Dunn, located on Capitol Hill. At this point, however, Marshall recognized that he was no longer seeking accommodations for the Court as a body. William Johnson's illness ultimately caused him to miss the entire 1834 term. He died on August 4 in New York City, following complications from jaw surgery. [88]

Questions of great constitutional import came before the Court during the 1834 and 1835 sessions, but the Court did not rule on them. One concerned whether Kentucky had issued prohibited bills of credit by effectively issuing a state currency, in violation of Article I, Section 10. Another questioned whether New York's requirement that ship captains provide lists of incoming passengers in an attempt to stem the tide of indigent immigrants to the city violated the commerce clause. Both cases would have required the Court to define the balance of power between the states and the federal government, questions that the Marshall Court had, in decades past, confidently answered. Here, however, Marshall wrote opinions that noted the absence of a quorum, due to illness and resignation of certain Justices, which precluded the Court from issuing decisions where constitutional questions were raised. [89]

Although 1834 did not witness the high drama of the preceding year, Marshall was nonetheless still pessimistic. He braced for



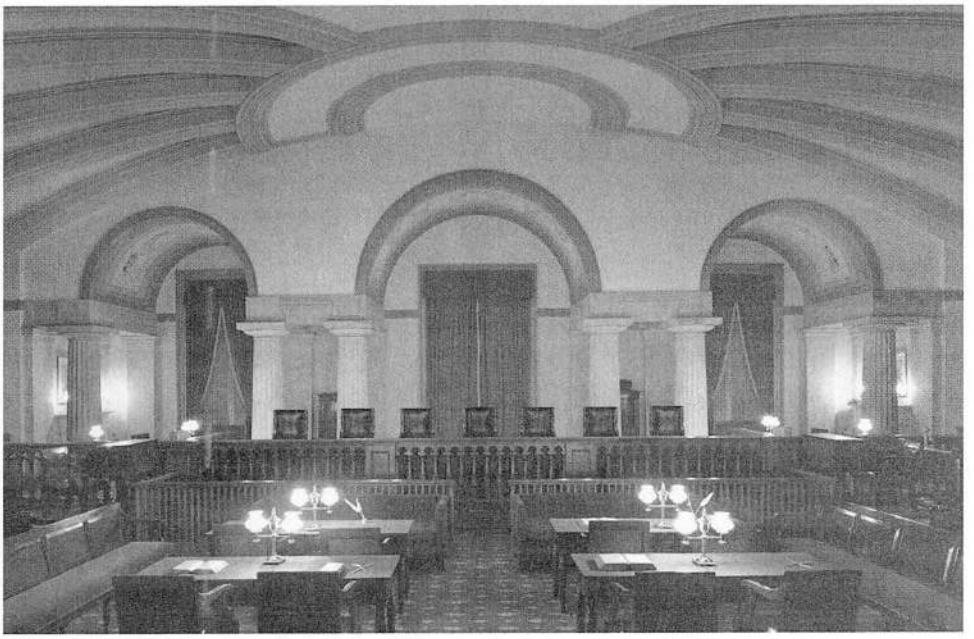
In 1832 Marshall found rooms for five of the Justices at the house of Tench Ringgold (pictured), the long-serving Marshal of the District of Columbia who had been recently forced out by President Andrew Jackson. By 1835, only Marshall and Joseph Story were sharing lodging together.

another year of what he felt was an assault on decades of work. Writing to Henry Lee, he noted that:

> we have a stormy session abounding with subjects of great excitement. The old federalists see much to deplore and not much to approve. We fear that the fabric erected for us by our predecessors is about to be tumbled into ruins. But I mix so little with politicians that it would be presumption in me to hazard conjectures on the future. The papers will give you some idea on the state of public feeling. Providence has saved us more than once, and I hope, will save us again.[90]

With his usual humility, he attributed the concern for the upcoming year to "our predecessors," while in reality much of his worry seemed to revolve around the destruction of a system he played an essential role in creating.

That summer, Marshall sat alone in his Richmond house. It had been two-and-one-half years since Polly had passed. He tinkered with his will, adjusting the lands he had planned on giving to his son John to vest in his grandchildren.[91] A sculptor arrived that May. Commissioned by a Boston institution to create a bust of his likeness, the artist realized that Marshall lived by himself in a house empty except for the domestic—read enslaved—help. (Marshall was an almost lifelong slave owner. Most Marshall biographers tend to reconcile this by noting that he owned considerably fewer slaves than his elite contemporaries and was a supporter of the colonization movement. Nonetheless, Marshall profited from the legally coerced labor of many enslaved men and women throughout his life.) Marshall, true to form, asked the sculptor to stay for dinner as well as for two or three glasses of Madeira and even sent him away with a bottle aged at least thirty years.[92] A September with his son James Keith Marshall at James's estate north of Richmond took him away from this seclusion, but once he returned, he continued his correspondence, which generally lamented the damage done to the cause of Union by the nullification crisis.[93]



The Old Supreme Court Chamber where the Marshall Court heard cases in the 1830s.

1835

New faces replaced old ones for the 1835 term. Duvall retired in January, leaving Marshall and Story as the final adherents of the old boardinghouse culture. Johnson was replaced by James M. Wayne of Georgia. Marshall and Story moved into a boardinghouse located near the Indian Queen without the other Justices.[94]

Marshall kept in contact with the sculptor and bought seven copies of the bust produced the previous year. His return to Richmond at the close of the session was disastrous; his stage coach flipped over and left him seriously injured.[95] Back at home and still in great pain, Marshall finalized plans to retire to James Keith's estate. He went through the mundane arrangements of sending his effects, paying particular attention to the timing of moving his wine and spirits so that he and they would arrive around the same time.[96] He wrote to old friends, lamenting his failing health and the limits of the medical profession, as he complained that his "old worn out frame cannot I beleive [sic] be repaired. Could I find the mill which would grind old men, and restore youth, I might indulge the hope of recovering my former vigor and taste for the enjoyments of life. But as that is impossible, I must be content with patching myself up and dragging on as well as I can."[97]

After collapsing during a walk to visit Polly's grave, Marshall again sought out medical treatment in Philadelphia. An enlarged liver protruded into his stomach and made it impossible to keep food down. Dr. Physick was unable to provide a cure. On the evening of July 6, 1835, at seventy-nine, Marshall died.[98]

Conclusion

Speeches, memorials, and resolutions were quickly produced across the country that celebrated Marshall's legacy as "the judicial father of all."[99] The Tennessee Supreme Court noted that "[w]hen it could be ascertained what had been the opinion of Chief Justice Marshall, on any important and doubtful legal question, doubts were generally no longer felt, and we willingly followed a guide, who so seldom erred. His name stamped with a seal, of the highest authority, all the decisions of that tribunal, of which he was the head, throughout the whole Union, and insured for them, the highest respect, in all civilized countries."[100] And with his death began the preferred memory of both the Chief Justice and his Court, a remembrance that largely minimizes the difficult final five years. In our contemporary estimation, Marshall is *the* Chief Justice, and the Court that operated for the first three decades of the nineteenth century under his direction represents its most celebrated age. The scores of biographies of the Chief Justice attest to our continuing fascination with and understanding of Marshall as a personally transformative figure who created the Court as a true institution in American life. What this appreciation sometimes obscures is the contingencies of place and era that provided Marshall and the other Justices the basis upon which they could enjoy this successful tenure. The challenging five final years of the Marshall Court shows the importance of very contingent variables to their success. When Washington was no longer in its infancy as a city, the Justices were no longer forced by necessity to live together, and the country turned away from the nationalist vision present in so many of the Court's most famous decisions, the forceful nature of Marshall's personality, upon which many predicate the Court's success, seems less pivotal.

ENDNOTES

[1] Gordon Wood, **Empire of Liberty** (2009), p. 80; "Mr. Lyon's Speech," **The Time Piece and Literary Companion** (New York), Vol. 1, Issue 39, p. 153, June 9, 1797, reprinted in **The Early American Republic**, Sean Patrick Adams, ed. (2009), p. 25;

James Sterling Young, **The Washington Community, 1800-1828** (1966), p. 74.

[2] Aristotle, **The Politics**, Book 1, Chapter 2, Translation by T.A. Sinclair (1962), p. 28; David J. Riesbeck, **Aristotle on Political Community** (2016), p. 2.

[3] See, for example, R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001), p. 270.

[4] G. Edward White, **The Marshall Court and Cultural Change, 1815-1835** (2010), p. 9; Newmyer, **John Marshall**, p. 269.

[5] R. Kent Newmyer, **Supreme Court Justice Joseph Story** (1985), p. 156; Newmyer, **John Marshall**, p. 396.

[6] Frances Trollope, **Domestic Manners of the Americans**, Donald Smalley, ed. (1949), p. 227.

[7] Michael Zakim, **Ready-Made Democracy** (2003), pp. 96-97, 203; Lucy Johnson, **19th-Century Fashion in Detail** (2016), p. 9; Leonard Baker, **John Marshall: A Life in Law** (1974), pp. 755-756, Frances Norton Mason, **My Dearest Polly (1961)**, p. 318.

[8] Jean Edward Smith, **John Marshall: Definer of a Nation** (1996), p. 402.

[9] *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Dartmouth College v. Woodward*, 17 U.S. 518 (1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824). Duvall dissented without writing a separate opinion in *Dartmouth*.

[10] Catherine Allgor, **Parlor Politics** (2000), pp. 4-47, Newmyer, **John Marshall**, pp. 129-130.

[11] Smith, pp. 160-161; Baker, pp. 47, 760-761.

[12] Newmyer, **John Marshall**, p. 14.

[13] "Judge Marshall," November 15, 1833, *Salem Gazette* (Salem, Mass.), p. 2.

[14] Maxwell Bloomfield, "Supreme Court Buildings," in **The Oxford Guide to the Supreme Court**, Second Edition, Kermit Hall, ed. (2005), p. 118; Allgor, p. 10.

[15] Young, pp. 3-4; White, p. 158; Bloomfield, p. 119.

[16] White, p. 158.

[17] Edward White posits that there may have been a rudimentary conference room, but little else. White, p. 160.

[18] Newmyer, **John Marshall**, p. 398. Though Newmyer is referring to the original courtroom on the first floor of the Capitol that housed the Court until 1810, the basement courtroom likewise gave the gallery a view of the Justices donning their robes.

[19] For a similar point about the blurring of personal and official roles in boardinghouse culture, see Newmyer, **John Marshall**, p. 398.

[20] A good description of the cosmopolitan state of Philadelphia in the 1790s, at least by North American standards, is found in Francois Furstenberg, **When the United States Spoke French** (2015), pp. 90-94.

[21] Michael Dougan, "Henry Brockholst Livingston," in **The Oxford Guide to the Supreme Court**, pp. 587-588; and Gerald T. Dunne, "Brockholst Livingston," in **The Justices of the United States Supreme Court**, Leon Friedman and Fred Israel, eds. (1969), p. 391.

[22] Donald Malcolm Roper, **Mr. Justice Thompson and the Constitution** (1987), pp. 100, 159.

[23] Smith, pp. 470-471.

[24] Fred L. Israel, "Thomas Todd" and "Robert Trimble," in **Justices of the United States Supreme Court**, pp. 407, 518.

[25] Albert P. Blaustein and Roy M. Mersky, "Bushrod Washington," in *ibid.*, pp. 243-247.

[26] January 8, 1830, JM to Joseph Story, **The Papers of John Marshall Digital Edition**, Charles Hobson, editor (2014) (hereinafter "**Marshall Papers**"), Vol. 11, p. 332; Smith, pp. 503, 507.

[27] White, pp. 295-296; Smith, p. 503, **Memoirs of John Quincy Adams**, Charles Frances Adams, ed., Vol. VIII (1970), pp. 109-110.

[28] Adams cited Psalms 55, Verse 21. **Memoirs of J.Q. Adams**, p. 25.

[29] Paul Brickner, "Reassessing Long-Accepted Truths about Justice John McLean," 38 *Ohio N.U. L. Rev.* 193, 195 (2011); White, p. 295.

[30] See, for example, *John McLean Papers*, 1817-1861, Library of Congress, ID No: MSS32326, especially Box 6, Reel 3 (Correspondence March 2, 1831, to December 21, 1832) and Box 7, Reel 4 (Correspondence December 22, 1832 to 1834), October 1829 Ninian Edward to Jackson, *Andrew Jackson Papers*, Vol. 7, p. 474, February 16, 1831, Joseph Blount Hinton to Jackson, *Andrew Jackson Papers*, Vol. 9, p. 85, April 2, 1831, James Booker Gardiner to Jackson, *Andrew Jackson Papers*, Vol. 9, p. 162.

[31] Charles Hobson, "Preface," **Marshall Papers**, Vol. 11, p. xx; "Letter from Judge Marshall," November 25, 1834, *Nashville Republican*, p. 2.

[32] Smith, pp. 507, 514; Frank Otto Gatell, "John McLean," in **The Justices of the United States Supreme Court**, p. 538; Newmyer, **John Marshall**, pp. 405-406; January 31, 1830, JM to Mary Marshall, **Marshall Papers**, Vol. 11, p. 343; George Haskins, **History of the Supreme Court of the United States, Vol. II** (1981), p. 85; White, p. 160; Newmyer, **Joseph Story**, pp. 218-219; October 12, 1831, JM to Joseph Story, **Marshall Papers**, Vol. 12, p. 119.

[33] 7 *Cong. Deb.* 532 (1831); *Cohens v. Virginia*, 19 U.S. 261 (1821); Frank Thompson, Jr. and Daniel H. Pollitt, "Impeachment of Federal Judges," 49 *U.N.C. L. Rev.* 100-102; Adam A. Perlin, "The Impeachment of Samuel Chase: Redefining Judicial Independence," 62 *Rutgers U. L. Rev.* 725, 100-102 (2010).

[34] Smith, pp. 78, 512; January 31, 1830, JM to Mary Marshall, **Marshall Papers**, Vol. 11, p. 343; Newmyer, **John Marshall**, p. 13; Robert Remini, **John Quincy Adams** (2002), p. 77.

[35] Newmyer, **John Marshall**, p. 13; May 12, 1831, JM to Mary Marshall, **Marshall Papers**, Vol. 12, p. 65; Smith, p. 512.

[36] John Marshall Will, September 24, 1831, **Marshall Papers**, Vol. 12, p. 100: "Marshall in Philadelphia, 28 September–19 November," editor's note, **Marshall Papers,** Vol. 12, p. 105; Smith, p. 512.

[37] George B. Roberts, "Dr. Physick and His House," **The Pennsylvania Magazine of History and Biography**, Vol. 92, No. 1 (Jan. 1968), p. 72; the medical term for this procedure is a lithotomy. Smith, 513.

[38] "Marshall in Philadelphia, 28 September–19 November," editor's note, **Marshall Papers**, Vol. 12, p. 109.

[39] Newmyer, **John Marshall**, p. 34; December 19, 1831, JM to James M. Marshall, **Marshall Papers**, Vol. 12, p. 136; Mason, p. 343.

[40] Smith, 98; Zakim, p. 203.

[41] May 29, 1831, Story to JM, **Marshall Papers**, Vol. 12, p. 69; June 26, 1831, JM to Story, **Marshall Papers**, Vol. 12, p. 94.

[42] October 14, 1831, *Richmond Enquirer*, p. 1; Andrew Oliver, **Portraits of John Marshall** (1977), p. 136; March 21, 1831, *Baltimore Patriot*, p. 2.

[43] January 11, 1832, JM to James Marshall, Jr., **Marshall Papers**, Vol. 12, p. 139.

[44] White, pp. 298, 343; Gatell, p. 576. There may be more as Richard Peters, the Clerk of Court, complained that Baldwin dissented in two-thirds of the cases that term but would later change his mind or would often fail to file his opinions as he most famously did with his dissent in *Worcester*. Lindsay Robertson, "Justice Henry Baldwin's 'Lost Opinion' in *Worcester v. Georgia*," *Journal of Supreme Court History* (March 1999), Vol. 24(1), pp. 51-52.

[45] October 12, 1831, JM to Story, **Marshall Papers**, Vol. 12, p. 119.

[46] Thomas J. Carrier, **Washington D.C.: A Historical Walking Tour** (1999), p. 47.

[47] **The Pennsylvania Avenue District in United States History** (National Park Service Report, 1965), illustration following p. 17.

[48] Constance McLaughlin Green, **Washington: Village and Capital** (1962), p. 127.

[49] Charles Hobson, "Preface," **Marshall Papers**, Vol. 12, p. xxi; June 26, 1831, JM to Story, **Marshall Papers**, Vol. 12, p. 93.

[50] **Memoirs of J.Q. Adams**, Vol. VIII, p. 22; White, 381-382; November 10, 1831, JM to Story, **Marshall Papers**, Vol. 12, p. 124; David Turk, "Firebrand: U.S. Marshal Tench Ringgold and Early American Politics," at The Historical Society of the D.C. Circuit, at https://dcchs.org/wp-content/uploads/2018/12/RinggoldArticle.pdf (accessed January 29, 2019); Smith, p. 514.

[51] June 26, 1831, JM to Story, **Marshall Papers**, Vol. 12, p. 93; Irving Dillard, "Gabriel Duvall," in **The Justices of the United States Supreme Court**, p. 427.

[52] Anthony F.C. Wallace, **The Long, Bitter Trail** (1993), 63.

[53] Wallace, p. 64; Francis Paul Prucha, **The Great Father**, Abridged ed. (1986), p. 75.

[54] Lindsay Robertson, **Conquest by Law** (2005), pp. 129-130; William McLoughlin, **Cherokee Renascence in the New Republic** (1986), p. 439; "General Summary," January 14, 1831, *Newburyport Herald* (Newburyport, Mass.), p. 3; "Domestic Affairs," January 15, 1831, *Farmer's Cabinet* (Amherst, N.H.), p. 3; Joseph C. Burke, "The Cherokee Cases," 21 *Stan. L. Rev.* 512-513.

[55] *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831).

[56] Grant Foreman, *Indian Removal* (1982), p. 235; Daniel Walker Howe, **What Hath God Wrought** (2007), p. 355.

[57] June 25, 1830, Dabney Carr to JM and June 26, 1830, JM to Dabney Carr, **Marshall Papers**, Vol. 11, pp. 380-382.

[58] *Worcester v. Georgia*, 31 U.S. 515 (1832); "Correspondence of the Mercury," March 7, 1832, *New York Mercury*, p. 77.

[59] *Macon Telegraph* (Macon, Georgia), March 31, 1832, p. 3.

[60] April 7, 1832, Andrew Jackson to John Coffee, **Andrew Jackson Papers**, Vol. 10, p. 226; Stephen G. Bragaw, "Thomas Jefferson and the American Nations," *Journal of Supreme Court History*, Vol. 31(2) (2006), pp. 156-157.

[61] Lindsay Robertson, "Justice Henry Baldwin's 'Lost Opinion' in *Worcester v. Georgia*," *Journal of Supreme Court History*, Vol. 24, Issue 1 (March 1999), pp. 50-51.

[62] Anne Ashmore, "Dates of Supreme Court Decisions and their Arguments," U.S. Reports Volumes 2 to 107 (1791-1882) (Aug. 2006), p. 33, available at http://www.supremecourt.gov/opinions/datesofdecisions.pdf; Jill Norgren, "Lawyers and the Legal Business of the Cherokee Republic in the Courts of the United States, 1829-1835," *Law and History Review*, Vol. 10, no. 2 (Autumn, 1992), pp. 156-157.

[63] "Letter from Washington" (Report from the *U.S. Gazette*), *Scioto Gazette* (Chillicothe, Ohio), March 21, 1832; March 23, 1832, JM to Richard Peters, **Marshall Papers**, Vol. 12, pp. 188-189; Bragaw, 156-157; Richard Ellis, **The Union at Risk** (1987), pp. 30-31.

[64] William Freehling, **The Nullification Era: A Documentary Record** (1967), p. x.

[65] "Ordinance of Nullification," November 14, 1832, in Freehling, **Nullification Era**, p. 150; **The Papers of John C. Calhoun**, Vol. XII, ed. Clyde Wilson (1979), p. 3.

[66] Newmyer, **Joseph Story**, pp. 161-162; December 25, 1832 JM to Story, **Marshall Papers**, Vol. 12, p. 248.
[67] Ashmore, p. 33.
[68] "The Missionaries," *New-York Spectator*, January 28, 1833.
[69] 9 *Cong. Deb.* 145 (Appendix) (1833).
[70] *Barron v. Baltimore*, 32 U.S. 243 (1833).
[71] William Davenport Mercer, **Diminishing the Bill of Rights: Barron v. Baltimore and the Foundations of American Liberty** (2017).
[72] W. Allan Wilbur, "Review of *John Marshall: A Life in Law*," *American Journal of Legal History* (April 1976), pp. 155, 157; Peter Irons, **A Peoples' History of the Supreme Court** (1999), p. 136; H. Jefferson Powell, "The Original Understanding of Original Intent," in **Interpreting the Constitution: The Debate over Original Intent** (1990), p. 115, n. 325; Scott Douglas Gerber, **To Secure These Rights** (1995), p. 104.
[73] Ashmore, p. 33; "Debate in the Senate," *Baltimore Gazette and Daily Advertiser*, February 18, 1833.
[74] *Niles' Weekly Register* (Baltimore, MD), February 23, 1833; "Speech on the Revenue Collection [Force] Bill," February 15-16, 1833, John C. Calhoun, **Union and Liberty**, ed. Ross M. Lence (1992), 401.
[75] Calhoun, **Union and Liberty**, pp. 68-69.
[76] Daniel Webster, "The Constitution is not a Compact," (February 16, 183), in **The Writings and Speeches of Daniel Webster**, Vol. 6 (1903), pp. 180-181, 197-198.
[77] Clare Cushman, **Courtwatchers** (2011), pp. 30-33.
[78] March 18, 1833, JM to Louis Marshall, **Marshall Papers**, Vol. 12, p. 268.
[79] Michael J. Birkner, "The New York–New Jersey Boundary Controversy, John Marshall and the Nullification Crisis," *Journal of the Early Republic*, Vol. 12, No. 2 (Summer, 1992), pp. 202-203.
[80] August 2, 1832, JM to Story, **Marshall Papers**, Vol. 12, p. 227.
[81] April 5, 1833, JM to Louis Marshall, **Marshall Papers**, Vol. 12, p. 270; May 7, 1833, JM to Humphrey Marshall, *Marshall Papers*, Vol. 12, p. 276; June 3, 1833 JM to Story, **Marshall Papers**, Vol. 12, p. 281.
[82] Smith, p. 425.
[83] Frank Otto Gatell, "Henry Baldwin," in **The Justices of the United States Supreme Court**, p. 576.
[84] November 16, 1833, JM to Story, **Marshall Papers**, Vol. 12, pp. 309-310 and October 12, 1831, JM to Story, **Marshall Papers**, Vol. 12, p. 119, note 4.
[85] December 26, 1833, JM to Duvall, **Marshall Papers**, Vol. 12, p. 322.
[86] November 16, 1833, JM to Story, **Marshall Papers**, Vol. 12, pp. 309-310.
[87] September 13, 1833, JM to James K. Marshall, **Marshall Papers**, Vol. 12, p. 299; Samuel Mordecai, **Richmond in By-Gone Days** (1856), pp. 188-189.
[88] November 16, 1833, JM to Story, Note 6, **Marshall Papers**, Vol. 12, pp. 309-310; Smith, 520; "Death of Judge Johnson," August 11, 1834 *Connecticut Courant* (Hartford, Conn.), p. 3.
[89] Albert Beveridge, **The Life of John Marshall**, Vol. IV (1919), pp. 582-583; *Briscoe v. Kentucky*, 33 U.S. 118 (1834); *New York v. Miln*, 34 U.S. 85 (1835); *Briscoe v. Kentucky*, 33 U.S. 118 (1834); *New York v. Miln*, 34 U.S. 85 (1835).
[90] January 18, 1834, JM to Henry Lee, **Marshall Papers**, Vol. 12, p. 326.
[91] See March 29, 1834 and July 1834 codicils, **Marshall Papers**, Vol. 12, p. 198.
[92] May 22, 1834, Interview with John Frazee, **Marshall Papers**, Vol. 12, p. 413; Oliver, pp. 173-174.
[93] September 10, 1834, JM to Thomas Hord, **Marshall Papers**, Vol. 12, p. 417; Baker, p. 765; October 6, 1834, JM to Thomas Grimke and October 6, 1834, JM to Story, **Marshall Papers**, Vol. 12, pp. 419-422.
[94] January 16, 1835, JM to Duvall, **Marshall Papers**, Vol. 12, p. 432; Baker, p. 765; **Washington, City and Capital (WPA Guide, 1937), pp. 632-633**.
[95] February 27, 1835, JM to John Frazee, **Marshall Papers**, Vol. 12, p. 457; April 4, 1835, JM to J.Y. Campbell, **Marshall Papers**, Vol. 12, p. 480; May 16, 1835, Interview with James Kent, **Marshall Papers**, Vol. 12, p. 486.
[96] April 13, 1835, JM to James K. Marshall, **Marshall Papers**, Vol. 12, p. 483; May 22, 1835, JM to James K. Marshall, **Marshall Papers**, Vol. 12, p. 487.
[97] April 30, 1835, JM to Richard Peters, **Marshall Papers**, Vol. 12, p. 485-486.
[98] Smith, p. 523.
[99] "Supreme Court of Tennessee" July 28, 1835, *Nashville Republican*, p. 2.
[100] July 28, 1835, *Nashville Republican*, p. 2.

Chief Justice Salmon P. Chase and the Permanency of the Union

CYNTHIA NICOLETTI

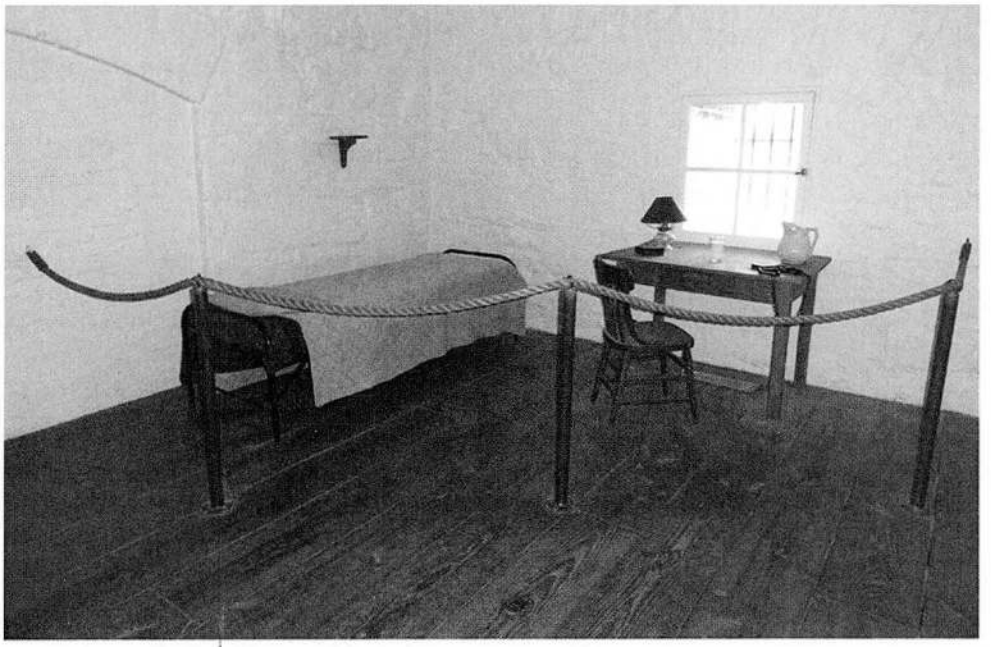
Chief Justice Salmon P. Chase is probably best known for what one historian called the most enduring thing Chase ever said: that the Union was "an indestructible Union of indestructible states."[1] Chase made this statement in the 1869 Supreme Court opinion in *Texas v. White*, in which he rejected the doctrine of state secession from the Union and the legal theory undergirding the establishment of the Confederacy. The case thereby vindicated the Union's view of the Civil War and rejected the Confederate theory of the conflict.[2] As the author of the opinion in *Texas v. White*, Chase is best known to the law world, or at least to the legal history world, as the person who established the permanency of the Union, who enshrined the idea that Union victory had rested on a firm legal foundation. Chase's decision solidified the judgment of the battlefield and made it apparent that the permanency of the Union was not only the result of the military might of the Union army. In *Texas v. White*, the Supreme Court told the nation that it was also what the Constitution required.

Today, Chase's decision in *Texas v. White* seems like a foregone conclusion or the natural analog of the Union victory. It seems like the fitting legal cornerstone capping the Civil War, and so lawyers and historians tend not to think very much about it. It is the type of decision that slides into our legal and historical consciousness, to the extent it even does that, as totally unsurprising, the way the American legal system would inevitably have confronted and resolved the question of the permanency of the Union in the aftermath of the Civil War. We rarely look any deeper than that, perhaps because this is a stone we emphatically want to leave unturned.

Historians are bad at leaving well enough alone, however, and I am no exception. If we go back to a time before *Texas v. White* was decided in the spring of 1869, what we see is a far less straightforward picture about the ultimate legal significance of the Civil War. It was not at all clear before the decision that the Supreme Court—or any court—would find that secession was unconstitutional. In April 1865, victory on the battlefield was the sole determinant of the Union's permanency. In the aftermath of the Civil War, Chief Justice Chase confronted the secession issue in another case, one fraught with much more danger. This was a case where secession would be much harder

to resolve in favor of the Union, where it would be harder to ensure it would come out in the "right" way. Indeed, it seemed quite possible that Chase would have to preside over a case that could instead vindicate secession and the Confederate cause. As a circuit court judge, Chase had to face the secession question head-on in a case with a much higher profile than *Texas v. White* ever had: Jefferson Davis's prosecution for treason in federal court in Virginia.

Jefferson Davis, the president of the Confederacy, had fled the Confederate capital of Richmond on April 2, when the city had fallen to the Union. He traveled south, and when President Lincoln was assassinated later that month, the new President, Andrew Johnson, had put a price on Davis's head, accusing him of involvement in the conspiracy to assassinate Lincoln.[3] Union troops had caught up with Davis in Irwinville, Georgia, on May 10 and had taken him into custody. From there, Davis was put on a ship and sent to Fort Monroe, Virginia, where he would spend the next two years in prison.[4] Here the lives of the former Confederate president and the Chief Justice of the United States intersected in a strange way: Salmon P. Chase was sailing on the same boat that conveyed Davis, now a prisoner, to Fort Monroe. Chase wrote in his diary that someone had asked him whether he wanted to meet the prisoner during the trip. Chase refused, citing impropriety.[5] This was not the last time Chase refused to interact with Davis and his case over the course of the next four years, although the problems raised by Davis's case became increasingly difficult to handle.



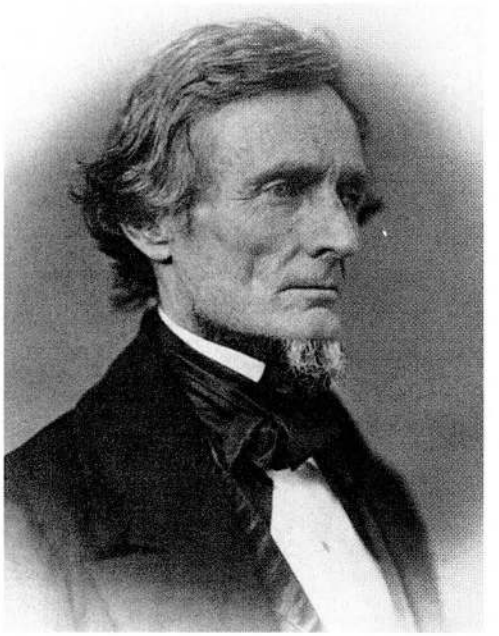
Having fled Richmond when it fell to the Union, Jefferson Davis, the president of the Confederacy, was eventually arrested and imprisoned in Fort Monroe, Virginia. He spent two years in this cell awaiting trial.

While Davis awaited trial at Fort Monroe, Union officials contemplated, and then later discarded, the idea of trying Davis for war crimes, either based on the assassination or for the treatment of Union prisoners at Andersonville.[6] Andrew Johnson and his cabinet

decided, after considerable discussion, to try another tack. Instead of charging Davis with violations of the law of war, they would put Davis on trial for committing treason against the United States. There was no doubt that the government could make out a *prima facie* case against Davis for treason. The facts were not in doubt: Davis had obviously served as president of the Confederacy and, in that capacity, had led great armies against the United States. There could hardly be any dispute that Davis had thus "levied war" against the United States within the meaning of Article III of the U.S. Constitution.[7] Indeed, his job was to levy war against the United States.

Where the government ran into difficulty was with respect to Davis's defense. It was widely anticipated that Davis would argue that the secession of his home state of Mississippi in January 1861 constituted an affirmative defense to the treason charge. Treason was a crime of loyalty, which could only be committed by someone who was a citizen of the United States.[8] If Mississippi's secession had been legal and effective, it would have removed Mississippi from the United States and Davis's United States citizenship along with it. And if Davis was no longer a United States citizen, he would have been incapable of committing treason against the United States. Secession would come up in Davis's case as a defense to the crime of treason, if he chose to raise it.

Davis's prosecutors contemplated that the case would raise the issue of secession's constitutionality and indeed would likely turn on it. Secession had been a hotly debated topic in American political discourse throughout the antebellum period. As the sectional crisis over slavery in the territories had heated up throughout the 1840s and 1850s, southerners had threatened to secede from the Union in order to prevent northerners from interfering with their right to hold slaves. The Constitution was silent on whether states possessed a legal right to withdraw from the Union, but secessionists and perpetual Unionists looked to the circumstances surrounding the adoption of the Articles of Confederation and the Constitution to bolster their arguments. Here constitutional thinkers distinguished between a *legal* right to secede (permissible within the bounds of the United States Constitution), and a *revolutionary* one, which necessarily derived from extralegal sources.[9]



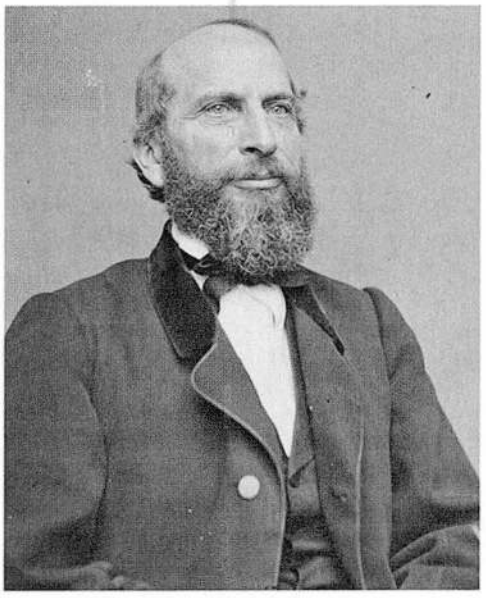
Americans looked to Jefferson Davis's treason case to provide a legal judgment on the legality of secession.

Secessionists argued that the present Union (under the Constitution) had been created through secession, because each of the states had seceded from the old government created by the Articles of Confederation in order to join the new one governed by the Constitution. Perpetual Unionists argued instead that the United States had been created in 1774 by all the people and that the substitution of the Constitution in lieu of the Articles simply constituted a change in the form of government and not the nation itself. In 1860 and 1861, following President Lincoln's election, eleven southern states had seceded from the Union because of his pledge to halt the expansion of slavery in the territories, which they argued was itself a violation of the Constitution.[10] As the

Supreme Court had decided in the highly controversial *Dred Scott* case several years earlier, the federal government was obligated both to protect slavery in the territories and to promote the interests of all the states (both slave and free) equally.[11]

But if secession had been a fraught, open question in 1860 to 1861, could the same be said about the issue in 1865, after the Civil War had been fought? How did government officials imagine that the issue could possibly be resolved in Davis's favor? Would victory on the battlefield be counted in the legal analysis?

First, the government's lawyers worried about the possibility of an adverse jury verdict or a hung jury. Although President Johnson's cabinet discussed the option of trying Davis in a military tribunal,[12] his Attorney General, James Speed, insisted that the trial be conducted in accordance with the Constitution, to ensure that the verdict would be seen as legitimate in the formerly Confederate South.[13] Treason was a civil crime, Speed reasoned, and so it had to be conducted in a civil court.[14] It also had to be conducted in accordance with Article III of the Constitution, which said that the trial had to be held in the "place where the crime was committed."[15] Speed considered—and rejected—the possibility of stretching the meaning of this phrase and trying Davis for treason anywhere the Confederate army had marched or Confederate raiders had infiltrated, including Ohio, Indiana, or Pennsylvania.[16] This left Speed with the alternative of trying Davis for the treason he had committed with his pen, at his desk in the Confederate capital of Richmond.[17]



President Andrew Johnson's Attorney General, James Speed (above), insisted that the trial be conducted in accordance with the Constitution, to ensure that the verdict would be seen as legitimate in the formerly Confederate South. He rejected the notion that Davis be tried in a military court.

