Great American Lawyers

AN ENCYCLOPEDIA

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VOLUME ONE A–I

John R. Vile

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Preface

From colonial times to the present, American attorneys have played significant roles in U.S. history. Lawyers largely drafted early state constitutions, the Articles of Confederation, the Declaration of Independence, the U.S. Constitution, and most of the state and national laws that have been subsequently adopted. When he visited the United States in the 1830s, French writer and politician Alexis de Tocqueville noted that lawyers played roles in the United States similar to those played by the hereditary aristocracy in some European nations. Not only do attorneys fill the judicial branch of the government, but many have been prominent as members of Congress and as presidents.

Courtroom appearances are the most dramatic aspect of most attorneys' lives. Such roles provide continuing grist for the mills of novelists and television producers alike, and lawyers sometimes capture as much attention as the clients or the issues they defend. Although several such books were published in the nineteenth century, no comparable twentieth-century volume focusing specifically on lawyers has attempted to survey more than a dozen or so of the great litigators. *Great American Lawyers,* which provides essays of approximately 2,500 words on the lives and major cases of one hundred great American lawyer-litigators throughout U.S. history, should prove to be useful both as a library reference volume and as a book for lawyers, scholars, and general readers who are interested in the legal profession and in great U.S. trials.

This book is edited by Dr. John R. Vile, a political scientist at Middle Tennessee State University who is author of the *Encyclopedia of Constitutional Amendments* and editor of a CD-ROM, *History of the American Legal System,* both published by ABC-CLIO. It includes contributions from more than fifty lawyers, political scientists, historians, and other scholars from throughout the nation. Lawyers as diverse as John Adams, F. Lee Bailey, Melvin Belli, Johnnie Cochran, Clarence Darrow, Andrew Hamilton, Charles Houston, Abraham Lincoln, Belva Lockwood, Thurgood Marshall, Earl Rogers, Gerry Spence, Kenneth Starr, and George Wythe are among the subjects of this volume.

Introduction

Choosing the Great Attorneys: Neither Legerdemain nor Science

For individuals, like me, who often start their workday by chuckling over a calendar of lawyer jokes or swapping such anecdotes with colleagues, the very idea of compiling a book about great American lawyers may initially seem like an oxymoron, or contradiction. Americans seem to have a love-hate relationship with lawyers, akin to that which they have with their representatives in Congress (who are themselves often lawyers).[1] Most Americans have nothing but praise for their constitutional system,[2] which has arguably spawned such a large number of lawyers, and most Americans appear to respect the lawyers they know and employ. Still, Americans enjoy ridiculing, and sometimes even denigrating, the legal profession as a whole.[3] Moreover, there is a general consensus that the United States has more than enough attorneys and that more attorneys bring still more litigation. Many readers will undoubtedly have heard the story of the small town that could not support one attorney but found that it had more than enough business for two.

Percy Foreman once passed out business cards immodestly listing his partners as "Mose Moses (1297–1202 B.C.), Flavius A. Justinian (A.D. 483–565), William Blackstone (A.D. 1723–1780), and Daniel Webster (A.D. 1782–1852)."[4] Certainly, lawyers, judges, and legal commentators have made their mark throughout history. In addition to the names Foreman mentioned, one could cite the biblical Solomon, the Grecian orators,[5] Rome's Cicero,[6] and England's Matthew Hale and Sir Edward Coke.[7] Eighteenth-century Americans were familiar with great cases in English history, including the trial of William Penn and the trial of John Lilburne.[8] Some-

times conflicting commentaries by Coke, Blackstone, and other Englishmen played a vital role in educating the generation of American revolutionary lawyers,[9] some of whom had actually attended one of the courts of law in England, but many of whom were largely self-taught through the process of reading law in the office of an established attorney.

Lawyers played a prominent role in the founding of the republic. Although trained lawyers were relatively scarce in seventeenth-century America, where the educated gentry often served in such roles,[10] lawyers were fairly well established by the time that Andrew Hamilton won the 1732 ruling on behalf of John Peter Zenger that helped expand freedom of speech and press in the colonies.[11] Patrick Henry and James Otis argued for colonial rights both in their respective state courtrooms and legislatures. A lawyer named Thomas Jefferson took the lead in crafting the Declaration of Independence (which reads, in part, like a legal brief), and another, John Dickinson, wrote the Articles of Confederation. Lawyers such as Alexander Hamilton, Edmund Randolph, Roger Sherman, John Jay, and James Wilson played prominent roles at the Constitutional Convention of 1787 and in subsequent ratification debates. This Constitutional Convention laid a foundation for a coequal judicial branch of government, in which, as Alexander Hamilton pointed out, legal training would be the unstated sine qua non.[12] Lawyers would also be prominent in the other two branches—with so many lawyers in Congress that a humorist proposed that the country had a government "of lawyers and not men"[13] and with three of the first five presidents (Adams, Jefferson, and Monroe) having been trained as attorneys.[14] Moreover, however familiar educated nonlawyer framers such as George Mason were with the rights of man (Mason largely crafted the Virginia Declaration of Rights, which served as a model for later documents), they themselves generally deferred to lawyers when it came to crafting laws and constitutions.

Early Americans, who had broken from Great Britain, prided themselves on the fact that they had no hereditary aristocracy, but when Alexis de Tocqueville of France visited the United States in the 1830s, he observed that lawyers were filling similar functions.[15] If abstract philosophical debates within the United States sometimes appeared dull when compared with those in other countries (America has arguably never produced a philosopher of the stature of Hegel, Rousseau, or Kant),[16] debates over legal issues—and especially that of slavery—reverberated throughout Congress and the nation.[17] The three most distinguished members of Congress in the mid-nineteenth century, Henry Clay, John C. Calhoun, and Daniel Webster, were all trained as lawyers, and Webster's arguments before the U.S. Supreme Court were among the best-attended social events in the nation's capital. Abraham Lincoln, U.S. president during the dark days of the

Civil War, first distinguished himself as a prairie lawyer and in debates for a Senate seat with another lawyer dubbed "the Little Giant," Stephen A. Douglas.

At the end of the nineteenth century and the beginning of the twentieth, lawyers helped manage and justify the fortunes that American entrepreneurs were making. At times, lawyers defending laissez-faire economics consciously portrayed themselves as defenders of the Constitution against the hoi polloi. Attorney John Randolph Tucker thus posed the following rhetorical question in 1892:

> Can I be mistaken in claiming that Constitutional Law is the most important branch of American jurisprudence; and that the American Bar is and should be in a large degree that priestly tribe to whose hands are confided the support and defense of this Ark of the Covenant of our fathers, the security of which against the profane touch of open and covert foes is the noblest function and the most patriotic purpose of our great profession?[18]

Not long after, a commentator noted that "of no other thing has our country more reason to be proud than of her long list of eminent jurists," and he proceeded to note that "safety of life, liberty of action, increase of wealth, material, mental and social expansion, depend fundamentally upon law—wisely enacted, and administered with impartiality and enlightenment."[19]

The debates between advocates of laissez-faire and the progressives often reverberated in the Supreme Court, where lawyers and justices such as Rufus and Joseph Choate, Stephen Field, Oliver Wendell Holmes Jr., Louis Brandeis, and Benjamin Cardozo articulated a gamut of political and social views. The media brought increased attention to lawyers and their cases, and a number of "trials of the century" propelled attorneys into the public spotlight. Clarence Darrow was but one of a number of modern lawyers who made a name for themselves not only defending the wealthy (which Darrow did toward the end of his career) but also promoting various social issues such as the cause of labor, opposition to the death penalty, and the right to teach evolution in the public schools.

With the rise of the New Deal (inaugurated by lawyer-president Franklin D. Roosevelt) and successive programs that concentrated greater power than ever in the nation's capital, lawyers continued to find themselves at the center of lawmaking, and lawyers continued to serve as key presidential and congressional advisors. Led by the National Association for the Advancement of Colored People and the American Civil Liberties Union, and a host of advocacy groups that would follow, other lawyers found that they could advance civil rights and liberties through courtroom adjudication. Still others continue to be propelled to fame by defending or prosecut-

ing the rich and famous. In the midst of such trials, modern lawyers may garner as much attention as the defendants. During the O. J. Simpson murder trial, it was common for the media to focus on the hairstyle and clothing of one of the prosecutors, Marcia Clark, or on reported tensions within the defense team, while other authors, attorneys, and law professors joined the media spectacle in their daily analyses of the day's proceedings, and *Tonight Show* host Jay Leno presented regular television skits of the "dancing Itos" (after the judge in the case).[20]

If it is undeniable that lawyers have played an important role in civilization generally and in American history in particular, the task of choosing one hundred attorneys for special treatment is not therefore easy. Based on my experience, few individuals are likely to know the names of one hundred great American lawyers, and even legal specialists may lack knowledge of a wide range of famous lawyers throughout American history. Among those scholars and practitioners with such knowledge, no two would be likely to compose an identical list of the top ten, much less of the top one hundred.[21]

From time to time, scholars survey colleagues to assess the greatness of American presidents or Supreme Court justices. As difficult as such jobs are, those who make such assessments do not need to define the initial pool but are drawing from a fixed and relatively narrow category of individuals. By contrast, the American Bar Foundation reports that there were 857,931 lawyers in 1995 alone, averaging one lawyer for every 303 persons.[22] There may be a few presidents who would not rank the attainment of this office as their highest achievement (visitors to Jefferson's Monticello home may remember that being president was not one of the three accomplishments—writing the Declaration of Independence, authoring the Virginia Statute for Religious Liberty, and founding the University of Virginia—for which Thomas Jefferson wished to be remembered), but there must be a very few. Individuals who are appointed to the U.S. Supreme Court hardly ever leave this post for another job, making it likely that, if they serve more than a minimum number of years, they too will be largely remembered for their accomplishments in this position. Again by contrast, a lawyer's reputation as a practicing attorney may well be overshadowed by the lawyer's accomplishments as a judge, an author, an elected officeholder, an advisor, a diplomat, or an entrepreneur, and evaluators might find it difficult to evaluate the worth of an individual as an attorney from his or her reputation in a subsequent position.

If there is anything that distinguishes American lawyers from others and adds drama to their lives, it is the lawyers' legally recognized ability to represent clients in the courtroom.[23] Bar associations ensure that this is a privilege reserved for those with legal educations. Moreover, although lawyers

are known for their ability to draft legislation, to give personal counsel in a wide variety of matters, and to draw up contracts, wills, and other conveyances, they are most renowned for their work in the courtroom, or what is generally referred to as litigation. Addressing the nature of a lawyer's work, Arthur T. Vanderbilt wrote, "Lawyers carry on a wide variety of activities but in the final analysis the advocate representing his client in court typifies the profession, for it is in the courts and other tribunals that the rights which the law protects must be vindicated."[24] Noting that litigators are "the closest thing America has to the Knights of the Round Table," Mary Ann Glendon observed that "nearly all of America's legendary lawyer heroes have been litigators."[25] She further noted that trials, rather than the more common legal routines, continue to be the primary subject matter of novels, movies, and television programs:

> Filmmakers, journalists, novelists, and television programmers are fascinated with the activities of the minority of lawyers who are engaged in courtroom work. Don't look soon for a TV sitcom on "Eleanor the Estate Planner," or an action-adventure series titled "This Is Your IRS," or real-life episodes from "Judge Wapner's Conciliation Clinic." Ratings thrive on crime, conflict, and courtroom drama.[26]

Jonathan Turley adds that "the top trial attorneys can become cultural icons."[27]

Although many authors focus on litigators and litigation in identifying outstanding lawyers, such terms can be used in at least two ways. Political scientists such as I tend to associate litigation with any trial appearances, whereas many lawyers tend to associate litigation with trial, rather than appellate, courts.[28] Either type of litigation is likely to receive far more attention than the more daily lawyerly routines; such litigation is accordingly more likely to shape public perceptions of the law.[29]

Having decided that the primary focus of this book would be on litigation (or "trial" work, broadly defined so as to include appellate advocacy) and being informed by my publisher that it was seeking approximately one hundred such individuals, I faced the formidable task of attempting to formulate a list of attorneys who might be considered for inclusion. It seemed clear that, if this book were to cover all of American history, attorneys should be chosen from the colonial and revolutionary period, as well as from the nineteenth and twentieth centuries. Given the obstacles that women and racial minorities often faced in gaining legal educations and/or admission to the bar, it would hardly be possible to include them in equal numbers,[30] but it seemed important to include enough of them to make it clear that such individuals are increasingly contributing to their pro-

fession.[31] Similarly, some individuals such as John Marshall, Joseph Story, and Tapping Reeve were included who might not have made it as advocates in their own right but whose influence on the profession was so profound as to mandate their treatment.

A problem with rating presidents and justices is that of introducing a bias when assessing persons who are still alive. Not only are such individuals more likely to be known to the reviewers, but such reviewers' assessments are more likely to be colored by ideological considerations.[32] I accordingly decided that living lawyers would not be excluded from consideration, but that their numbers should be kept relatively small and they should be chosen on the basis of reputation rather than the causes or philosophies with which they are identified. Readers should be warned that an attorney's inclusion or exclusion from this book is not intended as a seal of approval or disapproval of such an attorney's litigation abilities or ideologies, and, although there are entries on attorneys born in every decade from the 1720s forward, no attorneys under age fifty receive a full entry in this book.

Assessing lawyers, like assessing presidents and justices, often requires making complex moral judgments. It is certainly possible to be a virtuous president without thereby being regarded as an effective one (Jimmy Carter is sometimes cited as an example). Similarly, a president whose morality is questionable might be responsible for important accomplishments (Richard Nixon's diplomatic opening to the People's Republic of China or Bill Clinton's handling of the economy). Individuals motivated by the basest motives might profess high ideals; the general lover of humanity might not like, or get along with, any individual in particular. Ultimately, I decided that there would be no moral litmus test for the attorneys discussed in this book. Some such as George Wythe, John Adams, and Abraham Lincoln were individuals of obvious virtue and conviction, whereas others were better known for their trial expertise, and even for legal trickery, than for their moral distinction. Eschewing the notion that lawyers are, as a group, more immoral than others, I also reject the idea that every great practitioner has been a man or woman of virtue. At least for purposes of this book, being listed as a "great" lawyer does not necessarily mean that an individual would otherwise be classified as a "great" or "good" man or woman.[33]

Just as "great" cities often grow along "great" rivers, so too, "great" lawyers, or at least lawyers with great reputations, tend to emerge from "great" cases.[34] The landmark nineteenth-century case of *McCulloch v. Maryland* (1819), dealing with the constitutionality of the U.S. bank, thus featured a veritable "dream team" of six attorneys—William Pinkney, Daniel Webster, and William Wirt favoring the bank and Walter Jones, Joseph Hopkinson, and Luther Martin opposing it[35]—each of whom is the subject of an essay in this book. Individuals participating in a series of such

great cases are likely to have been highly regarded in their own day and to have left lasting reputations—although, in what might be an exception that helps prove the rule, I discovered that few modern scholars were aware of Hayden C. Covington, who successfully argued a large number of cases before the U.S. Supreme Court in the 1940s through the 1960s on behalf of the rights of Jehovah's Witnesses. In compiling a list of great lawyers, I have consulted numerous books dealing with noteworthy individual trials,[36] as well as several books that include essays on a number of such great trials.[37] I have tried to take into account the magnitude of the cases that attorneys have taken, while recognizing that one's participation or nonparticipation in such cases may often be fortuitous. Accordingly, I have not considered myself bound to include all attorneys who have participated in a single famous case.

The nineteenth century might have been more conducive to regarding lawyers, and perhaps men and women in general, as heroes than the centuries following have. Thus, in addition to scores of individual biographies, there are several nineteenth-century volumes that provide multiple biographies of leading lawyers, and only lawyers, much along the order of this book.[38] I have made good use of these tomes in identifying eighteenth- and nineteenth-century lawyers for this volume. Similarly, there are several helpful modern volumes, generally less ambitious in scope, that group a dozen or fewer modern lawyers for discussion and/or inspiration,[39] that attempt to assess the legal profession or some part of the profession,[40] or that are helpful in identifying important lawyers in previous time periods.[41] In an essay that I have found to be quite helpful, a student of the ratings of U.S. Supreme Court justices has noted that justices about whom other individuals have written tend to be more highly rated than those about whom little is known.[42] So it is with lawyers. Especially with the rise of radio and television, some great lawyers are good writers and inveterate self-promoters; others are fortunate enough to have argued notorious cases or to have caught the interest of biographers for other reasons. I have generally assumed that lawyers who are the subjects of book-length biographies (many of which I have discovered and purchased during the course of editing this book through sales sites on the Internet) are more likely to have been influential than those who are not so extensively written about—this is one reason I have included an essay on Earl Rogers, even though he was not recommended on the surveys that I sent to scholars. Still, there are undoubtedly many relatively unknown greats (especially those who did not live in large cities where their reputations might have been better known)[43] whose papers may have been destroyed or who have yet to catch the attention of biographers and who have accordingly been missed in this volume.

I compiled a preliminary list of nearly ninety lawyer-litigators, including one or two individuals such as Elbridge Gerry and George Mason who I later discovered were not attorneys. I grouped these attorneys into three periods of American history (colonial and Revolutionary, nineteenth century, and twentieth century) and mailed surveys to more than one hundred individuals. Most were other political scientists, but some were legal historians or practitioners. Respondents were asked to cross names off the list that they did not think belonged and to suggest the names of individuals who were not listed who should be. In hopes of ensuring that I did not miss key lawyers, I also requested that respondents list the twenty-five American attorneys who they thought to be most worthy of inclusion.

Most scholars who responded to the survey also decided to check the names of lawyers whom they apparently recognized and thought should be included. Many respondents, however, simply commended me for my work on the list and indicated their own inability to rank more than a dozen or so lawyers (indeed, such responses suggest that knowledge of great lawyers is not a subject in which there is widespread current scholarly knowledge). At times, respondents included helpful comments. For example, one respondent noted that Justice William O. Douglas had once referred to Robert Jackson (with whom Douglas was not on a particularly friendly basis) as one of the greatest advocates before the U.S. Supreme Court. Another respondent for whom I have great respect questioned what he considered to be the inflated lawyerly reputation of a president, who has nonetheless been included in this volume. Still others questioned the lawyerly skills of individuals such as Roy Cohn and Richard Nixon, whom I had included on the original list but have not dealt with at length in this book. Altogether, nearly one hundred additional names were suggested that were not on my original list, although many received only a single nomination or two.

I have largely worked through this list looking for eligible entries by reading short biographies in the *American National Biography*[44] or other standard general reference works, with a special eye to the individual's courtroom reputation. Although I eliminated most of these individuals on the basis that they were not primarily known for their litigation work (I have covered some of these in shorter sidebars that I have included in this book), in some cases some valuable additions were made. Some individuals have been included in this book largely because of the advocacy of their inclusion by a scholar particularly interested in writing their entry. I believed that such persistence and willingness to write was sometimes a barometer of the strength of such sentiment.

A number of scholars reacted negatively to the suggestion that they rank the top twenty-five lawyers. One even wrote "silly" in response to this part

of the survey. Such responses undoubtedly registered a healthy skepticism about the objectivity of such rankings. For what it is worth (and this may be a better indicator of name recognition than of true greatness), the attorney who received the highest number of rankings was Thurgood Marshall (whose ranking, although not unexpected, may reflect a greater knowledge among contemporaries), with Clarence Darrow, Daniel Webster, and Louis Brandeis close behind, followed by F. Lee Bailey, Edward Bennett Williams, James Otis, and John Davis. Other attorneys receiving more than three nominations for the top twenty-five included (in alphabetical order) John Adams, Melvin Belli, Henry Clay, Archibald Cox, Morris Dees, Alan Dershowitz, William Evarts, Davis Dudley Field, Percy Foreman, Abe Fortas, Ruth Bader Ginsburg, Jack Greenberg, Andrew Hamilton, Charles Houston, Robert Jackson, Leon Jaworski, William Kunstler, Abraham Lincoln, Louis Nizer, Edmund Randolph, Laurence Tribe, William Wirt, and George Wythe.

Among scholars who responded to the survey and included their names were Henry J. Abraham of the University of Virginia; Stanley Brubaker of Colgate University; Cornell Clayton of Washington State University; Brannon Denning of Southern Illinois University School of Law; James W. Ely Jr. of Vanderbilt University; Leslie Goldstein of the University of Delaware; Richard Glenn of Millersville University; Ken Gormley of the Duquesne University School of Law; Kermit Hall of North Carolina State University; Peter Handwork of Toledo, Ohio; Kenneth Holland of the University of Memphis; Harold Hyman of Rice University; Ronald Kahn of Oberlin College; David J. Langum of the Cumberland University School of Law; Anthony Lewis of the *New York Times;* Christopher N. May of the Loyola Law School in Los Angeles, California; Bruce Murphy of Lafayette College; Walter Murphy, retired from Princeton University; David Neubauer of the University of New Orleans; Stuart Nagel of the Dirksen-Stevenson Institute; Roger K. Newman of New York University; Mark Pohlmann of Rhodes College; Jack Rakove of Stanford University; John Reid of New York University; Don Roper of SUNY College at New Paltz; John Scheb of the University of Tennessee; Donald Grier Stephenson Jr. of Franklin & Marshall College; and Clyde E. Willis of Middle Tennessee State University.

I have consulted with many of the authors of essays in this book on a more informal basis. I have sought counsel from many others, especially my supportive colleagues in the Political Science, History, and Criminal Justice Administration Departments at Middle Tennessee State University, where I teach, and from colleagues in a wide variety of disciplines whom I see fairly regularly on the undergraduate mock trial circuit. In addition, I received numerous responses to my survey by e-mail, not all of which I

recorded. The help I have received from the Middle Tennessee State University library, and particularly the interlibrary loan department (especially Karin Hallett and Rhonda Armstrong), has been indispensable to the writing of this book. An article published by, and correspondence received from, Professor Jerry Uelmen at Santa Clara University School of Law has been useful in focusing on some attorneys with whom I was not familiar.

Ultimately, of course, the decision about which lawyers to include or exclude in this volume is mine and mine alone. I am not including the names of those whom I have consulted as a way of sharing blame but as a way of indicating that, although my selection has not been particularly scientific, I have tried to ensure that the selection was not simply arbitrary. I have also included shorter essays or anecdotes about individuals who have distinguished themselves in one or another area of the law but who have not been included among the hundred who are given fuller treatment in this volume.

More than fifty scholars and practitioners, who are identified and whose credentials are described elsewhere in this volume, have contributed essays to this book. Their interest in and dedication to this project has been a factor that continues to make me believe that this project is a worthy one. In most cases, authors have responsibly met deadlines and have responded positively to my suggestions. Although I provided no template, each writer was asked to include basic biographical information, including positions that lawyers may have held, while keeping the focus as much as possible on a lawyer's litigation skills. As one who has written about eighteen full essays for this volume, including essays of lawyers from each of the last three centuries, I have increasingly recognized that such information is not always easily accessible, and I have been humbled by the dedication that so many of the essayists have shown and I wish to thank each for his or her efforts.

I also wish to thank my friends at ABC-CLIO for suggesting this project and for helping me with it. Special thanks go to Alicia Merritt, Allan Sutton, Michelle Trader, and Liz Kincaid.

Some may question whether someone who is not a lawyer should edit a book like this. Ultimately, others will have to decide whether I have been adequate for the task. It is my hope that my training as a political scientist, my role as an undergraduate pre-law advisor and mock trial coach, and my personal friendships with a number of lawyers have given me both sufficient knowledge of and distance from the subject. That being said, although I have now taught U.S. constitutional law and courses on the judicial process and advised students interested in attending law school for more than twenty years, this book has helped me to realize how little I, and apparently many of my colleagues, actually know about many of the most influential of the legal profession. Like those in other professions, lawyers surely recog-

nize both that fame can be a noble spur to ambition and greatness and that recognition can be ephemeral.

I sincerely hope that this volume will be one way of directing renewed focus on those who have distinguished themselves as litigators and of rekindling serious thought about those qualities that make for a great lawyer. Although this book is intended to be primarily informational, I hope that it will also serve as a source of inspiration for those who are practicing or considering the practice of law and who view the legal profession and its study not simply as a job but as a calling. I enjoy humor too much to stop swapping lawyer jokes, but, contrary to what such jokes may often suggest, I am even more sincerely convinced after editing this book than before that the terms "great lawyers" and "great men (and women)" are not contradictory. Our republic and its citizens owe much to those who have served through our history as legal advocates, and I hope that this book is a worthy tribute to them.

—John R. Vile
Middle Tennessee State University

Notes

1. In "What the Public Dislikes about Congress," John R. Hibbing and Elizabeth Theiss-Morse thus note that "the truth is people disapprove of members of Congress as a *collectivity* while approving of Congress as an *institution*, just as they disapprove of the leaders of Congress while approving of their own members." Lawrence C. Dodd and Bruce L. Oppenheimer, *Congress Reconsidered*, 6th ed. (Washington: Congressional Quarterly, 1996), p. 62.

2. See Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1987).

3. This is probably not a new phenomenon. George Wharton Pepper noted both that "lawyers as a class have always been unpopular" and that "as individuals lawyers are as much trusted by their clients as are any other men I know." *Philadelphia Lawyer: An Autobiography* (Philadelphia: J. B. Lippincott, 1944), p. 341.

4. Michael Dorman, *King of the Courtroom: Percy Foreman for the Defense* (New York: Delacorte Press, 1969).

5. A student of the subject notes that Greek citizens were required to defend themselves in court. Although they could get advice from professional rhetoricians, laws prohibited payment for such services. See Robert J. Bonner, *Lawyers and Litigants in Ancient Athens: The Genesis of the Legal Profession* (1927; reprint, New York: Benjamin Blom, 1969), p. v.

6. See Robert N. Wilkin, *Eternal Lawyer: A Legal Biography of Cicero* (New York: Macmillan, 1947).

7. Henry Roscoe, *Lives of Eminent British Lawyers* (London: Longman, 1830).

8. For the influence of these cases, see Robert S. Peck, *The Bill of Rights & the Politics of Interpretation* (St. Paul: West, 1992), pp. 85–87 and pp. 117–120.

9. See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press, 1965).

10. Charles Warren describes this time as a time of "law without lawyers." Warren notes that a number of colonies actually prohibited lawyers from representing individuals in court for a fee. See *A History of the American Bar* (New York: Howard Fertig, 1966), pp. 3–18.

11. See James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger,* ed. Stanley Katz (Cambridge: Belknap Press, 1963).

12. In *The Federalist, no.* 78, Hamilton observed that "there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge." See *The Federalist*, ed. Paul Leicester Ford (New York: Henry Holt, 1989), p. 526.

13. Quoted in Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members*, 6th ed. (Washington: Congressional Quarterly Press, 1998), p. 120. Davidson and Oleszek note that 225 members of the 105th Congress were lawyers.

14. Mary Ann Glendon notes that twenty-three of the nation's forty-one presidents have been attorneys. See *A Nation under Lawyers* (New York: Farrar, Straus & Giroux, 1994), p. 12.

15. Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (Garden City, N.Y.: Doubleday, 1969), pp. 267–269.

16. For a similar observation, see Morton J. Frisch and Richard G. Stevens, eds., *The Political Thought of American Statesmen: Selected Writings and Speeches* (Itasca, Ill.: F. E. Peacock, 1973), pp. 1–2.

17. One scholar who has successfully emphasized the links between American political and legal thought is Alpheus T. Mason. See his *Free Government in the Making: Readings in American Political Thought*, 3rd ed. (New York: Oxford University Press, 1965). Also see Bernard Schwartz, *Main Currents in American Legal Thought* (Durham, N.C.: Carolina Academic Press, 1993), and, more recently, Allen C. Guelzo, *Abraham Lincoln: Redeemer President* (Grand Rapids, Mich.: William B. Eerdmans, 1999), pp. 21–25.

18. Cited in Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (New York: Russell & Russell, 1962), p. 149.

19. Alfred Salem Niles, "William Pinkney," in *Great American Lawyers*, ed. William Draper Lewis (Philadelphia: John C. Winston, 1907), vol. 2, p. 178.

20. Milton C. Cummings Jr. and David Wise, *Democracy under Pressure*, 8th ed. (Fort Worth: Harcourt Brace College Publishers, 1997), p. 262.