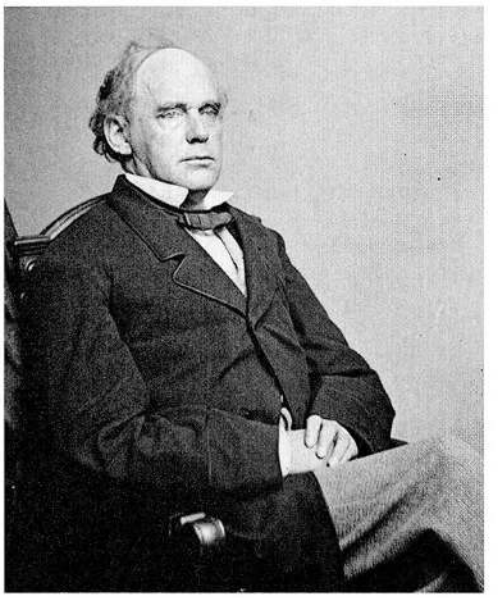
Trying Davis for treason before a jury in Richmond was a risky proposition in 1865, as the government realized. Jury nullification was a distinct possibility. Federal jurors were required to take the ironclad oath, swearing their unbroken loyalty to the United States. In theory, this meant that no Confederates could serve on the jury.[18] But in practice, no one could be sure what the jury would do in a place as deeply Confederate as Richmond. It was impossible to ensure that every juror took his oath in good faith and that no clandestine Confederate sympathizers would slip through the cracks and seize upon the opportunity to acquit Davis.[19] It was possible, despite a judge's instruction that secession was illegal and did not provide a defense to a treason charge, that the jury would ignore the instruction and refuse to convict. And it would only take one juror to prevent the conviction. This problem was compounded after the Supreme Court's 1867 decision in *Ex parte Garland*, which did not allow federal courts to prevent ex-rebel lawyers who had received presidential pardons from arguing before the federal courts. This ruling clearly extended beyond attorneys, but it remained unclear whether repentant jurors were included. As historian Harold Hyman argued, "the courts never decided upon the legality of jurors' test oaths," and Davis's prosecutors worried about the possible implications of *Garland* and the other test oath cases.[20]

What was equally troubling, but perhaps less intuitive, was the uncertainty of what the judges might do. Chief Justice Chase's views on the ultimate disposition of the Davis case were surprisingly difficult to predict in the spring of 1865. Chase was one of two judges set to preside over the Davis case in the federal circuit court in Virginia. All Supreme Court Justices had to ride circuit, and the circuit court was presided over by the district judge and the Supreme Court Justice assigned to that circuit. Chase's circuit was the Fourth, which included Virginia and North Carolina. So Chief Justice Chase was assigned to preside over Davis's case, along with District Court Judge John C. Underwood.

Both Chase and Underwood were Republicans and were generally counted as part of the Radical wing of the Republican Party. Chase, in particular, had had a long career as a politician before his appointment to the bench; he had been serving in Lincoln's cabinet as the Secretary of the Treasury until he was appointed to replace Chief Justice Roger B. Taney in late 1864. Chase had previously been the governor of Ohio and, perhaps more to the point, he had thrown his name into the mix as a possible presidential candidate in 1860 and 1864, and he would run again in 1868. Underwood, too, had been active in party politics in Virginia and had served as head of the state constitutional convention in 1867.[21]

But political party labels were somewhat fluid in this time. Chase had always been staunchly antislavery, and he was fully committed in 1865 to securing the vote for African Americans. But he had also been a Democrat before going over to the newly formed Republican Party in the mid-1850s. He had believed, as most Democrats did, in hard money and in state sovereignty. Chase had very much been a states' rights man when he had championed the antislavery cause in Ohio, and he had employed states' rights arguments on behalf of fugitive slaves. He had used the state's personal liberty laws to try to shield fugitive slaves who escaped to Ohio from the reach of the harsh federal Fugitive Slave Act of 1850.[22]

These prewar commitments led some people to speculate that Chase endorsed or, indeed, would *have to* endorse secession in Davis's case. Ohio Congressman Lewis Campbell told President Johnson that Chase "knows that if he has to try Jeff. Davis he must either acquit him or back down from his former state sovereignty positions—either of which horns of the dilemma would greatly interfere with his aspirations."[23] The *New York World* commented on the "awkwardness of Chase's position in respect to the treason trials."[24] The *Cincinnati Commercial* commented that in facing Davis's trial, the Chief Justice would be obliged to admit that his prewar defense of state sovereignty in fugitive slave cases put him "*on identically the same platform*" as Jefferson Davis.[25]



Chief Justice Salmon P. Chase kept finding excuses not to preside over the Davis trial as a circuit judge.

Chase's prewar state sovereignty views were not the only reasons he might endorse secession. In the *Prize Cases*, decided in the midst of the Civil War, the Supreme Court had endorsed the Union government's decision to treat the Confederacy as a separate entity—a

belligerent power—under international law.[26] Indeed, soon after the case was decided, many legal commentators worried that, by doing so, the Court had in effect tacitly endorsed secession—because it had legitimized the view that the Confederacy was an entity distinct from the United States—although the Court's opinion, read carefully, had done no such thing. The Court had said that the United States government "may exercise both belligerent and sovereign rights" in its dealings with the Confederacy. It could treat the Confederates as traitors under U.S. domestic law or as alien enemies under the law of war. The availability of one body of law did not imply the loss of the other. According to the Court's opinion in the *Prize Cases*, recognition of the Confederacy's belligerent status did not have any implications about the legitimacy of secession under the U.S. Constitution.

The Supreme Court made clear that both the law of nations and U.S. domestic law applied to the Confederacy, but it did not set forth any guidelines as to where the boundaries of each might lie. It had not clarified the collateral consequences of Confederate belligerency. The Union had maintained throughout the war that the Confederacy possessed a dual legal character as both a belligerent power (under international law) and as a criminal insurgency (under domestic law). But in the aftermath of the war, some jurists argued that the Supreme Court's recognition of Confederate belligerency in the *Prize Cases* should be interpreted to preclude prosecutions of individuals for treason. Under international law as it stood in the nineteenth century, war was a legal method of settling disputes between nation states, although the U.S. Constitution criminalized "levying war" against the United States. If the Supreme Court had recognized belligerency of the Confederate quasi-state during the war, had it also immunized individuals who levied war on its behalf from treason prosecutions? Jefferson Davis's lawyers thought that perhaps they might make use of the *Prize Cases*' acknowledgment of Confederate belligerency to excuse their client's treason.

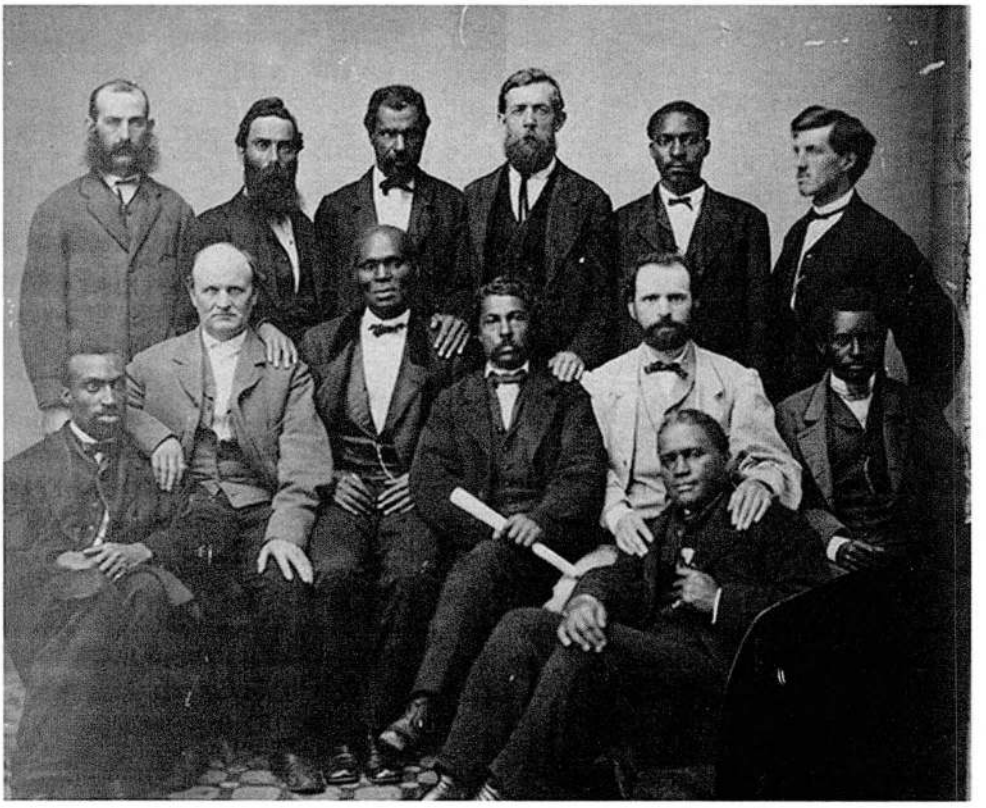
The law of belligerency had other potential uses as well—for Republican politicians. Some of the Republican architects of Radical Reconstruction, notably Pennsylvania Congressman Thaddeus Stevens, also sought to harness the Confederacy's status as a belligerent power in the service of their policy goals. During Reconstruction, Republicans hoped to bypass southern state governments and rewrite state laws in order to eradicate the legacy of slavery and secure the rights of African Americans. This required them to place the states of the former Confederacy under direct national control—a massive deviation from the normal operations of the federal system in the United States. They needed a constitutional theory in order to sustain such an unprecedented outlay of federal power.

Some Radical Republicans found a legal predicate by connecting Reconstruction to secession. Along with Massachusetts Senator and fellow Radical Charles Sumner, Stevens rejected President Lincoln's (and President Johnson's) view that the states' status had remained unchanged due to their purported secession from the Union in 1860 to 1861. Sumner argued that in attempting secession (an illegal act), the Confederate states had essentially self-destructed and reverted to territorial status. They had, by their own actions, ceased to exist, and forfeited their rights as independent governments. Stevens found the same power by a different route. Stevens endorsed the idea that secession had been effective, if not precisely legal, in carrying the states out of the Union in 1860 and 1861. During the pendency of the war, the Confederate government had enjoyed the shadowy legitimacy of a belligerent power. Confederate military defeat had reduced the seceded states to "conquered territory" and empowered the national government to replace their laws at will. [27] Stevens believed so wholeheartedly in this theory that he made some overtures to Davis's camp, recognizing that perhaps an endorsement of secession in Davis's case might prove helpful. He even offered to represent Davis in his case, but was rebuffed by Davis's lawyers.[28]

In 1865, the connection between secession, belligerency, and Radical Reconstruction was powerful enough to give rise to legitimate fears that Chief Justice Chase, who was also a believer in racial egalitarianism, might find common cause with Stevens.[29] He might actually find use for secessionist arguments and therefore instruct the jury in the Davis case that secession was legal, and he might even go so far as to espouse this view on the Supreme Court. Davis's lawyers realized that this proposition was realistic enough to worry the government, and they told President Johnson's close confidante Francis Preston Blair that there was a distinct possibility that Chase would endorse secession. Blair was shaken by the conversation, which he duly reported back to the President. Blair told Johnson that, although he thought that the Supreme Court could be counted on to condemn secession, Chase "might decide otherwise, as he holds the states out of the Union and so mere belligerents."[30]

Chase, meanwhile, was doing everything he could to avoid Davis's case. President Johnson requested a meeting with Chase to discuss the Davis matter, but Chase refused to consult with him, citing impropriety.[31] Gideon Welles, the Secretary of the Navy, criticized Chase for standing on ceremony, especially as Chase had previously met with the administration about other judicial matters. He reported that the President found Chase to be "cowardly and arrogant, shirking and presumptuous, forward and evasive,"[32] and declared that "there was no desire on the part of the Chief Justice to preside at the trial of Davis."[33]

Chase certainly found a number of excuses to avoid presiding over the Davis case. He first declared his unwillingness to sit on



Twelve members of a pool of twenty-four potential petit jurors appointed by the U.S. Circuit Court for the District of Virginia in 1867 as part of proceedings against Davis on treason charges were African-American, a first for a federal jury. Standing from left to right are E. Fox, J. Freeman, J. R. Fitchett, Joseph Cox, and Herman L. Wigand. Seated from left to right: W. A. Parsons, L. Carter, C. P. Fitchett, John Newton Van Lew (in foreground), F. Smith, and J. E. Frazier.

the federal bench because of the military presence in Reconstruction-era Virginia. The civil courts, he insisted, could not operate under military restraint.[34] If he were to sit in Virginia under military oversight, he could potentially be countermanded by a military official. Chase believed that "members of the highest tribunal of the United States should not be subjected to that supervision."[35] One of Davis's defense attorneys pointed out that Chase had had no objection to sitting in Maryland beginning with his appointment in 1864, although the state had also been placed under martial law during the war. This suggested to Davis's defense team that Chase's professed motivations were false ones.[36]

President Johnson responded to Chase's objections by issuing a proclamation in April 1866 declaring the insurrection at an end and further declaring that martial law would end in Virginia. But Chase found the measure to be insufficient, because he had observed that military commissions were still being convened in Virginia in spite of the proclamation.[37] This time, he agreed to meet with Johnson to discuss the matter, but he would not sit in Virginia until Johnson issued a stronger proclamation. After Johnson complied in August, Chase agreed that it was now "fair to conclude that martial law and military government are permanently abrogated."[38]

Then Chase found a new problem. In July 1866, Congress had passed the Judicial Circuits Act, which had reduced the number of federal circuits and altered their geographical coverage.[39] But the statute had failed to specify how Supreme Court Justices would be assigned to the reconstituted circuits. Chase's old circuit—the Fourth—had added the districts of West Virginia and South Carolina and subtracted that of Delaware, but the districts of Maryland, Virginia, and North Carolina remained part of the circuit.[40] Although Virginia's circuit allocation remained unaltered, Chase was inclined not to preside there and sought his fellow Supreme Court Justices' approval of this decision. Not all of them agreed with him, however. It was not lost on the other Justices that Chase's opinions on circuit court duty were formed with the Davis case firmly in mind.[41] They were aware that Chase's query was not a neutral one that implicated only procedure. Unsurprisingly, Chase ultimately concluded that he should not resume circuit duty until Congress acted to remedy the faulty legislation.[42]

Again the President tried to rectify the problem Chase had identified. President Johnson asked his Attorney General, Henry Stanbery, whether there was anything he could do about the circuit allotments, and Stanbery replied that the President could do nothing in this regard. But, Stanbery also said, the Chief Justice was dissembling. His reluctance to ride circuit was manufactured, according to Stanbery. Either Congress could allot the circuits, or the Court could do it itself.[43] Indeed, when Congress finally responded to Chase's objections, it passed a new act directing the Court to allot the circuits.[44]

Once Chase's formal objections to presiding over the case expired, he found new reasons not to appear in Richmond whenever the Davis case came near the docket. His personal safety would be compromised in Richmond, he said, which prompted the governor to reassure him that he would not be molested. He then decried the awkwardness of staying at the same hotel as Davis, which required new arrangements for the Chief Justice's lodgings.[45] And then Chase resorted to the best solution of all: just not showing up. In November 1867, for example, prosecutor Richard Henry Dana awaited Chase's arrival on the 2:30 train, "but the train came without him, and a telegram came to the District Judge from him, saying that he sent papers by mail which would arrive by morning."[46]

Both historians and contemporaries have judged Chase's actions harshly, thinking that political considerations rather than jurisdictional barriers prevented Chase from attending court in Richmond.[47] It was widely understood that Chase wanted to avoid presiding over

Jefferson Davis's case. The *Natchez Courier* mocked Chase's explanations for avoiding circuit court duty. "Was [there] ever so flimsy a pretext, so illy-covered a deceit?" the paper queried, going on to declare that these excuses proved that Chase "dare not try Jefferson Davis."[48] The *New Orleans Crescent* similarly rebuked Chase's "invent[ed]" objections, which imparted "a rather strong element of the farcical into the proceedings."[49] But Chase himself never acknowledged, even in his private correspondence, that anything but logic and practical considerations kept him away from Richmond.[50]

On Christmas Day 1868, President Johnson pardoned Jefferson Davis for the crime of treason. The charges against Davis were dropped early in 1869; he is pictured here at home in Beauvoir, Mississippi in about 1884.

Chase did, however, make it to North Carolina in the summer of 1867, where he presided over the case of *Shortridge v. Macon*. In *Shortridge*, a Pennsylvania plaintiff sued a North Carolina defendant to recover on a prewar promissory note. Instead of paying the plaintiff, during the war, the defendant had paid the amount due on the note to the Confederate government as required by the Confederate Sequestration Acts. These acts confiscated all the property of alien enemies, i.e., northerners, located in the Confederate States, including debts owed by southerners to northern Unionists.[51] The defendant contended that compliance with the Confederate statute had discharged his debt. In making this argument, Macon's counsel relied on the *Prize Cases*, arguing that the U.S. government's recognition of the Confederacy's belligerent status accorded its actions a certain legitimacy that American courts were bound to respect. Chase rejected the defendant's contentions.[52]

Chase's opinion was wide-ranging. In the course of denying Macon's claim, Chase condemned secession as well as the argument that a state's secession would excuse an individual's treason, and he repudiated the idea that Confederate belligerency had any collateral consequences in the postwar world. The opinion revealed the extent to which Chase considered himself bound by the decision of the battlefield. "Those who engage in rebellion must consider the consequences," Chase declared. "If they succeed, rebellion becomes revolution, and the new government will justify its founders." Otherwise, their military actions would be deemed illegal and could "originate no rights which can be recognized by the courts of the nation" against which they had rebelled.[53]

Chase flatly denied secession's constitutionality. In doing so, he relied on the results of the war to do much of the analytical work for him. "No elaborate discussion of the theoretical question seems now to be necessary. The question as a practical one is at rest, and is not likely to be revived." Nonetheless, Chase maintained that the "answer which it has received [on the field of battle was the one that] construction of the constitution warrants and requires." Moreover, secession was not a defense to treason. Treason was the levying of war, and war levied "under the pretended authority" of the Confederate government "was treason against the United States." North Carolina's secession ordinance did not "thereby absolve[] the people of the state from all obligations as citizens of the United States."[54]

Chase intended the *Shortridge* decision to signal his views about secession to Jefferson Davis's lawyers. One of Davis's lawyers literally stumbled over the opinion when fifty copies were sent to his office.[55] The lawyers reached the conclusion Chase had wanted them to reach—that the Chief Justice had no practical use for the secession argument in the postwar context and felt free to deny its constitutional basis. He would not be moved to vindicate the argument in Davis's case.

Morever, it seemed apparent that Chase wanted to avoid the Davis case altogether if he possibly could. As the 1868 presidential election drew near, Charles O'Conor, Davis's lead lawyer, suspected that Chase avoided the Davis case because of his desire for the presidency. In fact, in 1868, Chase was running for the presidency for a third time, this time on the Democratic ticket. And he needed to attract Democratic votes. O'Conor believed that because "Chase is an eager candidate for the presidency, he is quite anxious to get rid of the case." If possible, Chase would attempt to get the district judge to try it alone.[56]

Davis's lawyers wondered whether Chase's political ambitions could be channeled in their favor.[57] And in 1868, they found an incongruous ally in Chase in their quest to get the case dismissed. At some point in the summer of 1868, Chase met with one of Davis' defense lawyers, George Shea, and, over tea, got out his copy of the newly ratified Fourteenth Amendment. Chase read aloud from Section Three: "No person shall hold any office, civil or military, under the United States who shall have engaged in insurrection or rebellion against the same."[58]

Chase told Shea that he thought that this section "seems to make doubtful the liability to further punishment for treason of persons engaged in the rebellion."[59] Shea was startled —but motivated—by this reading of the clause.[60] Later that fall, Davis's counsel checked again with Chase and then presented his argument to the circuit court as part of a motion to quash the indictment against Davis.[61] While Chase's *ex parte* discussions with defense counsel would certainly transgress the bounds of judicial ethics today, his behavior was more ethically uncertain by nineteenth-century standards. Chase certainly did not want to publicize his involvement in the formulation of defense counsel's argument in the case, but he did not take great

pains to keep his actions hidden, which suggests that his behavior was ethically dubious, but did not rise to the level of blatant misconduct.[62] Davis's lawyers speculated that Chase's reading of Section 3 might be his way of gaining white southerners' support for the Fourteenth Amendment. It was a plausible theory. As O'Conor told Davis, "Whether this 14th Amendment has ever been adopted in such a perfect and effectual manner as to form a part of the Constitution is a question. Perhaps [Chase] hopes that a decision of the Supreme Court in this case might conclusively and finally determine that question in the affirmative."[63]

In November, Chase actually showed up for court in Richmond. The grounds of the motion made by the defense were not known to the prosecution until the court appearance. When the prosecutors scoffed at the argument presented, Chase blandly remarked that he had anticipated that the motion would be grounded on "the common principle of constructive repeal," and kept mum about where the argument originated.[64] Unsurprisingly, Chase ruled in the defense's favor, while the district judge did not, which meant that the question would be certified to the Supreme Court for resolution. At this juncture, President Johnson grew weary and issued an amnesty proclamation exempting Davis for criminal punishment, and the prosecution subsequently dropped the case against Davis.[65]

Following Jefferson Davis's release, the *Army and Navy Journal* forecast that there would be no final legal disposition of the secession question. It would probably go "undecided into history. Or, if it be exhumed at some distant day, it will appear in some dry, legal dictum, interesting as a professional opinion, but taking no vital hold as a fact upon the people of the republic."[66] The paper was wrong about when secession would get another legal hearing, but it was not wrong about the type of case in which it would be raised. *Texas v. White*, a case about the repayment of government bonds, came on the heels of *U.S. v. Jefferson Davis*. The case involved Texas's attempt to block payment on U.S. government bonds sold by the state during the Civil War.[67]

When *Texas v. White* came to the Supreme Court in early 1869, no one thought that the case would turn on secession. At issue in the suit was the ability of certain bondholders to receive payment on United States bonds given to Texas as part of the Compromise of 1850.[68] Texas had sold some of the bonds to the defendants in the midst of the Civil War pursuant to a state act to "provide funds for military purposes," in exchange for supplies. Texas sued the defendants after the war for recovery of the bonds, arguing that the state, while in rebellion, was unauthorized to sell bonds for the "purpose of aiding the overthrow of the Federal government."[69]

The case came to the court on original jurisdiction, which allows for lawsuits to be instituted in the Supreme Court when a state is a party. Defendant George White claimed that Texas, which was not represented in Congress during Reconstruction, was not presently one of the United States and could not therefore invoke the original jurisdiction of the Supreme Court. This meant that the threshold issue was a basic but difficult jurisdictional question: was Texas a state? Here White asked the Supreme Court to weigh in on one of the most contentious political issues of the day: the validity of the federal government's Reconstruction measures.[70] The status of the former Confederate states had been an issue percolating below the surface in both *Mississippi v. Johnson* and *Georgia v. Stanton,* both original suits in the Supreme Court brought in 1867 and 1868, but both were dismissed on other grounds. The Supreme Court had not touched it then.[71]

In *Texas v. White*, neither party raised the secession question in the briefs. Counsel for the bondholders had argued that Texas could not qualify as a state because Congress had

excluded its representatives from Congress and subjected it to direct federal supervision as part of military Reconstruction. They did not, however, touch secession, except to assure the Court that in 1861 Texans had sincerely believed that the Constitution had enshrined such a right.[72] Argumentation about Texas's statehood was confined to discussions about the significance—and the validity—of the federal government's program of Reconstruction, which suspended normal governmental operations in the former Confederate states after Confederate defeat. It was possible to address the statehood issues raised by Reconstruction without discussing secession.

Chase, however, did address the secession issue in *Texas v. White*, and we might say he reached for it. He declared that Texas was a state because it had never legally seceded from the Union—because secession was unconstitutional and therefore impossible. Chase disposed of the secession argument in about a paragraph, recycling President Lincoln's arguments from his first inaugural, which focused on the fact that the Articles of Confederation had declared the Union formed thereunder to be perpetual, and the Constitution had made the Union "more perfect."[73] To be more perfect, Chase declared, the Union must have remained indissoluble. He said not a word about the war; the opinion did not suggest that his logic owed anything to the triumph of the Union army, as it had when he issued the *Shortridge* opinion two years earlier. This time, his conclusions about secession rested solely on legal reasoning.[74]

At the time, Chase's opinion attracted little attention, and when it did, many people read it through a partisan lens. No one reported that the decision had changed his mind through the force of its logic.[75] Writing in the 1980s, historian David Currie expressed disappointment with the opinion, saying that Chase's perfunctory discussion was "hardly . . . an adequate treatment of an issue on which reasonable people had differed to the point of civil war."[76]

Looking back from the vantage point of 2019, we might ask ourselves whether Chase did the right thing. Chase avoided the secession question in a case as fraught as Davis's but took the opportunity to declare the Union to be perpetual when it was safe to do so. He reached for the issue and imprinted the Unionist vision of national structure onto the *U.S. Reports*, where it would reside in posterity. In writing his most memorable paragraph, we might say that Chase was doing what was necessary to ensure that the law as made by the courts fit with the ruling already issued on the battlefield. After all, Chase had little choice in the matter, and it is true that he faced enormous pressure to ensure that the battlefield's determination was ratified by law. Perhaps it is the proper role for the Chief Justice of the United States to issue decisions that owe nothing to the logic of events and rest solely on recognizable patterns of legal argumentation.

However much we might empathize with Chase's predicament with respect to the heavy responsibility of dealing with the secession question in the aftermath of the Civil War, there is still something troubling about his actions in both the Davis case and in *Texas v. White*. Chase never acknowledged, even in private, that reconciling the war and the law in the postbellum world was a difficult task for an introspective American. Chase insisted that he simply followed logic in making the law, even though his actions belied what he said. At a time in which the nation's foremost legal thinkers struggled openly to figure out how to conform the law to the realities of life in a post-Appomattox world, the Chief Justice professed to act as though legal outcomes were wholly divorced from the world around them. He took the path that looked more to a sanitized future than the messy present, thus allowing the nation to forget that there had ever been a serious discussion about secession's constitutionality after Appomattox.

ENDNOTES

[1] *Texas v. White,* 74 U.S. 720, 724 (1868). See also Charles Fairman, **Reconstruction and Reunion**, 2 vols. (New York: Macmillan, 1971), 1: 628.

[2] *Texas v. White,* 74 U.S. at 724 (1868).

[3] Presidential Proclamation 131, May 2, 1865, in Andrew Johnson, **The Papers of Andrew Johnson**, ed. Paul Bergeron (Knoxville: University of Tennessee Press, 1967–69), Vol. 8, pp. 15–16. See also *New York Times*, May 26, 1865; William J. Cooper, **Jefferson Davis, American** (New York: Vintage Books, 2000), pp. 374–75; Varina Davis, **Jefferson Davis, Ex-President of the Confederate States: A Memoir** (New York: Belford Company, 1890), Vol. 2, pp. 582–635; Jefferson Davis, **Rise and Fall of the Confederate Government**, (New York: D. Appleton, 1881), Vol 2, pp. 701–02.

[4] William J. Cooper, **Jefferson Davis: American** (New York: Vintage Books, 2000), pp. 576–656.

[5] Salmon P. Chase diary, Tuesday, May 16, 1865, Salmon P. Chase to Andrew Johnson, May 17, 1865, Salmon P. Chase to Charles Sumner, May 20, 1865, in Salmon P. Chase, **The Salmon P. Chase Papers**, ed. John Niven, (Kent OH: Kent State University Press, 1993), Vol 1, p. 550 and Vol 5: pp. 54–55, 49.

[6] See Depositions of Witnesses, volume 92, Joseph Holt Papers, Library of Congress [hereafter cited as LC]; Elizabeth D. Leonard, **Lincoln's Avengers: Justice, Revenge, and Reunion after the Civil War** (New York: W. W. Norton, 2004); Carman Cumming, **The Devil's Game: The Civil War Intrigues of Charles A. Dunham** (Urbana: University of Illinois Press, 2004), p. 145; Seymour J. Frank, "The Conspiracy to Implicate the Confederate Leaders in Lincoln's Assassination," *Mississippi Valley Historical Review* 40 (March 1954): 629; Louis Schade (attorney for Andersonville commandant Henry Wirz) to "the American Public," April 4, 1867, reprinted in James Madison Page, **The True Story of Andersonville Prison** (Neale Publishing Company, 1908), pp. 234–42. See also Jefferson Davis, **Andersonville and Other War-prisons** (New York: Belford & Company, 1890), pp. 15-16; George Shea, **Jefferson Davis: A Statement Concerning the Imputed Special Causes of His Imprisonment by the Government of the United States, and of His Tardy Release by Due Process of Law** (London: Edward Stanford, 1877), pp. 8–9; Charles O'Conor to William Preston Johnson, December 30, 1865, George Shea to Charles O'Conor, January 6, 1867, Box 24, Jefferson Davis Papers, Museum of the Confederacy, Richmond, Virginia [hereafter cited as MC].

[7] Article III, § 3 of the U.S. Constitution defines treason against the United States as "levying war against them, or in adhering to their enemies, giving them aid and comfort." U.S. Const. art. III, § 3.

[8] The Crimes Act of 1790 specified that a treason defendant had to "owe allegiance to the United States," but the 1862 Confiscation Act did not. In either case, the government could merely allege that Davis owed allegiance to the United States, and indeed, the prosecution's indictment offered no facts to prove Davis's citizenship. See Crimes Act of 1790, 1 Stat. 112, (1790); Confiscation Act of 1862, 12 Stat. 589 (1862).

[9] See Abraham Lincoln, Message to Congress, July 4, 1861, in Lincoln, **This Fiery Trial: The Speeches and Writings of Abraham Lincoln**, ed. William E. Gienapp (New York: Oxford University Press, 2002), p. 101. For a discussion of the right of secession, see Davis, **Rise and Fall**, Vol. 1, pp.: 86–168, and John C. Calhoun, "A Discourse on the Constitution and Government of the United States," in John C. Calhoun, **A Disquisition on Government and Selections from the Discourse** (Indianapolis: Hackett Publishing Company, 1995), pp. 85–104. See also Alexander H. Stephens, **A Constitutional View of the Late War between the States**, 2 vols. (Philadelphia: National Publishing Co., 1868, 1870), and Albert T. Bledsoe, **Is Davis a Traitor?** (Baltimore: Innes & Company, 1866).

[10] See Republican Party Platform of 1860, § 8, in **National Party Platforms**, ed. Kirk H. Porter (New York: Macmillan Company, 1924), 55. See also Dwight Dumond, ed., **Southern Editorials on Secession** (New York: The Century Co., 1931), and Howard Perkins, ed., **Northern Editorials on Secession** (Gloucester, Mass.: Peter Smith, 1964).

[11] See *Dred Scott v. Sandford* 60 U.S. 393, 448 (1857).

[12] See **Impeachment Investigation: Testimony Taken before the Judiciary Committee of the House of Representatives in the Investigation of the Charges against Andrew Johnson** (Government Printing Office: Washington, D.C., 1867), p. 397 (testimony of Edwin M. Stanton); Gideon Welles, **Diary of Gideon Welles**, ed. Edgar Thaddeus Welles, 3 vols. (Boston: Houghton Mifflin Company, 1911) Vol. 2, pp. 335–36.

[13] See James Speed to Francis Lieber, May 26, 1866, June 27, 1865, Box 62, Lieber Papers, Huntington Library, San Marino, California.

[14] See James Speed, "Case of Jefferson Davis," **Opinions of the Attorney General** 11 (1866): 411–13.

[15] *Ibid.*

[16] See John Palmer to Andrew Johnson, July 19, 1865; Crawford W. Hall to James Speed, August 12, 1865; attached presentment *United States v. Jefferson Davis*, Sixth Circuit and District of East Tennessee; C.W. Hall to James Speed, April 30, 1866, Jefferson Davis Case File, National Archives, College Park, Maryland; Indictment, *U.S. v. Jefferson Davis,* U.S. District Court, Washington, D.C., May 26, 1865, copy at Virginia Historical Society, Richmond, Virginia.

[17] See **Impeachment Investigation**, p.799 (testimony of James Speed).

[18] See Harold M. Hyman, **The Era of the Oath: Northern Loyalty Tests during the Civil War and Reconstruction** (Philadelphia: University of Pennsylvania Press, 1954), pp. 21–23, 157–58.

[19] See William Whiting, **The War Powers under the Constitution of the United States** (Boston: Little, Brown, 1864), p. 126.

[20] Hyman, **Era of the Oath**, p. 116, and pp. 115–20, for a general discussion of uncertainty as to the reach of the Garland opinion. See *Cummings v. Missouri* folder 2, Box 2, William Evarts Papers, Harvard Law School, Special Collections Library, on the Davis prosecutors' concerns about the legality of the test oaths.

[21] See John Niven, **Salmon P. Chase: A Biography** (New York: Oxford University Press, 1995), p. 373; William W. Freehling, **The Road to Disunion: Secessionists at Bay, 1776–1854**. (New York: Oxford University Press, 1990), Vol. 2, pp. 236–40; "John C. Underwood," **Dictionary of Virginia Biography**, accessed 2/23/2019 https://www.encyclopediavirginia.org/Underwood_John_C_1809-1873.

[22] See Finkelman, **An Imperfect Union**, pp.155–80, for a discussion of Chase's anti-slavery advocacy.

[23] Lewis Campbell to Andrew Johnson, November 20, 1865, in **Papers of Andrew Johnson**, Vol. 9, pp. 406–08.

[24] *New York World*, May 17, 1866.

[25] *Cincinnati Commercial*, May 10, 1866 (emphasis in original).

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

[27] See Thaddeus Stevens, "Reconstruction,' September 6, 1865, in Lancaster"; "'Reconstruction,' December 18, 1865, in Congress, in Stevens, **Selected Papers**, Vol. 2, p. 24.

[28] R. J. Haldeman to Virginia Clay, June 28, July 24, 1865, Box 5, Clement Clay Papers, Duke University Library, Durham, North Carolina. Davis's counsel William B. Reed confirmed Stevens's offer to represent Davis, telling Edward McPherson, who collected Stevens's papers for a possible biography, that "Mr. Stevens was willing and anxious to take part in the defence of Mr. Davis the President of the late Confederate States. I was a recipient of a message to that effect." William B. Reed to Edward McPherson, January 20, 1869, Box 50, Edward McPherson Papers, LC. See also William B. Reed to Edward McPherson, January 13, 1869, cited in Fawn Brodie, **Thaddeus Stevens: Scourge of the South** (New York: W. W. Norton, 1959), p, 399 n. 27 (original not found at Library of Congress).

[29] On the connection between Chase and Stevens, see R. P. L. Baber to James R. Doolittle, February 28, 1866. See also R. P. L. Baber to James Doolittle, March 29, 1866, Box 1, James R. Doolittle Papers, LC [microfilm edition].

[30] Francis Preston Blair, Sr. to Andrew Johnson, September 6, 1865, in **Papers of Andrew Johnson**, Vol. 9, pp. 32–33. See also William Ernest Smith, **The Francis Preston Blair Family in Politics** (New York: The Macmillan Company, 1933), Vol. 2, p. 325.

[31] Salmon P. Chase to Charles Sumner, August 20, 1865, in **Salmon P. Chase Papers**, Vol. 5, pp. 64–65.

[32] Gideon Welles, **Diary of Gideon Welles**, ed. Edgar Thaddeus Welles (Boston: Houghton Mifflin Company, 1911), Vol. 2, p. 316.

[33] *Ibid.*

[34] See *Ex parte Milligan*, 71 U.S. 2 (1866).

[35] Salmon P. Chase to Jacob Schuckers, September 24, 1866, **Salmon P. Chase Papers**, Vol. 5, p. 124.

[36] See Jonathan W. White, **Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman** (Baton Rouge: Louisiana State University Press, 2011), p. 51; George William Brown to Franklin Pierce, July 14, 1866, Reel 3, Franklin Pierce Papers, LC [microfilm edition]. Chase was only appointed to the Court in 1864, but martial law prevailed throughout the war in Maryland. See Randall, **Constitutional Problems Under Lincoln**, pp. 170–73. For information on Brown's imprisonment, see George William Brown, **Baltimore and the 19th of April, 1861** (Baltimore: Johns Hopkins University Press, 1887), pp. 97–112; George William Brown Letters, Box 6, Brune-Randall Papers, Maryland Historical Society, Baltimore, Maryland.

[37] Salmon P. Chase to Jacob W. Schuckers, September 24, 1866, **Salmon P. Chase Papers**, Vol. 5, p. 124.

[38] Salmon P. Chase to Jacob W. Schuckers, September 24, 1866, **Salmon P. Chase Papers**, 5: 124.

[39] Act of July 23, 1866, 14 Stat. 209 (1866) (changing the number of federal circuits); Act of July 15, 1862, 12 Stat. 576 (1862) (allocating the federal circuits).

[40] *Ibid.*

[41] See Fairman, **Reconstruction and Reunion**, Vol. 1, pp. 175–76.

[42] Salmon P. Chase to Noah Swayne, September 29, 1866, Salmon P. Chase to David Davis, October 4, 1866, **Salmon P. Chase Papers**, Vol. 5, pp. 129, 131; Salmon P. Chase to Members of the Supreme Court, October 5, 1866, Chase to Nathan Clifford, October 6, 1866, Samuel Miller to Salmon Chase, October 11, 1866, Reel 36, in Salmon Chase, **The Salmon P. Chase Papers**, ed. John Niven (Frederick, MD: University Publications of America, 1987) [microfilm edition].

[43] 12 Op. Att'y Gen. 69 (1866). See also Case of Davis, **Reports of Cases Decided by Chief Justice Chase** (New York: Diossy & Co., 1876), p. 74 [hereafter cited as **Chase's Reports**].