21. Thus, although he is not listed among the top one hundred attorneys in this book, Bernard Schwartz lists Thomas Jefferson among the top ten practitioners. See *A Book of Legal Lists* (New York: Oxford University Press, 1997). This author's judgment was based in large part on the fact that Jefferson spent most of his life in politics rather than in the practice of law. In assessing the greatness of Supreme Court justices, William G. Ross, in "The Ratings Game: Factors That Influence Judicial Reputation," points to what he calls "Longevity of Tenure: The Geriatric

Factor" at 411–414 *of Marquette Law Review* (Winter 1996), 79: 401–452. For other studies focusing on the difficulty of rating presidents and justices, see William D. Pederson and Ann M. McLaurin, *The Rating Game in American Politics: An Interdisciplinary Approach* (New York: Irvington, 1987), and William D. Pederson and Norman W. Provizer, eds., *Great Justices of the U.S. Supreme Court: Ratings and Case Studies* (New York: Peter Lang, 1993). The Cultural Center at Hofstra University in Hempstead, New York, sponsored a symposium entitled "The Leadership Difference: Rating the Presidents" on October 11, 2000. For a book helpful in demonstrating how difficult it is even to rank a single justice, see Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago: The University of Chicago Press, 1990). Since I conducted my own surveys attempting to define the top one hundred lawyers, Professor Gerald F. Uelmen has published an extremely useful article entitled "Who Is the Lawyer of the Century?" in the *Loyola of Los Angeles Law Review* (January 2000), 33:613–653. Uelmen, who believes there should be a "Lawyer's Hall of Fame," listed five criteria in attempting to choose the "lawyer of the century." These were: "(1) professional reputation; (2) participation in high-profile trials, especially those ranked as 'trials of the century'; (3) public recognition; (4) current accessibility of information about the individual's career and accomplishments; and (5) adherence to ethical standards" (p. 615). Uelmen focused on twentieth-century defense lawyers in criminal cases, thus excluding from consideration many of the lawyers included in this book. In seeking to identify the greatest lawyer of the twentieth century, Uelmen surveyed three groups, all in California and Arizona. When surveying twenty-five lawyers attending the annual Bryan Scheckmeister Death Penalty College in August 1999 for their top five choices, Uelmen got the following results: Clarence Darrow (19); Thurgood Marshall (10); Steve Bright (7); Gerry Spence (6); Millard Farmer (5); Michael Tigar (5); Johnnie Cochran (4); Earl Rogers (3); Edward Bennett Williams (3); and William Kunstler (3) (see Uelmen, p. 618). Twenty-two respondents from lawyers attending a convention of Arizona Attorneys for Criminal Justice meeting in September 1999 made the following choices: Clarence Darrow (19); Gerry Spence (17); William Kunstler (10); Thurgood Marshall (9); F. Lee Bailey (7); Michael Tigar (5); Alan Dershowitz (4); Leslie Abramson (3); and Johnnie Cochran (3). Twenty-five students in Uelmen's classes came up with the following rankings: Clarence Darrow (13); Johnnie Cochran (10); F. Lee Bailey (9); Alan Dershowitz (8); Gerry Spence (5); Thurgood Marshall (3); Barry Scheck (3); William Kunstler (2); Leslie Abramson (2); and Melvin Belli (1) (Uelmen, p. 618). Uelmen also surveyed contemporary lawyers who might be considered contenders for lawyers of the century, asking them to pick someone other than themselves for such a designation. Leslie Abramson picked Earl Rogers; F. Lee Bailey and Alan Dershowitz chose Edward Bennett Williams; Johnnie Cochran chose Thurgood Marshall; and Gerry Spence and Michael Tigar picked Clarence Darrow. Uelmen believes that Clarence Darrow was the greatest American defense attorney of the twentieth century. Professor Jonathan Turley has tried his hand at identifying the top four trial attorneys of the century in "The Trial Lawyers of the Century," *The Recorder* (December 15, 1999): 4. He lists

F. Lee Bailey, Delphin Delmas, Samuel Leibowitz, and Clarence Darrow. Like Uelmen, Turley believes that Darrow was the greatest of these.

22. Clara N. Carson, *The Lawyers Statistical Report: The U.S. Legal Profession in 1995* (Chicago: American Bar Foundation, 1999), p. 1. A book entitled *The Best Lawyers in America, 1999–2000*, ed. Steven Naifeh and Gregory White Smith, now the eighth in a series (Aiken, S.C.: Woodward-White, 1999), lists thousands of "best lawyers" by state and specialty, apparently based on surveys sent to the more than 14,000 attorneys listed in the previous edition (see p. vii). Entries are limited to names, firms, and addresses.

23. Arguably, good lawyers also know when *not* to go to court. Elihu Root reportedly once said that "about half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." Quoted in Sol Linowitz with Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (New York: Scribner, 1994), p. 4. Similarly, Lincoln advised, "Persuade your neighbors to compromise whenever you can," and once offered not to charge a client if the client agreed to settle his case out of court. See Guelzo, *Abraham Lincoln: Redeemer President*, p. 164.

24. Eugene C. Gerhard, *Arthur T. Vanderbilt: The Compleat Counsellor* (Albany, N.Y.: Q Corporation, 1980).

25. Glendon, *A Nation under Lawyers*, p. 40.

26. *Ibid.*, p. 262.

27. Turley, "The Trial Lawyers of the Century," p. 4.

28. Interestingly, Harvard law professor Alan Dershowitz, who specializes in appellate advocacy, considers himself "a lawyer of last resort." See Dershowitz's *The Best Defense* (New York: Random House, 1982), p. xv.

29. American law does not distinguish between those who do routine legal work advising clients and drawing up documents and those who appear in court (and especially higher courts) on behalf of clients, but in England these tasks are roughly divided between two different groups of lawyers, the solicitors and the barristers. For this distinction, see Henry J. Abraham, *The Judicial Process*, 7th ed. (New York: Oxford University Press, 1998), pp. 91–94. Also see J. H. Baker, *An Introduction to English Legal History*, 2nd ed. (London: Butterworths, 1979), pp. 140–142. Fans of John Mortimer's "Rumpole of the Bailey" stories (some of which have been faithfully produced for television) will recognize that Rumpole, notorious husband of "she who must be obeyed," is an English barrister, who regularly appears, as befits the more formal English setting, in court wearing a white wig. Rumpole was the creation of John Mortimer, a successful English author and barrister born in 1923.

30. See J. Clay Smith Jr., *Emancipation: The Making of the Black Lawyer, 1844–1944* (Philadelphia: University of Pennsylvania Press, 1993); J. Clay Smith Jr., ed., *Rebels in Law: Voices in History of Black Women Lawyers* (Ann Arbor: University of Michigan Press, 2000); Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* (Cambridge: Harvard University Press, 1988); Geraldine R. Segal, *Blacks in the Law: Philadelphia and the Nation* (Philadelphia: University of Pennsylvania Press, 1983); and Karen B. Morrello, *The Invisible Bar:*

The Woman Lawyer in America: 1638 to the Present (New York: Random House, 1986). More generally, see Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998).

31. The American Bar Foundation reports that the number of women lawyers has increased from 5,540, or 3 percent of the total, in 1951 (the first year in which it apparently began its surveys) to 202,308, or 24 percent of the total, in 1995. See Carson, *The Lawyers Statistical Report,* p. 4. The study does not address the number of racial minorities who are lawyers.

32. In "The Ratings Game," Ross describes the problems of assessment in terms of "Proximity in Time: The Myopia Factor" at 420–423 and "Ideology: The Political Correctness Factor," at 405–411.

33. Uelmen, "Who is the Lawyer of the Century?" cites "adherence to ethical standards" as a key measure of attorneys (pp. 633–642). Uelmen does note that ethical standards for attorneys have changed, and he defends Darrow's role as the premier twentieth-century attorney despite what he believes to have been his ethical lapses.

34. Uelmen's "Who is the Lawyer of the Century?" devotes considerable attention to what he describes as "participation in high-profile trials," identifying in an appendix to his article thirty-seven trials that have been identified as "trials of the century."

35. Robert M. Ireland, *The Legal Career of William Pinkney 1764–1822* (New York: Garland, 1986), pp. 182–183. John Marshall and Joseph Story, also treated in this book, were justices in this case.

36. These books are too numerous to mention here. One outstanding example of such a book is Edward J. Larson's *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* (New York: Basic Books, 1997).

37. These include Bryandt Aymar and Edward Sagarin, *A Pictorial History of the World's Great Trials from Socrates to Eichman* (New York: Bonanza Books, 1967), which, despite its title, includes far more than pictures; Edward W. Knappman, ed., *Great American Trials: From Salem Witchcraft to Rodney King* (Detroit: Visible Ink Press, 1994); Robert D. Marcus and Anthony Marcus, *On Trial: American History through Court Proceedings and Hearings*, 2 vols. (St. James, N.Y.: Brandywine Press, 1998); John W. Johnson, *Historic U.S. Court Cases 1690–1990: An Encyclopedia* (New York: Garland, 1972); John A. Garraty, ed., *Quarrels That Have Shaped the Constitution*, rev. ed. (New York: Harper & Row, 1987); R. Cornelius Raby, *Fifty Famous Trials* (Washington: Washington Laws, 1937); Stories of *Great Crimes & Trials from American Heritage Magazine* (New York: McGraw-Hill, 1973); Michael R. Belknap, ed., *American Political Trials* (Westport, Conn.: Greenwood Press, 1981); and Fred W. Friendly and Martha J. H. Elliott, *The Constitution, That Delicate Balance: Landmark Cases That Shaped the Constitution* (New York: Random House, 1984). Also see the scholarly series published by the University Press of Kansas entitled *Landmark Law Cases & American Society.* I have also drawn from a number of constitutional histories, including Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States* (New York: Alfred A. Knopf, 1988), and

Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Developments*, 7th ed., 2 vols. (New York: W. W. Norton, 1991).

38. The most comprehensive of these is an eight-volume work, edited by William Draper Lewis, entitled *Great American Lawyers* (Philadelphia: John C. Winston, 1907). Also see Gilbert J. Clark, *Life Sketches of Eminent Lawyers, American, English and Canadian to Which Is Added Thoughts, Facts and Facetiae* (Kansas City, Mo: Lawyer's International, 1895; reprint, Littleton, Colo.: Fred B. Rothman, 1963); and Henry W. Scott, *Distinguished American Lawyers with Their Struggles and Triumphs in the Forum* (New York: Charles L. Webster, 1891). In a related vein, see William L. Snyder, *Great Speeches of Great Lawyers* (New York: Baker, Voorhis, 1892). For another volume that appears to reflect the nineteenth-century attitude toward great men and includes, but is not limited to, lawyers, see George Cary Eggleston, *The American Immortals: The Record of Men Who, by Their Achievements in Statecraft, War, Science, Literature, Art, Law and Commerce, Have Created the American Republic and Whose Names Are Inscribed in the Hall-of-Fame* (New York: Putnam, 1901). For a book that also includes English greats, see Hamilton W. Mabie, *The Portrait Gallery of Eminent Lawyers* (New York: Shea & Jenner, 1880).

39. See, for example, Marian Calabro, *Great Courtroom Lawyers: Fighting the Cases That Made History* (New York: Facts on File, 1996); Phyllis Raybin Emert, *Top Lawyers and Their Famous Cases* (Minneapolis: Oliver Press, 1996); Daniel J. Kornstein, *Thinking under Fire: Great Courtroom Lawyers and Their Impact on American History* (New York: Dodd, Mead, 1987); Mark Litwak, *Courtroom Crusaders: American Lawyers Who Refuse to Fit the Mold* (New York: William Morrow, 1989); Emily Couric, *The Trial Lawyers, The Nation's Top Litigators Tell How They Win* (New York: St. Martin's Press, 1988); Peter Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1993); and Norman Sheresky, *On Trial: Masters of the Courtroom* (New York: Viking Press, 1977). One more ambitious modern volume is Darien A. McWhirter's, *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* (Secaucus, N.J.: Carol, 1998). This volume, which picks out one hundred individuals who have influenced the law in the United States, is not limited to Americans, to litigators, or to lawyers, although it obviously includes some of each. The individual ranked as having the greatest influence on Anglo-American law is nonlawyer James Madison. Others, by order, in the top ten are Alexander Hamilton, John Marshall, Cicero, Daniel Webster, Clarence Darrow, William Mansfield, Thomas Erskine, Edward Marshall Hall, and Earl Warren. For a book that prints closing arguments in ten great cases, see Michael S. Lief, H. Mitchell Caldwell, and Benjamin Bycel, *Ladies and Gentlemen of the Jury: Greatest Closing Arguments in Modern Law* (Touchstone Books, 2000).

40. See, for example, Martin Mayer, *The Lawyers* (New York: Harper & Row, 1967); Joseph C. Goulden, *The Million Dollar Lawyers* (New York: Putnam, 1978); and Mark Baker, *D.A.: Prosecutors in Their Own Words* (New York: Simon & Schuster, 1999). On a related theme, see Sam Schrager, *The Trial Lawyer's Art* (Philadelphia: Temple University Press, 1999). For a helpful treatment of all the U.S. Supreme Court justices, see Clare Cushman, ed., *The Supreme Court Justices: Illustrated Biographies, 1789–1993* (Washington: Congressional Quarterly, 1993).

For a book that describes the work of leading U.S. attorneys general, see Nancy V. Baker, *Conflicting Loyalties: Law & Politics in the Attorney General's Office, 1789–1990* (Lawrence: University Press of Kansas, 1992).

41. See, for example, Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (New York: Russell & Russell, 1962); and G. Edward White, "Prominent Lawyers before the Marshall Court," in *The Marshall Court and Cultural Change, 1814–1835* (New York: Oxford University Press, 1991), pp. 201–291. A more general treatment of the law in American history is Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989).

42. Ross, "The Ratings Game," pp. 423–430.

43. There are a number of treatments of state and city bars, as well as reminiscences, often by their children, of "country lawyers." See, for example, Charles H. Bell, *The Bench and Bar of New Hampshire* (Boston: Houghton Mifflin, 1894); Deane C. Davis, *Justice in the Mountains: Stories & Tales by a Vermont Country Lawyer* (Shelborne, Vt.: New England Press, 1980); Milton S. Gould, *The Witness Who Spoke with God and Other Tales from the Courthouse* [discusses the New York City Bar] (New York: Viking Press, 1979); Ben Jones, *Sam Jones: Lawyer* (Norman: University of Oklahoma Press, 1947); John Gwathney, *Legends of Virginia Lawyers* (Richmond: Dietz, 1934); Bellamy Partridge, *Country Lawyer* (New York: Grosset & Dunlap, 1939); James Summerville, *Colleagues on the Cumberland: A History of the Nashville Legal Profession* (Dallas: Taylor, 1996); and W. W. Robinson, *Lawyers of Los Angeles* (Los Angeles: Los Angeles Bar Association, 1959).

44. John A. Garraty and Mark C. Carnes, eds., *American National Biography*, 24 vols. (New York: Oxford University Press, 1999). These volumes, with vital personal information and short bibliographic entries after each essay, have proved almost indispensable. Also helpful has been Dumas Malone, ed., *Dictionary of American Biography*, 10 regular and 10 supplemental volumes (New York: Scribner, 1963).

Great American Lawyers

AN ENCYCLOPEDIA

ADAMS, JOHN

(1735–1826)

JOHN ADAMS
Library of Congress

BEFORE HE WAS A HERO OF THE Revolution, or vice-president or president of the fledgling United States, John Adams was a lawyer practicing in the Province of Massachusetts. His political convictions influenced his approach to law, and his experience at the bar in turn shaped the understanding of politics that he brought to his country's service later in life.

The citizens of Massachusetts in Adams's day were independent in spirit, famously knowledgeable about the law, and notoriously litigious (Burke 1993, 225–226). Then perhaps even more than today, court cases sometimes became the medium through which political controversies were acted out. In addition to being deeply involved in the day-to-day legal business of the colony, Adams tried a number of cases through which the colonists and crown carried out their prolonged struggle in the years before the Revolution. But Adams opposed extremism and believed in the right of legal representation for both sides, so he did not always work for the colonists.

John Adams was born on October 19, 1735, in Braintree, Suffolk County, to John Adams, a farmer, deacon, and shoemaker, and Suzanna Adams. His family never intended for him to practice law, a line of work that was barely respectable in those days. Although they were not affluent, the Adamses managed to send John to Harvard College, with the thought of his entering the clergy, as many of Harvard's graduates then did. Adams graduated in 1755, ranking fourteenth in a class of twenty-five. He agonized between the church and the bar, finally rejecting the former because his unorthodox religious convictions might have caused problems for him as a minister. But he resolved to approach the law in a godly way, to make of it a calling worthy of a religious man.