[44] Act of March 2, 1867, 14 Stat. 28 (1867).

[45] J. A. Schofield to John Underwood, March 30, 1867; Salmon P. Chase to John C. Underwood, May 13, 1867, November 23, 1867, Box 1, Underwood Papers, LC.

[46] Richard Henry Dana to Sarah W. Dana, November 25, 1867, Box 17, Dana Family Papers, Massachusetts Historical Society, Boston, Massachusetts.

[47] See Harold Hyman, introduction to **Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States Fourth Circuit, 1865–1869**, by Bradley T. Johnson (1876; reprint, New York: DaCapo Press, 1974), p. xxi; John Niven, **Salmon P. Chase: A Biography** (New York: Oxford University Press, 1995), p. 409.

[48] *Natchez Courier*, November 23, 1867.

[49] *New Orleans Crescent*, October 8, 1866.

[50] Chase told daughter Nettie that "[he did] not intend to hold Courts in rebel states until the question whether Martial Law is to be continued in practical force is settled by its absolute & complete abrogation at least so far as the National courts are concerned." Salmon P. Chase to Janet R. [Nettie] Chase, June 5, 1866, **Salmon P. Chase Papers**, Vol. 5, p. 104.

[51] See Daniel Hamilton, **The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War** (Chicago: University of Chicago Press, 2007), and Mark Weitz, **The Confederacy on Trial: The Piracy and Sequestration Cases of 1861** (Lawrence, KS: The University Press of Kansas, 2005), on the operation of the Confederate Sequestration Act.

[52] See *Shortridge v. Macon*, 22 F. Cas. 20 (C.C.D.N.C 1867) (No. 12,812). For more on the post-war recognition of wartime acts, see *Keppel v. Petersburg R. Co.*, 14 F. Cas. 357 (C.C.D. Va. 1868) (No. 7,722); *Ford v. Surget*, 97 U.S. 594 (1878); Erwin Surrency, "The Legal Effects of the Civil War," *American Journal of Legal History* 5 (Apr. 1961):145; Fairman, **Reconstruction and Reunion**.

[53] *Shortridge v. Macon*, 22 F. Cas. 20, 23 (C.C.D.N.C 1867) (No. 12,812).

[54] *Ibid.*, at 21.

[55] See Thomas F. Bayard to James A. Bayard, April 12, 1868, Vol. 12, Bayard Family Papers, LC.

[56] Charles O'Conor to Jefferson Davis, October 2, 1867, Box 24, Davis Papers, MC.

[57] As O'Conor pointed out to Davis: "Chase has the presidential mania in the most spasmodic form and is deeply incensed at the evident intent of the radicals to set him aside. The quarter from which under normal circumstances, nothing good could be expected, might, on this account, send forth a gentle breeze with healing and safety upon its wings." Charles O'Conor to Jefferson Davis, April 26, 1868, Box 24, Davis Papers, MC.

[58] U.S. Const. amend. XIV, § 3.

[59] George Parsons Lathrop, "The Bailing of Jefferson Davis," *Century Magazine* 33 (Feb. 1887), 636, 639. See also David K. Watson, "The Trial of Jefferson Davis: An Interesting Constitutional Question," *Yale Law Journal* 24 (1915): 669, 674, which called Chief Justice Chase's reading of the Amendment "exceedingly novel, interesting, and important."

[60] Lathrop, "The Bailing of Jefferson Davis," 639. Lathrop's article says that this meeting took place in 1865, but the fact that Chase read the Fourteenth Amendment aloud means that the meeting could only have taken place in 1868, as the Amendment was not ratified until July 9 of that year. Chase also avoided all involvement with the case until 1868. Lathrop learned his information from discussions with George Shea. See G. P. Lathrop to George Shea, November 21, 1885, Box 1, Bryan Family Papers, Library of Virginia, Richmond, Virginia.

[61] Charles O'Conor to Jefferson Davis, December 7, 1868, Box 24, Davis Papers, MC. Chase's instigation of defense counsel's argument in the motion to quash the indictment became an open secret, although the prosecutors remained ignorant of the Chief Justice's behind-the-scenes involvement while the case was pending. See Case of Davis, **Chase's Reports**, 87; "Why Jefferson Davis Was Never Tried," *Southern Historical Society Papers* 38 (1910): 347.

[62] Before the founding of bar associations in the late nineteenth century, there were no formal rules to direct the ethical behavior of lawyers of judges. University of Pennsylvania Professor George Sharswood, who began to formulate canons of ethical behavior in the 1850s, frowned upon ex parte communications between attorney and judge, because "such conduct is wrong in itself and has a tendency to impair confidence in the administration of justice." Sharswood, **A Compend of Lectures on the Aims and Duties of the Profession of the Law Delivered before the Law Class of the University of Pennsylvania** (Philadelphia: T. & J. W. Johnson, 1854), p. 66. For more on judicial ethics in the nineteenth century, see G. Edward White, **The Marshall Court and Cultural Change, 1815–1835** (New York: Macmillan, 1988), pp. 197–99.

[63] Charles O'Conor to Jefferson Davis, December 7, 1868, Box 24, Davis Papers, MC.

[64] Case of Davis, **Chase's Reports**, 91.

[65] The proclamation granted "unconditionally, and without reservation, to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof." Proclamation of December 25, 1868, 15 Stat. 711 (1868).

[66] "The Release of Davis," *Army and Navy Journal*, May 18, 1867.

[67] *Texas v. White,* 74 U.S. 700 (1869).

[68] Act of September 9, 1850, § 1, cl. 49, Stat. 446 (1850).

[69] *Texas v. White*, 74 U.S. 700, at 705, 709.

[70] *Texas v. White*. For more on this contradiction and various constitutional theories to sustain it, see Akhil Amar, "The Lawfulness of Section 5—and Thus of Section 5," *Harvard Law Review Forum* 126 (2013): 109; Bruce Ackerman, **We the People: Transformations**. (Cambridge: Belknap Press, 1998); John Harrison, "The Lawfulness of the Reconstruction Amendments," *University of Chicago Law Review* 67 (Sept. 2002): 375; and Gregory Downs, **After Appomattox** (Cambridge: Harvard University Press, 2015).

[71] *Mississippi v. Johnson,* 71 U.S. 475 (1867); *Georgia v. Stanton,* 73 U.S. 50 (1868).

[72] Brief for Defendant, John Chiles, at 27, *Texas v. White*, 74 U.S. 700, in Philip B. Kurland and Gerhard Casper, eds., **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law**. (Washington, D.C.: University Publications of America, Inc., 1978), Vol. 5, p. 460. The secession argument is set forth on pp. 17–26 of the brief. *Ibid.*, pp. 450–59.

[73] Abraham Lincoln, "First Inaugural Address," in Lincoln, **This Fiery Trial**, p. 88.

[74] *Texas v. White*, 74 U.S. 700, 724–26 (1869).

[75] For newspaper coverage, see *Houston Union*, April 21, 1869; *New York Tribune*, April 13, 1869; *Baltimore Sun*, April 13, 1869; *Little Rock Morning Republican*, April 22, 1869; *San Francisco Daily Bulletin*, April 22, 24, 1869; *New Orleans Times-Picayune*, April 21, 1869; *New York Herald*, April 14, 1869. For discussion in legal periodicals, see "Legal Notes," *American Law Register* 17 (1869): 371–76; "Summary of Events," *American Law Review* 3 (1868): 784; *American Law Review* 4 (1869): 170; "Recent American Decisions," *American Law Register* 18 (1870): 272; *Canada Law Journal* 5 (1869): 113.

[76] David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years, 1789–1888** (Chicago: University of Chicago Press, 1985), pp. 311–12.

The Influence of Legal Strategy in *Dennis v. U.S.* (1951) and *Yates v. U.S.* (1957)

HAYDEN THORNE

In 1951, the Supreme Court of the United States upheld the convictions of eleven leaders of the Communist Party of the United States of America (CPUSA) in *Dennis v. United States* despite a strong constitutional defense based on the First Amendment right of freedom of speech.[1] Six years later, in June 1957, the Supreme Court effectively reversed *Dennis* in *Yates v. United States* with a decision that greatly reduced the scope of the relevant legislation, the Alien Registration Act (1940), colloquially called the Smith Act.[2] As this article demonstrates, current scholarship on that interpretive change neglects an important factor in the Court's decision-making process—the influence of changes in legal strategy.

In an atmosphere of heightened anti-Communist tension in the early stages of the Cold War, the Federal Bureau of Investigation (FBI) and Justice Department deployed Smith Act provisions against CPUSA leaders in New York, where the Party had its headquarters. The conviction of the CPUSA leaders occurred after a ten-month trial that ended in October 1949. The convictions were upheld by the Court of Appeals for the Second Circuit.[3] On appeal from that ruling, the Supreme Court's majority in *Dennis* ruled that the Smith Act did not violate freedom of speech.

In *Dennis*, the Justices relied on a 1919 precedent, *Schenck v. United States,* which used what was known as the "clear and present danger" test to allow limitations on civil liberties during periods of heightened threats such as wartime.[4] In the case of the CPUSA defendants, the majority, upholding the convictions, accepted the U.S. District Court's decision that, based on quotations from Marxist–Leninist publications and speeches, the defendants intended to overthrow the government. The Court also upheld contempt of court convictions against the defendants' lawyers for their actions during the trial.[5]

After the Supreme Court had issued that decision, using the same Smith Act provisions, the FBI arrested other CPUSA officials, including fifteen Los Angeles–based leaders who were prosecuted in a six-month trial in 1952. The Los Angeles trial resulted in the conviction of fourteen defendants (one

defendant, Mary Doyle, was removed from the case in the early stages), and the imprisonment of Oleta Yates on the additional charge of contempt of court for refusing to testify about other defendants' CPUSA membership.[6] Again, the Court of Appeals upheld the convictions.[7] In its 1957 decision, the Supreme Court strictly construed the Smith Act to protect free speech and freedom of assembly and set aside the convictions from the federal District Court in Los Angeles, rendering the Act unusable for the majority of CPUSA prosecutions.[8] This analysis explores the contribution of legal strategies to that shift in interpretation.

Many scholars have analyzed the Supreme Court decisions in *Dennis* and *Yates.* Despite emanating from a broad range of disciplines and approaches, the authors reach one of two different conclusions. Some scholars, including Michael Belknap and William Wiecek, attribute the change in interpretation to broad contextual factors, particularly the anti-Communist hysteria that was near its peak in 1951 and had greatly diminished in 1957.[9] The alternative argument, taken up by Scott Martelle, Arthur Sabin, and others, is that the shift in interpretation was largely the result of changes to the composition of the Supreme Court.[10] Both factors were undoubtedly important in shaping the 1957 interpretation, but examining the legal strategy adopted by the attorneys in the two cases can provide a more nuanced explanation that makes a major contribution to our understanding of the Supreme Court's decision-making process. The lawyers for the defendants in the New York trial whose appeal resulted in the *Dennis* decision, and the Los Angeles legal team that conducted the appeal process,

In 1948, eleven U.S. Communist Party leaders were arrested and charged with violating the Alien Registration Act (front row: Eugene Dennis, William Z. Foster, Benjamin Davis; back row: John Williamson, Henry Winston, and Jack Stachel). As they had never openly called for the violent overthrow of the government, the prosecution depended on passages from the works of Marx and Lenin that advocated revolutionary violence and on the testimony of former members of the party who claimed they had privately advocated the use of violence.

which resulted in the *Yates* decision, utilized contrasting legal strategies. This article explores those strategies and argues that they were a major factor in explaining the different outcomes of the appeals when they reached the Supreme Court.

The New York Trial

From its beginnings in the 1948 New York trial to the *Dennis* decision and the upholding of the lawyers' convictions for contempt of court, the case was a legal marathon. Five attorneys constituted the defense team: Harry Sacher, Abraham Isserman, George W. Crockett, Jr., Richard Gladstein, and Louis F. McCabe.[11] Eugene Dennis represented himself, possibly in an attempt to ensure CPUSA control over the legal strategy.[12] Their conduct of the case was vigorous, resulting in a trial conducted in a hostile and at times aggressive manner. U.S. District Court Judge Harold Medina repeatedly demonstrated a loathing for the defense team and the defendants. It was thus not a surprise that the case did not end well for the defendants or their attorneys. Judge Medina convicted all six attorneys of contempt of court and sentenced them to jail terms of two to six months.[13]

The size of the defense team contributed to the length of the trial and at least partially explains why Medina quickly became so exasperated with them. All six insisted on exhaustively stating the case for their clients. The defense took up considerable time in presenting its case: 82 days out of 158 days in court, compared to 39 for the prosecution.[14] Often repeating what the other attorneys had argued, each lawyer presented a closing argument that further dragged out the already lengthy trial.[15] By contrast, the prosecution operated with a smaller and more cohesive team. The prosecutors did not have to worry about presenting multiple statements or emphasizing different ideas because they were representing the same entity, with the same goals and same strategy. The prosecution drew attention to the defense team's repetitive practices, describing a "flood of words" that was "overwhelming," as well as "long summations" and "tirades," in an intentional effort to add to the rancor in the Foley Square courtroom.[16] By emphasizing the contrasting nature of the two approaches, the prosecution further denigrated the defense team's reputation in the eyes of Medina and the jury.

As the indictment had alleged that the defendants had conspired to "organize as the Communist Party of the United States of America" and that the Party was "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the United States by force and violence," the prosecution organized its case accordingly, contriving a set of tactics that reoccurred in subsequent Smith Act trials.[17] Seeking to prove that the defendants had conspired to advocate and teach the overthrow and destruction of the U.S. government by force and violence, the prosecutors extensively quoted from CPUSA books, speeches, and informer testimony. They stressed the importance of Communist dogma over understanding the views of individual defendants, whether or not they subscribed to all the doctrinal principles. The prosecution strategy sought to prove that the defendants belonged to a criminal conspiracy, the CPUSA, and had violated provisions in the Smith Act, which provided criminal penalties for editing, printing, distributing, or displaying "any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence," or attempts to do so and any attempt to organize to achieve that goal.[18] The prosecution's strategy stressed that the CPUSA

leadership was dedicated to achieving the goals outlined in Marxist–Leninist texts.

The testimony of FBI informers reinforced the prosecution strategy by attributing revolutionary intentions to the defendants. In particular, ex-Communist Louis Budenz testified about events occurring during his involvement with the CPUSA leadership and his editorship of the CPUSA newspaper, the *Daily Worker*. Budenz testified that the *Daily Worker* and the CPUSA's National Literature Department placed great importance on promulgating Marxist–Leninist concepts, and that the CPUSA required that, as CPUSA officials, the defendants strictly adhere to those doctrines.[19] The prosecution combined informer testimony and textual quotations to construct the evidentiary basis for convicting the defendants because their Marxist–Leninist principles included a commitment to the "overthrow or destruction" of the American government by force and violence.

To strengthen the impact of their strategy, the prosecution sought to evoke fear in the jury by heightening prevailing concerns about the un-American nature of Communism during the post-war Red Scare. Throughout his summation to the jury, prosecuting attorney John F.X. McGohey repeatedly appealed to anti-Communist sentiment, asserting that "a few key men in a few key industries could paralyze our whole industrial machine and bring on a national crisis."[20] He argued that "by placing disciplined Communists, who are subject to their direction, in the proper positions in industry, these defendants, when the time of national crisis is upon us, intend ... to bring about the violent overthrow and destruction of the Government of the United States."[21] He

In the New York trial, U.S. District Court Judge Harold Medina convicted all six defense attorneys of contempt of court and sentenced them to jail terms of two to six months. He also showed a clear bias against the defendants during the nine-month trial. Medina is pictured here in October 1949 leaving the courthouse after sentencing the Communist leaders convicted of conspiracy to overthrow the government.

referred to the defendants as "professional revolutionaries" who "well fit Lenin's description of what the Party leadership should be."[22] McGohey also told the jury that "they can't plead immunity nor do their acts become any less criminal because their number is large or because they masquerade as a political party."[23] The evocation of Red Scare fears formed the crux of the government's case, acting as an appeal to the patriotic conscience of the jury to protect the American way of life from a subversive conspiracy.

In rebuttal, the defense attorneys repeatedly attacked the practice of quoting from "the works of Marx, Engels, Lenin and Stalin," in order to:

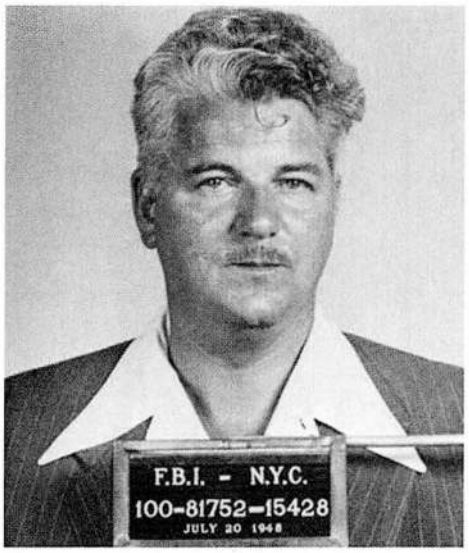
> prejudice the jury to believe that since these works are basic classics of Marxism-Leninism, and since the defendants are avowed adherents of Marxism-Leninism, it presumably follows that the defendants ... are committed to a course of using these classics ... as blueprints, blueprints for the alleged objective of establishing socialism in the United States by the sole method of employing force and violence

but the prosecution strategy created a dilemma for the defense.[24]

As CPUSA officials, the defendants could not repudiate official doctrines without jeopardizing their affiliation. The CPUSA position challenging the legitimacy of the U.S. government constituted another problem that made it difficult to use arguments based on the Bill of Rights, as the CPUSA insisted on the hypocrisy of capitalist democracy and the constitutional framework. Hemmed in by the CPUSA disciplinary apparatus, the defendants and their lawyers faced considerable difficulty in mounting a successful response to the prosecution.

The defense team faced an additional challenge in presenting a coherent defense as a result of internal disagreement over legal strategy. The CPUSA wanted to use the trial as a political exposé, while the lawyers wanted to conduct a defense that avoided convictions. As lawyers are duty-bound to take instructions from their clients, and those clients preferred to engage in a political battle, it was difficult to develop legal arguments that might have been more appealing to the judge and jury. Attorney Richard Gladstein's correspondence points to the extent of the disagreement over the legal strategy. Shortly before the trial began, Gladstein wrote to Abe Unger, another attorney, discussing the defendants' approach and the problem of inconsistent public communications about the trial. Gladstein, in an appeal to creation of a consensus approach, said that "we must be agreed upon a theory of the case, [and] upon a general court-room handling of a jury trial."[25] He continued that "the theory of our case must be that this is a shocking and menacing case of political persecution," and that so far, "your clients have been issuing public statements wholly inconsistent with that theory and to my mind extremely bad."[26] He pointed to statements by the defendants that "they will teach Communism from the witness stand" and argued that "it is very unwise to be telling people in advance that they intend to use the court as a classroom."[27]

Clearly there was a disconnect between the way Gladstein wanted to conduct the defense and the defendants' attitudes leading up to the trial. This was emphasized in a September 1951 letter to Gladstein from an unknown lawyer who commented "we await receipt of a copy of your original letter regarding Foley Square [New York trial] wherein you say you made suggestions which were not followed."[28] Delays in paying the lawyers added to the tension between the defense lawyers and their clients.[29] While preliminary court proceedings were still underway in early February



When Eugene Dennis (pictured) and his co-defendants were found guilty, they appealed to the Supreme Court, which ruled 6–2 against them in 1951. Dennis was subsequently imprisoned for five years.

1949, Gladstein wrote a memorandum deploring the absence of a "proper relationship" between clients and lawyers, which meant that the "clients do not have a proper understanding of what is involved in the professional handling of this case."[30] The lawyers also found it difficult to coordinate their work in the early stages of the trial. A letter from Maurice Sugar, another lawyer involved in the case, who was not listed as an attorney of record, to Gladstein, Sacher, Isserman, and Winter noted that "we have not effected the proper organization among the attorneys for doing our work efficiently and accurately" and added the admonition that "a system must be worked out, and adhered to."[31] The lawyers resolved their issues, but the differences over strategy between lawyers and defendants persisted, exacerbated by the dual role of Dennis as attorney and defendant.

As a result of CPUSA insistence, the defense was primarily conducted on a political level, with the defendants criticizing the trial itself as an illegitimate political attack. They often did so by promoting or discussing Communist ideology rather than focusing on the more technical legal arguments that could have been given greater emphasis. The aggressive attack on the judicial proceedings helped create antagonism between the lawyers and the judge, which did not aid the defendants and ultimately resulted in contempt of court proceedings against the defense team. The same approach continued during the trial and subsequent appeals, with the legal team focused on procedural issues relating to the jury selection process, the conduct of the judge, and the conduct of the prosecution lawyers. Trying to place the legal system on trial suited the CPUSA but did not convince judges or juries of the defendants' innocence. Required to comply with their clients' preferred strategy, the defense team emphasized attacks on the political nature of the prosecution. Sacher pointed to the key element in the defense strategy in his closing address, telling the jury, "I shan't dwell at any length on the large significance which necessarily attaches in this country to a criminal trial of a political party. A criminal trial of a political party: just ponder that a moment."[32] The defense team repeatedly made the same point in their arguments to the jury. Gladstein's letter to Unger reinforces that same thought, insisting that the claim about political persecution took precedence over other legal arguments[33]:

> Naturally, all legal points will be made during the course of the trial, and there will always be in reserve the issue of "clear and present danger" —but those remained of secondary importance to the defense case.[34]

Along with stressing the political nature of the case, the defense emphasized the negative impact of a conviction on the United States. In a draft of his closing argument, Gladstein argued that "your verdicts will affect the future of the vast

majority of 150 Million men, women, and children who constitute the American people."[35] There is also an idea that the lawyers, in representing their clients, were also performing a "duty to my country, to my people, to the Jewish people, the Negro people, the workers—all of the American people."[36] In a similar vein, Sacher told the jury that "by your verdict you affect not only the lives of these eleven men ... you will affect the rights of the American people in the most literal sense of the word."[37] Isserman likewise informed the jury that a not-guilty verdict "will support the institutions of American democracy and will enable America to go forward in its traditions and not as a state ridden by fear, clamped on by censorship and turned over to reactionary forces."[38] The eloquent references to the idea of American rights and democracy, coupled with an emphasis on political repression, formed the bedrock of the defense case.

As Gladstein outlined the strategy, he argued that "the defense objections will, in so far as possible, implement our basic conception of the case; that it presents political issues not triable in criminal proceedings."[39] The defense planned to object to all prosecution witnesses and documents, because "under this theory no document which the government could produce is free from objection. In fact, we insist that is so—and this constitutes another aspect of our basic position that the case is not triable in a criminal court."[40] Further, the defense consumed a substantial part of the trial in objecting to the evidence the government introduced, on the ground that the charge was not properly triable in a criminal court. Less successfully, the team objected to evidence introduced that related to events outside of the Southern District of New York, where the Grand Jury had issued the indictment.[41]

The defense strategy in the New York case exacerbated what might have already been a tense relationship between Judge Medina and the defense team. Medina believed the defense lawyers were conspiring to drag out the trial proceedings and damage his health because that scenario had occurred in a 1947 Smith Act prosecution. The judge in *United States v. McWilliams et al.* had died after eight months of an ill-tempered trial.[42] In convicting the lawyers of contempt, Medina concluded "that the acts and statements to which I am about to refer were the result of an agreement between these defendants," forming a conspiracy to cause "such delay and confusion as to make it impossible to go on with the trial," to provoke "incidents which they intended would result in a mistrial," and to impair "my health so that the trial could not continue."[43] In short, he believed that the defendants sought to create a mistrial by maliciously causing so much aggravation that he might suffer the same fate as his unfortunate colleague. The only pieces of evidence he provided to substantiate this allegation were extracts from the trial record of instances where the lawyers had acted contemptuously.[44] Moreover, a study of the record of the case supports Justice William O. Douglas's dissent in the lawyers' contempt case; he wrote that it is difficult to tell "whether members of the bar conspired to drive a judge from the bench or whether the judge used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted."[45]

The defense team did attempt to publicize the judge's perceived misconduct. It issued a press release about "a pattern of judicial conduct characterized by bias against the defendants and their counsel, the effect of which tends to deprive the defendants of a fair trial and to obstruct the defense lawyers in the performance of their duty."[46] A similar sentiment was expressed in a pamphlet published by the Public Relations Department of the "Trial of the 12," noting Medina's repeated findings

The 1952 Los Angeles trial of fifteen California Communist officials for violating the Smith Act was more successful than the New York trial. Pictured left to right are defendants Henry Steinberg, Slim Connelly, Al Richmond, Carl R. Lambert, Ernest O. Fox, Albert J. Lima, (second row) Dorothy Healey, Loretta Stack, Rose Chernin, Mary Bernadette Doyle, and Oleta Yates.

Defense attorneys Alexander H. Schullman, Norman Leonard, Leo Branton Jr., Ben Margolis, and A.L. Wirrin (front row) focused their energies on legal and technical arguments, not political ones.

during the trial that counsel had been contemptuous.[47] Further, the legal team filed motions for a mistrial based on Medina's conduct, alleging that he had demonstrated "active bias, prejudice, partiality, temper, rudeness, impatience, sarcasm, disbelief, and hostility against and towards the defendants and their counsel" and had in many instances taken on "the functions of the prosecutor."[48] It is, however, easy to imagine how this conflict between the judge and the defense may have played out in front of the jury, who are taking their cues from the judge.[49]

The climate of the time was hostile to lawyers acting on behalf of Communists, and Medina certainly appeared to share those views. There was significant pressure being placed on the legal profession by the American Bar Association (ABA) and Attorney-General (later Supreme Court Justice) Tom Clark to remove Communists and Communist sympathizers from the profession. Clark even went as far as to write an article in *Look* magazine threatening the investigation of "lawyers who act like Communists."[50] In contrast to the angry reaction from the left-leaning National Lawyers Guild (NLG), Medina's conduct drew a much more favorable reaction from anti-Communist groups and individuals. Indeed, Director of the FBI J. Edgar Hoover, who had supplied key witnesses from his agency and was himself a noted anti-Communist, wrote to Medina after the trial, but prior to sentencing, commending him on the way he conducted the trial.[51]

The attorneys appealed the contempt convictions up to the Supreme Court, after being rebuffed by the Court of Appeals for the Second Circuit.[52] In *Sacher et al., v. United States* a narrow 5–3 majority affirmed the convictions, with strong dissents from Felix Frankfurter, Hugo L. Black, and William O. Douglas.[53] Black concluded that "it is difficult to escape the impression that his [Medina's] inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs he attributed to their Communist leader clients."[54] Even the American Civil Liberties Union (ACLU), which had earlier passed a resolution barring Communists from holding office, stated, while expressing concern about free speech issues, that it was "unalterably opposed" to Communism.[55] Finding "no violations of civil liberties" in the contempt case, the ACLU refused to support the lawyers in their appeals, leaving it up to the NLG to defend the attorneys.[56]

In sum, the New York defense team faced substantial difficulties with a hostile judge and obdurate clients determined to profess their commitment to the CPUSA. What ensued was a long and rancorous trial in which they defended Communist ideology, attacked the trial as an example of political repression, and questioned its legitimacy at the expense of legal arguments that gained greater prominence in the appeals process, and in subsequent cases including *Yates*. Issues like the pertinence of the clear-and-present danger doctrine, the timing and location of the offense, and the sufficiency of evidence received less attention, thus making the appeals process less likely to succeed when it came before the Supreme Court as *Dennis v. United States*.

The Los Angeles Trial

Soon after the Supreme Court had rejected the appeal in *Dennis*, a federal grand jury in Los Angeles indicted fifteen California Communist officials for violating the Smith Act. The trial began in February 1952, with the defendants represented by six attorneys: Leo Branton, Norman Leonard (a partner in Gladstein's law firm), Ben Margolis (who would be the attorney of record), Alexander Schullman, Leo Sullivan, and A.L. Wirrin. All six attorneys put considerable effort into the defense case, particularly

at the trial stage.[57] Their conduct of the trial differed considerably from the New York strategy, suggesting that the lawyers contributed to the successful outcome in 1957.

The prosecution conducted the Los Angeles trial following the template laid down by the Smith Act and the New York case. The prosecutors sought to demonstrate that Marxism–Leninism was the official ideology of the CPUSA and its officials, which included a commitment to the overthrow of the United States by force and violence.[58] In his closing statement for the prosecution, U.S. attorney Walter S. Binns argued that the authors of the U.S. Constitution had demonstrated their interest "in insuring [sic] domestic tranquility, and we know that the most flagrant breach of domestic tranquility would be an insurrection in this country."[59] He also questioned the democratic nature of the CPUSA.[60] Rather than achieving political change "by the ballot," Communists "are going to do it as the classics say, by a civil war, they are going to do it by capturing power, then you see where the pertinency of having key people or people in basic industries come in."[61] The government's case appealed to the Red Scare fears of the jury about revolution and hostility to Communism. Binns told the jury that Marxism–Leninism "is something that I fail to see the appeal in" because it lacks "brotherly love, kindness, charity. It is all hard and harsh."[62] He and his fellow prosecutors tried to prove the claim underlying this sentiment during the six-month trial, which concluded in August 1952.

As the Supreme Court had upheld the convictions in *Dennis*, the federal prosecutors in Los Angeles saw no need to change a winning strategy. As evidence, the prosecution relied on quotations from Marxist texts, just as the prosecutors had done in the New York trial. They stressed these classic texts to prove that the defendants met the Smith Act criteria relating to violent revolution[63]; one of their lawyers wrote that the texts proved that "these people conspired to advocate the overthrow of the United States by force and violence."[64] They continued to use the testimony of informers while relying upon the anti-Communist sentiment already well-entrenched in a city where the House Un-American Activities Committee (HUAC) and Senator Joseph McCarthy had convinced many people of the danger of Communist subversion.

In the early stages of the case, the defense team in Los Angeles enjoyed greater success than had their New York counterparts. Prior to the start of the trial, the defense had successfully appealed the amount required for bail. They also had some encouragement from a *habeas corpus* petition to the Court of Appeals, where a divided panel ruled against them but they received a strong dissent from Circuit Judge Healy, who felt that "their claim that the bail fixed in their cases is excessive is worthy of serious attention."[65] The bail issue bounced around the courts multiple times on a variety of different questions, with the result that the defendants received a reduction. This represented a significant success for the defendants and for the defense attorneys, given that similar motions in New York were unsuccessful.

The second notable early success came in December 1951 with the approval of a motion to dismiss the initial indictment.[66] The defendants in this case alleged that the indictment had failed to include the element of intent.[67] Judge Mathes found that as a long and expensive trial was likely, "caution added to grave doubt," justified a ruling that the indictment was insufficient, and thus he granted the motion to dismiss.[68] Unfortunately for the defendants, the prosecution amended the indictment to remove any ambiguity over the elements of the offense to be proved. Despite the hollowness of this victory, it demonstrates that the defense team paid a greater level of attention to legal details, and it further suggests that Judge Mathes was fairer and less hostile toward the defendants and their attorneys than Judge

As primary witness for the defense, Oleta Yates (left) argued that Marxism is not a set of instructions but rather a set of principles which can be used to create positive change, without reliance on violent revolution. She refused to testify about the CPUSA membership of the other defendants and was charged with contempt of court. U.S. Marshal Peggy Costello (right) is pictured escorting her to jail.

Medina had been. Unsuccessful motions also demonstrated that greater attention was being paid to the legal arguments and the specific issues of the case. In particular, a supplementary memorandum shows early recognition of the argument that became a ground for reversal in the Supreme Court in 1957.[69] The general rule that words should be given their natural and ordinary meaning developed into the argument that the offense of "organizing" the CPUSA could only have been committed in July 1945 and was therefore barred by the statute of limitations.[70] The defense argued that "the existence of a conspiracy to commit an offense does not survive the completion of the substantive offense."[71] Although this motion did not succeed initially, it laid the legal groundwork for the subsequent Supreme Court reversal, and demonstrates a greater willingness to use legal avenues in the conduct of the case rather than engaging in political polemics.

Another legal success, in which one judge was removed from the case, led to a better relationship between the attorneys and the judge than was the case in New York. Judge James M. Carter conducted the pretrial bail hearings in the District Court. At the arraignment, the defendants moved that he recuse himself on the grounds of personal bias and prejudice against the defendants.[72] Carter chose not to do so, leaving Philip Connelly, one of the defendants, to appeal to the Court of Appeals for a writ of prohibition forbidding Carter from acting in the case.[73] In that hearing, an affidavit was presented to the Court

detailing a conversation between a defense lawyer and Carter, during which Carter expressed the sentiment "I am sorry to see you getting mixed up with these Commies."[74] The Court found that the facts proved "a sufficient showing of personal prejudice against the petitioner to deprive the respondent judge of the jurisdiction to hear and determine any issue, bail or otherwise, affecting petitioner."[75] The Court of Appeals' decision contained a thinly veiled rebuke of the judge's conduct. The majority opinion, by Chief Judge William Denman, noted that "here we find the respondent judge, in the presence of another attorney, deprecating the action of ... an able member of the bar of this court ... having the presumption of innocence of the charge which that officer of this court has devoted his proper professional services."[76] Upon receiving the writ preventing him standing in matters involving Connelly, Judge Carter disqualified himself from the whole case, and the matter was then assigned to Judge Mathes.[77]

William Schneiderman, then State Secretary of the Communist Party in California, was unimpressed with Judge Mathes, likening him to Judge Medina, with the qualification that "whereas Medina used a sledge hammer, Mathes concealed a stiletto."[78] Despite that, the relationship between Mathes and the attorneys was mostly cordial, with the case conducted in a professional and largely civil manner. The defense was therefore able to conduct the trial in a much calmer and more favorable atmosphere. As is inevitable in such a long trial, there were disputes between attorneys and judge, but these did not come close to rivalling the animosity seen in New York. In an indirect sense, this allowed the case to move forward in a much different manner from that used in *Dennis*. During the appeal, it was possible to shut out anti-Communist sentiment in favor of a focus on the specific legal issues that remained in play. This was likely a factor in helping the Supreme Court to reach its decision to reverse the convictions and to order either that the charges be dismissed or that a new trial be held for the defendants.

Also unsuccessful, but significant, was a defense motion to have the court hear testimony from civil liberties experts regarding the constitutionality of the statute itself. The defense submitted an "Offer of Proof of the Unconstitutionality of the Smith Act as Applied," which argued the case for expert testimony to prove the unconstitutionality of the legislation.[79] The defense team proposed that Osmond Fraenkel of the ACLU and NLG, Roger Baldwin of the ACLU, and prominent civil liberties lawyer Joseph Rauh testify that "there has been since the enactment of the statute herein involved ... a general, widespread and pervasive restraint in the United States ... upon the expression of social, economic, scientific, and political beliefs," with the Smith Act one of the major causes.[80] Although it was denied, the motion showed a more creative approach in making use of constitutional principles as part of the defense. That the case was conducted in a more legalistic manner provided the possibility of broader support from lawyers, civil libertarians, and potentially from Justices William O. Douglas and Hugo L. Black.

Despite this renewed focus on the legal aspects of the case, Schneiderman continued with the political approach to the trial. Schneiderman defended himself at the trial because "not only my political beliefs and ideals by which I live, but the meaning of my whole life is on trial here, and I must defend it myself."[81] In a series of internal memos outlining the CPUSA's position regarding the trial, Schneiderman makes it clear "that the best defense of the Party is a full and affirmative statement of its policies and activity. We must take the offense and keep it."[82] The Party's policy appears to have started out along the same lines as in New York, with a policy memorandum noting a two-fold objective "to defend our party against

a political frameup ... and to defend our constitutional right to function as a political party advocating peace, democracy and Socialism."[83] This policy was intended to draw on the developments since the "fiction" of the Foley Square trial, which would "expose the Government's hypocrisy."[84] In essence, they wanted to follow the same line of defense as they did in New York, emphasizing the nature of the "political frameup" and attacking the government's role in persecuting the CPUSA.

Schneiderman wanted to wage "a mass struggle to defend the democratic rights of Americans, which affects the rights not only of Communists, not only of those progressives who actively fight for peace, or for Negro rights, or for Labor's demands, but the rights of the whole American people ... ."[85] In another internal document, he wrote that "the Party shall demand and fight militantly for its full rights under the Constitution, but it shall place its basic reliance in the mass backing it is able to mobilize in support of the case."[86] He argued the need for "a complete trial of the entire issues at stake," and stated "[we] must have no pure-and-simple 'civil liberties' type of defense."[87] Somewhat surprisingly, he also suggested that "we should also stress the right of revolution, written into the Declaration of Independence and twice practiced by the American people, in 1776 to 1783 and 1861 to 1865," as he sought to insert the right to revolution into American historical precedents.[88]

The similarities with the approach in New York are startling. There was the same idea of attacking the political nature of the trial, the same full defense of Party policy and ideas, and the same method of militant defense and mass demonstration as opposed to a more purely legalistic approach to the case. Schneiderman also suggested that the attorneys "shall be required to defend the Party. ...We cannot expect them to defend Communism as such, but we must expect them to take at least as advanced a position as the Supreme Court did in the Schneiderman case."[89] These memoranda, which appear to have been written prior to the start of the trial, suggest that CPUSA officials were unwilling to compromise their principles in search of a legal victory. Yet, over the course of the trial, the defendants appear to have taken a much less confrontational approach.