In 1756, Adams entered into his legal studies under an established lawyer named James Putnam. Although he was disappointed in the rather neglectful and indifferent Putnam, Adams learned a great deal during his time with him. He studied not only the texts of British law but also classics such as Cicero and Justinian (Coquillette 1984, 363–366). Another powerful influence was his acquaintance with James Otis, a brilliant lawyer who would figure in the struggle with the crown before his growing madness led to his withdrawal from public life. Adams was admitted to the bar in 1758, after the rather informal examination of his knowledge and credentials typical of the time.

When Adams entered the bar, the status of law as a "profession" was still rather doubtful. Not only did lawyers typically engage in other types of business in addition to law practice, but much legal work was done by amateurs, whom the sworn lawyers disdainfully called "pettifoggers" (McKirdy 1984, 313–319). The law in the colony was an amalgamation of English legal traditions and modifications made in light of the very different local conditions in America (Billias 1965, xix), and these modifications sometimes became points of contention between crown and colony.

Lawyers alternately delighted in and derided the baroque technicalities that ensnared unlucky litigants. Indeed, one such technicality met Adams on his first foray into practice. Like many a brilliant young lawyer since, Adams had an excellent intellectual grasp of the law but little practical understanding. His first case was *Field v. Lambert*. Luke Lambert's horse had broken into Joseph Field's enclosure, and Field held the horse as security for the resulting damages. Lambert, however, effected a "rescous," retrieving the horse from Field's property—a legally dubious tactic. Field hired Adams to draw a writ for the resulting litigation. Despite his diligence, Adams fell afoul of the arcana of eighteenth-century writ practice, and the case was dismissed. Crestfallen, young Adams feared that the incident would drive away future business (Peabody 1973, 46–50).

He need not have worried. Adams's practice was to grow into the busiest

in the colony. Though law partnerships in the modern sense were unknown, he typically would employ two or three law clerks. In addition, the smallness of the bar and the need for frequent travel on circuit brought Adams close to his fellow lawyers (Williamson 1890). He worked in all areas of law, handling cases involving admiralty and real property, contract disputes and criminal defense.

Adams's political philosophy shaped his understanding of legal practice. Like his nearest counterpart across the Atlantic, Edmund Burke, Adams conceived of political society in terms of an opposition of forces out of which a rough harmony could emerge. This led naturally to his belief in governmental structures that balanced competing interests and political passions. It led him as well to a natural affinity for the adversarial legal system, the theory of which, after all, is that through the clash of interested partisans the objective truth will emerge.

Adams's character controlled his courtroom style. Although he was plagued throughout his life by the fear that he was unduly vain, Adams in practice took a positive pride in eschewing success achieved through mere popularity. Brilliant, argumentative, sometimes caustic or even explosive, he preferred to prevail by sheer superiority of intellect. His courtroom style, accordingly, was heavy on legal substance and convincing argument and was rather lighter on the subrational forms of persuasion that were available to those of more pleasing demeanor.

By 1768, Adams was the busiest lawyer in Massachusetts (Wroth and Zobel 1965, 1:lix). That same year, British troops were garrisoned in Boston in response to the unrest provoked by the Townshend Acts. Despite the troops' presence, Boston in the years before the Revolution was largely in control of mobs—as mobs go, relatively disciplined and restrained and not leaderless, but mobs nonetheless. These mobs terrorized those responsible for enforcement and collection of Townshend duties. In addition to this extralegal pressure, the pre-Revolutionary struggle was played out in the civilian courts, where juries typically favored the patriot cause. The life of the British soldier was endlessly frustrating. He faced abuse and provocation from civilians, but he could not act, other than in cases of self-defense, without orders from civilian authorities. And for any offense, real or imagined, he could be hauled before a civilian court to face a jury full of hostile patriots.

Adams was deep in the politicized legal dramas of the day. In May of 1768, the *Liberty* docked at Boston and unloaded Madeira wine. John Hancock—a prominent merchant, political figure, and flamboyant patriot—owned the ship. Rumors were rife that much more wine had come off the ship than the twenty-five "pipes" (large casks) on which duties had been paid. A month later, Thomas Kirk, a "tidesman" or customs inspector, be-

latedly reported that on his refusal to allow illegal unloading of wine from the *Liberty* when it docked in May, he had been locked on the ship in steerage, from where he had heard the unloading of a large quantity of goods (Wroth and Zobel 1965, 2:174–175).

On this basis an action was commenced that resulted in forfeiture of the vessel. (The physical seizure of the vessel raised a mob that roughed up the responsible officials, broke the windows in their houses, and burned a ship belonging to one of them.) A later action against Hancock and others sought treble damages—three times the value of the illegally imported goods. Jonathan Sewell, who stood to receive a third of the proceeds as informer, brought suit. Here Adams appeared for the defense.

Trial in *Sewell v. Hancock* began in January 1769 and continued for some weeks. The outcome was legally inconclusive but politically significant. In March, Sewell moved to dismiss the case, for reasons that are still unclear. But by then the case had been widely publicized, presented in colonial newspapers as an example of the corruption and oppression of the enforcement of duties by crown officials. The result was a decided turn of public opinion against those officials (Wroth and Zobel 1965, 2:182–184).

Another politically charged case arose from the impressment of seamen. At that time the Royal Navy sometimes practiced a sort of ad hoc draft, boarding commercial vessels and pressing sailors into naval duty on the spot. As with the issue of taxation, Adams's legal practice led him into the center of the controversy.

Henry Panton was a lieutenant on HMS *Rose*, which on April 22, 1769, stopped the *Pitt Packet*, which carried a load of salt. Panton and others boarded the vessel, apparently looking for sailors to press into service. Michael Corbet and some others holed up in the forepeak to escape impressment. When Panton discovered them, a lengthy effort commenced to induce the men to leave the forepeak. They obstreperously refused, threatening violence to anyone who came near. Panton's men began tearing down a bulkhead to get at the sailors. Although accounts varied to some degree, it is clear that in the ensuing hostilities Corbet stabbed Panton in the neck with a harpoon, an injury from which Panton died two hours later (Wroth and Zobel 1965, 2:276–277).

Thomas Hutchinson, later governor of the colony, presided over the sailors' trial for murder. With Adams on the defense was James Otis (Shaw 1976, 62). There was no question the killing had occurred, so the question became one of justification. A crucial legal question was the legality of the impressment itself. If the impressment lacked legal authority, then the sailors were entitled to use deadly force, if necessary, to defend their liberty against what would be no more than an attempted kidnapping in the eyes of the law.

Adams delivered the closing argument, as Otis at that time was not enjoying one of his lucid intervals. Adams had earlier located an old statute banning impressment of American sailors; its continued validity was in doubt, however (Wroth and Zobel 1965, 2:323). Adams argued forcefully based on this statute, accusing the deceased, Panton, of "an open Act of Pyracy" and calling self-defense "not only an unalienable Right but our clearest Duty, by the Law of Nature" (Wroth and Zobel 1965, 2:324, 326). Perhaps to forestall further provocative statements, Hutchinson suddenly adjourned the trial without allowing Adams to continue. Though Adams later pronounced himself "mortified" at this treatment (Shaw 1976, 62), the court ultimately reconvened to render its verdict in favor of his clients.

Adams's most politically charged legal work was still to come, however, in the trials of the soldiers involved in the so-called Boston Massacre (known in Britain as the King Street Riot). This incident does not correspond to patriotic legend in which soldiers fire on a crowd in response to schoolboys throwing snowballs. In fact, the eight soldiers led by Captain Thomas Preston were besieged by a threatening mob calling for their blood. One of the soldiers had been knocked down, and a club had been thrown at them. In addition, patriots had set the church bells ringing to bring more people out to the mob. But the ringing of the bells usually meant that there was a fire, so the call of "fire" resounded in the streets. And members of the mob itself dared the soldiers to "fire." Finally they did, leaving five dead (Zobel 1970, 180–205). Whether Preston had given the order, or the soldiers had mistaken one of the calls of "fire" for an order, or they had fired on their own was to become an issue at trial, as was the question of whether the shootings were in self-defense.

The soldiers were charged with murder before the civilian legal system of Boston. The legal representation in the case was paradoxical. Prosecuting the soldiers was Samuel Quincy, a Tory. For the defense were Adams and Josiah Quincy, patriots. Various motives have been ascribed to explain why Adams took the case. His own account focused on the sacred right of representation in criminal cases. Others have suggested that the patriots, confident that a Boston jury would convict, believed they had the luxury of allowing the defendants the best defense so as to defuse criticism of the fairness of the trials (Zobel 1970, 220–221).

An important pretrial matter concerned a potential conflict of interest between Preston and his men. Preston had not fired a musket; he was accused instead of having given the order to fire. Obviously it was in his interest to deny having given the order. The men, on the other hand, claimed in their defense that they had fired in response to Preston's order. Because of this conflict of interest, if the trial were held today, Adams would have to withdraw from his representation of either Preston or his men. But there

was no such rule of legal ethics accepted in Adams's day, and the problem was handled by severing the trials, with Preston's to be held first (Zobel 1970, 242).

Then, as now, jury selection could be at least as important as the trial itself. Boston and surrounding jurisdictions chose jurymen for the Boston courts. With tensions high, this could have odd results—for instance, the attempt to prosecute those responsible for the riot following the seizure of Hancock's *Liberty* was complicated when the town returned as potential jurors men allegedly involved in the riot. In *Rex v. Preston*, the defense managed jury selection beautifully, packing the jury with Tory sympathizers (Wroth and Zobel 1965, 3:19). This, combined with the likelihood of a royal pardon in case of conviction, made Preston's prospects relatively good, provided he could escape lynching, which loomed as a much-discussed possibility for some time.

The trial lasted five days; it was said that it was the first criminal trial in the province to exceed one day. Testimony concerning whether Preston gave the order was sharply conflicting. Some witnesses said they had heard him give the order, but others said they had heard no order, or that the word "fire" came from another man standing behind the soldiers. The witnesses identifying Preston as giving the order apparently misidentified his clothing, raising the possibility that they had mistaken someone else for him. Under eighteenth-century practice, Preston himself could not testify.

In closing argument, Adams echoed his remark in *Corbet* about self-defense, calling it "the primary Canon of the Law of Nature" (Wroth and Zobel 1965, 3:84; see also Zobel 1970, 260–264). He went on to question whether Preston had in fact ordered the soldiers to fire. Without accusing the crown witnesses of perjury, he suggested that their testimony resulted from "mistakes" or from emotions aroused by the events of that night. With his skillful performance and the contradictory state of the evidence, even a truly impartial jury probably would have acquitted (Zobel 1970, 255). As it was, the outcome was in little doubt. Preston went free.

There remained the trials of the soldiers, a more doubtful matter since at least some of them undoubtedly killed civilians. Once again, the defense impaneled a favorable jury. Conflicting testimony marked this trial as it had Preston's, although this time the focus was more on the degree of threat to which the soldiers were subjected. Josiah Quincy wanted to introduce evidence of the townspeople's unruliness in general, independent of the events on King Street, but Adams stopped him—whether he did this because he wanted to prevent bringing the town into odium even if it meant risking his clients' defense, or because he sincerely believed such evidence would harm the defense, is still disputed (see Zobel 1970, 281–282). The defense did manage to have entered into evidence hearsay uttered by one of the

victims before his death to the effect that he did not blame the man who had shot him (Zobel 1970, 285–286).

Adams's closing argument began with a quotation from Marquis Beccaria: "If I can but be the instrument of preserving one life, his blessing and tears of transport, shall be sufficient consolation to me, for the contempt of all mankind" (Wroth and Zobel 1965, 3:242). This statement was said to move his listeners deeply. He went on skillfully to comb both the evidence and legal sources (lawyers at that time argued both law and fact to the jury). He saw no justification for euphemistic efforts to avoid calling those on King Street a mob:

> Some call them shavers, some call them genius's. The plain English is, gentlemen, most probably a motley rabble of saucy boys, negroes and molattoes, Irish teagues, and outlandish jack tarrs. And why we should scruple to call such a set of people a mob, I can't conceive, unless the name is too respectable for them. (Wroth and Zobel 1965, 3:266)

He closed by invoking the inexorable majesty of the law, impartial and austere, oblivious to all pleas except those founded on justice (Wroth and Zobel 1965, 3:269–270).

The jury decided that the soldiers had fired too soon, but that the shootings could at most be manslaughter, not murder. The jurymen were confident that two of the soldiers had fired, so they convicted them of manslaughter. Of the other six, apparently one had not fired, but the jurymen were not sure which one. Accordingly they acquitted all six.

Manslaughter technically carried the same penalty as murder: death. But a relic of feudal law, at once humane and barbarous, saved the two convicted soldiers. This was the legal device of "benefit of clergy," by which clergymen could procure a reprieve from punishment for certain offenses, including manslaughter. At the time the doctrine developed, almost the only literate people were clergy, so one proved that one was a member of the clergy by reading a certain Bible verse (Psalm 51:1, known as the "neck verse"). By a legal fiction, in Adams's day a defendant still could prove himself a clergyman simply by reading the verse in court. This loophole had a barbarous side, however: Benefit of clergy could be pleaded only once in a lifetime, and to ensure that the accused could never plead it again he had to be branded on the thumb. This grisly ritual carried out, the two soldiers joined their comrades in freedom (Wohl 1992, 658).

Adams continued to practice law after the Boston Massacre trials, but his practice gradually declined as he spent more time in the struggle with the mother country. His last appearance in court was in 1777, with the war under way, in *Penhallow v. The Lusanna*, a complex matter involving an at-

tempt to seize a ship allegedly trading with the British enemy (Wroth and Zobel 1965, 2:365). While in the courtroom, Adams received word that he, along with Benjamin Franklin, had been appointed commissioner to France.

There followed years of diplomatic work in Europe on behalf of his new country, the vice-presidency, and finally the presidency of the United States. On leaving that office in 1801, Adams's desire to return to the law apparently was thwarted by an imperfection of speech brought on by the loss of his teeth. So although he would live another quarter century, he never returned to the courtroom. Nonetheless, in his political activities and writings, the impress of his legal learning is clearly in evidence.

—Tim Hurley

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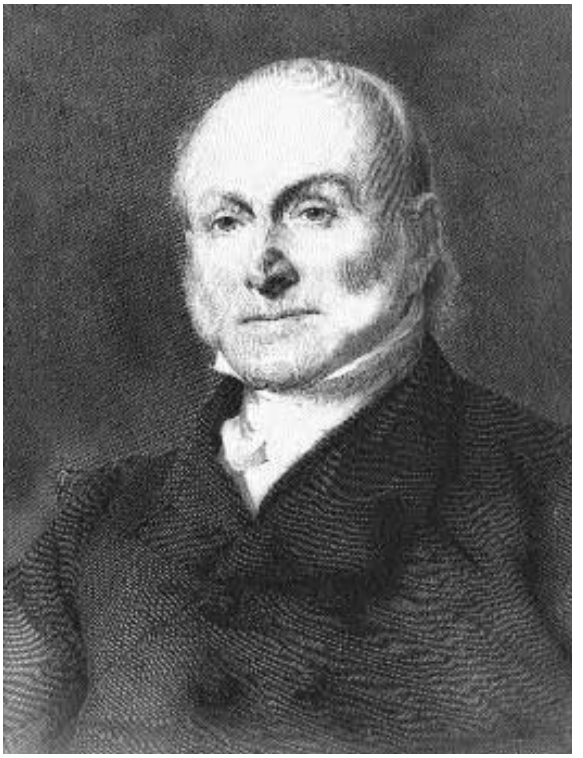
ADAMS, JOHN QUINCY

(1767–1848)



John Quincy Adams
Library of Congress

John Quincy Adams, the sixth president of the United States, is remembered today more for his contributions as a diplomat, scholar, and antislavery congressman than for his presidency, in which he failed to persuade Congress to accept his nationalistic program of internal improvements. Until the recent revival of interest in the Amistad case, Adams's legal career was also regarded as being of little consequence. Like many other presidents who were lawyers, Adams found the practice of law boring and frustrating and gladly abandoned it for politics. In many ways, however, Adams had a significant career at the bar, for he argued several landmark cases before the U.S. Supreme Court and was one of only two presidents (the other was William Howard Taft) to receive an appointment to the Supreme Court.