When it came to the trial, ten of the fourteen defendants rested their case at the conclusion of the prosecution's case, with only William Schneiderman, Oleta Yates, Loretta Stack, and Frank Carlson electing to present a defense.[90] Those four defendants had planned to present a significant number of witnesses and other pieces of evidence, but in the end only offered one substantive witness before also resting their case. Yates was the primary witness for the defense, using a long direct testimony to present the defendants' side of the story, and their understanding of Marxism–Leninism. Yates testified that "I understand that once one learns the basic scientific theories of Marxism, then it becomes possible to be guided by these theories ... in much the same way that science is used to meet the needs of action of society."[91] She pointed out that Marxism is not a set guide with instructions on how to do things, but rather a set of scientific principles which can be used to create positive change, without reliance on violent revolution.

On cross-examination, Yates was asked to name individuals who were involved in the CPUSA during her association with it. She refused to become "an informer," telling the court that, "I will not play the role of a witness for the Government, I will not add to the prosecution's case against people who have rested, who are defendants and who are putting no further defense. I am sorry, your Honor, I cannot answer that question."[92] Despite pressure from the judge and the threat of a contempt conviction, Yates refused to name names, asserting, "I stated what I did because in all conscience I cannot do otherwise and I must maintain that

position ... ."[93] She was jailed for the remainder of the trial and subsequently was convicted of contempt of court. The defense highlighted the heroism on Yates's part in a press release seeking sympathy because "the prosecution could not shake her testimony. Hence, the prosecution resorted to the sordid expedient of seeking to imprison her for contempt by posing the alternatives—inform on others, or go to jail."[94] These communication strategies also represent a departure from the militant stance taken in the New York trial.

The Yates testimony and subsequent contempt citation created a dilemma for the defense team.[95] Schneiderman informed the Court that "we had intended to call possibly 10 to 15 witnesses for the defense, including the three remaining defendants who had not rested, on the position of the Communist Party and the meaning of the books and literature in evidence, as well as the intent of the defendants."[96] Because of the prosecution's insistence on seeking names from the witnesses, the defense was "confronted with the alternative of continuing under these trying circumstances and subjecting future witnesses to the same kind of ordeal, or resting our case."[97] This development, presented by the defense as an improper attack by the prosecution, had in fact been predicted by the defense team. In a pretrial memo regarding the scope of permissible cross-examination, it was made clear that "under the broad views which the courts frequently take on the question of what is within the scope of direct, it would be exceedingly difficult, if not impossible, to frame a direct examination which would not open the question of names."[98] The defense were therefore aware that it would be nearly impossible to prevent questioning witnesses about names, and presumably it had already prepared to cut their defense testimony short once the prosecution had asked Yates to identify CPUSA members who might be subject to indictment.

The Los Angeles defense strategy contained a strong element of conscious pragmatism. It was pragmatic in the sense that the defense seized opportunities, where available, to make the argument that had the most realistic chance of success, and it was conscious in the sense that the lawyers, and to a lesser extent the defendants, had drawn lessons from the New York trial. The defendants, as CPUSA officials, did intend to defend their ideological commitments with the same vigor that the New York defendants adopted, but, as the trial continued, particularly as they experienced some success by sticking closer to legal arguments, there appears to have been a shift in the dynamic of how to conduct the best defense, with the legal team influencing the defendants.

Schneiderman, in accepting a more legalistic approach to the defense than had been used in New York, seems to have realized that the CPUSA tactics had not succeeded during the New York trial.[99] A note by Schneiderman details the shift. Asking about the conduct during the trial, it states emphatically, "Avoid lawyers going to jail — Don't repeat N.Y. Experience — Were we overly cautious? — Effect of more militant stand? Did it have any effect in NY outside courtroom?"[100] This suggests that the CPUSA officials recognized the difficulties caused by contempt charges imposed on the lawyers and the problems created by the more militant approach to the case. Schneiderman also commented on the trial itself, noting "fairly good public image" an "excellent legal stance" and a presentation of the CPUSA position that was "probably better understood than NY."[101] He also suggested that "winning the bail fight gives us a certain advantage" and that there is "less hysteria in LA" and "better press."[102]

Schneiderman's shift in thinking started to occur between the bail hearings and the start of the trial proper. He noted in his memoirs that "our first concern was to avoid

some of the pitfalls of the New York trial," while also suggesting a desire to "keep our lawyers out of jail."[103] Schneiderman wrote that "we set as our goal to make clear that the issue in this trial was our *constitutional right to advocate* the Party's principles and program," an idea he repeated in a discussion with CPUSA official William Foster during the later stages of the trial.[104] This represents a significant shift, from Schneiderman's early discussions of defending "party policies and activities," to advocating "the right of advocacy, not the correctness of our views."[105]

The evidence of this changing CPUSA position and the situation of the defendants helps to explain how the trial progressed. In the later stages of the trial, the attorneys' not calling large numbers of witnesses or attempting to pile on evidence as took place in the New York defense suggests greater pragmatism and an unwillingness to antagonize the judge and jury. The increased use of legal tools, through various motions and appeals, showed a growing willingness to utilize the legal system rather than to denounce it as unjust. This consciously pragmatic approach was likely driven by the experienced legal team, who knew about the likely consequences of doing otherwise, based on their study of the mistakes made during the New York trial. Norman Leonard's opening statement to the jury supports this point.[106] He elected to make his opening statement after the prosecution had made its case, and he placed substantial emphasis on the legal side of the case when he addressed the jury.[107] In particular, he argued that "not only must you of the jury find that the defendants conspired to advocate the ideas in question, and find that the ideas mean what the prosecution say they mean ... but you must find that the defendants agreed to advocate *those* ideas with *that* meaning," thus making the prosecution assume the burden of demonstrating intent rather than just imputing it by quotation from texts.[108]

The defense in Los Angeles took a much more legalistic approach, instead of mounting a political battle. While political arguments remained a part of the case, they were presented in a much clearer and more legally coherent manner. The defense also did not take up significant time presenting evidence, and they seemed not to have antagonized the judge or alienated the jury. While this did not result in acquittal, the legal strategy laid the groundwork for the eventual reversal by the Supreme Court in 1957.

A major difference in the Los Angeles case was the level of support the defendants and their legal team received from within the California area. Defense attorney Leonard's correspondence extensively documents cooperation with other lawyers, particularly in terms of borrowing and sharing copies of briefs and transcripts from other relevant cases, which were either too expensive or were not easily available to the defense team.[109] Leonard's files also demonstrate that he reached out to groups who may have had an interest in the case to seek their support in filing *amicus curiae* briefs with the court. One such request was made to Harry Bridges, leader of the International Longshore and Warehouse Union (ILWU), which Gladstein and Leonard had served as attorneys.[110] Leonard drew on this experience in dealing with anti-Communist forces. The legal team was also able to draw on the experience of two new attorneys for the Supreme Court appeal in the form of Augustin Donovan and Robert W. Kenny, who were experienced lawyers in their own right, and conveniently friends of Chief Justice Earl Warren.[111] This demonstrates that the defense team was focused on finding outside assistance in strengthening their legal strategy, which ultimately produced a successful outcome.

The NLG provided strong support for the defense, with a focus on the legal side of

the battle. It provided its members with regular updates on the court case and urged its membership to stay involved in seeing the case decided in their favor. The Los Angeles lawyers also appear to have enjoyed greater support from the ACLU than had the New York lawyers, because Wirin was very active in the ACLU's Southern California branch. Although the nationwide ACLU rules on membership and involvement of Communists remained in place, branches like the Northern and Southern California units exercised a degree of independent action. Ernest Besig, Director of the Northern California branch, made it clear that he objected to the anti-Communist stance taken by ACLU headquarters in New York: "We have always taken the position that so long as Executive Committee members and staff are willing to defend the civil liberties of all without distinction nothing more is required."[112]

The defendants did, however, have difficulty, similar to that experienced by the New York defendants, in finding counsel to represent them, particularly when it came to the appeal process. Ben Margolis, on behalf of the defendants, took their complaints to the California State Bar, arguing that "it appears to us that the reasons which have led prominent counsel to refuse to act in this case constitute a problem for the bar as a whole rather than a matter which can best be solved by any individual attorney."[113] Margolis wrote to Irwin Goodman, another attorney, regarding the process, suggesting that "we had been turned down not because lawyers were unwilling to take the case but because of the fear of consequences to the lawyer."[114] That fear no doubt stemmed from the contempt convictions and jail sentences of the New York lawyers, along with attacks by the Attorney General Clark and the ABA. The California State Bar Board of Governors responded to Margolis's request by passing a resolution specifically "referring to the necessity of lawyers taking Smith Act cases."[115] The support of the NLG, the State Bar Association, and the local ACLU branches ensured that the defense lawyers avoided the harsh treatment experienced by the New York lawyers.

Differences in Legal Strategies

Given the different results in the Supreme Court's rulings in *Dennis* and *Yates*, it is useful to examine how the defendants' lawyers proceeded at trial differently in the two cases. The legal team in Los Angeles focused their energies away from political arguments, instead placing much greater emphasis on technical, legal arguments, including the same arguments that would later prove successful before the Supreme Court. They also cultivated a better relationship with the judge and the jury. From the start, the legal strategy won the Los Angeles defendants several important concessions and motions early in the trial, including more reasonable bail, a redrafting of the indictment, and the removal of an anti-Communist judge.

To what extent does this change in strategy help to explain the difference in outcomes when the cases came before the Supreme Court? It is difficult to make broad claims because of a shift in the political atmosphere between 1951 and 1957 that no doubt played a part. The fall from power of Senator Joseph McCarthy in 1954 as conservatives came to see him as a liability to the Republican Party and to anti-Communism was a factor. Indeed, *Yates* was announced on the same day as other decisions in which Communists were on the winning side, drawing the wrath of Congress but irreparably weakening McCarthyism.[116] The change in leadership at the Court, with Earl Warren succeeding Fred Vinson as Chief Justice in 1953, had led the Court in a new direction. What can be demonstrated is that the *Dennis* decision displayed a substantial focus on the issue of

clear and present danger, the formulation of that test, and the question of whether danger existed. The Supreme Court decision followed the pattern of the trial—a political, rather than a legal, focus. By contrast, in the *Yates* decision, the Court emphasized the legal arguments, with little reference to political issues at all. It is thus clear that this conscious change in strategy had an impact on the Supreme Court's change in position.

ENDNOTES

[1] *Dennis, et al., v. United States*, 341 U.S. 494 (1951).
[2] *Yates, et al., v. United States*, 354 U.S. 298 (1957).
[3] *United States v. Dennis et al.*, 183 F.2d 201 (2d Cir. 1950).
[4] *Schenck v. United States*, 249 U.S. 47 (1919).
[5] *Sacher et al., v. United States*, 343 U.S. 1 (1952).
[6] *U.S. v. Schneiderman*, 106 F.Supp 906 (S.D. Cal. 1952).
[7] *Oleta O'Connor Yates, et al., v. United States*, 225 F.2d 146 (9th Cir. 1955).
[8] *Yates v. United States*, 354 U.S. 298 (1957).
[9] Michal R. Belknap, **Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties** (Westport, Conn.: Greenwood Press, 1977); William M. Wiecek, "The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*," *The Supreme Court Review* (2001): 375–434.
[10] Scott Martelle, **The Fear Within: Spies, Commies, and American Democracy on Trial** (New Brunswick: Rutgers University Press, 2011); Arthur J Sabin, **In Calmer Times: The Supreme Court and Red Monday** (Philadelphia: University of Pennsylvania Press, 1999).
[11] *Eugene Dennis et al., United States of America - against - William Z. Foster, et al.*: Memorandum of Law on the Clear and Present Danger Doctrine and Its Applicability in This Case (Memorandum, May 23, 1949), 9, Box 366, Folder 3, Norman Leonard Papers, larc.ms.0027, Labor Archives and Research Center, San Francisco State University [hereafter Leonard, LARC].
[12] *Ibid.*, 9.
[13] *United States v. William Z. Foster, et al.*, Trial Transcript" (October 14, 1949), T.R. 16,113, Box 367, Folder 2, Leonard, LARC.
[14] Public Relations Department, Trial of the 12, "Facts of the Trial" (Pamphlet, September 30, 1949), Box 363, Folder 5, Leonard, LARC.
[15] Richard Gladstein, Draft Closing Argument in *U.S. v. Foster* (n.d.), Box 360, Folder 7, Leonard, LARC; *US v. Foster Trial Transcript*; George W. Crockett, Summary to Jury, *U.S. v. Foster* (October 11, 1949), Box 363, Folder 8, Leonard, LARC; Louis F. McCabe, Summary to Jury, *U.S. v. Foster* (October 7, 1949), Box 363, Folder 9, Leonard, LARC; Abraham J. Isserman, Summation on Behalf of Defendants, *U.S. v. Foster* (October 7, 1949), Box 367, Folder 1, Leonard, LARC.
[16] John F. X. McGohey, Summation on Behalf of the Government: Extract from Trial Transcript in *United States v. Foster* (Transcript, October 12, 1949), Box 367, Folder 2, Leonard, LARC.
[17] *United States v. William Z. Foster, et al.*, Trial Transcript (Transcript, 1949), T.R. 15556, Box 363, Folder 7, Leonard, LARC.
[18] "Alien Registration Act," Pub. L. No. 670, 54 Stat. 670 (1940).
[19] McGohey, Summation on Behalf of the Government, pp. 358–360.
[20] McGohey, Summation on Behalf of the Government, 352.
[21] *Ibid.*, 400.
[22] *Ibid.*
[23] *Ibid.*, 312.
[24] History of the CPSU (Memorandum, n.d.), Box 358, Folder 4, Leonard, LARC.
[25] Richard Gladstein to Abe Unger, September 27, 1948, 1, Box 359, Folder 13, Leonard, LARC.
[26] *Ibid.*, 2–3.
[27] *Ibid.*, 28.
[28] Unsigned to Richard Gladstein, September 16, 1951, Box 362, Folder 7, Leonard, LARC.
[29] Richard Gladstein, Memorandum to Trial Counsel and Carl (Memorandum, February 9, 1949), 2, Box 359, Folder 13, Leonard, LARC.
[30] *Ibid.*, 3.
[31] Maurice Sugar to Winter et al., November 10, 1948, Box 362, Folder 7, Leonard, LARC.
[32] *U.S. v. Foster* Transcript, 177.
[33] Gladstein to Unger, September 27, 1948, 2.
[34] *Ibid.*
[35] Gladstein, Draft Closing Argument in *U.S. v. Foster*, 1.
[36] Proposed Material for Summation (n.d.), 2, Box 361, Folder 3, Leonard, LARC.
[37] *U.S. v. Foster* Transcript, 177.
[38] Isserman, Summation on Behalf of Defendants, *U.S. v. Foster*, 61.
[39] Richard Gladstein, Scope of the Indictment (Memorandum, n.d.), 1, Box 358, Folder 3, Leonard, LARC.
[40] *Ibid.*, 2.
[41] *Ibid.*, 3.
[42] *United States v. McWilliams*, 54 F.Supp. 791 (D.D.C. 1944).
[43] *United States v. Foster*, Transcript Extract, Verdict

and Contempt Citations (October 14, 1949), 7–8, Box 367, Folder 2, Leonard, LARC.

[44] *Ibid.*

[45] *Sacher v. U.S.*, 343 U.S. 89. Isserman, Summation on Behalf of Defendants, *U.S. v. Foster*, 61.

[46] Due Process in a Political Trial (n.d.), 2, Box 359, Folder 1, Leonard, LARC. Richard Gladstein, Scope of the Indictment (Memorandum, n.d.), 1, Box 358, Folder 3, Leonard, LARC.

[47] Public Relations Department, Trial of the 12, Facts of the Trial, 10.

[48] Eugene Dennis et al., *United States v. Foster*, Motion for Mistrial (n.d.), 27, Box 366, Folder 1, Leonard, LARC. *Ibid.*, 5.

[49] Peter David Blanck, Robert Rosenthal, and LaDoris Hazzard Cordell, "The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials," *Stanford Law Review* 38, no. 1 (November 1985): pp. 89–164.

[50] Public Relations Department, Trial of the 12, Facts of the Trial, 10.

[51] Arthur Sabin, **In Calmer Times: The Supreme Court and Red Monday** (Philadelphia: University of Pennsylvania Press, 1999), p. 54.

[52] *United States v. Sacher et al.*, 182 F.2d 416 (2d Cir. 1950).

[53] *Sacher v. US*, 343 U.S.

[54] *Ibid.*, 460.

[55] The Executive Director, American Civil Liberties Union to The Board of Directors, The Smith Act Decision and the Future, June 20, 1951, 1–2, Box 1, Folder 2, American Civil Liberties Union of Northern California records, MS 3580, California Historical Society [hereafter NC-ACLU, CHS].

[56] The Smith Act, Security and Freedom: The Great Challenge, 30th Annual Report of the American Civil Liberties Union, June 1951, 14–15, Box 2, Folder 33, NC-ACLU at CHS.

[57] Leo Branton, Jnr. et al., *U.S. v. Schneiderman*, Motion to Dismiss Indictment (January 9, 1952), Box 378, Folder 6, Leonard, LARC.

[58] Government's Theory of the Case, Extracts from Transcript of *U.S. v. Scheneiderman* (n.d.), 1, Box 1, Folder "Court Briefs," Schneiderman, LARC.

[59] *Yates et al., v. United States*, U.S. Supreme Court Transcript, Vol. 25 (October 1955), 12595, Box 394, Leonard, LARC.

[60] *Ibid.*, 12644.

[61] *Ibid.*, pp. 12644–12645.

[62] *Ibid.*, 12596.

[63] *U.S. v. Schneiderman et al.*, The Government's Case (n.d.), Box 380, Folder 6, Leonard, LARC.

[64] Norman Neukom, Government's Statement of its Theory of the Conspiracy, Extract from *U.S. v. Schneiderman* Transcript (January 8, 1952), Box 380, Folder 6, Leonard, LARC.

[65] *Loretta Starvus Stack, et al., v. James J. Boyle*, United States Marshal, United States Court of Appeals for the Ninth Circuit (October 3, 1951), 3, Box 377, Folder 10, Leonard, LARC.

[66] United States District Court for the Southern District of California, *U.S. v. Schneiderman et al.*, Memorandum of Decision Re: Motion to Dismiss (December 11, 1951), Box 378, Folder 7, Leonard, LARC.

[67] *Ibid.*, 5.

[68] *Ibid.*, 15.

[69] Leo Branton, Jnr. et al., *U.S. v. Schneiderman*, Defendants' Supplemental Memorandum in Support of Statute of Limitations Point of Motion to Dismiss Indictment (n.d.), Box 379, Folder 6, Leonard, LARC.

[70] Branton, Jnr. et al.; Alexander H. Schullman, Draft Argument on Motion to Dismiss - Statute of Limitations (n.d.), Box 379, Folder 6, Leonard, LARC.

[71] Schullman, Draft Argument on Motion to Dismiss - Statute of Limitations, 1.

[72] National Lawyers Guild, Second Report to Members of the California Bar Concerning Smith Act Prosecutions in This State (n.d.), 3, Box 377, Folder 2, Leonard, LARC.

[73] *Connelly v. United States Dist. Court in and for the Southern Dist. of California, Central Division, et al.*, 191 F.2d 692 (9th Cir. 1951).

[74] *Ibid.*, 694.

[75] *Ibid.*, 696.

[76] *Ibid.*

[77] National Lawyers Guild, Second Report to Members of the California Bar Concerning Smith Act Prosecutions in This State, 3.

[78] William Schneiderman, **Dissent on Trial: The Story of a Political Life** (Minneapolis: MEP Publications, 1983), p. 126.

[79] Norman Leonard, Ben Margolis, and William Schneiderman, *U.S. v. Schneiderman*, Offer of Proof of Unconstitutionality of the Smith Act as Applied (n.d.), Box 379, Folder 11, Leonard, LARC.

[80] *Ibid.*, 2.

[81] William Schneiderman, Opening Statement to Jury (February 6, 1952), 1, Box 1, Folder "Smith Act Speeches," Schneiderman, LARC.

[82] "Outline of Party Policy in the Trials" (n.d.), 1, Box 1, Folder "Smith Act CP Policy and Defense," Schneiderman, LARC.

[83] Policy Memo (October 29, 1952), 1, Box 1, Folder "Smith Act CP Policy and Defense," Schneiderman, LARC.

[84] *Ibid.*, 4.

[85] *Ibid.*, 1.

[86] "Outline of Party Policy in the Trials," 11.

[87] *Ibid.*, 11-12.

[88] *Ibid.*

[89] *Ibid.*

[90] *Yates et al., v. United States,* Supreme Court Transcript, Vol. 21 (October 1955), 10075, Box 392, Leonard, LARC.
[91] *Yates et al., v. United States*, Supreme Court Transcript, Vol. 21, 10430.
[92] *Ibid.*, 11239.
[93] *Ibid.*, 11367.
[94] For Immediate Release, re: Oleta O'Connor Yates (n.d.), 1, Box 1, Folder "Smith Act Miscellaneous," Schneiderman, LARC.
[95] *Yates et al., v. United States*, Supreme Court Transcript, Vol. 24 (October 1955), 11887, Box 393, Leonard, LARC.
[96] *Ibid.*
[97] *Ibid.*
[98] Memorandum of Law Re: Scope of Permissible Cross-Examination of Accused as Limited by Scope of Direct Examination (n.d.), 32, Box 379, Folder 8, Leonard, LARC.
[99] William Schneiderman, Different from N.Y. Trial of 'Conspiracy' (n.d.), Box 1, Folder "Smith Act Speeches," Schneiderman, LARC.
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] Schneiderman, **Dissent on Trial**, 127-131.
[104] *Ibid.*, 131.
[105] *Ibid.*, 178.
[106] Schneiderman, Opening Statement to Jury, 1.
[107] *Yates et al., v. United States,* Supreme Court Transcript, Vol. 21, 10080.
[108] *Ibid.*, (emphasis added).
[109] *Ibid.*, 10104.
[110] Norman Leonard to Harry Bridges, September 16, 1955, Box 377, Folder 1, Leonard, LARC.
[111] Schneiderman, **Dissent on Trial,** p. 241.
[112] Ernest Besig to Victor Stair, September 18, 1950, Box 7, Folder 126, NC-ACLU at CHS.
[113] Ben Margolis to DeWitt A. Higgs, June 14, 1955, Box 377, Folder 1, Leonard, LARC.
[114] Ben Margolis to Irvin Goodman, June 28, 1955, Box 377, Folder 1, Leonard, LARC.
[115] Margolis to Goodman.
[116] *Watkins v. United States,* 354 U.S. 178 (1957), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

The Trees Are Still Standing: The Backstory of *Sierra Club v. Morton*

M. MARGARET MCKEOWN

The query "Should trees have standing?" ranks among the iconic phrases in American jurisprudence. As environmental litigation blossomed in the 1970s, the Supreme Court took up the case of *Sierra Club v. Morton*.[1] Justice William O. Douglas's stirring dissent, arguing that "[t]he river as plaintiff speaks for the ecological unit of life that is part of it,"[2] was a rallying cry for opening the courts to protecting nature. Concern about ecology, in Douglas's view, "should lead to the conferral of standing upon environmental objects to sue for their own preservation."[3] Hence, the notion that trees have standing took root.

This article tells the backstory of how Douglas's dissenting opinion came to be, focusing on his longstanding relationship with the Sierra Club and the impact of an as-yet-unpublished law review article[4] that landed on Douglas's desk while the case was pending. For the first time, these events are explored through the lens of the case files in the lower courts, the Supreme Court docket, chambers papers from Justices Douglas, Potter Stewart, Thurgood Marshall, and Harry Blackmun, the Sierra Club archives, and interviews with key players. These sources provide a window into the debate about standing for environmental organizations, offers insights into the Justices' thought processes and judicial decision making, and highlights the ethical tensions surrounding judicial conflicts of interest and *ex parte* contacts with the Court.

The Man and His Mountains[5]

Although Douglas was a giant in the legal world, he is often remembered for his four wives, as a potential vice-presidential nominee, as a target of impeachment proceedings led by then-Congressman Gerald Ford, and for his tenure as the longest-serving Justice, even now, from 1939 to 1975. A committed civil libertarian, he authored landmark decisions about privacy,[6] free speech,[7] and criminal procedure.[8] But perhaps his most enduring legacy is his public and private advocacy for environmental causes and his success in that endeavor.[9]

Douglas's love for the mountains was his childhood refuge in Yakima, Washington. In his autobiography, *Go East Young Man*,

Douglas wrote, "My love of mountains, my interest in conservation, my longing for the wilderness—all of these were established in my boyhood in the hills around Yakima and in the mountains to the west of it."[10] After attending Whitman College and a brief stint teaching at Yakima High School, Douglas headed east to Columbia Law School.[11]

Although he toyed with returning to Washington to practice law and even dipped his toe in a country practice, Douglas eventually stayed in New York. He worked both as a lawyer at the now-famed Cravath firm and as a professor at Columbia. After an unexpected offer from Yale Law School —Douglas professed he "actually did not

Justice William O. Douglas's love of nature stemmed from his boyhood growing up in Yakima, Washington and hiking the mountains to the west. On the Court, he became "a one-man lobby shop for the environment."

know where [it] was"[12]—he moved to New Haven. He was at Yale only six years before the other Washington—the nation's capital—beckoned. Nonetheless, he maintained a physical and spiritual connection with Washington State. His summer home was a cabin in Goose Prairie, which he described as "my place in a sense that Washington, D.C., never could be. My roots are deep in the Prairie. I am a part of the rhythm of the place ... ."[13]

With a strong interest in politics, ties to the Democratic Party, and an expertise in corporate law, it was no surprise that Douglas landed a job with Joseph P. Kennedy, the first Chairman of the Securities and Exchange Commission. Before long, he was confirmed as a commissioner. The *Yakima Republic* boasted in a January 29, 1936, editorial: "It is not every day that a Yakima boy can make the first page of the *Wall Street Journal*." Calling him "[l]iberal Douglas," the paper wrote that "[w]hether he reforms the world of finance and makes Wall Street a safe place for the lambs is not predictable, but he will do it if anybody can." Just a year later he was named chairman, only days before a stock market plunge on Black Tuesday, September 7, 1937.[14]

By then, Douglas was a Washington insider and a frequent guest at the poker parties of the President, Franklin Delano Roosevelt.[15] Roosevelt's nomination of Douglas to fill the seat of retiring Justice Louis D. Brandeis was not totally unexpected. In 1939, at the age of forty, Douglas joined the Court.

Despite joining the "third branch," Douglas kept a toe in politics and remained a Washington player.[16] Truman asked him to be his running mate in 1948 and Douglas demurred, writing in July 1948 "that politics had never been my profession and that I could serve my country best where I am."[17] He continued to receive overtures from Democratic players but, as he wrote to banker James Paul Warburg in January 1952,

> there are many things in the stream of events which I would like to change and some which perhaps I could change. But the court is a custodian of an important tradition. If we can keep the tradition alive, perhaps that is as great a contribution as one can expect to make.

He concluded that,

> after long reflection, [] my place in public life is on the Court.[18]

This personal resolution to stay on the Court was in contrast with a statement made earlier in his tenure, when he "said that the Supreme Court is an old man's job."[19]

Posterity has linked Douglas to environmental and conservationist causes, but Douglas's public commitment to the environment did not emerge until more than a decade after he took his seat on the Court. In 1954, several years after publishing his watershed autobiographical account of his spiritual connection with nature, *Of Men and Mountains*,[20] Douglas spearheaded a protest hike on the Chesapeake and Ohio Canal to save the canal from a proposed road. "With Douglas's leadership, the byway was stopped, and in 1970 Congress approved a historic park."[21] Later he protested a proposed highway down the Olympic coast in Washington State and teamed up with Olaus and Mardy Murie, iconic conservation advocates, on an expedition to the Brooks Range in Alaska to highlight the fragility of the Arctic landscape.[22]

In a manner unthinkable today, from his chambers at the Supreme Court, Douglas was a one-man lobby shop for the environment. This is not to say that other Justices, such as Brandeis and Felix Frankfurter, were not playing the political long game with their presidential contacts,[23] but Douglas's approach was laser focused on the environment and particular projects. He cajoled and persuaded

Douglas's advocacy for the environment included spearheading a protest hike in 1954 along the Chesapeake and Ohio Canal to save it from becoming a scenic highway. Charles A. Reich, clerk to Justice Black, is pictured walking behind Justice Douglas.

the Secretaries of the Interior and Agriculture, badgered the Forest Service and the National Park Service, and inveigled Senators and members of Congress to support his causes, all in the spirit of preserving wilderness. We know all of this because his papers are now public at the Library of Congress. His commitment to conservation and the wilderness was no secret, but the scope of his advocacy was not fully known during his lifetime.

Douglas believed that wilderness spaces provide solitude and strength and connect the individual to environmental and historical forces larger than oneself. He viewed automobiles as a culprit in the fight to preserve wilderness. In describing nature, his books, speeches, and court opinions are filled with references to "solitude," "sanctuary," and "refuge." In 1965, he published *A Wilderness Bill of Rights,* advocating that "[w]hen it comes to wilderness we need a similar Bill of Rights [to the U.S. Constitution] to protect those whose spiritual values extend to rivers and lakes, the valleys and the ridges, and who find life in a mechanized society worth living only because those splendid resources are not despoiled."[24] This theme would find its way into his dissent in *Sierra Club v. Morton.*

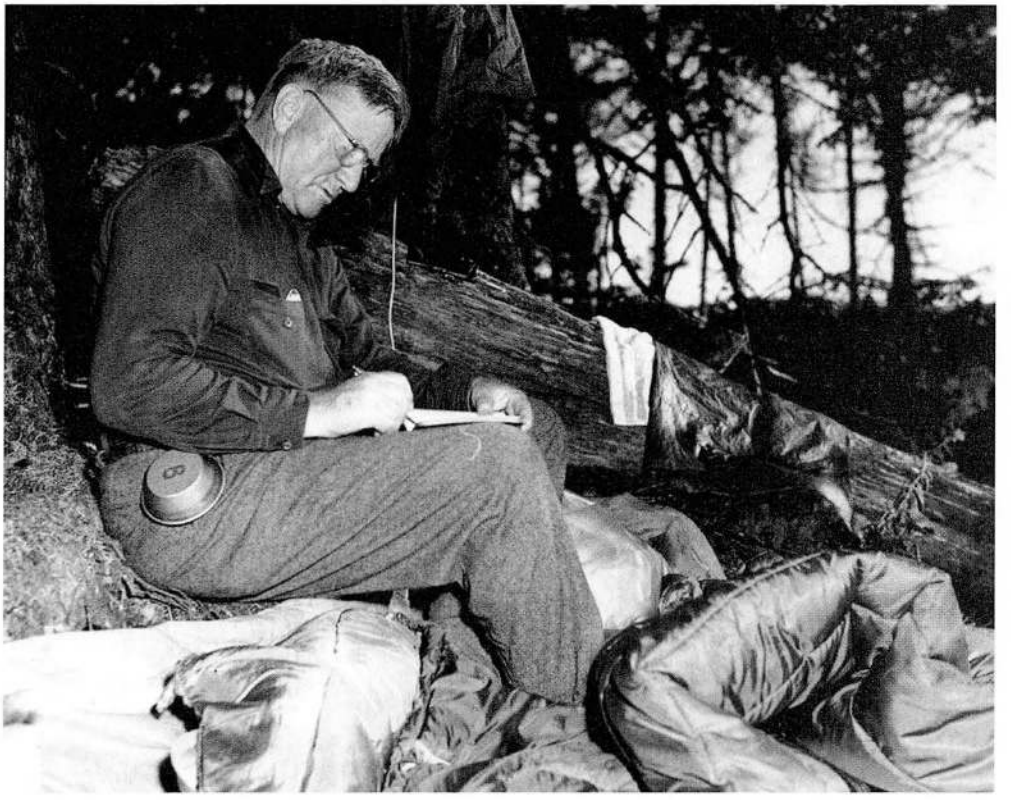
Legal Challenges to the Development of Mineral King

The Mineral King Valley is in central California. It is a twelve-mile glacial valley in the southern Sierra Nevada Mountains.[25] The

Sierra Club v. Morton story begins there, far from the rarified atmosphere of the Supreme Court. The valley's floor is an expanse of open, verdant meadows, which give way on both sides to steep, rocky slopes, dotted by clusters of ancient conifers. Above the tree line, sheer granite walls form sharp, towering peaks. Mineral King Valley nurtures beautiful flora, along with abundant and diverse wildlife, including black bears, mule deer, yellow-bellied marmots, and an array of freshwater fish. No commercial services are available. In short, Mineral King is a true wilderness.

In 1969, however, a normally benign force imperiled Mineral King's pristine and unspoiled vistas: Walt Disney Productions, Inc. The company received approval from the United States Forest Service to develop a $35 million year-round resort in the Mineral King Valley. Disney's construction plans included fourteen ski lifts, a chapel, an ice-skating rink, convenience shops, restaurants, a conference center, two large hotels, a heliport, and a 60,000 square-foot underground facility to house resort services. The company estimated that the resort would attract 2.5 million visitors within its first year of operation—approximately the same as today's annual traffic at Bryce Canyon National Park in Utah.[26]

Opposition arrived quickly and forcefully. Opponents pointed out that Mineral King's official name was, after all, the Sequoia National Game *Refuge*. They insisted that development would desecrate the fragile valley and destroy its ecosystem. In no time, bumper stickers bearing the message, "Keep Mineral King Natural," appeared across the region. Opponents also staged "hike-ins" at Mineral King and a march on Disneyland.[27]



Justice Douglas took notes for a book about protecting the wilderness during the three-day, twenty-two-mile hike along the Olympic Peninsula coast he undertook to protest a proposed highway.

Over time, the Sierra Club's position evolved, as did the scope of the planned resort. "In 1948 [the Club] viewed Mineral King as an area with high potential for ski development. In 1953 it was not opposed to making the area more accessible, and a policy favoring modest development still prevailed in the mid-Sixties."[28] Fast forward to 1965, the Club unsuccessfully sought a public hearing on the proposed development, and, in later correspondence with the Forest Service and the Department of the Interior, expressed specific objections to Disney's plans. With the Forest Service's approval, however, significant commercial development of the Mineral King Valley seemed inevitable.

But the Sierra Club refused to give up. In June 1969, the Club sued in the United States District Court for the Northern District of California.[29] A committee of the Sierra Club chose a young San Francisco lawyer, Leland R. Selna, Jr., as its lead counsel; he represented the Club through all of the proceedings, including the Supreme Court.[30]

The Sierra Club asked for a declaration that various aspects of Disney's proposed development violated federal laws and regulations governing the preservation of national parks, forests, and game refuges.[31] The Club also wanted preliminary and permanent injunctions restraining federal officials from granting approval or issuing permits for the development.[32] The Club sued as a membership corporation with "a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada mountains."[33]

In crafting its complaint, the Club had to make a strategic choice. As all good lawyers know, some actual or imminent injury or stake in the outcome of the controversy is required for purposes of standing to sue.[34] And, under the standard at the time, to obtain an injunction, a plaintiff needed to demonstrate "a strong likelihood or reasonable certainty" of prevailing and an irreparable injury, balancing the damage to both parties.[35]

The Sierra Club worried that if the court were to stop the project, the harm to Disney would outweigh any injury to the Club or its members. The potential injury to Mineral King's *environment*, however, would likely eclipse any harm to Disney. For that reason, the Sierra Club alleged only that the environment of Mineral King Valley would suffer injury; it did not allege any injury to itself or its members. The Ninth Circuit characterized the complaint in this way:

> The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an "interest" in the sense that the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all.[36]

Sierra Club's counsel recognized the risk of this approach: "It was a tortured issue. You had the risk of what happened, but it was a risk the Club wanted to take."[37] The Club's strong position "was that California already had more skiers than all resorts, including Mineral King, could accommodate, so in terms of harm to the body politic, stopping development would not take something away—it was not 'the final brick.'" But "the pathway to get to the resort, let alone what was to be on the site," was the focus of irreparable harm; the Club "was not saying the valley had standing but it was saying the irreparable harm was to the valley."[38]

At first, this strategy worked. After two days of hearings, the district court granted the Sierra Club's request for a preliminary

In 1969, Walt Disney Productions, Inc. received approval from the United States Forest Service to develop a $35 million ski resort in the beautiful Mineral King Valley. Opponents staged a hike-in.

injunction.[39] The court rejected the government's challenge to the Sierra Club's standing, writing that the Sierra Club "may be held to be sufficiently aggrieved to have standing as a plaintiff."[40] It also determined that the complaint raised questions "concerning possible excess of statutory authority, sufficiently substantial, and serious to justify a preliminary injunction."[41] The court topped off the opinion with this reminder:

> The court is not concerned with the controversy between so-called progressives and so-called conservationists. Our only function is to make sure that administrative action, even when taken in the name of progress, conforms to the letter and intent of the law ... .[42]

The government quickly appealed—and won. In September 1970, the Ninth Circuit Court of Appeals reversed the judgment of the district court.[43] Regarding standing, the Ninth Circuit underscored that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them."[44]

Earlier in its opinion, the court concluded:

> We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.[45]

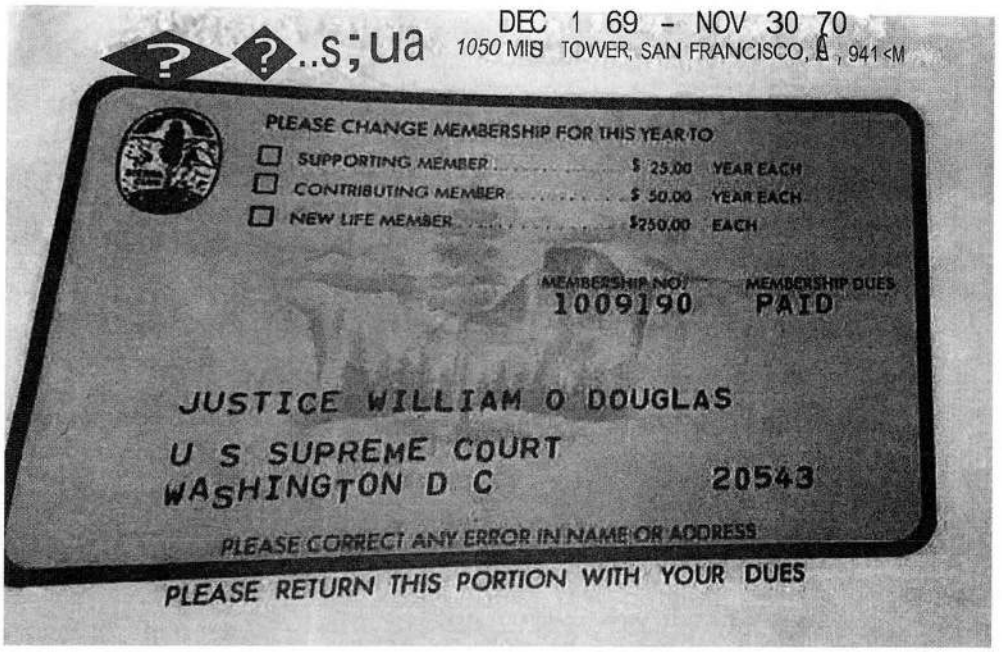
In closing the discussion of standing, the court pointed to two other cases where "the Sierra Club was joined by local conservationist organizations ... with a direct and obvious interest" and contrasted them with this case, in which "[n]o such persons or organizations ... joined as plaintiffs."[46] The Ninth Circuit vacated the injunction because the Club did not show irreparable injury or a likelihood of success on the merits.[47]

The Sierra Club was undeterred. On November 5, 1970, the Club petitioned the Supreme Court for a writ of certiorari.[48] Douglas's relationship with two institutions —the Sierra Club and the *Southern California Law Review*—would shape both his role and his legal theory in the case. This case was made for Douglas and Douglas was made for this case.

Justice Douglas and the Sierra Club

Douglas was no stranger to the Sierra Club. He had been a member for many years by the time the Club filed its petition; he even served on the Club's Board of Directors from 1961 to 1962. Upon receiving the John Muir Award from the Sierra Club in 1975, Douglas acknowledged that "[b]eing a director made me realize that my views as to policy in environmental matters do not always jibe with those of others, but my views are patterned after models" such as John Muir and Clarence Darrow.[49] The Sierra Club's case would throw into sharp relief Justice Douglas's views on environmental policy.

Douglas resigned as a director of the Sierra Club after just one year, stating that "in fairness to the office which I hold and in fairness to the Sierra Club I should no longer serve as a member of the Board of Directors."[50] He went on to detail that "[t]he reason that I am resigning is that I understand from some of our mutual friends that the Sierra Club, like other conservation agencies, may be engaging in litigation in the state of [sic] federal courts on



Over the years, Douglas meticulously saved communications from the Sierra Club, including his annual membership cards.

conservation matters which at least in their potential might reach this court."[51] He explained that during his time on the board, he was not aware of "any actual or contemplated litigation." And in an earlier letter to Charles Reich, his longtime friend and then a professor at Yale, Douglas wrote that he resigned "because the Club may, I hear, get into litigation."[52] The Sierra Club acknowledged the Justice's stated reason but wrote that it "[h]oped the Club can continue to benefit" from Douglas's "broad experience on behalf of conserving some of the non-completely-spoiled as well as wilderness parts of the earth."[53] Years later, however, Douglas would state that he resigned as a director not because of potential ethical conflicts but rather "because of the impossibility of getting to the [Club's] meetings in San Francisco."[54]

Whatever his reasons, the Sierra Club acknowledged Douglas's resignation but made him a "life member." Douglas did not abdicate this membership until his December 2, 1970 letter to Dr. Philip Berry, then president of the Sierra Club:

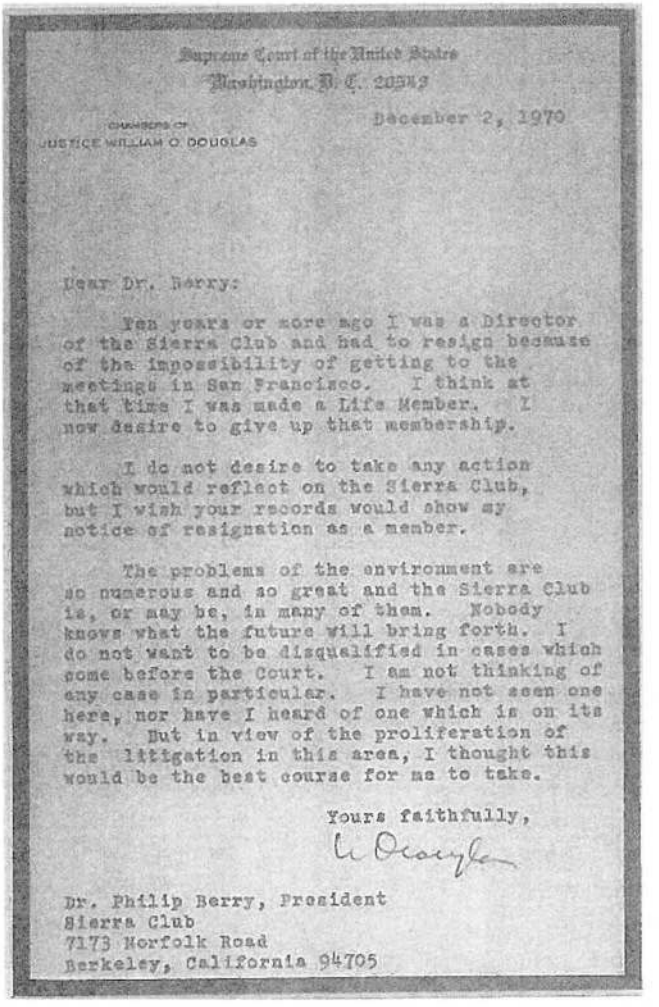
> The problems of the environment are so numerous and so great and the Sierra Club is, or may be, in many of them. Nobody knows what the future will bring forth. I do not want to be disqualified in cases which come before the Court. *I am not thinking of any case in particular.* I have not seen one here, nor have I heard of one which is on its way.[55]

According to an unsigned, undated memorandum in the Douglas files at the Library of Congress, Douglas checked with the Clerk's Office the day before authoring this letter to see whether there were any Sierra Club cases currently on the docket, and was erroneously told "No."[56]

The notion that Douglas was not "thinking of any case in particular" strains credulity and

surely Dr. Berry must have been taken aback at the reference as the litigation had been pending for years and the petition for certiorari was filed a month before. Why make such an inquiry and request, out of the blue, eight years after resigning from the board? By all indications, Douglas must have known the case was coming to, or was in, the Court, and he wanted to ensure that he could sit on the case.

Although Douglas had resigned from the Sierra Club Board long before, over the years he received and meticulously saved communications from the Club, including his annual membership cards. For example, a board report on litigation found in Douglas's files, dated in 1969, reflects that "Sierra Club standing to sue has taken a decided turn for the better with the recent decisions in *Sierra Club v. John Volpe* and in the Disney case." The summary also notes that the Club was seeking amicus status "in the United States Supreme Court in support of the adapso."[57] The report explains that the Club hoped to cabin the case "to commercial cases" and avoid



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 2, 1970

Dear Dr. Berry:

Ten years or more ago I was a Director of the Sierra Club and had to resign because of the impossibility of getting to the meetings in San Francisco. I think at that time I was made a Life Member. I now desire to give up that membership.

I do not desire to take any action which would reflect on the Sierra Club, but I wish your records would show my notice of resignation as a member.

The problems of the environment are so numerous and so great and the Sierra Club is, or may be, in many of them. Nobody knows what the future will bring forth. I do not want to be disqualified in cases which come before the Court. I am not thinking of any case in particular. I have not seen one here, nor have I heard of one which is on its way. But in view of the proliferation of the litigation in this area, I thought this would be the best course for me to take.

Yours faithfully,

W. O. Douglas

Dr. Philip Berry, President
Sierra Club
7173 Norfolk Road
Berkeley, California 94705

Douglas did not fully resign his Sierra Club membership until this December 2, 1970 letter to Dr. Philip Berry, the club's president. While he worries about having to recuse himself if the Sierra Club is involved in a case before the Supreme Court, he erroneously states that he was "not thinking of any case in particular." In fact, the Sierra Club had filed a cert. petition a month earlier.

extending it "to cases such as *Sierra Club v. Hickel* in which the plaintiff has noncommercial interests and is suing to preserve a public interest."[58]

In *Association of Data Processing Services Organizations, Inc. v. Camp*, an association of data processors sued the Comptroller of the Currency, challenging a ruling that permitted national banks to provide data services incidental to their banking services. In an opinion authored by Douglas, the Court upheld the association's standing and held that the association satisfied Article III's "case or controversy" requirement because it alleged that competition by the banks caused competitive injury. Citing earlier decisions, the opinion noted that an aggrieved party's "interest ... may reflect 'aesthetic, conservational, and recreational' as well as economic values."[59]

Another reference point as to Douglas's likely familiarity with the appeal was his service as the Court's "Circuit Justice" assigned to the Ninth Circuit Court of Appeals.[60] In this role, he regularly attended the Ninth Circuit's judicial conferences and, in a nod to his western heritage, hired his clerks almost exclusively from states within the Ninth Circuit.[61] He would almost certainly have been aware of key Ninth Circuit decisions.

In addition, news of Disney and the Mineral King development had been percolating in the press for some time. Indeed, Douglas later acknowledged in his dissent that, although he had not visited the area, he "ha[d] seen articles describing its proposed 'development.'"[62] Contemporary articles had also appeared, for example, in the news sections of the *New York Times,* the *National Observer*, the *San Francisco Chronicle,* the *Fresno Bee,* and the *Los Angeles Times.*[63] And Douglas's long-time pal, Stewart Udall, Secretary of Interior, highlighted Mineral King in an article, noting that "some courts have grown surprisingly receptive to ecological arguments," citing a decision that "halted efforts by the U.S. Forest Service to lease Mineral King Valley in California to the Walt Disney organization, which wanted to turn this wilderness into a big ski resort."[64] Once the Ninth Circuit issued its opinion and the case was headed to the Supreme Court in the fall of 1970, Mineral King resurfaced in the press, including the *New York Times,* the *New York Post,* the *Wall Street Journal,* the *San Francisco Chronicle,* the *Far West News,* and the *Chicago Sun Times.*[65]

Only a few years before the Sierra Club case came before the Court, Douglas was once again in close contact with the Club in a major way. In 1967, Douglas and his wife Cathy Douglas Stone, recently married, headlined a protest hike—organized by the Cumberland Chapter of the Sierra Club—to fight the effort to dam the Red River Gorge in Kentucky. Several Sierra Club organizers, like others before them, wanted national attention; recruiting Douglas was central to their plan. Diane Sawyer, then a young reporter for the local television station, joined Douglas and filmed the hike. Another reporter characterized Douglas as "a showboat," which was precisely the point; one of the Sierra Club members concluded, "I'm not sure we could have stopped the dam if he hadn't come."[66] That same year, the Club again invoked Douglas's help: "We would greatly appreciate it if you would consider using your contacts with the Forest Service to see if it is possible to get deferment of [a] particular timber sale."[67]

Just a year after the hike, Douglas was in touch with David Brower, Executive Director of the Sierra Club, and offered to do "anything in particular you would like to have me do apropos of the Sierra Club salute to the First Lady [Lady Bird Johnson]."[68] Not one to mince words, he went on to say that no credit was due President Lyndon B. Johnson for the Red River Gorge, "of which I had something to do with," and castigated the President's environmental record:

Sierra v. Morton **forced the Court to confront incongruities between traditional standing doctrine and the relatively new field of environmental litigation. The Justices heard arguments on whether the Sierra Club had standing to sue on behalf of the environment (Mineral King Valley is pictured), as no harm had been caused to the organization itself.**

"I hope any publicity which is released will play down the achievements of LBJ as a conservationist, because the guy, in my view, is a complete phoney [sic] on that score."[69]

The protest hike at the Red River Gorge was not the only tie Douglas maintained with the Sierra Club. Just months before oral argument, he communicated with the Club in July 1971 about efforts to classify as wilderness the Cougar Lakes area of Washington State. The Sierra Club, which invested heavily in the fight, noted that resolution of the controversy would be "a question of strategy and tactics" and promised to keep Douglas advised.[70] Perhaps he viewed the Washington State controversy as divorced from the pending Sierra Club case, permitting him to coordinate with the Club while at the same time considering its appeal. Whatever Douglas's mindset, the Sierra Club later lauded him as "the highest-placed advocate of Wilderness in the United States."[71]

According to William Alsup, a clerk for the 1971–72 term, "the big question surrounding this case [*Sierra Club v. Morton*] was whether Justice Douglas would participate—it was a source of gossip around the Court. Douglas did not consult his clerks on the question. He was undecided whether to sit but ultimately decided to sit through argument."[72]

Douglas's extensive ties, both formal and informal, with the Sierra Club raise the kind of ethical questions that continue to command the attention of lawyers and scholars.[73] In thinking about conflicts of interest, it appears that Douglas focused on his Sierra Club board membership a decade before and the potential *actual* conflict of interest, while glossing over the question of appearances and his ongoing support of and

"connect[ion]" to the Club. At the time, Supreme Court Justices had a guiding ethics statute[74]—the precursor to today's 28 U.S.C. § 455—although they were always bound by their oath to "faithfully and impartially discharge and perform" the duties of judicial office.[75] The 1948 statute directly raises the question of appearance of conflict that would "make it improper," in the opinion of a Justice, to sit on the appeal. Although this version of the statute did not put in sharp relief the obligation to recuse when a Justice's "impartiality might reasonably be questioned," as today's version makes explicit,[76] the sentiment was certainly on the table. Indeed, maintaining the appearance of propriety is important in terms of public confidence in the judiciary.[77]

Once Douglas resigned from lifetime membership in the Sierra Club and overcame what he perceived as a potential actual conflict, whether he analytically considered the appearance of a conflict, we will never know. We do know that he contemplated the conflict issue and that the question was floating around the Court. By the time he married Cathy some five years earlier in 1966, she said he was "getting very concerned" about conflicts and that he was "less and less active" in environmental causes because he felt "it would present an actual or apparent conflict."[78] Nonetheless, it appears that he took a very narrow view of recusal vis-à-vis his environmental endeavors: "At times in the past Mrs. Douglas and I have hiked or in other ways protested certain government projects. In such cases the protester should not sit as a judge because he has at least a partial commitment on the merits."[79] Fortunately for Douglas, he had not joined the hiking protests in Mineral King Valley.

The Supreme Court's Opinion in *Sierra Club v. Morton*

On February 22, 1971, the Court agreed to hear the Sierra Club's appeal.[80] Although Douglas was an acknowledged conservationist and had focused very recently on his prior role with the Sierra Club, perhaps his concerns about conflicts informed his vote on granting a writ of certiorari: he did not take a position, but said, "pass."[81] The requisite four Justices voted to grant: Justices Harry Blackmun, William J. Brennan, John Marshall Harlan, and Hugo L. Black. Chief Justice Warren E. Burger and Justices Thurgood Marshall, Byron R. White, and Potter Stewart voted to deny the petition for certiorari.[82]

Morton was both historically and legally significant. The Supreme Court Historical Society lists it as one of the significant arguments of the Burger Court,[83] and it has been dubbed a "golden age classic" of environmental law.[84] Lawyers and judges nowadays are accustomed to seeing the Sierra Club in federal court, but *Morton* was the Club's first appearance as a party before the Supreme Court.[85] *Morton* also forced the Court to confront incongruities between traditional standing doctrine and the relatively new—and ever-evolving—field of environmental litigation.

Ultimately, the Court cleaved to tradition. In April 1972, the Court affirmed the Ninth Circuit in a 4–3 decision.[86] Justices William H. Rehnquist and Lewis F. Powell, who joined the Court in January 1972, did not participate in the decision.[87]

Justices Stewart, Burger, and Blackmun dominated questioning during the Sierra Club's argument.[88] Blackmun pressed on whether the record showed that some of the Sierra Club members used Mineral King, a point on which counsel acknowledged there was "no direct testimony." Blackmun rhetorically mused that "[t]his goes back to the days of John Muir, is it not?" He was apparently referring to the fact that Muir was the founder of the Sierra Club. Stewart was looking for a principle to cabin the argument: "I was just wondering how far your argument would go." Trying to save the situation, Leland Selna,

counsel for the Sierra Club, strategically pleaded: "We do not ask the court to be wide open."[89] Douglas was pretty quiet during oral argument. He pursued only one point: during the government's argument, he pointed out that Michigan had "enacted a law to give standing down to [a] citizen and [the] environment" and that a pending bill in Congress "did the same thing." Solicitor General Erwin Griswold shot back: "I am not sure that even Congress has the power to create a case or controversy ... ."[90]

Curiously, at the conference a few days following argument, Douglas passed when his turn came to offer his view. (We now know that by that time Douglas had already produced a first draft of his dissent.) In contrast, Brennan gave a broad explanation of his position:

> This case did not require the Sierra Club to present the issue as broadly as it did. No injury in fact is pleaded. That relates to the use of the Mineral King area by Sierra Club members. That kind of evidence could be brought in under allegations on the petition. That supports the ruling of the district court and brings it under *Data Processing*. Is standing a function of the case or controversy requirement? It is a real case controversy, as my separate opinion in *Data Processing* shows. The latter allows aesthetic as well as economic factors to be taken into account.[91]

He queried "whether it is in the district court record," to which Justice White responded that "it is not."[92] Brennan went on to conclude, "I would not decide the broad question if we need not. I would reverse and remand."[93] Justice Blackmun was in accord. Justice Stewart, who authored the majority opinion, was direct and succinct: "I cannot agree with the district court; I agree with the court of appeals. I would be willing to decide the broad question and remand this, but I would prefer to affirm."[94]

Blackmun's notes from the conference are particularly revealing on the question of a potential conflict of interest: "The notes indicate that Justice Douglas initially passed when it came his turn to vote and then later explained that he might recuse himself from the case because he had been a member of the Sierra Club for ten years, and lately an honorary member, though he had resigned years ago."[95] Justice White responded, "everyone in the [United States] is not a private Attorney General."[96]

Apart from veiled criticism of Douglas's role in the Sierra Club, there was a "negative feeling" among some Justices that the Sierra Club set up "a test case to try to transform standing doctrine."[97] This recollection is not inconsistent with the Sierra Club's earlier-discussed litigation strategy and the recognition that its standing argument would be stretching the limits.

Writing for the Court, Justice Stewart —joined by Chief Justice Burger and Justices White and Marshall—held that the Sierra Club lacked standing to sue because it did not allege that the Club *itself* was injured by Disney's planned resort.[98] Justice Stewart explained that because "the Constitution's Case-or-Controversy Clause prohibits courts from issuing advisory opinions, any legal wrongs from which the Administrative Procedure Act protects must, at minimum, meet the prevailing constitutional requirements of standing."[99] The Sierra Club's legal interest in the case, according to the Court, seemed to rely on a "zone of interests" test that Justice Douglas had announced in two recent cases.[100] Declining to clarify the meaning of the term "zone of interests," however, the Court noted simply that broadening the categories of the necessary "injury" is fundamentally different "from abandoning

In 1972, Justice Potter Stewart (seated, left), joined by Justices Byron White, Thurgood Marshall, and Chief Justice Warren E. Burger, agreed with the Ninth Circuit that the Sierra Club had not alleged any legal interest in the case. Douglas (seated, second from left) advocated in his dissent for "a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where the injury is the subject of public outrage."

the requirement" that plaintiffs be injured at all.[101]

Justice Stewart circulated his initial draft majority opinion the same day Douglas circulated his dissent.[102] Justices White, Marshall, and Burger joined the final opinion.[103] Notably, the opinion contained a key footnote of advice to the Sierra Club: "Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure."[104] This footnote was inserted just a week before publication.[105]

How Justice Douglas's Dissent Came to Be

Douglas's dissent, buttressed with Stone's rights-of-nature theory, stemmed from a heartfelt belief that the courts should open their doors to citizen challenges. It is surprising that Blackmun's dissent, which was equally eloquent and founded on a firmer footing, generally goes unmentioned.

Justice Douglas's Dissent

Douglas penned one of the most famous and passionate dissents in the Supreme Court's history. He reasoned that the question of "standing" would be

> simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where the injury is the subject of public outrage.[106]

In other words, Justice Douglas favored a rule that would recognize Mineral King Valley *itself* as the plaintiff for purposes of standing.

Douglas's position was informed in part by the writings of Aldo Leopold, the father of wildlife ecology and the American wilderness system. Leopold viewed nature as an ecological community united by "the land ethic." According to Leopold, the land ethic "simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."[107] Douglas believed that if this concept were applied to standing, "[t]hen there will be assurances that all of the forms of life" that inanimate, natural objects represent "will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams."[108]

Douglas borrowed the constitutional theory underlying his dissent from Christopher Stone's *Southern California Law Review* article, a preview of which landed in Douglas's lap just as he put pen to paper. How the article found its way to Douglas and into the dissent is a story of strategy and serendipity. Although much has been written by Stone[109] and others about Douglas's dissent and the role of Stone's theory, this article for the first time reconstructs the chronology based on the integration of Stone's writings and recollections, correspondence between the law review and Douglas, Douglas's papers, and the recollection of the law clerks.

The University of Southern California looms large in this story. Douglas was a prolific writer. He authored thirty-two books and hundreds of articles. His publications ran the gamut from law review pieces to *Good Housekeeping* and *Playboy* articles.[110] So it was no surprise that he agreed to write a preface for the *Southern California Law Review*'s first Law and Technology issue, scheduled for publication in 1972.[111] In the fall of 1970, the editor sent Douglas a tentative list of contributors, which did not include Stone because he had never been slated to write for that volume. The publication informed Douglas that manuscripts would be sent in Spring and Summer 1971.[112]

A year later, on November 17, 1971—perhaps not coincidentally the day of the argument in *Sierra Club v. Morton*—the editor sent Douglas "brief synopses of the articles which will appear in the issue" and offered to send the "full text" of the articles if that "would be more helpful."[113] Now, Stone's name was associated with the law review publication. The collection of synopses contained a one-paragraph summary of Stone's article but advised, "Professor Stone's draft has not yet been edited but because of its extraordinary nature, we are sending along a draft of the first sixty paragraphs."[114] Alongside technology-themed articles like "Personal Liberty and Behavior Control Technology and Freedom, Responsibilities and Control of Science," the Stone piece—then titled "Legal Rights for the Environment?"—was decidedly out of place.[115]

Stone recognized that Douglas "got a jump in looking at the article," including the early synopsis.[116] As it turns out, following the argument, Douglas wrote the first draft of his dissent in about two hours.[117] It was not uncommon for Douglas to do research during oral arguments and even to start drafting his opinion. He was known as a quick, although some said sloppy, writer.[118] His clerk, William Alsup, remembers it as "the most beautiful thing [he] had ever read."[119] He thought, "[This is] so vintage Douglas. I could not presume a law clerk to improve it," so he found a comma or moved a semicolon, but he did not want to change the opinion.[120] The criticism that Douglas's opinions read like "rough drafts" did not hold true here; the opinion evolved and was polished over the course of twelve iterations. The dissent's rationale for granting standing to inanimate objects more than resembles the Stone synopsis. In the first draft, Douglas explained that "[i]nanimate objects are

sometimes parties in litigation," and that "a ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—[a] creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases."[121] These principles mirror the synopsis of Stone's article that Douglas had at the time of the first draft: "Investing objects with 'rights' is nothing new to the law, Stone observes instancing ships and corporate bodies."[122] In terms that Douglas echoed in his dissent, Stone wrote: "The river as plaintiff speaks for the ecological unit of life that is part of it," and "[t]hat is why these environment issues should be tendered by the inanimate object—itself."[123]

The law review's November 17 letter and its multiple enclosures surely had not arrived when Douglas penned his first draft that very day of oral argument. But, as luck would have it, Richard Jacobson, one of Douglas's law clerks who did not work on the case, had been a protégé and friend of Stone. As Jacobson put it, "I know how WOD [William O. Douglas] knew about Chris Stone's article. I am the culprit."[124] It is likely that Jacobson received an earlier summary directly from Stone or the law review and then passed it on to Douglas before the argument.

Once Douglas was privy to Stone's "trees have standing" theory, he was anxious to get the full article. Douglas's secretary immediately wrote back to the law review editor, "Mr. Justice Douglas has your letter of November 17. The draft of Professor Christopher Stone, however, was not enclosed. Inasmuch as time is of the essence, the Justice would appreciate your getting off the copy of this to him right away."[125] The urgency was, of course, that Douglas was in the throes of drafting a dissent that relied on Stone's analysis. Records do not reveal when a final copy of the article arrived in chambers, but by February 1972, new footnotes referencing the article had been inserted into the draft,[126] and Douglas cited the article in the final text of his dissent.[127]

After adopting Stone's theory in his initial drafts, Douglas expanded his dissent with an assault on the Forest Service. He had a stack of books on his desk, which he directed Alsup to "summarize into a series of footnotes to explain how the Forest Service has sold out to the logging industry."[128] Douglas asserted that "[t]he Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests."[129] This attack on the Forest Service was ironic; Gifford Pinchot, Chief of the United States Forest Service, was a "boyhood hero" and, along with Teddy Roosevelt, a "romantic woodsman." Of course that was before Douglas learned of "Pinchots" and the Forest Service's multiple use philosophy.[130]

In Alsup's words, placing footnotes in the dissent was a "tough assignment."[131] Because "there seemed to be no logical place to put the footnotes," Alsup wrote them in chronological order so they make sense when read sequentially. Douglas offered a rare compliment: "This is great. This is just what I wanted."[132]

In juxtaposition to Douglas's approach, the Solicitor General viewed the issue through the lens of separation of powers. As part of his opinion, Douglas appended an excerpt from the argument of the Solicitor General, who urged against "a system of government in which every legal question arising in the core of government would be decided by the courts" and warned that "[i]f there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the administrator ... can take any action."[133]

The Genesis of Stone's Law Review Article

Serendipity and strategy guided Stone's article to Douglas's desk and ultimately to the first paragraph of his dissent. In a property class, Stone was lecturing about the development of property rules and how society defines property. Speaking off the cuff, "beyond his notes," he floated the general idea that a river could have its own persona and have standing. The students' reaction was derisive, to say the least, thinking that he had "gone too far."[134]

Stone pondered, "What would it take to give a river its own existence? What does it mean to dole out rights to nonhumans?" To test this theory, he needed a case with a standing issue, an object that had its own damages, and an effective remedy on behalf of nature.[135] When Stone asked the library to look for such a case, the reference librarian quickly came up with the Sierra Club case in the Ninth Circuit.[136] By then the case was headed to the Supreme Court.

The match was perfect, according to Stone: "This [case], it was apparent at once, was the ready-made vehicle to bring to the Court's attention the theory that was taking shape in my mind. Perhaps the injury to the Sierra Club was tenuous, but the injury to Mineral King—the park itself—was not."[137]

So Stone sat down with the editor-in-chief of the *Southern California Law Review* and what followed was a strategic effort to bring the article to the Supreme Court's attention, or more specifically, to Douglas's attention because of the likelihood of a sympathetic ear.[138] The coincidence that Douglas was writing a preface for the next volume of the law review was too good to hope for, so Stone quickly penned the piece.[139] Apparently, no one raised an ethical concern that sending a targeted legal missive to a single Justice in the form of an unpublished article while the appeal was pending might be seen as a violation of the *ex parte* contact rule and the Supreme Court's procedure for the filing of *amicus curiae* briefs.[140] It could be that the players were not familiar with professional conduct rules governing litigation or that they didn't consider the issue because they were sending a law review article, not a letter or other communication. Stone was a corporate law professor, not a litigator, and the law review was populated with students who had yet to practice law.

To be sure, law professors and others are often *amici curiae* in high-profile cases, but those submissions follow the Supreme Court's rules on the filing of amicus briefs. Indeed, this case generated considerable interest from outside groups. The Environmental Defense Fund, the National Environmental Law Society, and the Wilderness Society filed amicus briefs in support of the Sierra Club. On the other side, the County of Tulare, the American National Cattlemen's Association, and the Far West Ski Association filed briefs supporting the government's position. The Stone article fell well outside the deadline for filing an amicus brief, but its arrival over the transom had a monumental impact on Douglas's dissent.

Yes, Douglas was writing a preface for the law review, but Stone's article referenced the pending litigation, named the Sierra Club and other organizations as appropriate advocates for the environment, and was shoehorned in for a specific purpose—to float the nature's right proposition to Justice Douglas.[141] Final publication of the article virtually coincided with publication of the Court's opinion, which meant that it was not available to the Court, counsel, or the public until the spring of 1972. The preface Douglas wrote for the journal spoke generally to the intersection of law and technology, with a passing reference to the "environmental crisis ... that gave us garbage unlimited."[142] No mention was made of Stone's article or its thesis.

In Stone's view, he had conceived of "other ways of looking at nature that others

had not considered."[143] The final version of his article, "Should Trees Have Standing?—Toward Legal Rights for Natural Objects," observed that inanimate objects are often parties to litigation, for example, ships in matters of maritime law, or corporations in most civil matters.[144] In other words, Stone believed that conferring rights on inanimate, natural objects—such as valleys, meadows, rivers, lakes, and even air—would not be extreme or unprecedented. Stone further concluded that economic and social policy favored bestowing such rights.[145] Douglas's dissent echoes Stone's thesis. Although the phrase, "should trees have standing?" was decidedly Stone's creation, it became so closely associated with Douglas's dissent that it is often attributed to Douglas.

Justice Blackmun's Dissent

Although Douglas's dissent is the one remembered today, Justice Blackmun, who also dissented, was equally passionate about nature and was expansive about the environmental impact of the Disney proposal.[146] Even though he was never tagged with the moniker of "environmentalist," he was "[a]lways a lover of nature,"[147] often walking in Theodore Roosevelt Island National Park. At the time of the *Morton* argument, Blackmun had been on the Court for just eighteen months; over time, "he generally became a reliable vote in favor of environmental interests."[148]

Unlike Douglas's papers, which are comparatively skimpy for such an important case, Blackmun's case file reflects a careful analysis before argument, including a series of questions posed by the appeal, a four-page memorandum from the Justice himself reflecting on the case, a law clerk bench memorandum, and detailed argument notes.[149] Foreshadowing his dissent, in his preargument note, Blackmun posited: "If petitioner has no standing, who conceivably does?"[150] Blackmun reflected on the Supreme Court's expansion of standing, stating, "Ten years ago Sierra would have had no recognizable standing. On the other hand, I think this court in the data processing and related cases has gone far down the road to uphold standing in a litigant."[151]

In the face of Douglas's flowery dissent, Blackmun's eloquent argument for nature is often overlooked. To begin, he highlighted "the Nation's and the world's deteriorating environment with its resulting ecological disturbances."[152] Blackmun took a practical approach, outlining the real world consequences of the majority's green flag for the project and recognizing that "[r]easons, most of them economic, for not stopping the project will have a tendency to multiply."[153]

Blackmun would have upheld the district court's judgment on the condition that the Sierra Club amend its complaint to allege some sort of injury to the Club or its members.[154] As a second option, Blackmun would have permitted "an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues."[155] Blackmun was confident that courts could fashion rules to ensure that such an "incursion upon tradition" would not be "very extensive."[156] In conference, he hinted that his view was a product of emotion, rather than reason. "I may be reaching for a position I emotionally desire enough here in the interest of Sierra Club members to sustain their standing."[157]

In contrast to Douglas, whose dissent had little in the way of facts about Mineral King, Blackmun focused on the scope of the project and emphasized the large number of visitors and automobiles that the development would spawn. And he noted that any actual user would be unlikely to challenge

The Mineral King controversy tarnished Walt Disney Productions' reputation as friendly to nature conservation. Walt Disney, who died in 1966, was an honorary life member of the Sierra Club and would probably have jettisoned the project when environmentalist opposition heated up. In 1977, the legal case was dismissed by agreement of the parties.

the project because of personal economic interests. He queried, "Are we to be rendered helpless to consider and evaluate allegations and challenges of this land because of procedural limitations rooted in traditional concepts of standing?"[158]

Brennan, who earlier had tried to get the appeal dismissed as improvidently granted, joined Blackmun's opinion as stated in the second alternative. He would have reached the merits, but he also noted his agreement with Blackmun "that the merits are substantial."[159]

Although hailed as a landmark standing decision, in reality the case also boiled down to a lesson in civil procedure and pleading. The Sierra Club had rolled the dice and lost in its effort to tie standing to place, not people. In the wake of the Court's ruling, the Sierra Club followed the advice of the majority and Blackmun: it returned to the district court with an amended complaint.[160] The second time around, the Sierra Club alleged a sufficient injury to its *members* to confer standing on the Club. The amended complaint also added a claim under the newly enacted National Environmental Policy Act.[161] The district court concluded that "notwithstanding the Court of Appeals' 'handwriting on the wall,' plaintiffs still have their right to proceed on the merits."[162]

Development of the proposed project stalled until the almost 600-page environmental assessment was completed in 1978. Despite Forest Service efforts to revive the plan, Disney was done. Ironically, like Douglas, Walt Disney had been a lifetime member of the Sierra Club, primarily in recognition of his pathbreaking nature series, *True-Life Adventures*. He died in 1966, long before the litigation heated up; despite his passion for the resort, had he lived, Disney

might well have jettisoned the project long before the company chose to fight the fight. In 1977, the case was dismissed by agreement of the parties.[163]

The State of Nature's Rights

The notion of standing for inanimate objects was not just an academic exercise. In fact, the rights of nature movement, sometimes referred to as "RoN," has gained some traction in the international arena over the past four decades. The Universal Declaration of the Rights of Mother Earth, which grew out of the World People's Conference on Climate Change and the Rights of Mother Earth, reflects these values.[164] Ecuador's constitution, for example, the first of its kind in affording rights to nature, now grants legal rights to rivers, forests, and other natural entities.[165] Similar provisions are being developed in Brazil, Argentina, and Nepal.[166] In New Zealand, recent agreements between the Crown and a local Maori population recognize the Whanganui River and Mount Taranaki as "persons" under the law.[167] Colombia's Supreme Court reached a similar conclusion regarding the Rio Atrato.[168] By contrast, India's Supreme Court recently rejected an effort to declare the Ganges River a person,[169] and the European Court of Human Rights rejected efforts to obtain standing to sue on behalf of a chimpanzee.[170]

As environmental litigation has expanded, conservationists in the United States have found some solace, albeit not necessarily success, invoking the theory underlying Douglas's dissent. This notion has yet to gain acceptance in American courts because of, as one commentator put it, "the attenuated, almost fictive connection between the interested or injured party and the threatened resource."[171] Not long after the decision in *Morton*, lawyers in New York sued in the name of the Byram River, although the river never had to face the standing issue because the complaint also named an individual "directly and adversely affected by the claimed pollution."[172]

Recognizing the standing hurdle in the courts, several local governments have enacted ordinances that directly give nature rights. For example, in an effort to target pollution, the Tamaqua Borough of Schuylkill County, Pennsylvania, adopted an ordinance that permits a civil enforcement suit against a person or corporation "who deprives any Borough resident, natural community, or ecosystem of any rights, privileges or immunities secured by [the] Ordinance."[173] That effort grew out of "a new approach to grassroots organizing centered on Democracy Schools, which trained community residents 'to confront the usurpation by corporations of the rights of communities, people and earth.'"[174] Douglas would have lauded this approach, as it mirrored his earlier advocacy of "Committees of Correspondence" to initiate local citizen action.[175]

The themes of wilderness and sanctuary were mainstays of Douglas's judicial philosophy. He surely would have embraced the views of biologist and nature writer David George Haskell, who wrote that "because life is a network, there is no 'nature' or 'environment' separate and apart from humans. ... [T]he human/nature duality that lives near the heart of many philosophies is, from a biological perspective, illusory."[176] In his farewell letter to colleagues, Douglas analogized his time on the Court to a canoe trip in the wilderness, noting the Justices were "strangers at the start but warm and fast friends at the end."[177] Douglas hoped that future Justices would "leave these wilderness water courses as pure and unpolluted as we left those which we traversed."[178]

Although Douglas's views did not carry the day in *Sierra Club v. Morton* or later cases, the influence and impact of his dissent

on environmental litigation endures to this day. The trees remain standing.

Author's Note: Judge McKeown thanks Nicholas DiCarlo, David Thoreson, David Martin, Morgan Weiland, and Valerie Railey for their research assistance and the librarians at the Library of Congress, Manuscript Division, the University of Southern California Special Collections, and the University of California-Berkeley, Bancroft Library, for their assistance. She is also grateful to Professors Judith Resnik and Mary Harnett for their review of the draft manuscript.