After graduating from Harvard College at age twenty with highest honors, Adams studied law in Newburyport, Massachusetts, in the office of Theophilus Parsons, a distinguished attorney who later served as chief justice of the Supreme Judicial Court of Massachusetts. Adams soon found that he had more taste for literature than for law. The tedium of his legal studies and the drudgery of his clerical work for Parsons led him to despair of his ability to master the vast corpus of the law. Suffering from mental de-

pression and exhaustion, Adams withdrew from Parsons's office after several months and continued his legal studies at the home of his parents in Braintree before returning to Parsons's office to resume his work at a more relaxed pace.

Adams commenced his practice in Boston in August 1790, shortly after his admission to the Massachusetts bar. Contrary to Adams's recollection late in life that he had gone to Boston as "a stranger" and "without support of any kind," Adams enjoyed special prestige as the son of the vice-president, and through his family connections he was personally acquainted with many luminaries of the Boston bar. Moreover, Adams set up his office in a house owned by his father and stocked his office shelves with his father's extensive law library. Despite these advantages, Adams was not able to establish a self-supporting practice for at least two years, during which time he accepted an allowance from his parents. During his first sixteen months in practice, Adams collected only twelve fees, amounting to the equivalent of a few thousand dollars. By 1792, when his practice began to burgeon, Adams received sixty-two fees amounting to £77, roughly the equivalent of $30,000 in today's money. His income increased to a healthy £222 in 1793, and he received £170 during his final six months of practice in 1793.

Like most lawyers of his day, Adams had a diverse practice, dispensing business advice to clients, drafting wills, and handling litigation that required the preparation of writs and frequent court appearances. While most of his business involved commercial matters, Adams assisted at least two clients with naturalization proceedings and prepared petitions to Congress for at least two others.

Even after Adams's practice began to prosper, he remained frustrated with the intellectual aridity of the law. He also continued to question his avocation for the law, and his principal passions remained literary and political. Throughout his first four years in Boston, Adams found ample time to indulge these interests. During 1791, he published eleven anonymous essays in the *Columbian Centinel* attacking the French Revolution. During 1793, Adams published in the same newspaper a series of essays defending President Washington's declaration of neutrality in the war between Britain and France and another series denouncing the intrusion of the French ambassador into American politics. Adams also participated in local politics, serving on committees to change the boundaries of Quincy and to effect police reform.

Adams was delighted to escape the tedium of his law practice by accepting Washington's appointment as minister to the Netherlands in May 1794, even though his practice was swelling and he believed that his diplomatic service would ruin his legal career. Adams doubted whether he could re-

Early Women Lawyers

America's first woman lawyer appears to have been Margaret Brent, a wealthy cousin of Lord Baltimore, who arrived in St. Mary's Parish, Maryland, in 1638 and was addressed in court as "Gentleman Margaret Brent" (Morello 1986, 3). Brent was quite active at the bar but was denied a vote in the Maryland assembly on the basis of her sex. Brent handled the estate of Leonard Calvert and is credited with making the unpopular but prudent decision to pay troops out of Lord Baltimore's estate when Calvert's was found to be deficient. Brent moved to Virginia and died in Westmoreland County in 1671 (Morello 1986, 7).

Although some women apparently represented themselves in court and some may have been practicing at the local level, it was not until 1869 that Belle Babb Mansfield, a woman in Mount Pleasant, Iowa, officially passed that state's bar after graduating from Iowa Wesleyan College and becoming an apprentice in her brother's law firm. She subsequently became a college professor and administrator rather than practicing law.

Although she passed the Chicago bar examination, Myra Colby Bradwell subsequently lost her case seeking admission to the Illinois bar, a decision reaffirmed in 1873 by a 7–1 vote of the U.S. Supreme Court. The year before, Alta M. Hutett had become that state's first female lawyer after she and others worked to adopt state legislation permitting women to be lawyers.

In 1876, the U.S. Supreme Court denied Belva Lockwood's admission to the bar of that court, but in 1879 a bill passed Congress allowing for the admission of women. Lockwood subsequently became a strong advocate of women's suffrage. When Lockwood died in 1917, three years before ratification of the Nineteenth Amendment granting women the right to vote, women had been admitted to the bar in all but four states (Morello 1986, 36).

Long after women had begun practicing law, many men continued to argue that the profession was not suitable for women. Although he led many other reform efforts, Clarence Darrow is quoted as having told a group of Chicago women attorneys that

> You can't be shining lights at the bar because you are too kind. You can never be corporation lawyers because you are not cold-blooded. You have not a high grade of intellect. You can never expect to get the fees men get. I doubt if you [can] ever make a living. Of course you can be divorce lawyers. That is a useful field. And there is another field you can have solely for your own. You can't make a living at it, but it's worthwhile and you'll have no competition. That is the free defense of criminals. (Morello 1986, x)

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sume the mental discipline required by the law after enjoying the glamour of an ambassador's life, and he feared that he would lose his clients and fall hopelessly behind other lawyers of his own age who had continued to apply themselves to their profession.

Although Adams never again regarded the law as his primary occupation, he continued to practice law sporadically almost until the end of his life. After returning to the United States in 1801 after seven years of diplomatic service in the Netherlands and Prussia, Adams resumed the practice of law in Boston. Contrary to his expectations, he was able to establish a moderately lucrative practice at once, partly because U.S. District Court Judge John Davis appointed Adams as commissioner in bankruptcy as a political favor for Davis's appointment to the bench by John Adams. Although Adams continued this practice for eight years, until he was named ambassador to Russia in 1809, he spent most of these years immersed in politics and scholarship, serving briefly in the Massachusetts House of Representatives and later in the U.S. Senate from 1803 to 1808 and as professor of rhetoric at Harvard from 1806 to 1809.

During this period, Adams argued several significant cases before the U.S. Supreme Court. In a number of these cases, Adams espoused positions that were consistent with his advocacy of a strong federal government. One of the cases, *Fletcher v. Peck* (1810), was one of the most important in American history because the Court's decision unequivocally established that the Court had the power to invalidate a state statute. The decision also provided the Marshall Court with another opportunity to defend vested property rights. In *Fletcher,* Adams represented a party who had sold land to a buyer who contended that the seller lacked proper title because the seller had bought the land from the state of Georgia pursuant to a statute that the legislature later rescinded because it had been enacted as the result of bribery. Although the Court ruled against the seller because of a technical defect in his pleading, Chief Justice John Marshall indicated in remarks from the bench that he favored the substantive arguments made by Adams. The case remained on the docket and was re-argued a year later by Joseph Story after Adams had become ambassador to Russia. The Court declared in its decision that the rescinding statute was unconstitutional because it violated vested property rights and the Constitution's contracts clause, which prohibits any state from impairing any obligation arising under a contract.

In another case, *Hope Insurance Co. v. Boardman* (1809), Adams successfully argued that insureds who sued an insurance corporation in federal court on the basis of diversity of citizenship between the plaintiffs and the corporation did not need to allege the citizenship of the individual members of the corporation. The Court's decision in favor of Adams's position made it much easier for corporations to be sued in federal court, since diversity of citizenship was much more likely to be present if the citizenship of a corporation's members were not considered.

Adams also won another marine insurance case, *Head and Amory v. The Providence Insurance Co.* (1804), in which Adams argued that an agreement

to discharge an insurer's obligation was invalid because it was not in writing and was not executed in accordance with the terms of the insurance company's own rules. Adams lost another insurance case, *Church v. Hubbart* (1804), in which the Court found that Adams's client, a cargo insurer, was not relieved of liability for cargo allegedly seized by Portugal because the insurer had failed properly to establish that the cargo had been seized.

While serving as ambassador to Russia in 1809, Adams was, without his knowledge or consent, nominated by President James Madison and confirmed by the Senate for a seat on the U.S. Supreme Court. Learning of the appointment three months later, Adams rejected it on the grounds that he would not be able to return to the United States for another year and that judicial service did not suit his interests or abilities. Adams also feared that his disdain for the common law made him unfit to serve as an American jurist.

After the termination of his service in Russia in 1814, Adams served as commissioner to the peace conference in Ghent in 1814, as ambassador to Great Britain from 1814 to 1817, as James Monroe's secretary of state from 1817 to 1825, and as president from 1825 to 1829. Although Adams's familiarity with legal terminology and concepts were useful to him in all of these occupations, his legal training and experience do not appear to have profoundly influenced his performance in any of these positions. Adams's legal experience probably was most useful to him in helping him to evaluate the qualifications of candidates for federal judgeships during his presidency. Although Adams made a number of appointments to the lower federal courts, his influence on shaping the Supreme Court was negligible. His first nominee, Robert Trimble, died in 1828 after serving only two years. The Senate indefinitely postponed action on Adams's second nominee, John J. Crittenden, whom Adams named to succeed Trimble after Adams's defeat for reelection in 1828.

After leaving the presidency in 1829, Adams does not appear to have considered the possibility of resuming the practice of law. Instead, he served in the House of Representatives from 1831 until his death in 1848. As a representative from Massachusetts, Adams became one of the most vocal and tenacious opponents of slavery in Congress.

Adams's hostility toward slavery led to the most famous episode in his legal career—his successful representation of thirty-nine Africans who sought freedom from Spanish slave traders after mutinying aboard the slave ship *Amistad* in 1839. The Africans revolted during a voyage between ports in the Spanish colony of Cuba and had ordered their Spanish captives to sail back to Africa. The Spaniards secretly steered the *Amistad* toward the United States, where the Africans were jailed in Connecticut while the courts decided whether to free them or return them to Africa or to send

them to slavery in Cuba. Although Spanish law permitted slavery but forbade the importation of slaves into Spanish colonies, the Spanish government demanded the return of the Africans to Cuba. The case soon became a cause célèbre that highlighted the growing conflict between abolitionists and proponents of slavery.

After the proslavery administration of Martin Van Buren decided to appeal to the U.S. Supreme Court a federal circuit court's affirmation of a federal district court's ruling that the Africans had been illegally kidnapped and must be returned to Africa, an abolitionist defense committee persuaded Adams to work with the abolitionist Roger S. Baldwin in representing the Africans before the nation's highest tribunal.

During several days of oral argument in the case during the late winter of 1841, the government argued that international law required the United States to return the Africans to the Spanish authorities because a Spanish-American treaty of 1795 provided for the delivery of one nation's property on presentation of proper proof of ownership. Arguing for the Africans, Baldwin emphasized that the United States could not give extraterritorial force to a foreign slave law and that the Spaniards had failed to present proper evidence in support of their claims.

Following Baldwin's presentation, Adams delivered a highly emotional argument that stretched over most of two days. Adams eloquently denounced slavery in an appeal to principles of natural law and justice as expressed in the Declaration of Independence, and he attempted to demonstrate that Cuba conducted an extensive slave trade in violation of Spanish law. Drawing on his extensive knowledge of treaty law and practice, he tried to demonstrate that slaves could not be included in cargo as property unless they were specifically denominated as property. Adams argued with vehemence that the government's position would undermine the principle of habeas corpus by placing every American at the discretion of executive caprice or tyranny. Adams also argued at length that the Spaniards had improperly interfered in American domestic affairs by trying to persuade Secretary of State John Forsyth to cooperate in returning the Africans to Cuba, and that Forsyth had violated separation of powers principles in conniving with the Spaniards to circumvent the judicial process.

Although Adams's argument naturally incensed advocates of slavery, even some abolitionists believed that it was too histrionic and lacked legal precision. His role in the case underscored his essential impatience with the law and his tendency to evaluate legal issues from a political perspective. His argument's impact on the Court's seven-to-one decision in favor of the Africans is uncertain. Although Joseph Story, who delivered the Court's opinion, praised Adams's argument for its extraordinary power, he remarked that it covered too many extraneous points. Ignoring Adams's

sweeping appeals to justice and his contention that the Van Buren administration had unduly interfered in the case, the Court's opinion largely rested on the narrow ground that the government had failed to prove that the Africans were property. Since they were not proved to be slaves, the Court concluded that the 1795 treaty was not applicable.

While Adams's argument in the case may have lacked intellectual precision, Adams did not need to make a careful legalistic presentation, since Baldwin's argument and legal brief already had informed the Court of the salient legal issues. Adams's contribution was to infuse the case with his passion for justice, to appeal to the justices' sense of history and equity, and to lend the weight of his distinguished name to the case. Adams's argument also called widespread public attention to the shame of American slavery and marked the first time that abolitionist themes were espoused before the Supreme Court. Adams's argument in the *Amistad* case was dramatized in a popular film about the case in 1997.

The *Amistad* case marked the end of Adams's career at the bar, although he continued his antislavery activities. An ardent opponent of the "gag rule" by which proponents of slavery attempted to suppress the controversy over slavery by prohibiting any debate about slavery in Congress, Adams finally secured the repeal of the rule in 1844. The clever parliamentary maneuvering by which Adams was able first to evade the rule and later to secure its repeal may owe much to his legal training and experience.

Although Adams's primary vocation was outside the law, his legal career presents a significant example of how political figures who have legal education and experience can use their legal background to advance political causes.

—William G. Ross

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ARNOLD, THURMAN WESLEY

(1891–1969)

During his varied career, Thurman Arnold wore a variety of hats: small-town lawyer, mayor, law school dean, Yale law professor, New Dealer, federal judge, and founder of the Washington, D.C., law firm Arnold, Fortas & Porter (now Arnold & Porter). Although he was known at the time for his witty critiques of existing institutions in *Symbols of Government* (1935) and *The Folklore of Capitalism* (1937), Arnold's lasting legacies are the reinvigoration of antitrust prosecutions as a tool of governmental regulation and his role in the founding of the paradigmatic "inside-the-Beltway" law firm.

Thurman Wesley Arnold
Bettmann-UPI/Corbis

Beginnings

Thurman Arnold was born in Laramie, Wyoming. In 1911, he received his B.A. from Princeton University, after first spending a year at Wabash College in Indiana. From Princeton, he matriculated at the Harvard Law School, and he received his LL.B. in 1914. Arnold began his legal career in Chicago, but World War I intervened; his National Guard unit was mobilized and he served in France from 1917 to 1919. After the war, Arnold returned to his native Laramie, where he served one term in the Wyoming legislature and also served for a time as mayor of Laramie.