ENDNOTES

[1] 405 U.S. 727 (1972).

[2] *Id.*, at 743 (Douglas, J., dissenting).

[3] *Id.*, at 742.

[4] Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) [hereinafter *Should Trees Have Standing*].

[5] Adapted from M. Margaret McKeown, *Justice Takes a Side*, THE SEATTLE TIMES, Aug. 19, 2018. For general background about Douglas, see William O. Douglas, GO EAST YOUNG MAN, THE EARLY YEARS, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1974) [hereinafter GO EAST]; William O. Douglas, THE COURT YEARS, 1939–1975, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1980) [hereinafter THE COURT YEARS]; and Bruce Alan Murphy, WILD BILL, THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003) [hereinafter WILD BILL].

[6] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[7] *Terminello v. City of Chicago*, 337 U.S. 1 (1949).

[8] *Brady v. Maryland*, 373 U.S. 83 (1963).

[9] *See generally* HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE DOUGLAS (Stephen L. Wasby ed. 1990); NATURE'S JUSTICE, WRITINGS OF WILLIAM O. DOUGLAS, 21–27, 269–92 (James M. O'Fallon ed. 2000).

[10] GO EAST, p. 55.

[11] *Id.*, pp. 97, 117, 159.

[12] *Id.*, p. 163.

[13] *Id.*, p. 237.

[14] *Id.*, p. 283.

[15] *Id.*, p. 317.

[16] *See* THE SECRET DIARY OF HAROLD L. ICKES, VOL. III, THE LOWERING CLOUDS 1939–41, pp. 172, 196, 544–45, 617–18 (1953–54) [hereinafter ICKES DIARY].

[17] Melvin I. Urofsky, THE DOUGLAS LETTERS, SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS, p. 219 (1987) [hereinafter DOUGLAS LETTERS].

[18] *Id.*, pp. 219–20.

[19] ICKES DIARY, p. 334.

[20] William O. Douglas, OF MEN AND MOUNTAINS (1950).

[21] McKeown, "Justice Takes a Side," p. 14.

[22] *Id.*, Douglas wrote about these hikes in MY WILDERNESS, THE PACIFIC WEST (1960).

[23] *See generally* Bruce Alan Murphy, THE BRANDEIS/FRANFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982); *see also* David Danelski, *The Propriety of Brandeis's Extrajudicial Conduct*, BRANDEIS AND AMERICA (Nelson L. Dawson ed., 1989).

[24] William O. Douglas, A WILDERNESS BILL OF RIGHTS (1965), p. 86.

[25] For a general description of Mineral King, *see* Roger Rapoport, *Disney's War Against the Wilderness*, RAMPARTS (Nov. 1971); *see also* Sierra Club advocacy flyer, Sierra Club Archives, Container 6:11. (Hereinafter, the Sierra Club Archives, housed at the University of California-Berkeley Bancroft Library, are referred to as "Bancroft SCA.")

[26] NATIONAL PARK SERVICE, VISITATION STATISTICS, https://www.nps.gov/orgs/1207/02-28-2018-visitation-certified.htm.

[27] Flyers from Mineral King Development Records, Collection 0037, Box 1, Folder 23 (Publicity 1968–1973), Special Collections, University of Southern California Libraries.

[28] Peter Browning, *Mickey Mouse in the Mountains*, HARPER'S MAGAZINE (Mar. 1972), p. 65; *see also* Draft Forest Service-Michigan State Study re litigation related to management of Forest Service lands, July 6, 1970, pp. 21, 46–50, Bancroft SCA, Container 6:11.

[29] *Sierra Club v. Hickel*, 1 Envtl. L. Rep. 20010 (N.D. Cal. 1969). The case began as *Sierra Club v. Hickel*—not *Morton*—because Walter J. Hickel was the Secretary of the Interior when the Club filed suit.

[30] Author's interview with Leland R. Selna, Jr., Dec. 4, 2018.

[31] *Sierra Club v. Hickel*, 433 F.2d 24, 26 (9th Cir. 1970).

[32] *Id.*

[33] *Id.*, at 29.

[34] *See, e.g., Baker v. Carr*, 369 U.S. 186, 204–06 (1962) (framing the inquiry as: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

[35] *Sierra Club v. Hickel*, 433 F.2d at 33; 11 C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1, p. 139 (2d ed. 1955).

[36] *Sierra Club v. Hickel*, 433 F.2d at 29–30.
[37] Selna interview.
[38] *Id.*
[39] *See Sierra Club v. Hickel*, 1 Envtl. L. Rep. at 20014; *Sierra Club v. Morton*, 405 U.S. at 731.
[40] *Sierra Club v. Hickel*, 1 Envtl. L. Rep. at 20014.
[41] *Id.*
[42] *Id.*
[43] *Sierra Club v. Hickel*, 433 F.2d at 38.
[44] *Id.*, at 33.
[45] *Id.*, at 30.
[46] *Id.*, at 33.
[47] *Id.*, at 36–38.
[48] *Sierra Club v. Morton*, 405 U.S. 727 (1972), No. 70-34 (Pet. for Writ of Certiorari).
[49] THE COURT YEARS, p. 371.
[50] Douglas to Dr. Edgar Wayburn, President of the Sierra Club, Oct. 1, 1962, William O. Douglas Papers, Box 1763. [Hereafter, the William O. Douglas Papers, housed at the Manuscript Division of the Library of Congress, are referred to as the "Douglas Papers."]; *see also* DOUGLAS LETTERS, p. 62.
[51] *Id.*
[52] Douglas to Charles Reich, Sept. 11, 1962, Douglas Papers, Box 365.
[53] Wayburn to Douglas, Oct. 23, 1962, Douglas Papers, Box 1763; *see also* Wayburn to Douglas, Nov. 6, 1962, Douglas Papers, Box 1763.
[54] Douglas to Dr. Philip Berry, President of the Sierra Club, Dec. 2, 1970, Douglas Papers, Box 1764.
[55] *Id.*, (emphasis added).
[56] Author Unknown, Memorandum titled "WOD and the Sierra Club" (undated), Douglas Papers, Box 1545. This note lists key dates concerning Douglas' involvement with the Sierra Club.
[57] The "adapso" reference is to *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), which was pending in the Court at the time and decided the following year.
[58] Minutes of Sierra Club Board Meeting, July 25, 1969, Douglas Papers, Box 1764.
[59] 397 U.S. at 154, 158.
[60] By statute, "[t]he Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court." 28 U.S.C. § 42.
[61] THE COURT YEARS, p. 171.
[62] *Sierra Club v. Morton*, 405 U.S. at 743–44 (footnote omitted).
[63] *Sierra Club Role Disputed by U.S.*, N.Y. TIMES, Feb. 10, 1970; *"American Alpine" in Style*, NAT'L OBSERVER, Dec. 27, 1965; *Government's View on Mineral King Case*, S.F. CHRONICLE, Jan. 10, 1970; *Wilderness Buckers' Lectures Oppose Disney's Mineral King*, FRESNO BEE, Dec. 11, 1968; *Disney Profits Sharply, Higher for 1st Quarter*, L.A. TIMES, Feb. 4, 1980.
[64] *When Government Turns Its Back on Pollution*, NEWSDAY, AUG. 25, 1970.
[65] *Sierra Club Will Appeal Ruling on Disney Project*, N.Y. TIMES, Sept. 20, 1970; *Sierra & Disney to High Court?*, N.Y. POST, Sept. 30, 1970; *Sierra Club's Attempt to Halt Disney Project Rejected by Court*, WALL STREET J., Sept. 21, 1970; *A Court Go-Ahead for Mineral King*, S.F. CHRONICLE, Sept. 18, 1970; *New Moves on Mineral King*, S.F. CHRONICLE, Nov. 6, 1970; *Sierra Club Seeks to Reverse Ruling on Disney Resort*, N.Y. TIMES, Nov. 6, 1970; *Appeals Court Quashes Mineral King Injunction*, FAR WEST NEWS, Oct. 1, 1970; *"Finest Winter recreation area" in courts*, CHI. SUN TIMES, Oct. 15, 1970.
[66] Tom Eblen, *50 years ago, Red River Gorge almost became a lake. The story of a hike that saved it*, LEXINGTON HERALD LEADER, Nov. 17, 2017, https://www.kentucky.com/news/local/news-columns-blogs/tom-eblen/article185173423.html (last visited Dec. 18, 2018).
[67] M. Brock Evans, Sierra Club Northwest Representative, to Douglas, May 31, 1967, Douglas Papers, Box 1764.
[68] DOUGLAS LETTERS, p. 252.
[69] *Id.*
[70] M. Brock Evans to Douglas, July 23, 1971, Douglas Papers, Box 559. Douglas' criticism of President Johnson is somewhat ironic, as Johnson wrote the foreword to *A Wilderness Bill of Rights*.
[71] VOICES FOR THE EARTH: A TREASURY OF THE SIERRA CLUB BULLETIN, 1893–1977 (Ann Gilliam ed., Sierra Club Books 1979), pp. 538–39. These introductory remarks were made in connection with a speech by Douglas, "Nature and Value of Diversity."
[72] Author's interview with William Alsup (now a U.S. District Judge for the Northern District of California), Jan. 18, 2017 [hereinafter Alsup interview I].
[73] *See, e.g.*, Robert Tembeckjian, *The Supreme Court Should Adopt an Ethics Code*, WASHINGTON POST, FEB. 6, 2019; Lincoln Caplan, *Does the Supreme Court Need a Code of Conduct?*, THE NEW YORKER, July 27, 2015.
[74] 28 U.S.C. § 24 (1948) ("Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest ... or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding.").
[75] The Judiciary Act of 1789, ch. 20, 1 Stat. 73.
[76] 28 U.S.C. § 455 (requiring disqualification of any justice, judge, or magistrate judge "in which his impartiality might reasonably be questioned"); *see also* Chief Justice Roberts' emphasis on this obligation, SUPREME COURT OF THE UNITED STATES, 2011 YEAR-END

REPORT ON THE FEDERAL JUDICIARY (2011), available at https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

[77] M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, J. APP. PRAC. & PROCESS 45 (2005).

[78] Author's Interview with Cathy Douglas Stone, Nov. 27, 2018.

[79] THE COURT YEARS, p. 370.

[80] 401 U.S. 907.

[81] Untitled note in *Sierra Club v. Morton* case file, Douglas Papers, Box 1545.

[82] *Id.*

[83] SUPREME COURT HISTORICAL SOCIETY, SIGNIFICANT ORAL ARGUMENTS 1955–1993: The Burger Court, http://supremecourthistory.org/history_oral_decisions_burger.html (last visited Dec. 18, 2018).

[84] James Salzman & J. B. Ruhl, *New Kids on the Block —A Survey of Practitioners Views on Important Cases in Environmental and Natural Resources Law*, 25 NAT. RESOURCES & ENV'T 15, 45 (2010).

[85] In a prior case, the Sierra Club appeared as amicus curiae. *See, e.g., Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 396 U.S. 808 (1969) (order granting motion to appear as amicus).

[86] 405 U.S. at 741.

[87] Justices Hugo Black and John Marshall Harlan II retired from the Court before argument. SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members_ text.aspx.

[88] Oral Argument in *Sierra Club v. Morton* (Nov. 17, 1971), available at https://www.oyez.org/cases/1971/70-34; *see also* Brian S. Tomasovic, *Soundscape History and Environmental Law in the Supreme Court*, 896 LEWIS & CLARK L. REV. 913, 929 (2015).

[89] Oral Argument in *Sierra Club v. Morton*.

[90] *Id.* Oddly, in a note to Douglas before the argument, his clerk Kenneth Reed took the position that "[t]he standing question is not much in issue before this Court." (Kenneth R. Reed Note to Douglas, Nov. 5, 1971, Douglas Papers, Box 1545). That is a hard proposition to swallow in light of the history of the case and the focus of the Sierra Club's argument. Douglas was not a big note-taker so his files don't reveal whether he pressed the clerk on this point.

[91] THE SUPREME COURT IN CONFERENCE (1940–1985) – THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Del Dickson ed., Oxford Univ. Press 2001), pp. 133–34. Justice Brennan refers to *Association of Data Processing Service Organizations, Inc. v. Camp*.

[92] THE SUPREME COURT IN CONFERENCE, p. 134.

[93] *Id.*

[94] *Id.*

[95] Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10637, 10657 (2005) [hereinafter Percival, *Blackmun Papers*].

[96] *Id.*

[97] Author's interview with Paul Gewirtz, law clerk to Justice Marshall, and now a professor at Yale Law School, Nov. 26, 2018. Gewirtz speculates that Stewart may have spread this view, but indicates that it definitely was not Marshall.

[98] 405 U.S. at 740–41.

[99] *Id.*, at 731–32.

[100] *Id.*, at 733 (citing *Data Processing*, 397 U.S. 150, and *Barlow v. Collins*, 397 U.S. 159 (1970)).

[101] *Id.*, at 738.

[102] First Draft Stewart opinion for the court, Thurgood Marshall Papers, Box 81, folder 11. (Hereinafter, the Thurgood Marshall Papers, housed at the Manuscript Division of the Library of Congress, are referred to as the "Marshall Papers.").

[103] 405 U.S. 727.

[104] Id., at 736 n.8.

[105] Percival, *Blackmun Papers*, p. 10657.

[106] 405 U.S. at 741 (Douglas, J., dissenting).

[107] *Id.*, at 752 (quoting ALDO LEOPOLD ET AL., A SAND COUNTY ALMANAC (1949), p. 204).

[108] *Id.*

[109] Christopher D. Stone, SHOULD TREES HAVE STANDING? LAW MORALITY AND THE ENVIRONMENT (3rd ed. 2010), p. 35 [hereinafter Stone, *Law Morality and the Environment*].

[110] Douglas said he wrote for *Playboy* because it "reaches 18 million youngsters." *Mr. Justice Douglas: Who Was William O. Douglas?* (Columbia Broadcast Systems, Inc. 1972). On October 30, 1970, Dagford Hamilton, Douglas' longtime literary assistant, elliptically raised the ethical question of disqualification based on Douglas' writings: "If you expand the Playboy ecology article into a fourth book for Random House, you will not be able to comment on proposed or pending cases like the fire ants but—I don't see why you can't comment on the misuse of defoliants in Vietnam which you have already mentioned elsewhere." Dag Hamilton to Douglas, Oct. 30, 1970, Douglas Papers, Box 889.

[111] Douglas to M.D. Talbot, Articles Editor of the *Southern California Law Review*, Oct. 10, 1970, Douglas Papers, Box 889; M.D. Talbot to Douglas, Nov. 17, 1971, Douglas Papers, Box 889 (enclosing a preview paragraph of Professor Christopher D. Stone's article, then titled *Legal Rights for the Environment Too?*).

[112] M.D. Talbot to Douglas, Nov. 10, 1971, Douglas Papers, Box 889.

[113] M.D. Talbot to Douglas, Nov. 17, 1971, Douglas Papers, Box 889.

[114] *Id.*

[115] *Id.*

[116] Author's interview with Professor Christopher D. Stone, April 4, 2018.

[117] Alsup interview I.

[118] L.A. Powe, Jr., a former clerk and now a professor at the University of Texas Law School, has been a pointed critic. He believes that Douglas' "published opinions often read like rough drafts" and thus "are easy to ignore." David G. Garrow, *The Tragedy of William O. Douglas*, THE NATION, Mar. 27, 2003.

[119] Alsup interview I.

[120] *Id.* The twelve opinion drafts are contained in the case file. Douglas Papers, Box 1545.

[121] *Id.*

[122] M.D. Talbot to Douglas, Nov. 17, 1971.

[123] *Id.*

[124] Email from Richard Jacobson to the author, March 19, 2018.

[125] Letter from Nan Burgess, Secretary to Justice William O. Douglas, to M.D. Talbot, Nov. 21, 1971, Douglas Papers, Box 809.

[126] Case file for *Sierra Club v. Morton*, Douglas Papers, Box 1545.

[127] The article was initially entitled *Legal Rights for the Environment Too?* Douglas asked Alsup to look at the tentative draft of Stone's article, and the final version of the dissent was adjusted to reflect the new title of the article. Alsup to Douglas, Feb. 18, 1972, Douglas Papers, Box 1545; Alsup to Douglas, March 14, 1972, Douglas Papers, Box 1545.

[128] Alsup interview I; author's interview with William Alsup, Oct. 3, 2018 [hereinafter Alsup interview II].

[129] *Morton*, 405 U.S. at 748 (Douglas, J., dissenting).

[130] GO EAST, p. 68.

[131] Alsup interview II.

[132] *Id.*

[133] *Morton*, 405 U.S. at 754.

[134] Stone interview.

[135] *Id.*

[136] *Id.*

[137] Stone, *Law Morality and the Environment*, iii.

[138] Stone was not the only enterprising individual reaching out to Douglas. A law student at Santa Clara University School of Law sent his law review article, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*. The student acknowledged that he was "committing some breach of procedure" but suggested that Douglas, "perhaps more than [his] fellow Justices, realize[d] the importance of standing for environmental litigants." Law Student to Douglas, Jan. 13, 1971, Douglas Papers, Box 1545.

[139] The link between Stone and the law review remains somewhat of a mystery. He wrote, "I can't recall how I learned that the law review had lined up Douglas; I am sure it was widely circulated. I was not the faculty advisor. I seem to remember that the editor in chief was behind the idea of a proposed the piece in the Tech Symposium. He was encouraging. It was written in short order." Stone email to author, April 18, 2018.

[140] Rule 42, Briefs of an Amicus Curiae, Rules of the Supreme Court (effective during 1971–72 time frame); ABA Model Code of Judicial Conduct, Rule 2.9(a); ABA Model Rules of Professional Conduct, Rule 3.5 (2016); the California State Bar Act and Rule of Professional Conduct, Rule 16 (in effect Oct. 1970) ("A member of the State Bar shall not ... without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge. ...").

[141] Stone, *Should Trees Having Standing*, p. 466.

[142] William O. Douglas, *Preface*, 45 S. Cal. L. Rev. 450 (1972).

[143] Stone interview.

[144] Stone, *Should Trees Have Standing?*, pp. 450, 452–53.

[145] *Id.*, pp. 473–80.

[146] *Id.*, 405 U.S. at 755 (Blackmun, J., dissenting).

[147] *See* Tinsley Yarborough, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE (2008), p. 271. During law school in the 1970s, I often went to Theodore Roosevelt Island, where I saw Justice Blackmun taking a solitary stroll.

[148] Percival, "Environmental Law in the Supreme Court," 10663.

[149] Harry M. Blackmun Papers, Box 137, Folder 7. (Hereinafter, the Harry M. Blackmun Papers, housed at the Manuscript Division of the Library of Congress, are referred to as "Blackmun Papers.").

[150] Typewritten questions by H.A.B., Nov. 15, 1971, Blackmun Papers, Box 137, Folder 7.

[151] Case Memorandum by H.A.B., Blackmun Papers, Box 137, Folder 7.

[152] 405 U.S. at 755 (Blackmun, J., dissenting).

[153] *Id.*, at 756.

[154] *Id.*, at 756–57 (there is a similarity with the majority's footnote on amendment).

[155] *Id.*, at 757.

[156] *Id.*

[157] THE SUPREME COURT IN CONFERENCE, p. 134.

[158] 405 U.S. at 759.

[159] *Id.*, at 755 (Brennan, J., dissenting).

[160] *See Sierra Club v. Morton*, 348 F. Supp. 219, 219–20 (N.D. Cal. 1972).

[161] *Id.*, at 220.

[162] *Id.*

[163] Order Dismissing Action Pursuant to Stipulation, Bancroft SCA Container 5:3.

[164] This proclamation was presented to the United Nations, though it has not been adopted. *U.N. Prepares to Debate Whether 'Mother Earth' Deserves Human*

Rights Status, THE INTERNATIONAL UNION FOR CONSERVATION OF NATURE, May 2, 2011, https://www.iucn.org/content/un-prepares-debate-whether-mother-earth-deserves-human-rights-status.

[165] Andrew C. Revkin, *Ecuador Constitution Grants Rights to Nature*, N.Y. TIMES (Sept. 29, 2008), https://dotearth.blogs.nytimes.com/2008/09/29/ecuador-constitution-grants-nature-rights/?mcubz=3.

[166] Craig Kauffman & Pamela L. Martin, *Comparing Rights of Nature Laws in the U.S., Ecuador, and New Zealand: Evolving Strategies in the Battle Between Environmental Protection and "Development"*, Presented at International Studies Association Annual Conference, Baltimore, Md., Feb. 23, 2017, available at http://files.harmonywithnatureun.org/uploads/upload472.pdf.

[167] Sandra Postel, *A River in New Zealand Gets a Legal Voice*, NAT'L GEOGRAPHIC BLOG (Sept. 4, 2012), https://blog.nationalgeographic.org/2012/09/04/a-river-in-new-zealand-gets-a-legal-voice; Eleanor Ainge Roy, *New Zealand gives Mount Taranaki same legal rights as a person*, THE GUARDIAN (Dec. 22, 2017), https://www.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person.

[168] Nicholas Bryner, *Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem*, INT'L UNION FOR CONSERVATION OF NATURE (Apr. 20, 2018), https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem.

[169] *India's Ganges and Yamuna rivers are 'not living entities'*, BBC NEWS (July 7, 2017), https://www.bbc.com/news/world-asia-india-40537701.

[170] *See Stibbe v. Austria*, No. 26188/08 (decision letter issued Jan. 22, 2010).

[171] Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L. Q. 1, 3 (2016) (advocating the importance of giving nature access to the courts).

[172] *Byram River v. Vill. of Port Chester, N.Y.*, 394 F. Supp. 618, 620 (S.D.N.Y. 1975) (dismissing claims against the state agency on Eleventh Amendment grounds but otherwise sustaining jurisdiction).

[173] Tamaqua Borough, Schuylkill County, Pa., Ordinance No. 612 § 12.1 (Sept. 19, 2006); *see also, e.g.*, SANTA MONICA, CAL., MUNICIPAL CODE ch. 4.75 (2013).

[174] Kauffman & Martin, "Comparing Rights of Nature Laws," 9.

[175] Adam M. Soward, *William O. Douglas's Wilderness Politics: Public Protest and Committees of Correspondence in the Pacific Northwest*," 37 W. HIST. Q. 21, 21–22 (2006).

[176] DAVID GEORGE HASKELL, THE SONGS OF TREES x (Viking Press 2017).

[177] Douglas letter to the Chief Justice and Associate Justices, Nov. 14, 1975; *see also* Percival, *Environmental Law in the Supreme Court*.

[178] *Id.*

"Standing on the Corner When the Bus Came By": Harry A. Blackmun's Appointments to the United States Court of Appeals for the Eighth Circuit (1959) and the United States Supreme Court (1970)

MELISSA NATHANSON

Anyone familiar with Richard Nixon's Supreme Court legacy knows about the so-called "Minnesota Twins," the first two of Nixon's four appointees. Warren E. Burger was sworn in as the 15th Chief Justice of the United States on June 23, 1969. Harry A. Blackmun became an Associate Justice a year later, on June 9, 1970. Blackmun and Burger shared a long history, having grown up within blocks of each other in the working class Dayton's Bluff neighborhood on the east side of St. Paul. They attended the same grammar school, recited Bible verses in the same Sunday school class, and belonged to the same Boy Scout troop. Blackmun was best man at Burger's wedding. Their designation as "Minnesota Twins" shortly after Blackmun joined the Court played on the name of the American League baseball team that relocated to Minneapolis—St. Paul's "twin city"—in 1961. But it also reflected the regularity with which Blackmun and Burger voted together during the early 1970s.[1]

Long active in Republican Party politics, the hard-charging Burger was and is widely credited with facilitating the rise of his lower-profile friend to the federal appellate bench and then to the Supreme Court.[2] Burger never claimed responsibility for putting Blackmun on the Court, according to Blackmun, and Blackmun never directly disputed Burger's role in either of his appointments.[3] Instead, Blackmun usually

stuck to broad generalities when describing how they came about. The key to becoming a federal judge, he said, was to "be on the corner when the bus comes by."[4] He quipped that at least a dozen people claimed individual responsibility for putting him on the Supreme Court, repeating a pattern he first observed a decade earlier when "at least twenty people" took individual credit for his appointment to the Eighth Circuit Court of Appeals.[5]

This article seeks to present a richer account of how Blackmun's personal and political capital helped make the unassuming Minnesotan a judge and then a Justice. In early 1959, Eighth Circuit Judge John B. Sanborn, Jr., and Burger, then a judge on the Court of Appeals for the District of Columbia Circuit, together brought Blackmun to the attention of the Justice Department as the best candidate to fill Sanborn's seat upon his contemplated retirement. Once the nomination was made, Blackmun's association with Burger almost prevented him from getting a hearing before the Senate Judiciary Committee because the junior Senator from Minnesota, resentful of Burger for having accused him of protecting subversives in government, refused to turn in his blue slip until he had time to investigate the relationship between Blackmun and Burger. It was Blackmun's surprisingly large and robust Minnesota network of professional and personal relationships that jump-started his stalled nomination when the window for judicial confirmations was about to slam shut in the run-up to the 1960 presidential election.

Ten years later, a colleague of Blackmun's on the Eighth Circuit, Judge Pat Mehaffy of Little Rock, chartered a beneath-the-radar "southern strategy" that helped deliver Blackmun safely onto the U.S. Supreme Court after Nixon's first two nominees for the seat vacated by Associate Justice Abe Fortas—Southerners both—were defeated in the Senate.

The Road to the Court of Appeals for the Eighth Circuit

Late on a Friday afternoon in early November 1958, Harry A. Blackmun, resident counsel at the Mayo Clinic in Rochester, Minnesota, drove up to St. Paul to visit his former boss.[6] Twenty-six years had gone by since Judge Sanborn, newly appointed to the Eighth Circuit, had hired Blackmun as his law clerk. In the depths of the Great Depression, Blackmun had returned home from Harvard Law School without a job and without any immediate prospect of getting one.[7] Sanborn had thrown him a lifeline, launching him on a course to partnership in a prestigious Minneapolis law firm and an executive position at a world-renowned medical institution. As they sat down beneath the mahogany-beamed ceiling of the private Minnesota Club for dinner, Judge Sanborn got right to the point. He planned to retire and wanted to know if Blackmun would consider succeeding him.[8] Sanborn was disheartened by the condition of his court. It had been one of the stronger federal appeals courts when he was appointed to its bench in 1932, but now he felt it was one of the weaker ones. Three of its seven judges had been there since Blackmun's clerkship days. At seventy-five, Sanborn was the youngest of the three. Along with his concerns about the ability of some of the more recently appointed judges, Sanborn feared that the waning faculties of the older judges had eroded the court's reputation. His plan was to muster whatever influence he could to ensure that his replacement was a strong one.[9] Blackmun was, in Sanborn's eyes, the best legal scholar he had ever known, "the single person who," in Sanborn's view, "would be the ideal appellate judge."[10] And he believed Blackmun's friend, Judge Warren E. Burger of the D.C. Circuit, could help bring about the desired result. Before his appointment to the bench, Burger had served as an Assistant Attorney

General in the Eisenhower Justice Department and knew all the key players there.

Flattered and gratified, Blackmun protested that he lacked the necessary experience and qualifications, not to mention the political connections he thought necessary for securing a judgeship.[11] Sanborn assured him he had "everything that is needed to make an outstanding Circuit Judge" and advised him to talk things over with Burger. He added that he had already written to Burger himself, asking him to find out "whether the Court of Appeals could trade a 75 year old Sanborn for a 50 year old Blackmun."[12]

Blackmun and Burger talked over Sanborn's proposal later that month. After Blackmun signaled his willingness to proceed, Sanborn and Burger were able to put him at the head of the line before word got out about Sanborn's impending retirement. Also working in Blackmun's favor was an arrangement between the Eisenhower administration and the American Bar Association to have every candidate under serious consideration for a specific judicial nomination vetted by the ABA's Standing Committee on the Judiciary, part of an effort to make judicial appointments less partisan and more meritocratic.[13] The advantage of this procedure for someone as removed from party politics as Blackmun was considerable.

In early February 1959, Sanborn and Burger went to see Deputy Attorney General Lawrence Walsh about Sanborn's plan to retire. They argued that Blackmun was the individual best qualified to replace him. Walsh asked them to name others who were "reasonably well qualified." Sanborn and Burger came up with three, making it clear in each case that Blackmun was the stronger candidate.[14] Coming midway

Judge John B. Sanborn, Jr., congratulated his protégée and successor, Harry A. Blackmun, when he was appointed to the Court of Appeals for the Eighth Circuit in 1959, as his daughters, Sally, Nancy, and Susan, and his wife, Dorothy, looked on. Blackmun had been Sanborn's law clerk from August 1932 to December 1933.

through Eisenhower's second term, Sanborn's proposal was attractive to the incumbent administration. Democrats held the majority in the Senate, giving them a firm grip on the processing and timing of confirmations. With the next election in sight and the hope of putting a member of their own party in the White House, they would be in no rush to fill court seats which, if left vacant, might soon be filled with their own party's appointees. Walsh told Sanborn he believed the Senate would soon stop confirming the administration's nominees, leading Sanborn to think the Justice Department would act quickly.[15]

Ordinarily, the Justice Department would have cleared Blackmun at an early stage with Minnesota's two Senators to ensure that neither of them opposed the nomination. But Walsh bypassed the incumbents—Hubert H. Humphrey and Eugene J. McCarthy, both Democrats—conferring instead with Walter Judd, a Minneapolis Republican serving in the U.S. House of Representatives, and former Senator Ed Thye, also a Republican, who had lost his seat to McCarthy in the last election.[16] Judd and Thye reacted favorably to nominating Blackmun, but the failure to reach out to Humphrey and McCarthy would turn out to be a major blunder.

Soon after the meeting with Walsh, Burger advised Sanborn that Blackmun was the frontrunner and that Sanborn should put his intentions in writing on a confidential basis so that a background check on Blackmun could commence.[17] Keeping his ear to the ground back in Rochester, Blackmun heard passing speculation about several prospective federal court vacancies. "I am, of course, doing nothing and remain somewhat troubled in spirit," he wrote Burger. "Perhaps that is the proper state of mind. I have never been able 'to go out after' these things."[18]

In March, the ABA began making inquiries.[19] Before long, the organization returned to Walsh with a preliminary rating of "well qualified" for Blackmun.[20] At the end of April, Burger reported that the only thing standing in the way of Blackmun's nomination was an official letter of retirement from Judge Sanborn.[21] It was a difficult step for Sanborn to take because he could not be sure that Blackmun would be named to take his seat. Concluding that things were "lined up as well as they can be," he notified the President at the beginning of May that he was "handing in [his] dinner pail" effective June 30, 1959.[22]

Several weeks passed before the press took notice. Once it did, speculation about a successor began. "Line Is Forming for U.S. Judgeship," the *Minneapolis Star* reported on May 20, adding that a "major political scramble is developing in Minnesota to fill the vacancy."[23] "Mayo Counsel Top Choice for 8th Circuit Court Post," the *St. Paul Pioneer Press* declared two days later, naming a total of eight contenders for the seat.[24] Three days after that, the *Minneapolis Tribune* hinted at a brewing conflict:

> Harry A. Blackmun, general counsel for the Mayo clinic, Rochester, Minn., who was Sanborn's law clerk in 1932, is said to have [the] support of the retiring jurist. It is known that Blackmun, who is believed to be a Republican even though he is unknown to party officials, has not sought the post.
>
> The Mayo attorney may have important backing in other quarters. He is a friend of Federal Judge Warren Burger, former Minnesotan who recently was named to the board of the Mayo Association.[25]

Blackmun was distressed by the publicity linking Sanborn and Burger to his prospective nomination, believing it might embarrass the judges.[26] His concern only

On April 15, 1970, Judge Blackmun flew home to Rochester, Minnesota, the day after his nomination to the U.S. Supreme Court was announced. He had been in St. Louis attending an Eighth Circuit Council meeting when he heard the news.

deepened after an acquaintance passed along another clipping reporting on Blackmun's "well-muscled Eisenhower administration backing" and detailing the opposition of active Minnesota Republicans "who never heard his name until it appeared in news dispatches from Washington."[27]

Walsh told his good friend Bernard G. Segal, chairman of the ABA's Standing Committee on the Federal Judiciary, about

the skirmishing underway in Minnesota. Segal replied that he was hopeful that the committee would be able to raise Blackmun's rating to "exceptionally well qualified." In a letter to a committee member, Segal argued that Blackmun's was exactly the type of nomination the ABA should be encouraging, noting that Blackmun was "under serious consideration although he has never held political office or been active in the party. Since there is going to be such a scramble for this position," Segal concluded, "I have the feeling we ought to accord the top man our top classification if he deserves it." The committee duly raised Blackmun from "well qualified" to "exceptionally well qualified."[28]

Once word about Blackmun was out, well-wishers tried to help move things along. The local bar association passed a resolution supporting Blackmun's nomination and sent it to the U.S. Attorney General.[29] One local judge wrote to the President; another wrote to Senator McCarthy and Attorney General William P. Rogers.[30] Conspicuously lacking, though, was any sign of movement from inside the Eisenhower administration. "I don't know what is going on now," Burger wrote to Blackmun in mid-May, "but that's inevitable. It's like a pregnancy—you can start it but it's hard to control after that." Burger had seen Walsh at a dinner the night before. The Deputy Attorney General had been noncommittal, saying only that the nomination "was now in the laps of the 'gods.'"[31]

June 30 came and went. The local paper announced Sanborn had gone on "senior status": although retired, he continued hearing cases.[32] Still there was no official word of his replacement. Blackmun knew from Burger and others that the delay resulted, at least in part, from a promise made to Republican stalwart George E. MacKinnon to compensate him in some form for resigning his position as U.S. District Attorney to carry the party standard in a foredoomed race for governor in 1958.[33] Burger, the Republican insider, had to do some fast footwork when newspaper reports tied him to Blackmun's nomination. In a handwritten note to MacKinnon, Burger somewhat disingenuously attempted to disentangle himself, explaining:

> I am sure the Mayos would fire me from the Board if they thought I was trying to lure Blackmun away. I would assume, however, that the story is correct as to Sanborn recommending Blackmun who is almost like a son to him.[34]

Privately, Burger expressed his exasperation with the delay to Blackmun, blaming it on Walsh's boss, Attorney General William P. Rogers.[35] Only later would Blackmun learn from Walsh that the White House had signed off on his nomination in June, but that Arkansas Senator John L. McClellan, a senior member of the Senate Judiciary Committee, had prevailed upon the administration to delay the nomination until they were able to work out a deal to fill a federal district court seat in his state with a Democrat.[36]

Burger took a six-week vacation in Europe that summer. From Italy, he wrote of his frustration with the lack of information coming from the Justice Department.[37] Blackmun responded with surprising equanimity, taking the opportunity to extend the pregnancy metaphor Burger had offered before leaving:

> My own posture here remains somewhat anomalous, but I don't mind too much. It is like having one's pregnancy announced very early. After a while, people start to worry about you but say very little and then, as the months drag by, wonder if after all you lost the baby.[38]

He could afford to be equable. Months earlier he had begun huddling with

well-connected friends at his old law office, Dorsey, Owen, Scott, Barber, and Marquart, and at the Mayo Clinic, developing his own lines of intelligence.[39] His sources informed him that the Minnesota Republicans were in disarray and had not come up with a plausible candidate with whom to counter him.[40] From a Mayo doctor, he learned the Republican organization in Minnesota had been told in no uncertain terms that the appointment would be made at the White House and to "keep hands off."[41]

Finally, on August 18, 1959, President Eisenhower announced Blackmun's nomination and sent his name to the Senate for confirmation. Blackmun was in Michigan visiting his daughter Nancy at music camp when the Associated Press called his office to follow up on the story, which is how he learned he had been nominated. He found it strange that no one from the Justice Department had contacted him.[42]

Blackmun's name had gone "up to the Hill" at last, but there it sat. Burger's Republican connections could advance matters only so far. The action had moved to the Senate, where a Democratic majority was in control. For months, the Senate Judiciary Committee had been sitting on every nomination that came before it. By the end of August, when Blackmun's name arrived there, nineteen were caught in the logjam, half of them since the middle of March, one since January. The committee had conducted hearings on most of the nominees but never reported them out to the floor of the Senate for the necessary confirmation votes.[43] Blackmun encountered trouble getting even that far. Under Senate rules, both Senators from a nominee's home state had to turn in "blue slips" indicating their approval before his name could be sent to the Judiciary Committee. No blue slips were forthcoming from the state of Minnesota, but no one knew why.[44]

Walsh and Blackmun discussed the situation by telephone in the late afternoon on September 1. The Senate was scheduled to go into recess ten days later. Nominations that were not approved by that date would not be addressed until January. It was time to "jog" the blue slips loose from the recalcitrant Senators.[45]

Walsh urged Blackmun to enlist the aid of James C. Cain, a doctor on the Mayo Clinic staff and personal physician to the Senate's powerful Democratic majority leader, Lyndon B. Johnson of Texas.[46] Blackmun found the idea of openly campaigning for the position distasteful, but, with just ten days left for the Senate to act, he dialed Cain's number as soon as he hung up with Walsh. Cain told Blackmun he had never asked Johnson for a political favor but would give it a try.[47] The next day, he reported back that while he had not yet been able to reach LBJ, he had spoken to LBJ's protégée Bobby Baker, Secretary to the Senate Majority, and had "other lines" out as well.[48]

On Monday, September 7—Labor Day—word came from Washington that twelve of the pending nominees would be reported out of committee and put to a vote of the full Senate that week.[49] Blackmun was not among them because his name had never gone into committee. The pressure was on, as these would likely be the last judges confirmed before the November elections.