On the recommendation of legendary Harvard Law School dean Roscoe Pound, Arnold was offered the position of dean of West Virginia's law school in 1927. During his three-year tenure at West Virginia, Arnold's

prodigious scholarship earned him the notice of Yale Law School dean (and future Second Circuit Court of Appeals judge) Charles Clark, who lured Arnold to Yale in 1930. At the time, Yale was the epicenter of American Legal Realism, the jurisprudential school that sought to replace arid, formalistic conceptions of the law and legal institutions with more "realistic" ones by, for example, demonstrating the gap between what legal rules on paper purported to direct and how courts actually applied those rules to decide cases. Arnold flourished, writing *Symbols of Government* and *The Folklore of Capitalism*, both of which went through several printings.

The New Deal

Shortly after Arnold's arrival at Yale, Franklin Roosevelt won the presidency and attracted hoards of lawyers and law professors to Washington to participate in the creation and administration of the New Deal. Arnold followed suit, and between 1933 and 1938, he divided his time between government and teaching. His first job was helping prominent Legal Realist and sometime Yale law professor Jerome Frank (who, like Charles Clark, went on to serve on the Second Circuit Court of Appeals) in Frank's Agricultural Adjustment Administration. In subsequent assignments, Arnold served as aide to the governor general of the Philippines; as a trial examiner for former Yale professor and future Supreme Court justice William O. Douglas' Securities and Exchange Commission; in the Department of Justice's tax division; and finally as the head of the department's antitrust division. (In the meantime, Yale, weary of constant sabbatical requests from Arnold, announced in 1938 that he had "resigned" [Arnold 1965, 136].)

It was as the head of antitrust prosecutions that Arnold received considerable notoriety. Although he had poked fun at the uses of antitrust law in *Folklore of Capitalism*, during his tenure he quadrupled appropriations and increased personnel nearly fivefold. Arnold is credited with singlehandedly reviving antitrust law as a means of regulating industry. During the period of Arnold's service, he instituted antitrust prosecutions against the oil industry, the American Medical Association, the Associated Press, and General Electric. Arnold professed great disappointment, however, in his inability to employ antitrust laws successfully against labor unions (Arnold 1965, 116–119).

From Bench to Bar

In 1943, as a reward for his tireless efforts, President Roosevelt nominated Arnold for a seat on the Court of Appeals for the D.C. Circuit. Arnold wrote some memorable opinions, including one finding that *Esquire* maga-

zine was not "obscene," and thus holding that the postmaster could not refuse to send it through the mails. Nevertheless, finding the life of a judge unsuited to his temperament, Arnold resigned from the bench in 1945.

Arnold returned to private practice and for a short time was in a partnership with a former Department of Justice colleague, Arne Wiprud. After an unsuccessful attempt to secure control of the Pullman Car Company for a client, that partnership dissolved, and Arnold formed a second partnership with Abe Fortas, another ex-Yale law school professor and future Supreme Court justice. Arnold and Fortas later added Paul Porter, former ambassador to Greece, creating the firm of Arnold, Fortas & Porter.

The new firm of Arnold, Fortas & Porter, though it would become the very model of the "Washington law firm," was distinguished by "its continuous involvement in civil liberties issues" during the 1950s and 1960s (Kearny 1970, 46). Pro bono, the firm defended many government employees whose loyalty was attacked during the period of virulent anti-Communism led by Senator Joseph McCarthy. The firm's principals sometimes endured criticism for taking these cases. According to one story, Paul Porter was accosted by a fellow member of Washington's exclusive Burning Tree golf club, who accused his firm of defending primarily "Communists and homosexuals." Nonplussed, Porter is said to have remarked, "Yes, that's correct. What can we do for you?" (Gressley 1977, 484). Arnold also successfully defended *Playboy* magazine against an obscenity charge in Vermont, irreverently suggesting that the magazine sought only to prove "the mammalian character of American womanhood" (Rostow 1970, 985). Simultaneously, Arnold was known as a skilled corporate lawyer; the firm claimed among its clients Coca-Cola, Pan American Airways, Lever Brothers, Western Union, Sun Oil, and the American Broadcasting Company.

The Lattimore Affair

Arnold's and his firm's reputation for championing unpopular causes was cemented with its representation of Owen Lattimore, an Asia expert critical of Washington's China policy, in an ordeal that for many symbolized the inquisitorial nature of the McCarthy era. In 1950, Lattimore was fingered by Senator McCarthy as a "top" Soviet agent—possibly the head of the ring that included Alger Hiss; McCarthy later backed away from his espionage allegation but contended that Lattimore was the chief architect for the government's Far East policy. Although McCarthy could never produce concrete evidence to back up his claim, Lattimore nevertheless appeared before a Senate committee chaired by Maryland Democrat Millard Tydings to answer McCarthy's charges.

Shortly before appearing before the Tydings Committee, Lattimore's wife secured the services of Arnold, Fortas & Porter to represent her husband. Abe Fortas, occasionally relieved by Arnold, represented Lattimore before the Tydings Committee and, later, the McCarran Committee. Lattimore's first committee appearance went well, and as Lattimore's testimony before the committee (which, in marked contrast to the later McCarran Committee hearings, were fairly restrained, even cordial) concluded, all concerned believed the matter to be closed. The chairman, Senator Tydings, even announced that the senators' examinations of summaries of Lattimore's FBI files found no evidence that Lattimore was a spy or even a communist (Kutler 1982, 192–194).

The invasion of South Korea by the North in 1950, and the subsequent involvement of the Chinese, gave new life to the "Who Lost China" controversy. In 1952, Lattimore was summoned to appear before the Senate's Internal Security Subcommittee, chaired by Nevada Senator Pat McCarran, who was also the chair of the Senate Judiciary Committee. For twelve days, the committee harangued Lattimore, who, though he had counsel present (Fortas and, occasionally, Arnold), was unable to consult with them during questioning. His lawyers were, according to Lattimore's biographer, "treated . . . like dirt" (Newman 1992, 366).

The original charge—that Lattimore was the head of a Soviet espionage ring—was all but forgotten as the McCarran Committee concentrated on catching Lattimore in a misstatement that could later form the basis for a perjury indictment. As Arnold himself described it to former Yale law school dean Robert Maynard Hutchins, "The policy of the McCarran Committee is first to have the witness in secret session, get him to testify to the best of his recollection as to events from five to ten years ago, then bring him on at a public hearing, ask him if he did not so testify at the secret session and then give him some letter to which he has not previously been given access which shows he is wrong." It was all calculated, wrote Arnold, to "give the impression that he is an evasive and untruthful witness" (Kalman 1990, 149–150). After bringing significant public pressure to bear first on Truman's, then on Eisenhower's, attorney general, McCarran convinced the government to prosecute Lattimore for perjury (Arnold 1965, 217; Kutler 1982, 205–206).

Although it was Fortas who had squired Lattimore through his appearances before the committees, once the indictment was handed up, Arnold took over. In his memoirs, Arnold describes Lattimore's indictment as "one of the most curious documents in the history of criminal law" (Arnold 1965, 217). It alleged, among other things, that Lattimore was a "communist sympathizer" and a "follower of the communist line" who had lied to

the committee when he testified to the contrary. In addition, wrote Arnold, "there were six other counts of so frivolous a nature that they were later dismissed without going to trial" (Arnold 1965, 217).

Luckily for Lattimore and Arnold, the case was assigned to a federal district court judge named Luther Youngdahl, a former Republican governor from Minnesota, who refused to bow to either government pressure or public opinion. Youngdahl immediately dismissed the count alleging that Lattimore lied about being a "communist sympathizer"; the judge agreed with Arnold that the charge was so vague as to preclude preparation of any defense. The count, the judge wrote, was "so nebulous and indefinite that a jury would have to indulge in speculation in order to arrive at a verdict" (Kutler 1982, 207). Other counts were also dismissed as being similarly vague (Arnold 1965, 218; Kutler 1982, 207). The court of appeals upheld Youngdahl's decision on the first and seventh counts by a vote of 8 to 1 (Kutler 1982, 208); however, the judge was reversed on counts related to Lattimore's testimony about the publication of articles by communists in a journal of which he had been editor (Kutler 1982, 208).

Undeterred, the government sought, and received, a second perjury indictment against Lattimore. Arnold drolly noted later that the difference between the two counts of the second perjury indictment—in which Lattimore was accused of lying about being a "follower of the Communist line" and a "promoter of Communist interests"—"was never clear to me as counsel for the defense" (Arnold 1965, 222). Furthermore, the government filed a motion requesting that Judge Youngdahl recuse himself from the case (Arnold 1965, 218; Kutler 1982, 208). Later, Arnold would excoriate the prosecutor and the attorney general, Herbert Brownell, for this filing. Except for the adverse ruling of the judge in dismissing the first indictment, the prosecution could not point to any action of the judge that evinced bias or prejudice. During arguments regarding the motion, Arnold later recalled that the U.S. attorney "was positively insulting to the Judge; indeed, his argument was not addressed to the Judge, but, rather, to a crowded courtroom with the press present" (Arnold 1965, 224). When he was finished, reports Lattimore's biographer, Arnold rose to deliver an "impassioned defense of the original . . . ruling, and of the court of appeals that had upheld the vital part of it" that "is a model for students of judicial pleading" (Newman 1992, 478).

The government's attempt to intimidate Judge Youngdahl and perhaps replace him with a less independent judge failed. Not only did Youngdahl refuse to step aside, he dismissed the second indictment in January 1955. "To require defendant to go to trial for perjury under charges so formless and obscure as those before the Court," he wrote, "would be unprecedented and

would make a sham of the Sixth Amendment and the Federal Rule [of Criminal Procedure] requiring specificity of charges" (Newman 1992, 484). That June, the court of appeals upheld the dismissal on a 4–4 vote. The close vote troubled Arnold, who later wrote: "I have often wondered on what grounds half the judges of the Court of Appeals could have sustained the second indictment, which seems to me even worse than the first. Could it possibly be that the affidavit attacking Judge Youngdahl for ruling against the government made these four judges . . . hesitate?" (Arnold 1965, 226). Lattimore's ordeal—which began with explosive charges of espionage—closed with a whimper as the solicitor general and the attorney general decided not to appeal the decision to the U.S. Supreme Court. Arnold, Fortas & Porter charged Lattimore nothing for its services, even though his defense was estimated to have cost $2.5 million in 1950 dollars (Kutler 1982, 212). Little wonder, then, that Lattimore's biographer dedicated his story to Thurman Arnold, Abe Fortas, and the lawyers of Arnold, Fortas & Porter, as well as to Judge Luther Youngdahl (Newman 1992, v).

"Voltaire and the Cowboy"

Although he considered himself an ardent civil libertarian, Arnold became increasingly disillusioned with the radicalism of the 1960s—even privately resigning from the American Civil Liberties Union over its advocacy, as Arnold saw it, of civil disobedience (Gressley 1977, 476). Late in life, Arnold also publicly defended both President Johnson's policies in Vietnam and his former law partner Abe Fortas, who was eventually forced to resign from the U.S. Supreme Court because of financial improprieties.

After Arnold's death in 1969, remembrances were studded with tributes to his "inner gaiety" (Levi 1970, 983), his intense dislike of "pomp" (Rostow 1970, 985), and his "generosity as a human being," which "prevailed over his sardonic awareness of the importance of stupidity and nonsense in our affairs" (Rostow 1970, 986–987). Despite his trenchant wit and his impatience with affectation, writers noted that he had none of the "meanness" that can make a wit seem boorish and rude (Levi 1970, 984; Rostow 1970, 987). Yale Law School dean Eugene Rostow claimed that Arnold "asked fundamental questions, beyond the reach of more pedestrian professors. And he posed bold solutions for them" (Rostow 1970, 987). That quality, his wit, and the fact that "in gait, cigar and style" Thurman Arnold looked as if he had stepped from a Remington painting (Rostow 1970, 985) are the reasons why a contemporary could describe Arnold's character as a combination of "Voltaire and the cowboy" (Gressley 1977, xiv).

—Brannon P. Denning

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BAILEY, F. LEE

(1933–)

F. Lee Bailey

O.J. Simpson and his defense attorney F. Lee Bailey (left) consult with each other during the Simpson double murder trial in Los Angeles, 30 June 1995. (AP Photo/Reed Saxon, Pool)

During his forty-year legal career, F. Lee Bailey epitomized the role of the criminal defense attorney. Equally lauded and criticized for his brash, aggressive style, Bailey was involved in nearly all of the most noteworthy American criminal cases of the late twentieth century, winning most of them. Because of his preeminent legal skills and mastery of the art of cross-examination, Bailey has contributed numerous stylistic and strategic innovations to the practice of American criminal law. Many of Bailey's innovations—most notably the use of cutting-edge scientific evidence and technology in mounting a defense and the use of the mass media in the hopes of "educating" the general public to develop a sympathetic jury pool for his clients—have become so ingrained in the public's perception of lawyers that few realize that he was the first lawyer to use such tactics. For these reasons, Bailey remains among the most influential, and controversial, American lawyers of the twentieth century.

The eldest of three children, Francis Lee Bailey was born in 1933 in Waltham, Massachusetts, to middle-class parents. His father was a newspaper salesman who was forced to work for the Works Progress Administration during the Great Depression, and his mother ran a nursery school. From a young age, Bailey showed great academic promise, graduating from private school at age sixteen, then attending Harvard with the intention of becoming a writer. Bailey's youth, however, served as a disadvantage at Har-

vard, and, after two years of mediocre scholastic achievement, he dropped out to enlist in the Navy flight corps.

It was while in the Navy that Bailey, on reading Lloyd Paul Stryker's *The Art of Advocacy*—a book that argued that the defense lawyer was an honorable profession but also a dying species—became interested in practicing law. After joining the Marine Corps, Bailey, without the benefit of either an undergraduate or a law degree, served as a defense counsel in court-martials, participating in more than two hundred cases. At the same time, Bailey taught himself a practical form of criminal law by working as a private investigator for a North Carolina defense attorney named Harvey Hamilton. Hamilton became Bailey's first legal mentor, repeatedly stressing to him the value of courtroom experience over book learning in mastering the skills needed for criminal litigation.

Based on his experience as a military lawyer, Bailey received the equivalent of a bachelor's degree, and in 1957, he enrolled in law school at Boston University. While attending law school, Bailey supported himself by starting his own private investigative service, thus continuing his extra-classroom education in courtroom law. Despite the considerable time demands of his investigative service, Bailey still graduated first in his class at Boston University in 1960. Bailey's dual careers served him well shortly after graduation when he was asked to join the legal defense team of George Edgerly, who was accused of murdering his wife in the sensationalized "torso murder," so named because the victim's head was never found. In that case, Bailey's proficiency from his detective experience with the use of the newly developed polygraph (better known as the lie detector) served him well as he cross-examined the man who administered an incriminating polygraph to Edgerly. Bailey's first cross-examination as a member of the Massachusetts bar established his preeminent credentials in this indispensable legal skill as he forced the test administrator to concede that although the accuracy of the polygraph required that the subject be in perfect health, Edgerly had been tested while still hung over from the previous night's drinking, thus casting doubts on the results of the test. After this auspicious performance, Bailey became a permanent member of Edgerly's legal team, initially supplementing the efforts of lead counsel John Tobin, who was seventy-two years old and hindered by poor health, and later taking over the case. Because of the strength of Bailey's witness examination and summation, Edgerly was found not guilty, leading Bailey to become involved in several more cases dealing with the polygraph. Because of this experience, Bailey advocated that the polygraph become a permanent tool in the U.S. criminal system.