Over the next five days, bar leaders and Blackmun's personal and professional networks swung into high gear, launching an "all-out-effort to blast [the] nomination loose."[50] On Tuesday, September 8, Bernard Segal of the ABA urged the immediate past president of the Minnesota Bar Association to light a fire under A.M. ("Sandy") Keith, an ambitious young member of Minnesota's Democratic-Farmer-Labor ("DFL") Party.[51] Keith, who had worked with Blackmun at the Mayo Clinic, had recently been elected to the Minnesota State Senate. Keith called Senator Humphrey and tried to persuade him to put in his blue slip. Humphrey told Keith

The far-flung Blackmuns reunited at the family home in Rochester after their father became the third nominee to the seat vacated by Abe Fortas. Seated with Blackmun, left to right, are daughter Susan Karl (husband Roger standing to the left); Dorothy Blackmun with the family chihuahua, Pitter; daughter Sally Funk (husband Rick standing to the left); and daughter Nancy Blackmun.

he would confer with McCarthy and that the two would act together one way or the other.[52]

On Wednesday, September 9, the current and past presidents of the Minnesota Bar Association sent telegrams to Senators Humphrey and McCarthy, urging them to work for Blackmun's confirmation before the Senate recessed.[53] Blackmun's wife, Dottie Blackmun, called her former boss, William J. Hickey, who was well connected in St. Paul's influential Catholic community.[54] Hickey reached out to the Most Rev. James P. Shannon, a close confidant of McCarthy and president of McCarthy's alma mater, St. Thomas College, and to Ignatius O'Shaughnessy, a major benefactor of the college. Both men sent McCarthy telegrams on Blackmun's behalf. Hickey prevailed on McCarthy's campaign manager to talk to McCarthy directly. Then he called Humphrey himself.[55] On Tuesday and Wednesday that week, the St. Paul papers reported there was no chance Blackmun would be confirmed before the Senate recessed.[56] On Thursday, the *Minneapolis Star* ran an editorial excoriating Senate Democrats generally and Senators Humphrey and McCarthy in particular for playing politics with Blackmun's nomination.[57]

On Friday evening, after conferring once again with Dr. Cain, Blackmun reached out to John Chisholm, a Rochester bank executive who was well connected in DFL circles. Chisholm offered to call McCarthy. A few hours later, he called Blackmun back

with a full report. McCarthy was upset that the Attorney General had not cleared Blackmun's name with him. He learned of the nomination only when he read about it in a press release. He pointed out to Chisholm that he had also not approved the last two Minnesota judicial selections, one of whom was Warren E. Burger. McCarthy had not forgotten that, six years earlier, when he was running for reelection to Congress, Burger had attacked him for protecting subversives in the federal government.[58] McCarthy won the election, but had harbored bitter feelings against Burger ever since.[59] Still resentful, McCarthy was concerned about Blackmun's connection with Burger, especially because of Burger's recent appointment to the Mayo Association Board of Directors. McCarthy told Chisholm that he had "no personal animus" toward Blackmun but wanted to make his own investigation and would take no further action until January, after the election.[60] Humphrey's previously stated position was that he and McCarthy would act—or not act—together. It appeared that all was lost.

The weekend came. On Saturday morning, Blackmun wrote to Judge Sanborn, apologizing for his "inability to get confirmed."[61] He spent the afternoon on the roof of his house removing leaves and painting gutters in preparation for another Minnesota winter. At 2:30 p.m. he was called to the telephone. Deputy Attorney General Walsh was on the line, calling to report that McCarthy was wavering.[62] Just before 6 p.m., another call came through. Senator Humphrey greeted Blackmun with news that the tide had turned: Humphrey, McCarthy, and several others had been trying all afternoon "to rush all this through." A subcommittee hearing on Blackmun's nomination had been scheduled for 10:30 a.m. on Monday. Could Blackmun be in Washington by 10:00?

No sooner did Blackmun hang up with Humphrey than the telephone rang again. It was the Justice Department, calling to notify him of his hearing. Next, Dr. Cain called to debrief Blackmun on the day's events as related to him by Senator Humphrey: Bobby Baker had "worked hard on Humphrey at lunch that day [and] Senator Johnson had gone to work on McCarthy," with the result that the hearing had at long last been scheduled. Before turning in for the night, Blackmun phoned Burger, who knew nothing of these most recent developments.

Blackmun's hearing on Monday, September 14, lasted all of twelve minutes.[63] Senator Humphrey kidded, "This guy really has contacts." Afterward, during a private fifteen-minute visit in the Senate dining room, McCarthy told Blackmun about his grievance against Burger. Then, with nothing left to do but wait, Blackmun found a seat in the Senate Gallery and took in the proceedings. At 10:00 p.m. he returned to his room at the Cosmos Club to retire for the evening. In the early hours of the morning, at about 2:30 a.m., the Senate voted to confirm his nomination.[64]

Once the matter reached its hoped-for conclusion, Judge Sanborn pronounced the delay had done more good than harm. "[T]he publicity and the efforts of your friends certainly gave you a send-off and a reputation that you would not otherwise have had initially," he wrote Blackmun.[65] For Dottie Blackmun, the week's events confirmed one of her more incisive observations about the man she had married eighteen years earlier: Harry Blackmun, despite his avoidance of party politics, was the most astute politician she had ever known.[66]

The Road to the Supreme Court

On January 20, 1969, President Richard M. Nixon came to office with a single Supreme Court seat to fill. Four months later he had two.[67] An extraordinary chain of events enabled Nixon to begin reshaping the Court soon after his election. A year earlier,

Blackmun visited the Capitol Hill office of Minnesota Senator Eugene J. McCarthy (left) in advance of his Senate Judiciary Committee confirmation hearing in 1970. They were joined by the junior Senator from Minnesota, Walter F. Mondale (center).

at the end of March 1968, a monumentally unpopular President Lyndon Johnson had announced he would not run for reelection in November.[68] In June, Chief Justice Earl Warren announced his intention to retire from the Supreme Court "effective at [the President's] pleasure," giving Johnson what seemed like a reasonable window to appoint a successor before leaving office.[69] But Johnson stumbled badly by trying to elevate his long-time political fixer and confidante, Associate Justice Abe Fortas, to Warren's seat.[70] Those hoping for a Republican victory in November argued that the next President, not Johnson, should make the appointment.[71] Separately, Fortas came under attack for having continued to advise the President after Johnson appointed him Associate Justice in 1965, violating the bedrock constitutional principle of separation of powers.[72] Fortas's nomination lingered in the Senate Judiciary Committee as summer turned to fall. In September, allegations of a conflict of interest surfaced. That summer, Fortas had taught a course at American University, and his $15,000 stipend had not been paid from university funds but by clients from his former legal practice, powerful business leaders who might someday find themselves with cases before the Supreme Court.[73] When the nomination was reported out of committee

to the full Senate by a vote of 11–6, Fortas's opponents began a filibuster.[74] With cloture to shut off the filibuster having failed, on October 2, a month before the election, Johnson withdrew the nomination at Fortas's request.[75] The Court remained as it was, with Earl Warren as Chief Justice, his retirement hanging fire until after the new President assumed office in January, and Fortas continuing as Associate Justice.

In the wake of the Fortas episode, newly inaugurated President Nixon was in no hurry to act. Better to wait until passions cooled before launching his own nominee into the fray. Chief Justice Warren agreed to continue serving until the end of the Supreme Court term in June 1969.[76] Nixon's patience paid off. At the beginning of May 1969, new allegations of financial improprieties propelled Fortas back into the headlines, this time with intimations of worse to follow. Three years earlier, Fortas had accepted, although he later returned, a $20,000 honorarium from the Wolfson Family Foundation, whose founder was then under investigation for (and subsequently convicted of) securities laws violations. The story triggered an IRS investigation, which uncovered an agreement for the foundation to pay Fortas $20,000 a year for life in exchange for advisory services. The beleaguered Associate Justice resigned from the Court under pressure on May 14, 1969, giving Nixon a second seat to fill.[77]

Nixon had definite ideas about his prospective Supreme Court nominees. Like Eisenhower, he preferred to promote from within the judiciary, believing an extant body of judicial opinions the best indicator of future performance. He sought younger judges—under the age of sixty—with the hope that they would remain on the bench for years to come. Especially after LBJ's blunder with Fortas, he had no interest in appointing anyone who could be tagged as his crony. Having made a campaign issue of the Warren Court's "activist" holdings, particularly in the area of criminal procedure, Nixon needed to make good on his promise to appoint "law and order" Justices who would halt the expansion of rights for the accused. He said his nominees would be "strict constructionists." He was highly motivated to appoint a Southerner to shore up his support among a key regional constituency that had helped carry him to victory. And, not a product of the Ivy League himself and suspicious of elites, he told his Attorney General to find nominees from "meat-and-potatoes" law schools.[78]

Nixon did not, however, have the luxury of being inflexible. After eight years of Democratic Party control of both the White House and both houses of Congress, there were few federal judges who met all his standards. When he came to office, only four Republicans under sixty were sitting on U.S. courts of appeals and only two Republicans under sixty were on state supreme courts of southern states, both of them in border state Maryland.[79]

For the top spot, he tapped Blackmun's old friend Warren E. Burger, who became the 15th Chief Justice of the United States on June 23, 1969. While few would have predicted Burger would take the top seat, he fit Nixon's general criteria. Burger had served on the D.C. Circuit since 1956, where he waged a losing battle against the "implacable effort" of other federal judges to expand procedural protections for the accused in criminal proceedings.[80] Nixon had noted with approval a commencement speech Burger delivered at Ripon College criticizing the Warren Court's criminal procedure rulings.[81] The two had known each other for years through their involvement in Republican Party politics, although they were not personal friends. Burger, having turned sixty-one a few months before the 1968 election, was slightly beyond Nixon's preferred age for a Supreme Court nominee, but he was a graduate of an unaccredited night law school, which

satisfied Nixon's "meat-and-potatoes" requirement. As Chief Justice Warren's anticipated retirement date approached, rumors began flying that Burger would be appointed to the Court.[82] Before the end of May, those rumors became reality.

But what about Harry Blackmun? Even before Nixon's 1968 victory, Blackmun had some idea his own name had been advanced, or might be advanced, for consideration. In late October, eight days before the election, he visited his youngest daughter, Susan, a sophomore at DePauw University in Greencastle, Indiana, and mentioned the astonishing possibility to her. "What you told me at lunch about the Supreme Court didn't really hit me until I had time to think about it later," she wrote him afterward, "and I must say I'm kind of stunned." Blackmun had indeed said something to his daughter but, as is evident from the rest of her letter, his remarks were less than transparent:

> I can take it two ways and am confused as to which is the correct [one]. First, you're extremely modest and somewhat of a pessimist, meaning that there's a lot better chance than you indicated. This would be my first assumption, but the second throws me off the more I think about it. What that amounts to is that you're a normal human being and need to express your hopes and accomplishments as much as the next guy, so maybe you were just opening up to me. Sometimes you're so hard to figure out![83]

Many years later, Blackmun's daughters recalled that their father had known he was on a "short list" for the Supreme Court long before he was nominated.[84] There were, in fact, two lists. In the early days of the Nixon administration, before the President made his first appointment, Attorney General John Mitchell compiled the names of all those who "merited consideration" for a seat on the Court. This "long list" of 150 names was winnowed to ten before Nixon selected his first nominee.[85]

According to a later account by Mitchell, this "short list" included Blackmun, Burger, Fourth Circuit Judge Clement F. Haynsworth, Jr., and former American Bar Association President Lewis F. Powell, Jr.[86] With the exception of Blackmun, all these men—and many others—saw their names floated in the press as possible nominees between Nixon's election and his selection of Burger.

Behind-the-scenes efforts to get Blackmun nominated to the Court had begun the preceding November, immediately following Nixon's election. Blackmun's good friend Dr. Howard P. Rome, head of psychiatry at the Mayo Clinic, had written several letters on Blackmun's behalf. The first was to their U.S. Congressman, Albert H. Quie. Rome was insistent that he had "not consulted Judge Blackmun about this move inasmuch as it is done wholly on my personal initiative."[87] Quie followed up by writing to Bryce N. Harlow, assistant to the President-elect, recommending Blackmun for a Court nomination.[88] Rome also solicited aid from his brother, Edwin P. Rome, a prominent lawyer in Philadelphia. Ed Rome's good friend Bernard G. Segal—the same Bernard Segal who had worked closely with the Justice Department to get Blackmun's Eighth Circuit nomination through the Senate in 1959—was president-elect of the American Bar Association and might be in a position to help. While Dr. Rome may have taken these actions "wholly on [his] own personal initiative," it seems likely that he and Blackmun had already discussed Blackmun's prospects for a Supreme Court appointment. At the very latest, Rome laid his cards on the table in December 1968, a month after he initiated his writing campaign and a month before the Nixon inauguration, when he sent his correspondence with Congressman Quie to Blackmun ("I think you ought to have these for your confidential files")

Dorothy Blackmun helped the new Justice with his robe. She said that, despite his avoidance of party politics, her husband was the most astute politician she had ever known.

and advised Blackmun of his letter to Ed Rome.[89] In May, following Fortas's resignation, Quie again took up his pen, writing to both the President and Attorney General Mitchell to renew his support for Blackmun.[90]

After Burger was nominated, Blackmun's prospects appeared dim. The Fortas seat was still vacant, but it appeared that geography would work against Blackmun. The Commonwealth of Virginia claimed the new Chief Justice as its own—by then the Burger family had been living in Arlington for fifteen years—but there was no question that Burger's roots were in Minnesota. It was improbable that a President would choose two successive nominees from that state. The next appointment—and any future appointments that might come along during Nixon's remaining term in office—would likely go to lawyers from other parts of the country. Blackmun knew the odds against two boyhood friends from the same Midwestern working-class neighborhood ending up on the Supreme Court at the same time were astronomical. After Burger became Chief Justice, Blackmun's mood darkened for months. Dottie Blackmun attributed her husband's discouragement to Burger's appointment. With Burger on the Court, Blackmun might never get there himself.[91]

Among the many letters that arrived in Burger's office congratulating him on his nomination was a curious one from Judge Pat Mehaffy of Little Rock:

> It may seem presumptuous on my part to even write as I only met you once a few years ago . . . but I have heard Harry Blackmun speak of you so often and with such esteem that it has left me with the feeling that I know you well.
>
> I have such high regard for Harry Blackmun as a man and as a judge

> that I was most hopeful he would receive an appointment to the Supreme Court, but you know he is such a modest fellow he would not raise a finger in his own behalf.[92]

Mehaffy, appointed by John F. Kennedy in 1963, was Blackmun's best friend on the Eighth Circuit.[93] A former assistant state attorney general and prosecutor, the Arkansas native had gone into private practice in Little Rock in the early 1940s. With his partners, he built one of the most politically connected law firms in the state. One of those partners, Herschel Friday, had frequent dealings with a New York bond lawyer named John N. Mitchell, who had become a close friend and was now Nixon's Attorney General, responsible for vetting and recommending Supreme Court nominees.

Immaculately dressed, with a low, gravelly voice, Mehaffy had long been a behind-the-scenes mover and shaker in his home state's Democratic Party, and he knew the state's officials in Congress.[94] Arkansas wielded outsize influence in the nation's capital. Its two U.S. Senators had served in that chamber continuously since the mid-1940s and held important committee chairmanships; in the House of Representatives, another Arkansan chaired the powerful Ways and Means Committee. Mehaffy prided himself on being the only person in his state who got along with everyone: the Faubus faction,[95] the McClellan faction,[96] and the Fulbright faction.[97] Conservative in many respects, he was a legendary raconteur with a talent for getting the more staid Blackmun to loosen up and laugh.[98] Blackmun respected Mehaffy as an able judge and delighted in his company.

In the words of an Eighth Circuit colleague of both Mehaffy and Blackmun, "Pat thought the world began and ended with Harry."[99] Like Judge Sanborn, who passed away six months after Mehaffy joined the court, Mehaffy saw in Blackmun a judge's judge. He respected Blackmun for his scholarship, common sense, integrity, and tireless work ethic. "If President Nixon could find two or three justices of Harry's ability," he told others, "he would be doing a great service to this country."[100] Mehaffy was determined to get his friend a seat on the Supreme Court and used his powerful Washington connections to help bring it about.

During the weekend immediately before Burger's Supreme Court investiture, John McClellan, Arkansas's senior U.S. Senator, visited Little Rock. On Saturday, June 21, during a daytime meeting and then over dinner that evening, Mehaffy convinced him that Blackmun was the ideal nominee for the remaining Court vacancy. Back in Washington on Monday, after Burger was sworn in as Chief Justice, McClellan dined aboard the presidential yacht Sequoia, where he "most forcefully" brought Blackmun to the attention of President Nixon. Mehaffy wrote to Blackmun of these developments, telling him that McClellan would meet with Attorney General Mitchell on Tuesday, after which he would call Mehaffy "to advise whether or not the time is right to set the hounds loose."[101] By "hounds," he meant Blackmun's supporters. Mehaffy was about to step into the role of lead dog as Blackmun's unofficial campaign manager. (Relying on an account of these events he heard from Blackmun, Judge Richard S. Arnold placed Mehaffy's intervention with McClellan and the latter's intervention with Nixon ten months later, after the April 8, 1970 defeat of the nomination of Judge J. Harrold Carswell, but the documentary evidence is to the contrary.[102])

That spring, the retired chaplain of Rochester Methodist Hospital recommended Blackmun to Minnesota Democrat Walter F. Mondale, who had succeeded Humphrey in the Senate following Humphrey's 1964 election as Vice President. Mondale sent

the recommendation to the Attorney General.[103] In June and July, two more of Blackmun's politically minded Minnesota friends—Gregg Orwoll, Blackmun's successor as resident counsel at the Mayo Clinic, and Robert A. Bezoier, president of Rochester's First National Bank—reached out to Minnesota's House Republicans and the Justice Department.[104] Judge Mehaffy advised from the sidelines:

> [A] movement in Harry's behalf should be started by the Minnesota congressional delegation—at least the Republican members of the delegation. If the congressional delegation would get busy on this and convey their strong recommendations to the Attorney General, then I am sure that lawyers and judges through the Eighth Circuit as well as other parts of the country would join in the project. I know that would be true in my part of the country and we probably would have started it here except for the most part we have been Democrats and are wary of putting too much Southern influence on such a movement.[105]

As much as he may have wished to seize the initiative himself, Mehaffy was mindful that "too much Southern influence" had the potential to backfire, causing northern and liberal constituencies to question Blackmun's stance on civil rights. "If, however, a campaign is initiated by the leader of the Minnesota Republican congressional delegation," Mehaffy reasoned, "it most likely would do no harm to supplement anything done in Minnesota by recommendations from other parts of the country." Once the Minnesotans got the ball rolling, Mehaffy would "do everything in [his] power" to help.[106] As they had a decade earlier, partners at Blackmun's old law firm went to work on his behalf, reaching out to clients who could assist with recommendations to the Nixon administration. They reported making "[v]arious communications to this effect," including "one approach through a partner in the old Nixon law firm."[107]

Encouraging news soon came from the nation's capital. On July 25, the *Washington Evening Star* featured Blackmun as a possible nominee.[108] "This is all to the good," Chief Justice Burger wrote after the article appeared. But he suggested that someone other than Blackmun would get the nod. "Seeds need time to grow, but they need planting!"[109] Burger was right. Just as quickly as it had appeared, Blackmun's name vanished from public view. Nonetheless, Blackmun took the possibility of being nominated seriously. Preparing for that contingency, he began collecting material that might be helpful if and when the call came. The file included a list of Blackmun's most important judicial opinions, headed by *Robinson v. United States*, in which he had memorably protested the advantages criminal defendants seemed to be gaining: "Somewhere the rights of the public and the rightful demands of orderly criminal procedure deserve protection, too."[110] Over the next twelve months, he would continue adding to his nomination file.

Although it is not clear how he came by the information, by August 8, 1969, Blackmun knew the likely nominee for the seat vacated by Fortas was Chief Judge Clement Haynsworth of the Fourth Circuit and that the announcement would be made "very soon."[111] Ten days later, on August 18, Nixon named Haynsworth as his choice for the Court. Any regret Blackmun felt at being passed over was quickly overshadowed by the firestorm that engulfed the new nominee. Haynsworth's nomination was widely perceived as politically motivated, part of Nixon's "Southern Strategy" to solidify the Republican Party's growing political base among disaffected Democrats in that part of the country.[112]

Unions and civil right groups opposed Haynsworth on policy grounds. AFL-CIO

Dr. James C. Cain, a specialist in internal medicine at the Mayo Clinic and personal physician to Senate Democratic Majority Leader Lyndon B. Johnson, told Blackmun he had never asked Johnson for a political favor but was willing to give it a try to advance Blackmun's appointment to the Eighth Circuit. Blackmun was Mayo's resident counsel when President Eisenhower nominated him in August 1959. Cain and Johnson are pictured here in October 1965 as Johnson recovered from surgery during his second term in the White House.

President George Meany testified that Haynsworth had taken the antilabor side in seven cases that were reviewed by the Supreme Court and been reversed in all of them—unanimously in six of the cases, with Justice Whittaker as the sole dissenter in the seventh.[113] Civil rights leader Clarence Mitchell testified that Haynsworth was a segregationist who would grant rights to black Americans "with an eye dropper."[114] Representative Shirley Chisholm of New York told the Judiciary Committee that Haynsworth's confirmation would make it difficult for black leaders to persuade young people "you do not have to riot in the streets."[115] But the main event was the pounding the nominee took on the issue that had felled Fortas: conflict of interest. In 1963, Haynsworth had cast the deciding vote in an unfair labor practices case in favor of the employer, a textile company.[116] The Textile Workers' Union complained afterward that he should have recused himself because of his interest in a vending machine company that had a contract with the parent company of the employer textile company to sell food in three of its plants. Discussion of Judge Haynsworth's interest in the Carolina Vend-A-Matic Corp. pervaded all eight days of his Senate Judiciary Committee hearing. In the middle of his ordeal, Blackmun's mother wrote her son, "I still can't understand the Haynsworth situation. I don't know but what you will be a very lucky man if you stay just where you are. This maligning of a man's character and integrity just gets me down."[117]

Haynsworth's nomination was defeated in a 55–45 Senate vote on November 21, 1969. "Judge Haynsworth was really put through a wringer and, in my view,

undeservedly so," Blackmun wrote a former law school classmate:

> It must have been a time of great distress and humiliation for his family and for him. I do not understand just why it was carried down to the actual vote. I suspect that there was poor staff work originally either in the White House or in the [Department of Justice]. I hope that he does not feel that he is destroyed for future work on the federal bench. What the next step will be I do not know. I would suspect that the President would not name another until Congress begins its second session. There would be little to gain by an earlier appointment and perhaps much to lose. The Court needs its ninth member. I only hope he or she will be a good, solid lawyer.[118]

The next nominee was someone whose name had originated with Chief Justice Burger the prior year, when the Nixon administration invited then-Judge Burger to suggest candidates for promotion within the judicial ranks.[119] Judge G. Harrold Carswell, a Republican and an Eisenhower appointee, had been serving on the U.S. District Court for the Northern District of Florida since 1958. In May 1969, President Nixon elevated Carswell to the Fifth Circuit. The Senate approved the nomination with no opposition from the floor, although the Leadership Conference on Civil Rights submitted a memo detailing Carswell's "strong bias against Negros asserting civil rights claims" as a district court judge.[120]

When Nixon nominated Carswell to the Supreme Court half a year later, his opponents were ready. Two days after the President announced him as his new choice for the Fortas seat, a reporter unearthed evidence that during a run for the Georgia legislature in 1948 Carswell had made a speech in which he declared his allegiance to segregation and white supremacy. Carswell immediately repudiated his words and ideas of twenty-two years before as "obnoxious and abhorrent to [his] personal philosophy."[121] Testimony during the Senate Judiciary Committee hearing on his nomination, however, cast strong doubt on Carswell's repudiation. In 1956, after the U.S. Supreme Court issued a ruling prohibiting the segregation of municipal recreational facilities, Carswell, while serving as U.S. Attorney, helped privatize a public golf course, a move many understood was motivated by a desire to place the club beyond the reach of the Court's ruling.[122] As a judge, Carswell had treated young black lawyers in civil rights cases with open hostility,[123] and he had given advice to a city prosecutor on how to flout a civil rights decision of the Fifth Circuit.[124]

Carswell was further singled out as a particularly undistinguished jurist. Two-thirds of his colleagues on the Fifth Circuit failed to extend the customary courtesy of endorsing his nomination.[125] Louis H. Pollak, dean of Yale Law School and later a federal district court judge, described Carswell as presenting "more slender credentials than any nominee for the Supreme Court put forth in this century."[126] Opponents pointed to Carwell's disproportionately high reversal rate as indicative of his deficiencies as a district court judge.[127] With little to be said in the nominee's defense, Senator Roman Hruska of Nebraska made an ill-advised attempt to stick up for Carswell during a broadcast interview. "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers," he ventured. "They are entitled to a little representation, aren't they, and a little chance."[128]

Blackmun watched closely as Nixon's second attempt to fill Fortas's seat unraveled. "I suspect that the President has had a commitment to the South and that, whatever happens to the Carswell nomination, he has fulfilled it," he wrote at the beginning of 1970. "The Court needs to have that empty chair filled. I received this impression when I had a chance to visit with the Chief. Actually, something has to be done to alleviate the mountain of work they have." Blackmun had been in Washington for an organizational meeting of the Federal Judicial Center's interim Advisory Committee on Judicial Activities when Carswell was nominated on January 19 and had met with Burger later the same evening.[129]

On Wednesday, April 8, 1970, the Senate rejected Carswell, 51–45. Nixon reacted with an indignant statement that "I cannot successfully nominate to the Supreme Court any Federal appellate judge from the South who believes as I do in the strict construction of the Constitution." He described the Senate's rejection of Carswell as an "act of regional discrimination."[130] His next nominee would not be from that part of the country. All of a sudden, being from Minnesota didn't look so bad.

The day after Carswell's defeat, Attorney General Mitchell called Blackmun and asked him to be in Washington by the next morning. Mitchell was solidly behind the Minnesotan, having been assured of his bona fides both by his close friend Hershel Friday, the Arkansas bond lawyer, and by Friday's former law partner—and Blackmun's close friend—Judge Pat Mehaffy. Chief Justice Burger's recommendation was another significant factor.[131] Blackmun flew to Washington that evening. He spent the first part of the following day, Friday, April 10, 1970, undergoing a lengthy interview with two of Mitchell's Assistant Attorneys General, Johnnie Walters, head of the Justice Department's tax division, and a middle-aged lawyer from Arizona named William H. Rehnquist, head of the Office of Legal Counsel.[132]

The preceding year, when Blackmun had first been considered for the Fortas seat before Nixon settled on Haynsworth, Rehnquist had been charged with reviewing Blackmun's Eighth Circuit opinions. After a "necessarily fragmentary" examination—presumably because Rehnquist was asked to complete the job on short notice—he concluded that Blackmun was "a responsible, conservative judge, attuned to the President's desire that judges 'interpret, not make the law.'"[133] He then summarized three decisions illustrating his point: one upholding the death sentence of a college student convicted of shooting and killing three bank employees while robbing the bank; the second upholding the dismissal of a civil rights plaintiff's complaint in a discriminatory housing case (Rehnquist added that Blackmun, however, had "not hesitated to enforce desegregation on [sic] local schools where he felt that the law required it"); and a third in which the Eighth Circuit held that the showing for a search warrant under the Fourth Amendment had been met.[134] Rehnquist went on to say of Blackmun, "I would not say that he is a top notch writer, and his opinions seem on occasion longer than necessary; however, they do deal with the points in issue."

Since that time, the Justice Department had undertaken a more comprehensive study of Blackmun's record, which would form the basis for a letter transmitted to the Senate Judiciary Committee over the signature of Assistant Attorney General Richard Kleindienst in support of the nomination.[135] This second canvass presented a more nuanced picture of Judge Blackmun, with its unidentified author concluding that Blackmun "can be fairly characterized as a conservative-to-moderate in both criminal law and civil rights," who "does not uniformly come out on one side or the other, though his tendencies are certainly more in the

conservative direction than in the liberal. His opinions are all carefully reasoned, and give no indication of a preconceived bias in one direction or the other."[136] The Kleindienst memo includes an assortment of decisions bearing out this assessment.

After Rehnquist and Walters finished grilling the prospective nominee, Blackmun and Attorney General Mitchell traveled to the White House for a meeting with the President. This was no mere formality: Nixon had met with neither Haynsworth nor Carswell before nominating them to the Court.[137] Twice burned, the President had some pointed questions for Blackmun.

"Judge Blackmun, what are you worth?" Nixon asked without preliminaries. Blackmun's hackles rose at what he felt was an inappropriate question, but answered that apart from the family's home in Rochester his net worth was probably less than $70,000. "We have reached the point where we have to put paupers on the Supreme Court," the President grumbled. "Do not misunderstand me," Nixon elaborated. "What I mean is that anyone with substantial wealth is under a disadvantage from the start."[138]

With institutions of higher learning across the country roiled by antiwar demonstrations, the President wanted to know if Blackmun was caught in the "generation gap." Was he able to communicate with his three daughters, now twenty-one, twenty-three, and twenty-seven? Had any of them been active in campus protests? Blackmun assured him on all these points.[139] Nixon warned Blackmun of the social set that would do its best to "elbow in" on his family after they moved to Washington. Would the judge and Mrs. Blackmun be able to resist craven wooing by the "Georgetown crowd"? Blackmun told President Nixon that he thought that they could.[140] When the President finished, Blackmun shared a concern of his own. He worried that his life-long relationship with the Chief Justice might cause some people to think that Burger would be able to influence his vote. "Look, you two grew up together," the President reassured him. "Your paths separated when you went to different high schools. But you have remained good friends. I don't see what anyone can find wrong with that."[141]

Meanwhile, FBI agents swarmed all over Rochester, St. Paul, Minneapolis, and points beyond to complete a background check on the new candidate.[142] Under the direction of former Deputy Attorney General Walsh, who was now its chair, the ABA Standing Committee on the Federal Judiciary compiled what was, by the standards of the time, a gargantuan list of references: it had interviewed all members of the Eighth Circuit, the chief judges of each of the federal district courts in the circuit, and other federal and state judges within the circuit; it had interviewed and received reports from over 100 lawyers who practiced in the Eighth Circuit; and it had interviewed the deans of four law schools within the circuit, twenty-five law school deans outside the Eighth Circuit, and a "substantial number" of judges and some lawyers outside the Eighth Circuit.[143] Blackmun had not been told to bring his tax returns to Washington, so Assistant Attorney General Walters flew back to Rochester, as did Blackmun, following the meeting with Nixon. After completing his review the next morning, Walters pronounced Blackmun's returns the cleanest he had ever seen.[144]

Then it was back to work as usual. Blackmun flew that evening, Saturday, April 11, to St. Louis, where the Eighth Circuit heard argument, to get ready for the court's April session. He heard cases all day Monday and Tuesday morning. Tuesday afternoon, April 14, he and the other judges assembled in a conference room for a Circuit Council meeting. By 3:30 p.m., there was an audible rumble in the hallway outside. This could mean only one thing. Blackmun returned to his chambers through adjoining offices, trying to avoid the gathering crush of

reporters and television cameras. But when he got there, the media burst in on him. It was at that moment Blackmun first heard the White House had announced his nomination. In that initial, impromptu press conference, Blackmun admitted to feeling "as though a ton of bricks" had landed on him.[145]

Blackmun flew home to Rochester the next day. Flashbulbs popped as the judge deplaned from the 5:30 p.m. Ozark Airlines flight from St. Louis; inside the terminal Dottie Blackmun was waiting with an enterprising young reporter named Nina Totenberg from the *National Observer* by her side.[146] On Friday, Blackmun held a formal press conference in his Rochester chambers.[147] For the first time in his life, the name "Harry Blackmun" was splashed all over newspapers across the country.

The *National Observer* story that ran the following week led with the Blackmun-Burger connection. It reported on Blackmun's Oval Office meeting and the concern he shared with the President that "some people might say that his vote would be subject to Mr. Burger's influence, that 'Blackmun was in Burger's pocket.'" The story also quoted Blackmun's mother, who recounted how, when Burger was appointed to the Court a year earlier, he invited Blackmun to let him know whenever he needed help sorting out recent Supreme Court decisions. "But Judge Blackmun," the story continued, "quickly declined the invitation, making it clear to the Chief Justice that he did not think receiving such assistance would be proper."[148]

Burger was displeased. On the eve of Blackmun's Senate Judiciary Committee hearing the following week, he sent Blackmun a letter filled with stern words of warning about the press. He assured his friend that not one member of the Court trusted any reporter—as far as he knew. If Blackmun let his guard down for even a second he would surely get burned. He should be especially wary of women reporters. "[T]rue to history—or is it biology—the female of the species is the more deadly," Burger opined.[149] Burger told Blackmun that the press would play on his vanity to win him to the liberal cause, and would do its best to come between them. "The activist-liberal-avant garde boys will spare nothing to create tension between Justices," Burger warned, "and they will especially go to work on us now because of our long friendship."

Burger also took the opportunity to allude to his own role in Blackmun's nomination. He recalled a conversation he had had a year earlier with Blackmun's twenty-seven-year-old daughter, Nancy, when the "happy prospect" of Blackmun's nomination to the Court "began to take shape in my mind as being within the range of possible accomplishment." Burger described how he told Nancy "what the 'next step' was" and how "[s]he opened those eyes of hers—very wide—and said something like, 'Do you think it's possible!'"[150]

Burger was not the only one looking back on his role in what had come to pass. After Blackmun's nomination was announced, letters of support for the prospective Supreme Court Justice began flowing into Senator McClellan's office. The Senator answered all of them, but when responding to correspondents he knew well enough to address by first name, he promised there was a good story behind it all. "I have personally been in touch with this situation for quite a long time," he wrote to federal District Court Judge Oren Harris. "I will tell you about it someday."[151] To the widow of another federal judge, he wrote, "It is my intention to support [Blackmun's] nomination. I will tell you a little story about this someday when I see you."[152]

Judge Mehaffy was in Little Rock on the day of Blackmun's Senate Judiciary Committee hearing. In that era, hearings on Supreme Court nominations were not televised, but with an informant in the hearing room, Mehaffy was

able to monitor the proceedings closely by telephone. In the middle of the day, he wrote to Blackmun:

> I'm keeping check on the action of the committee today and at the moment Senator Kennedy is questioning you. I know everything will be one hundred per cent all right ...
>
> If my informant is correct, everything is in perfect shape. I'll get a periodic call on it and will certainly be alerted if anything else needs to be done.[153]

This confirmation hearing, like the one ten years earlier when Blackmun was nominated to the Eighth Circuit, was almost a nonevent. It lasted only three hours. When the hearing opened, both Senators from Minnesota and two members of the House of Representatives from the state were in the room to introduce the nominee. Blackmun was the only sworn witness. No one had asked to testify against him. His credentials were sterling. The ABA had given him its highest rating.[154] Every judge in his circuit had endorsed him.[155] Somewhat grudgingly, labor would lend its support the following week.[156]

Civil rights groups did nothing to stand in Blackmun's way. In fact, NAACP Washington Bureau director Clarence Mitchell called Nixon's nomination of Blackmun an act of "divine intervention," lauding Blackmun as an "able and fair-minded person."[157] His opinion was informed by the experiences of Little Rock attorney John W. Walker, who, based on his representation of plaintiffs in school desegregation cases before the Eighth Circuit, observed that Blackmun might "be philosophically closer to [Justice] Brennan than anyone suspects."[158] Unlike civil rights advocates who suffered rough treatment at the hands of defeated nominee Harrold Carswell, Walker and his co-counsel had been met with courtesy and kindness when they appeared in Blackmun's courtroom. On "a few off-the-bench occasions," Blackmun had "indicated full sympathy and support for the civil rights cause" and had expressed "great concern" when the Attorney General supported efforts to delay school desegregation in Mississippi and with the Nixon Justice Department's "general change in direction" with respect to civil rights enforcement. In August 1969, the Nixon administration had taken the unprecedented action of asking for an extension of a court-ordered school desegregation deadline. Two months later, the Supreme Court rejected the request.[159] Passing along Walker's appraisal of Blackmun to the office of Senator Birch Bayh of Indiana, who had been a vocal opponent of both the Haynsworth and Carswell nominations, NAACP leader Mitchell observed that it looked as though the Justice Department's investigation had once again "missed some important points about the nominee's views *but this time the oversight was in our favor.*"[160]

Recalling the conflict-of-interest issue that had defeated Judge Haynsworth's nomination, Blackmun preemptively released all his financial records. He volunteered without being asked and ahead of the hearing the circumstances surrounding several cases involving companies in which he held small amounts of stock.[161] He had cleared each with the chief judge of his circuit before deciding to sit on the cases, but he acknowledged that he might act differently now given what had transpired in the last few years.[162]

Similarly, Blackmun preempted criticism of his opposition to capital punishment. Despite personal reservations, he had written several opinions upholding death sentences on the Eighth Circuit. In 1967, he drafted an opinion in a capital case that included a statement explaining his own views, only to withdraw it after every other member of the en banc panel, with one exception, objected.[163] A year later, he again decided to voice his opposition, but this time he did

not back down, although the other judges hearing the case, while joining his opinion, did not join his personal statement. The defendant's death sentence, Blackmun wrote,

> makes the decisional process in a case of this kind particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.[164]

Blackmun's candor about his deeply held belief, paired with his demonstrated ability to put it to one side in the fulfillment of his judicial duties, reassured those who needed reassurance that he would join the Court without any hidden agenda.[165]

As expected, Blackmun's friendship with Burger was raised during his hearing. A sympathetic Senator Edward M. Kennedy of Massachusetts asked whether Blackmun, as an Associate Justice, would be comfortable disagreeing with Chief Justice Burger. Blackmun readily acknowledged the inevitability of future differences. He anticipated occasions when the "friendship of the past" would "be strained mightily because of disagreement," assuring his interlocutor, "I do not fear this."[166]

At the end of the April 29 hearing, the Judiciary Committee decided not to vote until the following week, "in light of the long delays over the first two defeated nominees."[167] On May 5, the committee took "not more than three or four minutes" to vote Blackmun's nomination out to the floor of the Senate, unanimously.[168] When the full Senate took up Blackmun's nomination, some complained of a double standard that worked against Southerners, but all were united in their support of the man from Minnesota.[169]

On May 12, 1970, by a vote of 94–0, with six Senators absent (but who had indicated support for the nomination), the Senate confirmed Judge Blackmun as the 98th member of the U.S. Supreme Court.[170]

ENDNOTES

[1] During their first full term together on the Court, Blackmun and Burger voted together in 89.9% of decided cases. "The Supreme Court 1970 Term," 85 *Harv. L. Rev.* 351 (1971–1972). In sharply divided cases, they joined in the same result 89.1% of the time. Philip B. Kurland, "1970 Term: Notes on the Emergence of the Burger Court," 1971 *Sup. Ct. Rev.* 265, 268-269.