Bailey's profile took on national dimensions when he battled to free from prison Sam Sheppard, a Cleveland osteopath who had been convicted in a

sensational trial in 1954 for the murder of his pregnant wife. Sheppard's argument that he had tried to fight off the real murderer, a "bushy-haired intruder," became the basis for the popular television series and movie *The Fugitive*. Years later, DNA testing (a scientific technique that did not exist at the time of the trial) conducted on blood drops preserved from the Sheppard home raised the prospect that this might well have been true, with the murderer being an itinerant window washer who was later convicted of a similar murder (although a jury in a civil trial on this case did not agree).

Shortly after Sheppard's brother Steven brought Bailey onto the case in November 1961, the attorney sought permission to give the defendant a polygraph examination in jail. With no obvious legal avenues for appeal on this issue, Bailey invented a new tactic for defense lawyers by waging a public campaign for Sheppard's lie-detector test with the press on television shows such as the *Mike Douglas Show* and the *Tonight Show*. Although the Ohio Supreme Court refused Bailey's request, the media campaign was effective in renewing public interest in the case.

Bailey then filed a writ of habeas corpus with the U.S. Supreme Court in April 1963, claiming that the judge's inability to control the media and protect the jury from outside influence in Sheppard's trial had prevented him from receiving justice. The Supreme Court's ruling in Sheppard's favor in this case became a legal landmark for the establishment of a fair trial.

Freed from jail, Sheppard faced a second trial in October 1966, with Bailey serving as lead defense counsel. At this trial, Bailey developed and pursued several highly risky strategic maneuvers. Knowing that his client had effectively incriminated himself in more than three days of testimony in the first trial, Bailey chose not to call Sheppard as a witness. Then, relying on his use of cutting-edge technology, he called to the stand an expert in "blood spatter" arrays, arguing that a man of Sheppard's strength could not have left the murder scene as it was found. Finally, Bailey argued that by immediately assuming Sheppard to be the killer, the police missed other obvious suspects, such as a married couple in the neighborhood who were rumored to be having affairs with one or both of the Sheppards. By putting them on trial, rather than Sheppard, Bailey was able to prove enough "reasonable doubt" for the jury to find his client not guilty. At age thirty-three, F. Lee Bailey was universally acknowledged by the American people as the nation's preeminent defense attorney.

In the midst of his five-year struggle to exonerate Sam Sheppard, Bailey was involved in several other high-profile cases. First, he defended those accused of the "Great Plymouth Mail Robbery," the robbery of $1.5 million from a Federal Reserve truck—the largest such robbery of its time—which took place in August 1962 and set off the largest manhunt in the history of New England. Although the money was never found, Bailey protested

against the undue harassment of his clients by U.S. postal inspectors assigned to investigate the case. Postal officials tore apart one man's house looking for the stolen money and agreed to pay another of the accused men $100,000 to testify falsely against his cohorts. This case marked the first of many times that Bailey would butt heads with government officials, as he filed several ultimately unsuccessful harassment claims against the postal inspectors. After two of the four defendants had disappeared, in August 1967 the federal government indicted the remaining two suspects just before the expiration of the statute of limitations on the crime. In the trial, Bailey's withering cross-examination persuaded the jury that none of the eyewitness testimony was reliable, and his two clients were cleared of the crime.

During this period, F. Lee Bailey also defended the notorious "Boston Strangler," Albert DeSalvo, who was charged with the rape and murder of eleven women between June 1962 and January 1964 even though there never was any evidence of forced entry into their homes. After meeting DeSalvo in March 1965 through another of his clients, George Nassar, Bailey's defense of the accused murderer was complicated by the fact that he wanted to confess to the crimes in exchange for access to psychiatric help and permission to write a book about his killing spree, with the royalties going to his wife and child. Once more Bailey clashed with government authorities who wanted to charge DeSalvo with first-degree murder and seek the death penalty. After arranging for DeSalvo to be examined by psychiatrists, who concluded that he was a schizophrenic with uncontrollable sexual urges, Bailey arranged for his client to be questioned only to persuade the Massachusetts authorities that he was indeed the killer, but not for the purposes of admitting his statement into a trial. As a result of this agreement, DeSalvo pleaded innocent by reason of insanity in the trial, and the district attorney agreed not to seek the death penalty.

In the trial, which began in January 1967, Bailey argued that DeSalvo's schizophrenia rendered him unable to contain his sexual desires and thus called for a "not guilty" verdict. Despite the testimony of several psychologists who confirmed Bailey's position, prosecutors argued that the kind of skill and forethought that the defendant would have had to use to talk his way into the victims' homes to commit the crimes was evidence of his clear premeditation. In addition, the prosecutors were aided by the archaic standard for determining insanity at the time, the nineteenth-century McNaughten Rule, which claimed that a person could be insane only if he or she did not know the nature or quality of his or her act. With the legal cards stacked against him, DeSalvo was found guilty of the crime and sentenced to life in prison, marking Bailey's first defeat in a major case.

Ralph Nader: Public Interest Lawyer No. 1?

Few lawyers are better known to most contemporary Americans than Ralph Nader. Nader has made his reputation primarily as a consumer advocate and public interest lawyer rather than as a litigator. The son of immigrants from Lebanon who earned an undergraduate degree at Yale and a law degree at Harvard, Nader first came into public prominence with the publication of a book entitled *Unsafe at Any Speed* (1965), which took on the General Motors Corporation for what Nader alleged to be safety lapses in the production of the Corvair. When Nader testified about these defects before a congressional committee, General Motors hired an undercover investigator to threaten Nader and to come up with negative information about him. Nader subsequently was awarded $425,000 for invasion of privacy, money that he used to fund a number of public interest groups.

As his use of his legal settlement funds suggests, Nader is known for his spartan lifestyle, as a speaker recognized for his candor in addressing college students and other groups, and for his fervency in advocating his ideas. Numerous attorneys work in some of the many public interest groups that he has founded and that he oversees, including a litigation group that works under the auspices of Public Citizen. He has run for president as a candidate of the Green Party, advocating environmental and reform issues.

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In terms of his legal ideology in these cases, F. Lee Bailey would be best described as a realist. In his later book, *The Defense Never Rests*, published in 1971, Bailey acknowledged that innocence or guilt has little bearing on the decision that a jury makes in criminal cases. Rather, Bailey believes that the chance that a person accused of a crime has of being acquitted is directly related to the competency of the person's lawyer, which in turn is directly related to the amount of money that the person has to spend on mounting a defense. Another aspect of Bailey's legal ideology is the belief that justice simply means that a person is granted a fair trial, not that absolute innocence or guilt is found. Bailey extends this belief to mean that all persons accused of a crime—no matter how despicable or how certain their guilt—are entitled to adequate legal representation. Consistent with this belief, throughout his career, Bailey unapologetically represented many clients who were accused of heinous crimes with a great presumption of guilt.

After the Boston Strangler case setback, Bailey faced the vengeful wrath of an angry organized bar and government for his defense tactics in the first

of several professional condemnations. In 1970, a Massachusetts judge censured Bailey for breaching legal ethics by criticizing the conviction of one of his clients on the *Tonight Show with Johnny Carson*. A year later, Bailey's license to practice law in New Jersey was suspended for one year after he accused a prosecutor of pressuring and attempting to bribe witnesses. Finally, in 1973, Bailey, along with a client, was indicted for mail fraud in Florida, although charges were never brought to trial. After ten years of aggressively challenging governmental authority, it seemed as if the legal establishment was seeking to punish F. Lee Bailey to make him an example of the dangers of such behavior.

In the early 1970s, Bailey took on a series of high-profile legal cases that were demonstrative of the U.S. political environment at the time. In 1971, he defended Captain Ernest Medina in a court-martial over his alleged role in leading troops in the 1968 massacre of civilians at My Lai, an infamous event in the Vietnam War. Here Bailey again effectively used the media during the pretrial stages, persuading the public that the army was putting Medina on trial to create a scapegoat for public relations purposes. During the court-martial at Fort Benning, Georgia, Bailey used positive lie detector results to claim that rather than ordering his troops to kill innocent civilians, Medina was unable to stop the killing when he became aware of it. In September 1971, Medina was acquitted of all charges, a result that Bailey later cited as being among his proudest achievements.

After Medina's trial, Bailey took on a client with political overtones by representing James McCord, the former security chief of President Richard Nixon's reelection campaign, who was one of five men arrested while breaking into the Democratic party headquarters at the Watergate complex in Washington, D.C. Bailey's defense was unsuccessful, as McCord was convicted for burglary and subsequently served nearly a year in prison. After his conviction, McCord spurred the Watergate political investigation by informing Judge John Sirica of the White House's involvement in the burglary in the hopes of reducing his sentence. In 1974, McCord filed a $10 million lawsuit against Bailey, claiming that he had provided inadequate legal counsel at the trial by conspiring with John Mitchell and other White House officials to prevent McCord from disclosing his knowledge of high-level involvement in the burglary at his trial. Eventually, in 1983, Bailey settled McCord's lawsuit out of court for an undisclosed amount of money.

In his third high-profile case in the early 1970s, Bailey once again entered the world of the "trial of the century" by agreeing to defend Patricia Hearst, the heir to the Hearst publishing empire. In 1974, when she was a student at the University of California at Berkeley, Hearst had been abducted by members of a terrorist organization known as the Symbionese Liberation Army and subsequently participated in several bank robberies. Bailey's defense was

that Hearst had been brainwashed and participated in the crimes only out of fear for her life. The "brainwashing" defense was considered to be an innovative legal strategy at the time in that Bailey was not claiming insanity for his client, but rather that the weeks of mental torture had rendered Hearst unable effectively to resist her abductors. Once more, Bailey supplemented his legal moves by seeking to persuade the media, and through them public opinion, that his client was the victimized daughter of wealthy parents rather than the transformed "urban guerilla" as the authorities claimed. After Hearst was found guilty of all charges in March 1976, for which she served seven years in jail before being released by President Jimmy Carter, the case ended in legal squabbling between Bailey and his client.

The negative fallout associated with Hearst's conviction seemed to take Bailey out of the public limelight. Younger, slicker lawyers, all following the defense-lawyer model that Bailey had developed in his fifteen-year run of trying high-profile cases, began to come to the forefront. In fact, though, between 1976 and 1994, Bailey maintained a busy legal career, albeit at a much lower profile. Partly due to his interest in aviation stemming from his days as a pilot in the Marine Corps, Bailey made a lucrative living by representing family members of those who perished in commercial plane crashes. Among Bailey's clients were the families of victims of Korean Air flight 007, which was shot down by the Russian military, and Pan Am flight 103, which exploded over Lockerbie, Scotland, as a result of a bomb placed on board by Libyan terrorists.

Bailey also became involved in a series of cases challenging the legal practices of the U.S. government. For example, in 1992, during the drug trial of deposed Panamanian dictator Manuel Noriega, Bailey compared the government's policy of granting immunity to witnesses to bribery, claiming that a former client, drug dealer Gabriel Taboada, lied about Noriega's connection to Colombian drug cartels to get a reduced sentence. Bailey was highly critical of the federal government's decision to seize his fees for defending convicted drug trafficker Mario Lloyd, claiming that the government's policy of seizing lawyer fees was having the effect of pushing better lawyers out of criminal defense. Finally, in 1991, Bailey served as defense counsel in an American Bar Association mock war crimes trial of Saddam Hussein, and he took the opportunity to point out the hypocrisy of U.S. politicians seeking a war crimes indictment for Hussein, considering the U.S. disregard for international law in pursuit of foreign policy objectives. Because of all of his legal successes, in a 1993 poll of its readers the *National Law Journal* found that F. Lee Bailey was the most admired lawyer in the United States.

Just one year later, Bailey was center stage in his third "trial of the century," introducing his unique legal style to a new generation of Americans as

part of the "Dream Team" defending ex–football star O. J. Simpson on charges that he murdered his ex-wife and her friend Ronald Goldman. Bailey's main contribution to Simpson's defense was his cross-examination of Los Angeles detective Mark Fuhrman, who had discovered a bloody glove on Simpson's property, the piece of evidence that for many most strongly tied Simpson to the crime. Under Bailey's withering cross-examination, Fuhrman denied that he had ever uttered a particular racial epithet in the previous ten years. Some months later, however, an author who had interviewed Fuhrman came forward with audio tapes of him using that precise epithet, thus discrediting his entire testimony to the mostly African-American jury and leading to Simpson's eventual acquittal. Bailey's involvement in the case was not without cost. In the years that followed, he had a serious falling out with the friend who had brought him into the case, attorney Robert Shapiro, and faced ethics charges in Florida over his management of some government-seized stock in a case involving a French drug trafficker he had been defending, named Claude Duboc. The result was a forty-four-day jail term on a contempt-of-court charge and legal hearings as to whether his license to practice law in the state should be lifted.

These problems notwithstanding, F. Lee Bailey's career has been nothing short of remarkable, making him the virtual prototype of the modern criminal defense lawyer.

—Bruce Murphy and Scott Featherman

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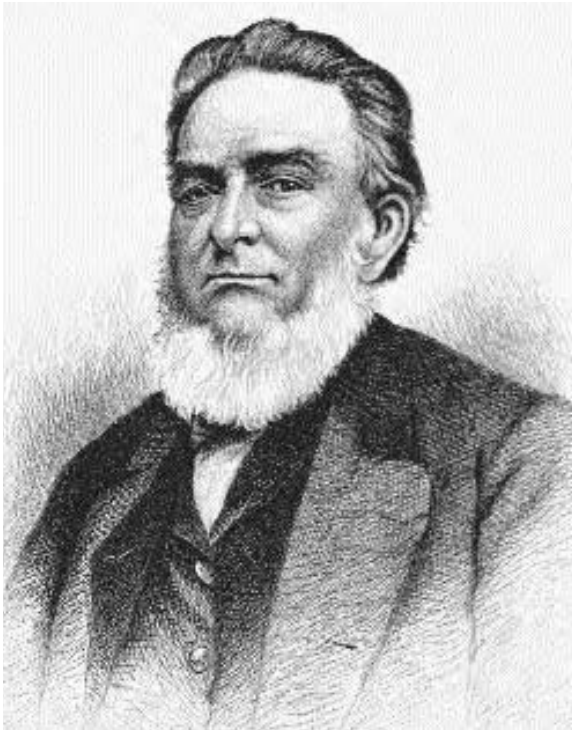
BATES, EDWARD

(1793–1869)



Edward Bates
Library of Congress

Abraham Lincoln's first attorney general, Edward Bates, born on September 4, 1793, was one of twelve children born to Thomas Fleming Bates, a Virginia planter and merchant, and Caroline Matilda Woodson. Educated by his father and a cousin, Benjamin Bates, Edward Bates attended Charlotte Hall Academy in St. Mary's County, Maryland. In February 1813, he joined a volunteer militia company to assist in protecting Norfolk from a threatened attack by the British. He served until October, rising to the rank of sergeant.