[2] See, e.g., "Blackmun '59 Job Tied to Burger Friendship," *Minneapolis Star*, Apr. 15, 1970, p. 10A; Henry J. Abramson, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II**, 5th ed. (Lanham, MD: Rowan & Littlefield Publisher, Inc., 2008), pp. 13, 240.

[3] *The Justice Harry A. Blackmun Oral History Project*, Harold H. Koh, interviewer, recorded July 6, 1994-Dec. 13, 1995, under the auspices of the Supreme Court Historical Society and Federal Judicial Center ("OH"), pp. 50, 141. http://memory.loc.gov/diglib/blackmun-public/series.html?ID=D09.

[4] Blackmun attributed the "standing on the corner" theory of judicial appointment to Associate Justice Tom C. Clark, who served on the Court from 1949 to 1967. Harry A. Blackmun, "Some Personal Reminiscences and What They Meant for Me," 29 *Journal of Supreme Court History* No. 3 (2004), p. 323; see also, e.g., Draft Remarks to U.S. Air Force Academy, Colorado Springs, Colorado, Jan. 28, 1975, Harry A. Blackmun Papers, Library of Congress, ("HAB Papers"), Box 1475 Folder 2.

[5] OH, pp. 50, 141.

[6] Memorandum to file, Sept. 25, 1959 ("HAB 1959 Memorandum"), HAB Papers, Box 50 Folder 2.

[7] Blackmun's diary entries during 1931 and 1932 document a frustrating search for a post-graduation law job and the tremendous relief he felt when Sanborn hired him as his law clerk. Harry A. Blackmun Diary,

HAB Papers, Box 11 Folder 13 (see, e.g., Apr. 22, Dec. 29, Dec. 30, 1931; Jan. 4, Mar. 9, Mar. 30, Apr. 5, Apr. 15, May 16, May 20, July 5–7, 11–12, 21–23, Aug. 1, 1932).

[8] HAB 1959 Memorandum; "Some Personal Reminiscences," p. 325.

[9] HAB 1959 Memorandum.

[10] U.S. Senate, *Hearing before the Committee on the Judiciary, Nomination of Harry A. Blackmun to Be Associate Justice of the Supreme Court of the United States*, 91st Cong., 2nd sess. (Washington, DC: GPO, 1970) ("*Blackmun Supreme Court Hearing*"), p. 31. The view expressed by Judge Sanborn, who had passed away six years earlier, was related in a letter from U.S. District Court Judge Miles W. Lord to Senator James O. Eastland, Chairman of the Senate Judiciary Committee. Lord's letter, dated Apr. 29, 1970, was admitted into the record of Blackmun's confirmation hearing.

[11] HAB to John B. Sanborn, Jr., Nov. 8, 1958, HAB Papers, Box 49 Folder 2.

[12] Sanborn to HAB, Nov. 10, 1958, HAB Papers, Box 49 Folder 2.

[13] Sheldon Goldman, **Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan** (New Haven: Yale University Press, 1997), pp. 137-138.

[14] Sanborn to HAB, Feb. 14, 1959, HAB Papers, Box 49 Folder 3; HAB 1959 Memorandum; Eighth Circuit Court of Appeals, list of prospective nominees, undated ("8–13-59" penciled at the top of the first page is the date of Blackmun's nomination; the content of the document suggests it was created in Feb. 1959), White House Central Files, General File, Box 81, 4-C-8 Endorsements folder, Dwight David Eisenhower Presidential Library ("DDEL").

[15] Sanborn to HAB, Feb. 14, 1959, HAB Papers, Box 49 Folder 3; HAB 1959 Memorandum.

[16] *Id.*

[17] Warren E. Burger to Sanborn, Feb. 20, 1959, HAB Papers, Box 49 Folder 3.

[18] HAB to Burger, Mar. 13, 1959, HAB Papers, Box 49 Folder 3.

[19] Morris B. Mitchell to Burger, Mar. 9, 1959, HAB Papers, Box 49 Folder 3.

[20] Goldman, **Picking Federal Judges**, p. 139.

[21] Burger to HAB, undated (marked "4–28-59" by HAB), HAB Papers, Box 49 Folder 3.

[22] Sanborn to HAB, undated (marked "4–30-59" by HAB), HAB Papers, Box 49 Folder 3.

[23] Larry Fitzmaurice, "Line Is Forming for U.S. Judgeship," *Minneapolis Star*, May 20, 1959, p. 1B.

[24] Robert E. Lee, "Mayo Counsel Top Choice for 8th Circuit Court Post," *St. Paul Pioneer Press*, May 22, 1959, p. 12.

[25] John C. McDonald, "Etzell Sees Minnesotan as Likely U.S. Appellate Court Appointee," *Minneapolis Morning Tribune*, May 25, 1959, p. 2.

[26] HAB to Burger, May 25, 1959, HAB Papers, Box 49 Folder 3.

[27] Undated, unsourced news clipping, HAB Papers, Box 50 Folder 3.

[28] Sheldon Goldman, **Politics, Judges, and the Administration of Justice: The Backgrounds, Recruitment, and Decisional Tendencies of Judges of the United States Courts of Appeals, 1961-4** (1965: unpublished PhD thesis), pp. 122-123; Goldman, **Picking Federal Judges**, pp. 139-140.

[29] Leo F. Murphy, Jr., to William P. Rogers, June 16, 1959 (transmitting unanimous resolution of the Third District Bar Association of the Minnesota State Bar Association), HAB Papers, Box 49 Folder 3.

[30] Arnold Hatfield to Dwight David Eisenhower, June 12, 1959; Leo F. Murphy, Sr. to Eugene J. McCarthy, June 23, 1959; Murphy, Sr. to Rogers, June 23, 1959, HAB Papers, Box 49 Folder 3.

[31] Burger to HAB, undated (marked "5–20-59" by HAB), HAB Papers, Box 49 Folder 3.

[32] Louis H. Gollop, "Judge Sanborn—'Retiring' But Not Retired," *St. Paul Pioneer Press*, May 24, 1959, p. 2; "Sanborn Named Senior Judge," *St. Paul Pioneer Press*, July 1, 1959, p. 13.

[33] Sanborn to HAB, June 24, 1959, enclosing letter from Burger to Sanborn, undated (marked "Rec'd June 24, 1959"), HAB Papers, Box 49 Folder 3; Robert E. Lee, "US Job Sought For MacKinnon," *St. Paul Pioneer Press*, June 16, 1959, p. 15. MacKinnon became a federal judge in 1969 after Burger urged a newly elected President Nixon to appoint him to the D.C. Circuit. Burger to HAB, undated (marked "3–31-69"), HAB Papers, Box 51 Folder 1.

[34] Burger to George E. MacKinnon, undated (marked "Recd 6/1/59"), George E. MacKinnon Papers, Box 15, Minnesota Historical Society ("MNHS").

[35] Burger to HAB, July 4, 1959, HAB Papers, Box 49 Folder 3.

[36] Note to file, Sept. 1, 1959 (report from Walsh that Blackmun's appointment was "OKed in June & Sen McCl[ellan] made him hold to Aug. McC[lellan] s[aid] he w[oul]d tell 2 Sens it w[a]s his fault." HAB Papers, Box 50 Folder 2; Anthony Lewis, "Senate Unit Set to Act on Judges," *New York Times*, Aug. 22, 1959, p. 38; Peter Edson, "The Snarl on Judgeships: Plain Politics Holds Up Twenty Nominations," *New York World-Telegram*, Aug. 31, 1959, p. 16.

[37] Burger to HAB, July 4, 1959, HAB Papers, Box 49 Folder 3.

[38] HAB to Burger, July 9, 1959, HAB Papers, Box 49 Folder 3.

[39] Note to file, undated, HAB Papers, Box 50 Folder 2; Peter Dorsey to HAB, July 16, 1959, HAB Papers, Box 49 Folder 3.

[40] Memorandum to file, July 15, 1959, HAB Papers, Box 50 Folder 2.

[41] Memorandum to file, July 17, 1956, HAB papers, Box 50 Folder 2.

[42] HAB 1959 Memorandum.

[43] Lewis, "Senate Unit to Act on Judges"; Edson, "The Snarl on Judgeships."

[44] HAB 1959 Memorandum.

[45] Note to file, Sept. 1, 1959 (4:30 p.m.), HAB Papers, Box 50 Folder 2.

[46] *Id.*

[47] Note to file, Sept. 1, 1959 (4:45 p.m.), HAB Papers, Box 50 Folder 2.

[48] Note to file, Sept. 2, 1959 (11:15 a.m. and 2:30 p.m.), HAB Papers, Box 50 Folder 2.

[49] HAB 1959 Memorandum. The logjam broke after President Eisenhower nominated Johnson's candidate for district court judge for the Eastern District of Texas on Monday, September 7. "Senate Confirms 13 as Federal Judges" *New York Times*, Sept. 10, 1959, p. 16; Editorial, "On Knowing the Right People," *New York Times*, Sept. 10, 1959, p. 34.

[50] Bernard G. Segal to HAB, Sept. 17, 1959, HAB Papers, Box 49 Folder 12.

[51] Keith went on to serve as Minnesota's Lieutenant Governor and an associate justice and chief justice of the Minnesota Supreme Court.

[52] HAB 1959 Memorandum; note to file, undated (recounting Sept. 8, 1959 telephone conversation between Humphrey and Keith), HAB Papers, Box 50 Folder 2.

[53] Morris B. Mitchell to Segal, Sept. 9, 1959, HAB Papers, Box 49 Folder 8.

[54] HAB 1959 Memorandum; note to file, Sept. 9, 1959, HAB Papers, Box 50 Folder 2. William J. Hickey was the president and general manager of H.M. Smyth Printing Company, a large commercial concern headquartered in St. Paul. Prior to her marriage to Blackmun in 1941, Dorothy ("Dottie") Clark was Hickey's executive assistant.

[55] Hickey to HAB, Sept. 14, 1959, HAB Papers, Box 49 Folder 8.

[56] "Blackmun Nomination Delay Seen," *St. Paul Dispatch*, Sept. 8, 1959, p. 19; "Blackmun Nomination Delay Seen," *St. Paul Pioneer Press*, Sept. 9, 1959, p. 17.

[57] "The Delay on Blackmun," *Minneapolis Star*, Sept. 10, 1959, p. 10A.

[58] HAB 1959 Memorandum; note to file, Sept. 11, 1959, HAB Papers, Box 50 Folder 2. Between 1947 and 1951, a federal Loyalty Review Board investigated more than three million government employees; thousands lost their jobs through dismissal or resignation based on their alleged political beliefs or associations. McCarthy, then a member of the House, supported legislation that would have given hiring preference for non-sensitive government jobs to employees who were dismissed from other government jobs as security risks.

[59] Letter from McCarthy to Horace R. Hansen, May 29, 1969, Eugene J. McCarthy Papers, Box 240, MNHS. The Senator's blue slip for Burger's nomination to the D.C. Circuit, which he never turned in, can be found in the same file.

[60] HAB 1959 Memorandum; note to file, Sept. 11, 1959, HAB Papers, Box 50 Folder 2. McCarthy had in fact already launched his investigation. Mrs. Geri Joseph, Chairwoman of the DFL State Central Committee, turned in a glowing report on Blackmun at the end of August. Geri Joseph to McCarthy, Aug. 31, 1959, McCarthy Papers, Box 59, MNHS.

[61] HAB to Sanborn, Sept. 12, 1959, HAB Papers, Box 49 Folder 8.

[62] The events in this and the next three paragraphs are recounted in HAB 1959 Memorandum.

[63] U.S. Senate, *Hearing Held before Subcommittee on Nominations of the Committee on the Judiciary, Nomination of Harry A. Blackmun to Be United States Circuit Judge for the Eighth Circuit*, Sept. 14, 1959 (Washington, DC: Ward & Paul, 1959).

[64] U.S. Senate, *Congressional Record*, 86th Cong., 1st sess., Sept. 14, 1959, p. 19580.

[65] Sanborn to HAB, Sept. 16, 1959, HAB Papers, Box 49 Folder 9.

[66] Author interview with Nancy Clark Blackmun, Sally Ann Blackmun, and Susan Manning Blackmun, Dec. 3, 2005.

[67] In September 1970, not long after the conclusion of the events described in these pages, Associate Justices Hugo L. Black and John Marshall Harlan would retire because of declining health, giving Nixon a total of four seats to fill during his first term in office. Black died later that month; Harlan died in December 1970.

[68] Lyndon B. Johnson, "The President's Address to the Nation Announcing Steps to Limit the War in Vietnam and Reporting His Decision Not to Seek Reelection," Mar. 31, 1968. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. https://www.presidency.ucsb.edu/node/238065. At the time of Johnson's announcement, the Gallup Poll reported that his over-all job approval rating was at an all-time low of 36%. "Johnson Rating in Poll Hits Low," *New York Times*, Mar. 31, 1968, p. 50. For a fuller exposition of the events leading up to Johnson's announcement, see Doris Kearns Goodwin, **Lyndon Johnson and the American Dream** (New York: Harper & Row, 1976), pp. 251–349.

[69] Earl Warren to Lyndon Johnson, June 13, 1968, Earl Warren Papers, Library of Congress, Box 667.

[70] The account of the Fortas affair that follows is drawn from Laura Kalman, **Abe Fortas: A Biography** (New Haven: Yale University Press, 1990), pp. 327-373.

[71] Fred P. Graham, "Senators Press Effort to Delay Action on Fortas," *New York Times*, July 12, 1968, p. 1; U.S. Senate, *Hearings before the Committee on the Judiciary, Nomination of Abe Fortas to Be Chief Justice of the United States and Nomination of Homer Thornberry to Be Associate Justice of the United States*, 90th Cong., 2nd sess. (Washington: GPO, 1968) ("*Fortas Hearing*"), pp. 45–46 (Senator Robert P. Griffin, Michigan).

[72] *Fortas Hearing*, pp. 47–49 (Senator Griffin).

[73] *Fortas Hearing*, Part II, Sept. 13 and Sept. 16, 1968.

[74] Graham, "Fortas Approved by Senate Panel; Filibuster Looms," *New York Times*, Sept. 18, 1968, p. 1; Graham, "Critics of Fortas Begin Filibuster, Citing 'Propriety,'" *New York Times*, Sept. 26, 1968, p. 1; Graham, "Senate Bars Move to End Filibuster by Fortas Critics," *New York Times*, Oct. 2, 1968, p. 1.

[75] Graham, "Fortas Abandons Nomination Fight; Name Withdrawn," *New York Times*, Oct. 3, 1968, p. 1.

[76] R.W. Apple, Jr., "Warren Consents to Nixon Request to Stay Till June," *New York Times*, Dec. 5, 1968, p. 1.

[77] Kalman, pp. 364-369, 373.

[78] David Alistair Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (Chicago: University of Chicago Press, 1999), pp. 98, 100.

[79] *Id.*, pp. 99, 242 n.5.

[80] Burger to HAB, Nov. 18, 1957, HAB Papers, Box 12 Folder 11.

[81] Burger to Herbert Brownell, Jr., undated [Sept. 1968], Herbert Brownell, Jr. Papers, Box 107, Burger 1968–1970 (2), DDEL. Burger's Ripon College address was excerpted in "What to Do About Crime in U.S.: A Federal Judge Speaks," *U.S. News & World Report*, Aug. 7, 1967, pp. 70–73.

[82] Peter Grose, "Rogers Denies Rumors of Leaving Post," *New York Times*, Apr. 24, 1969, p. 19; Graham, "Crucial Choice for Nixon: A New Chief Justice," *New York Times*, May 4, 1969, p. 7E; Robert B. Semple, Jr., "Fortas Quits the Supreme Court, Defends Dealings with Wolfson; Liberal Majority May Be Curbed," *New York Times*, May 16, 1969, p. 1; Sidney E. Zion, "Shadow of Impropriety over a Great Institution," *New York Times*, May 18, 1969, p. 1E; "Justice Abe Fortas on the Spot," *Newsweek*, May 19, 1969, p. 33 (naming Burger as a "current betting favorite"); Edward O'Brien, "Burger Considered as Fortas' Successor," *St. Louis Globe-Democrat*, May 21, 1969, p. 3A.

[83] Susan Manning Blackmun to HAB, undated (marked "Oct. 28, 1968") (copy on file with author).

[84] Author interview with Nancy Clark Blackmun and Susan Manning Blackmun, Feb. 7, 2006; see also Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (New York: Simon & Schuster, 1979; 1st Simon & Schuster paperback edition, 2005), p. 100.

[85] "Court Prospects Include Three Women," *New York Times*, Nov. 29, 1969, p. 22 (contemporaneous account referring to "original group of about 150 judges and lawyers" the Nixon administration considered in filling judicial vacancies); John L. Steele, "Haynsworth v. the U.S. Senate," *Fortune*, Mar. 1970, p. 91; John P. Frank, **Clement Haynsworth, the Senate, and the Supreme Court** (Charlottesville: University Press of Virginia, 1991), p. 24.

[86] Frank, pp. 24, 140 n. 5 (citing to Frank's May 20, 1987 interview with Mitchell).

[87] Howard P. Rome to Albert H. Quie, Nov. 19, 1968, HAB Papers, Box 1360 Folder 7.

[88] See Quie to Rome, Dec. 8, 1968, enclosing a copy of the reply he received from Nixon aide Bryce N. Harlow dated Nov. 29, 1968, HAB Papers, Box 1360 Folder 7.

[89] Rome to HAB, undated (marked "recd 12–20-68"), HAB Papers, Box 1360 Folder 7.

[90] Quie to Nixon, May 21, 1969, HAB Papers, Box 1360 Folder 7; Quie to John N. Mitchell, May 22, 1969, Box 1360 Folder 13.

[91] Author interview with Nancy Clark Blackmun and Susan Manning Blackmun, Dec. 2, 2005. Blackmun's mother noted the "feeling of depression" that weighed her son down that fall, although she attributed it to other causes. Theo Reuter Blackmun to HAB, Oct. 15, 1969, copy on file with author.

[92] Pat Mehaffy to Burger, May 22, 1969, HAB Papers, Box 50 Folder 6.

[93] OH, p. 182.

[94] Author interview with Allan Gates, Aug. 29, 2013 (by telephone). Gates, who clerked for Justice Blackmun in October Term 1974, was Judge Mehaffy's clerk the preceding year. Blackmun remarked on Mehaffy's skill in navigating Arkansas politics during "A Conversation with Justice Blackmun," an interview with Ted Gest taped at the Federal Judicial Center, Washington, D.C., for the Eighth Circuit Historical Society on November 29, 1985.

[95] Mehaffy's firm counseled Arkansas Governor Orval Faubus, who made international headlines in 1957 when he stationed National Guard troops at Central High School in Little Rock to prevent federally mandated desegregation.

[96] John L. McClellan represented Arkansas in the U.S. Senate from 1943 until his death in 1977. He was a senior member of the Senate Judiciary Committee at the time of Blackmun's nomination to the Supreme Court.

[97] An outspoken opponent of U.S. involvement in Vietnam, J. William Fulbright represented Arkansas in the U.S. Senate from 1945 until his resignation in 1974, and served as chair of the Senate Foreign Relations Committee from 1959 to 1974.

[98] Author interview with Daniel B. Edelman, Nov. 20, 2006. Edelman clerked for Blackmun on the Eighth

Circuit from 1969 to 1970 and on the Supreme Court during October Term 1970.

[99] Author interview with Judge Gerald W. Heaney, March 14, 2007. Heaney went on to say he was convinced that "without Pat Mehaffy, Harry Blackmun never would have been on the Supreme Court."

[100] Mehaffy to Robert A. Bezoier, July 3, 1969, HAB Papers, Box 1360 Folder 7.

[101] Mehaffy to HAB, June 23, 1969, HAB Papers, Box 1360 Folder 7; Presidential Daily Diary, June 23, 1969, Appendix B, Richard Nixon Presidential Library.

[102] Judge Arnold, who was appointed district court judge in 1978 and elevated to the Court of Appeals for the Eighth Circuit two years later, wrote of Blackmun's Arkansas connection in "Justice Harry Blackmun: Some Personal Notes," 43 *Am.U.L.R.* 699, 701 (1994).

[103] Raymond B. Spurlock to Walter F. Mondale, May 23, 1969; Mondale to John N. Mitchell, June 11, 1969, HAB Papers, Box 1360 Folder 12.

[104] Gregg Orwoll to Rep. Clark MacGregor, June 12, 1969; MacGregor to John N. Mitchell, June 19, 1969 (forwarding Orwoll's letter), HAB Papers, Box 1360 Folder 12; MacGregor to Orwoll, June 19, 1969 (advising that he had communicated Orwoll's recommendation of Blackmun to the Attorney General), Box 1360 Folder 7; Bezoier to Mitchell, June 23, 1969, Box 1360 Folder 15; Bezoier to Rep. Odin Langen, July 10, 1969; Langen to Harry S. Fleming, Special Assistant to the President, July 16, 1969 (forwarding Bezoier's letter); Bezoier to MacGregor, July [illegible], 1969, Box 1360 Folder 13; MacGregor to Bezoier, July 8, 1969 (acknowledging Bezoier's recommendation of Blackmun and advising that he had communicated it to the President and the Attorney General); Quic to Orwoll, June 17, 1969 (acknowledging Orwoll's recommendation of Blackmun); Congressman Ancher Nelson to Orwoll, June 23, 1969 (acknowledging Orwoll's recommendation of Blackmun and advising that he had communicated it to the Attorney General); Quie to Bezoier (acknowledging Bezoier's recommendation of Blackmun), June 27, 1969, Box 1360 Folder 7.

[105] Mehaffy to Bezoier, July 3, 1969, HAB Papers, Box 1360 Folder 7.

[106] *Id.*

[107] Robert J. Johnson to Bezoier, July 7, 1969, HAB Papers, Box 1360 Folder 7.

[108] Lyle Denniston, "Possible Supreme Court Nominees Reviewed," *Washington Evening Star*, July 25, 1969, p. A-5.

[109] Burger to HAB, undated (marked "recd 7–30-69"), HAB Papers, Box 1360 Folder 7.

[110] *Robinson v. United States*, 327 F.2d 618, 623 (8th Cir. 1964). For Blackmun's list of cases, see HAB Papers, Box 1357 Folder 5.

[111] HAB to Judge Fred Kunzel, Aug. 8, 1969, HAB Papers, Box 1360 Folder 7.

[112] Joel B. Grossman & Stephen L. Wasby, "The Senate and Supreme Court Nominations: Some Reflections," *Duke Law Journal* 1972 (Summer) 557, 578-579. For a comprehensive account of the failed Haynsworth nomination, see Frank.

[113] U.S. Senate, *Hearings Before the Committee on the Judiciary, Nomination of Clement F. Haynsworth, Jr. to Be Associate Justice of the United States*, 91st Cong., 1st sess., (Washington, DC: GPO, 1969) ("*Haynsworth Hearing*"), p. 163.

[114] *Id.*, p. 424.

[115] *Id.*, p. 479.

[116] *Darlington Manufacturing Company v. National Labor Relations Board*, 325 F. 2d 682 (4th Cir. 1963).

[117] Theo Reuter Blackmun to HAB, Oct. 15, 1969, copy on file with author.

[118] HAB to Russell C. Jewell, Dec. 3, 1969, HAB Papers, Box 16 Folder 1.

[119] John P. MacKenzie, "Crossing the Judicial Line," *Washington Post*, June 13, 1974, p. A22; **The Brethren**, pp. 8–9.

[120] Semple, "Southerner Named to Supreme Court; Carswell, 50, Viewed as Conservative," *New York Times*, Jan. 19, 1970, p. 1. For an in-depth account of the Carswell saga, see Richard Harris, **Decision** (New York: E.P. Dutton & Company, 1971), originally published as a two-part series in *The New Yorker*, Dec. 5 and Dec. 12, 1970.

[121] "Carswell Disavows '48 Speech Backing White Supremacy," *New York Times*, Jan. 22, 1970, p. 1; U.S. Senate, *Hearings before the Committee on the Judiciary, Nomination of George Harrold Carswell to Be Associate Justice of the United States*, 91st Cong., 2nd sess. (Washington, DC: GPO, 1970) ("*Carswell Hearing*"), pp. 4, 10–11.

[122] Graham, "Carswell Denies He Tried to Balk Club's Integration," *New York Times*, Jan. 28, 1970, p. 1; *Carswell Hearing*, pp. 11–13, 31–32, 36–37, 67–71, 77–79, 107–111, 117, 132, 207, 211, 218, 231, 254-66, 271-75, 279-81.

[123] Graham, "Senators Are Told Carswell Was 'Insulting' to Negro Lawyers," *New York Times*, Feb. 3, 1970, p. 15; *Carswell Hearing*, pp. 227-229.

[124] Lewis, "The Significance of Judge Carswell," *New York Times*, Mar. 7, 1970, p. 29; *Carswell Hearing*, p. 152.

[125] Bruce H. Kalk, **The Origins of the Southern Strategy: Two-Party Competition in South Carolina, 1950–1972** (Lanham, Maryland: Lexington Books, 2001), p. 120.

[126] *Carswell Hearing*, p. 242 (testimony of Louis H. Pollak, Feb. 2, 1970).

[127] *Carswell Hearing*, p. 228 (testimony of Leroy D. Clark, Feb. 2, 1970); U.S. Senate, *Congressional*

Record, 91st Cong., 2d sess., Mar. 26, 1970, pp. 9607-9610 ("Analysis of Judge Carswell's Record").

[128] Spencer Rich, "Hruska Calls Foes of Carswell Unfair," *Washington Post*, Mar. 17, 1970, p. A2.

[129] HAB to Jewell, Jan. 28, 1970, HAB Papers, Box 16 Folder 1; HAB Appointment Book, Jan. 19, 1970, HAB Papers, Box 60 Folder 8.

[130] Richard Nixon, "Statement About Nominations to the Supreme Court," Apr. 9, 1970. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/node/240982.

[131] Frank, p. 118.

[132] "Some Personal Reminiscences," p. 328.

[133] William H. Rehnquist, Memorandum to the Attorney General: Judicial Selection, July 10, 1969, HAB Papers, Box 1360 Folder 14.

[134] The cases are *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967) rev'd 392 U.S. 409 (1968), and *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), rev'd 393 U.S. 410 (1969).

[135] Richard Kleindienst to Eastland, Apr. 15, 1970, *Blackmun Supreme Court Hearing*, pp. 12–18.

[136] Memorandum for the Attorney General, Apr. 10, 1970, HAB Papers, Box 1360 Folder 13. Relying on a composite document prepared in Justice Blackmun's chambers and filed in Box 1549 Folder 8, several writers have identified Rehnquist as the author of more of the material in the Memorandum for the Attorney General than may fairly be attributed to him. The composite document is a transcription drawn from two different Justice Department memos, only one of which was signed by Rehnquist. See Box 1360 Folders 13 and 14; Box 1382 Folder 1.

[137] Nina Totenberg, "Judge Worries About Ties to Chief Justice," *National Observer*, Apr. 20, 1970, p. 18.

[138] "Some Personal Reminiscences," p. 328.

[139] OH, p. 149.

[140] OH, p. 148; "Some Personal Reminiscences," p. 329.

[141] Totenberg, p. 1.

[142] Federal Bureau of Investigation, Freedom of Information Act File No. 77-80639, HAB Papers, Box 1574 Folders 1–5.

[143] *Blackmun Supreme Court Hearing*, p. 9.

[144] OH, p. 143.

[145] "Supreme Court Nod: Judge 'Overwhelmed,'" *Minneapolis Star*, Apr. 15, 1970, p. 4D.

[146] Jack Erwin, "Nominee Makes Triumphal Entry to Rochester in Reserved Way," *Rochester Post-Bulletin*, Apr. 16, 1974, p. 28; OH, p. 147.

[147] Nancy Strobel, "'Reserved' Blackmun Has His Lighter Side," *Rochester Post-Bulletin*, Apr. 18, 1970, p. 1; Austin C. Wehrwein, "Blackmun's Clean Breast," *Minneapolis Star*, Apr. 22, 1970, p. 5.

[148] Totenberg, p. 1.

[149] Burger to HAB, Apr. 27, 1970, HAB Papers, Box 1360 Folder 8.

[150] Burger placed the exchange with Nancy Blackmun in the Supreme Court courtyard on May 21, 1969, the date of Burger's nomination. It is more likely that the conversation took place on June 23, 1969, when the entire Blackmun family was in Washington to witness Burger's swearing-in as Chief Justice.

[151] John L. McClellan to Oren Harris, May 1, 1970, John L. McClellan Collection, Special Collections, Riley-Hickingbotham Library, Ouachita Baptist University, Box 556 Folder 2.

[152] McClellan to Mrs. Gordon E. (Elizabeth) Young, Apr. 23, 1970; see also McClellan to E.J. Butler, Apr. 23, 1970; McClellan to Courtney C. Crouch, May 1, 1970; McClellan Collection, Special Collections, Riley-Hickingbotham Library, Ouachita Baptist University, Box 556 Folder 2.

[153] Mehaffy to HAB, Apr. 29, 1970, HAB Papers, Box 1360 Folder 8.

[154] Walsh, ABA Standing Committee on the Federal Judiciary, to Eastland, Apr 28, 1970, *Blackmun Supreme Court Hearing*, p. 9.

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

[156] "AFL-CIO Endorses Blackmun," *Minneapolis Tribune*, May 5, 1970, p. 4.

[157] Sanford Watzman, "NAACP Leader Hails Choice of Blackmun," *Cleveland Plain Dealer*, Apr. 16, 1970, p. 13-D.

[158] John W. Walker to Clarence M. Mitchell, Jr., Apr. 15, 1970, Memos, Letters & Notes, 1969–1970, Nominations: Supreme Court–Harry Blackmun, Judiciary Committee Files, Birch Bayh Senatorial Papers, Modern Political Papers Collection, Indiana University Libraries, Bloomington.

[159] *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

[160] Clarence M. Mitchell, Jr. to Robert Keefe, Apr. 21, 1970 (emphasis added), Memos, Letters & Notes, 1969–1970, Nominations: Supreme Court—Harry Blackmun, Judiciary Committee Files, Birch Bayh Senatorial Papers, Modern Political Papers Collection, Indiana University Libraries, Bloomington.

[161] Kleindienst to Eastland, Apr. 15, 1970, and Kleindienst to Eastland, Apr. 28, 1970, *Blackmun Supreme Court Hearing*, pp. 15–17 and 18–26.

[162] *Blackmun Supreme Court Hearing*, pp. 41, 45–49.

[163] Charles J. Vogel to HAB, Jan. 9, 1967; Marion C. Matthes to HAB, Jan. 9, 1967; Donald P. Lay to HAB, Jan. 10, 1967 (specifically requesting that Blackmun retain the language expressing his personal views); Floyd R. Gibson to HAB, Jan. 12, 1967; Martin D. Van Oosterhout, Jan. 13, 1967; Mehaffy to HAB, Jan. 16, 1967; HAB to Vogel, Van Oosterhout, Matthews, Mehaffy, Gibson, and Lay, Jan. 23, 1967, HAB Papers, Box 38 Folder 15. The case was *Pope*, 372 F.2d.

[164] *Maxwell v. Bishop*, 398 F.2d 138, 153–154 & n. 11 (8th Cir. 1968). Maxwell was a black man who had been convicted and sentenced to death for the rape of a white woman.

[165] *Blackmun Supreme Court Hearing*, pp. 59–61 (questioning by Senator Hiram L. Fong, Hawaii).

[166] *Blackmun Supreme Court Hearing*, p. 40.

[167] "Hill Panel Puts Off Vote on Blackmun," *Washington Post*, May 1, 1970, p. A6 (quoting Senator Robert C. Byrd, West Virginia).

[168] Graham, "Blackmun Backed by Senate Panel," *New York Times*, May 6, 1970, p. 1; Bradshaw Mintener to HAB, May 7, 1970, HAB Papers, Box 1360 Folder 9.

[169] U.S. Senate, *Congressional Record*, 91st Cong., 2nd sess., May 12, 1970, pp. 15110–15111 (remarks of Senator Ernest F. Hollings, South Carolina), 15111 (remarks of Senator Spessard L. Holland, Florida; remarks of Senator Marlow W. Cook, Kentucky), 15112 (remarks of Senator Russell Long, Louisiana), 15112-13 (remarks of Senator Robert J. Dole, Kansas), 15119 (remarks of Senator Strom Thurmond, South Carolina).

[170] U.S. Senate, *Congressional Record*, 91st Cong., 2nd sess., May 12, 1970, p. 15117.

Contributors

William Davenport Mercer is a senior lecturer in the Department of History and College of Law at the University of Tennessee, Knoxville.

M. Margaret McKeown is a judge on the United States Court of Appeals for the Ninth Circuit.

Melissa Nathanson began her legal career as an associate at Cravath, Swaine & Moore and later served as senior vice president and counsel at a major investment bank. She is writing a full-scale biography of Justice Harry A. Blackmun.

Cynthia Nicoletti is the Class of 1966 Research Professor of Law at University of Virginia School of Law.

Hayden Thorne is a doctoral student at Victoria University of Wellington, New Zealand.

Corrections to vol. 44, no. 2.

Cover photo caption—the hike was about 175 miles and started at Lock 72, about 10 miles south of Cumberland, and they walked east to Washington.

Page 149—photo credit, Franz Jantzen, Collections Manager for Graphic Arts, Office of the Curator, Supreme Court of the United States
Page 203—photo credit AP Images

Illustrations

Page 138, Charles Balthazar Julien Fevret de Saint-Mémin portrait of Chief Justice John Marshall (1807–1808), National Portrait Gallery, Smithsonian Institution; gift of Mr. and Mrs. Paul Mellon
Page 140, Library of Congress
Page 145, Courtesy of the John Marshall House
Page 147, Library of Congress
Page 148, Circa 1860 photograph of the Tench Ringgold House by Mathew Brady, courtesy of the Historical Society of Washington, D.C.
Page 149, Architect of the Capitol
Page 155, File photo
Page 156, Photo by Vannerson and Jones, Library of Congress
Pages 157 and 158, Library of Congress
Page 160, Salt print created in 1867 by David H. Anderson, courtesy of The Valentine Historical Museum
Page 160, Edward Livingston Wilson, 1838-1903, photographer, Library of Congress
Page 171, file photo
Page 173, AP/Wirephoto
Page 175, UPI
Page 177, Both photos by *Los Angeles Examiner*/USC Libraries/Corbis via Getty Images
Page 180, AP/Wirephoto
Page 190, *Yakima Herald*
Page 192, National Park Service
Page 193, AP/Wirephoto
Page 195, Mineral King Development Records, Collection no. 0037, Special Collections, USC Libraries, University of Southern California.
Pages 197 and 198, papers of William O. Douglas, Library of Congress
Page 203, Collection of the Supreme Court of the United States
Page 208, This illustration by Gene Holtan appeared in the November 1971 issue of *Ramparts*
Page 217, *St. Paul Dispatch*, Nov. 4, 1959
Page 219, *Rochester Post-Bulletin*, Apr. 16, 1970
Page 222, AP/ Wirephoto
Pages 224 and 227, UPI Telephoto
Page 230, LBJ Library, photo by Yoichi Okamoto

Cover image: In 1954 Justice William O. Douglas led a 30-mile hike along the Chesapeake and Ohio Canal from Washington, D.C. to Cumberland, MD to protest the *Washington Post*'s endorsement of a scenic highway project. Courtesy of Charles Reich.