His brother, Frederick Bates, then secretary of Missouri Territory, persuaded Edward to move to Missouri, where he studied law under Rufus Easton, the most prominent lawyer in the territory. Bates was licensed to practice law in 1816 and in 1818 formed a partnership with Joshua Barton, a relationship that lasted until 1823. That same year, Bates married Julia Davenport Coalter. She bore them seventeen children.

Bates was elected to the U.S. House of Representatives in 1826 and completed a single term. Previously, he had served as a member of the State Constitutional Convention in 1820, as state attorney general, and as a member of the state legislature. He was the choice of the Whig Party for the U.S. Senate, but he lost to the followers of Thomas Hart Benton and the Jacksonian Democrats.

After his defeat for a second term in Congress in 1828, Bates resumed his thriving law practice. In 1830, he was elected to the state senate, where he served for four years, and in 1834 he was again elected to the Missouri House of Representatives.

In 1847, as president of the River and Harbor Improvement Convention, which met in Chicago, he delivered an eloquent speech that attracted national attention. Just three years later, Bates's reputation growing, President Millard Fillmore nominated him secretary of state, but for personal reasons Bates declined the appointment.

Nonetheless, by this time his views on social, political, and constitutional questions were frequently sought. In speeches and newspaper articles, he expressed opposition to the repeal of the Missouri Compromise, thereby aligning himself with the "Free Labor" party in Missouri, although he still considered himself a Whig. In 1856, he acted as president of the Whig national convention at its meeting in Baltimore. Simultaneously, he grew close to the newly formed Republican Party after his opposition to the admission of Kansas under the Lecompton Constitution.

In 1860, supporters in Missouri launched a Bates-for-President movement, arguing that a Free-Soil Whig, from a border state, if elected on the Republican ticket, could avert secession. He won early support from many Republicans in the border states, but the decision of the national Republican committee to hold the convention in Chicago instead of St. Louis proved a fatal setback to the Bates boom by adding strength to the candidacy of Abraham Lincoln. On the first ballot, Bates received only forty-eight votes, and by the time the balloting was over on the third ballot, his number had shrunk to twenty-two, and Lincoln was the nominee.

After the Republican victory that November, the relatively unknown and inexperienced Lincoln decided to offer Bates a cabinet position in deference to the latter's national support. Some urged that Bates be appointed secretary of state, but the president-elect believed that this position was more appropriate for the better-known William H. Seward, who had been his chief rival at the convention. Instead, Bates was offered his choice of any other cabinet position. He wisely opted to become the twenty-sixth attorney general and become the first cabinet officer chosen from west of the Mississippi River.

Although he was regarded as a political conservative, Bates initially exerted considerable influence in the cabinet. He suggested, for example, that the federal navy equip a fleet on the Mississippi River, an idea that proved decisive in the coming civil war. During the *Trent* affair (ignited when the navy seized two Confederate diplomats on the high seas), he sought to avert war with Great Britain, arguing that the question of legal rights should be waived. Later, he differed with Lincoln on the admission of West Virginia

to the Union, asserting that such a move would endorse secession by one section of a state, thus validating the whole notion of secession. He declared the movement for separate statehood "a mere abuse, nothing less than attempted secession, hardly veiled under the flimsy forms of law" (*Opinions* 1868, 431–432). But Lincoln ignored this advice.

In response to *Ex parte Merryman* (1861), he defended Lincoln's suspension of the privilege of the writ of habeas corpus on the grounds that the three branches of government were coequal and that Chief Justice Roger B. Taney could not order Lincoln to act. Bates disliked the suspension but thought it preferable to martial law. The Confiscation Acts, applying to the property of rebels, ran counter to Bates's sense of property rights, and his office rarely supported them. Even Lincoln claimed that no slave was ever freed by the Second Confiscation Act.

Bates believed that free blacks could be U.S. citizens because he narrowly construed *Dred Scott v. Sandford* (1857) to apply only to blacks "of African descent" suing in Missouri. He affirmed that every free person born in the United States was "at the moment of birth *prima facie* a citizen." Thus, the attorney general proclaimed the *Dred Scott* decision unconstitutional.

Bates went on strongly to support the Emancipation Proclamation, as long as it remained limited to areas still under rebel control and those freed were colonized or repatriated to Africa. His support was linked to his hope that Lincoln was more likely than Congress to provide for colonization of freed blacks. Bates always opposed policies that might lead to equality of blacks with whites in the United States and particularly disliked the employment of blacks as soldiers. Despite his prejudices, Bates also delivered an opinion to the president that suggested that black soldiers merited equal pay with whites. For a while, Lincoln ignored the opinion.

In May 1864, when the administration learned of the Fort Pillow massacre, in which hundreds of black Union soldiers were slaughtered by Confederates, Bates reminded the president of his early warnings of "the great probability of such horrid results" (*Opinions* 1869, 43). Nevertheless, Bates saw no choice but to order anyone involved in the massacre executed unless the Confederate government disavowed the act and surrendered the commanding officers.

As the "president's lawyer," Bates disagreed with many of the administration's military policies, worrying that as the war progressed constitutional rights were giving way to military authority. Resenting the interference of the secretary of state in matters that he thought belonged to the attorney general's office, Bates repeatedly questioned the actions of Seward, Secretary of War Edwin M. Stanton, and Secretary of the Treasury Salmon P. Chase. He felt that Lincoln lacked the will power to end what Bates considered constitutional abuses by the cabinet departments.

Yet, Bates's conception of the presidency was broad. He thought the president should undertake the big acts of national leadership, while scrupulously avoiding wasted time on small problems. Repeatedly, he urged Lincoln to act as commander in chief of the army, the actual director of events. "The *General-in-Chief* or *Chief General—is your only lieutenant* . . . to command under you," he told Lincoln (Bates 1933, 200). He considered the president the officer who should give general directions and dismiss the unsuccessful and the disobedient. He never doubted Lincoln's character or purposes, but he did voice concern over whether Lincoln demonstrated "the *power to command*" (Bates 1933, 20). This view of presidential authority contrasted sharply with that of Roger B. Taney, a former U.S. attorney general who, as chief justice of the U.S. Supreme Court, evinced growing disloyalty to both the chief executive and the Union.

Bates held a Hamiltonian conception of the presidency, arguing that the president needed to lead the nation energetically. He often advised what Lincoln could do constitutionally, but told the president no more often than yes. This aspect of the relationship between the attorney general and the president was quickly reflected in Bates's first opinion on April 18, 1861. He advised the president that he could not, without legislation, reorganize the War Department to set up a separate division of militia with Lincoln's young friend E. E. Ellsworth in charge. Although he often acted as a naysayer to Lincoln on such minor matters, his opinions upholding the habeas corpus suspension, supporting the naval blockade of the South, and endorsing the Emancipation Proclamation were among the most important issues confronting the administration and represented confirmation of major administration policy. Bates's enduring legacy is primarily based on those opinions. He remained a conservative loyalist to the president and the Union.

During the Bates era, the role of attorney general was not yet considered a major job, even if it was one of the four oldest cabinet positions, dating back to the Washington administration. A department of justice with a professional staff was still ten years in the future. The attorney general possessed a staff of only six, including clerks and messengers. His functions were to deliver opinions requested by the president and department heads and to handle government litigation in the Supreme Court. He had no real authority over the U.S. attorneys; they were responsible only to the president. The pay and perquisites of the judiciary and the government law offices were largely in the hands of the Interior Department. Government claims were for the most part handled by the Treasury.

In these circumstances, no attorney general had made much of the office, in contrast to John Marshall's creative behavior on the Supreme Court. Of the famous men who had served as attorney general, few had enhanced

their reputation by service in that office. Most attorneys general before Bates have been utterly lost to history. The few great advocates, like Reverdy Johnson and Jeremiah S. Black, made a mark, but unlike them, Bates was no courtroom lawyer, and he farmed out most of his Supreme Court work. Yet the attorney general always provided two crucial functions for the president: He was an important political adviser and he could legitimize the actions of the president.

Unfortunately, Bates's legacy was limited by his functionary role and small portfolio within the Lincoln cabinet. He remained something of a minister without a department, and he drifted gradually into disaffection with most of his cabinet colleagues. William Seward, Edwin Stanton, and Postmaster General Montgomery Blair at times seemed outright enemies.

Nonetheless, Bates performed a specialized and occasionally important legal job in the Lincoln administration. His 154 opinions, published in two volumes of the *Opinions of the Attorneys General,* amount to a public diary of his intellectual and professional life. The product is a measure of the man. Although the opinions may be classified in a variety of ways, since the categories overlap, the following table suggests the broad scope of Bates's official work:

Opinions of Attorney General Bates, 1861–1864

Routine administration	77
Claims	30
Scope and general powers of the president	14
Blockade, prize, international	10
Procurement duties	9
Scope of attorney general's office	8
Citizenship and slavery	5
Other	1
Total	154

Like any opinion giver, the attorney general determines his own jurisdiction. Ironically, Bates did not consider himself a court of last resort, since other cabinet members might choose to overrule him. As he told Gideon Welles, when the navy secretary asked for his "decision": "Pardon my criticism of the last word in your letter. You refer the matter for my 'decision.' I beg to state that the Attorney General has no power to *decide* a question of law. He can only give his *opinions,* to aid, as far as he can, the judgment of his coordinate departments" (*Opinions* 1868, 48). Unfortunately, Bates never understood the need to win over other members of the president's administration.

The complex relationship between the president and the attorney general also embraced the issue of mercy. Bates and the president collaborated

often on the matter of pardons. Whereas Bates firmly believed that, for political reasons, the president must not pardon convicted slave traders, he and the president frequently found reason to avoid death penalties. In deference to his own leniency in this regard, Lincoln sometimes joked about his "chicken-hearted" attorney general. Bates was a firm, but not a bloodthirsty, man, and his prudent temperament made him a valuable counselor.

Bates finally decided to leave office in November 1864. For a while he was under consideration for appointment as chief justice of the United States, but the president instead chose the more politically astute and politically progressive Salmon P. Chase to succeed Roger B. Taney.

Bates resigned effective November 30, 1864. The president's private secretaries, John Nicolay and John Hay, believed that Lincoln would have retained Bates as attorney general if Bates had not suggested or expressed a desire to resign.

On January 6, 1865, a Radical constitutional convention assembled in St. Louis to draw up a new state constitution for Missouri. It also passed an ordinance emancipating the slaves in an ouster ordinance, which was intended to place the state judiciary in the hands of the Radicals. Back at home, Bates fought the Radicals by publishing a series of newspaper articles in which he pleaded for a government of law instead of a government of force. This struggle against the Missouri Radicals proved to be Edward Bates's final political contest. Soon thereafter, his health began to deteriorate. Bates died on March 25, 1869. The one-time lawyer, politician, and former attorney general ended his public life battling extremists in his adopted state, just as his mentor Abraham Lincoln had fought both Northern and Southern extremists nationally.

—Frank J. Williams

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BELLI, MELVIN MOURON, SR.

(1907–1996)

MELVIN MOURON BELLI SR.
Jack Ruby (center), the man who shot Lee Harvey Oswald, confers with his attorneys Marvin Belli (right) and Joe Tonnehill (left) in district court in Dallas, 20 January 1964. (AP Photo)

MELVIN M. BELLI FOREVER changed the landscape of the modern courtroom with the introduction and refinement of many trial techniques. He has been called both "the King of Torts" and "the Father of Demonstrative Evidence." He was a brash and flamboyant maverick who turned accepted notions of corporate and professional liability on their heads. Belli was born on July 29, 1907, in Sonora, California, to Leonie Mouron Belli and Caesar Arthur Belli. His family included early California bankers and educators. His grandfather had been a headmaster at some of California's first schools. Anna Mouron, his grandmother, was an early California pharmacist. His father was a prominent California banker.

Belli attended the University of California at Berkeley and was described as a mediocre student and a carouser. After a short time serving as a seaman, he enrolled at the University of California Boalt School of Law. He graduated from there in 1933, thirteenth in his class. One of his first jobs was to write a report on the Depression's effect on the vagrant population of the United States for the National Recovery Administration of the federal government. He assumed the role of an indigent and traveled by boxcar across the United States. His report was part of the basis for transient relief programs for the nation.

He was admitted to the California bar in 1933. Belli began his legal career as counsel for the Catholic priest of San Quentin prison. He defended

death-row inmates, filing appeals for those already condemned to die. He once remarked that the execution of two prisoners wiped out his entire practice. His interest and success in the area of torts began early in his career. In one of his early courtroom victories, he represented Chester Bryant, an injured cable car gripman. In a rare but not unheard of move, and over objections by the defendant insurance company's lawyers, he brought into the courtroom a large model of a cable car intersection and the gearbox and chain involved in the accident. The jurors awarded his client thirty-two thousand dollars, a large verdict for the time.

Belli is remembered for his involvement with a long list of famous clients and important cases. Celebrity clients of Belli's over the years included Mae West, Errol Flynn, Tony Curtis, Martha Mitchell, Lana Turner, Muhammad Ali, Lenny Bruce, Jim and Tammy Faye Baker, Zsa Zsa Gabor, and the Rolling Stones. He represented Jack Ruby in 1954 for the murder of Lee Harvey Oswald. The Korean jetliner disaster, the MGM Grand Hotel fire in Las Vegas, the collapse of the Kansas City Hyatt walkway, the Bendectin birth defect cases, the Bhopal Union Carbide isocyanate gas disaster, the Dow Corning breast implant cases, computer piracy, and cable television rights are among the headline-grabbing cases he became involved with during his career, which spanned six decades.

Melvin M. Belli headed the law firm of Melvin M. Belli, Sr., which operated offices in San Francisco, Los Angeles, Stockton, San Diego, Pacific Grove, Santa Cruz, Santa Ana, and Sacramento, California, and Rockville, Maryland. He was a founder and former president of the Association of Trial Lawyers of America, which served to unite plaintiff's lawyers in a way the American Bar Association never had. In addition, he was the founder and dean of the International Academy of Trial Lawyers, served on the board of directors of the Barrister's Club, and was provost of the Belli Society.

Melvin Belli was a prolific writer and speaker. He authored or coauthored some sixty books, mainly dealing with civil and criminal trial procedure. His five-volume *Modern Trials*, first published in 1954 and later revised, discusses the law, trial techniques, demonstrative evidence, cross-examination, the merits of factual disclosure, the value of just and early settlements, the employment of medicolegal information, and the necessity of a just and proportionate (adequate) award for the dead and injured, among many other topics. It is said to have forever changed the face of the American courtroom and has been called the plaintiff lawyer's bible. Although most of Belli's scholarship deals with techniques for success in the courtroom, he also wrote books about the significant trials in which he was involved, such as three books about the defense of Jack Ruby. As a result of his interest in the legal systems of other countries, he wrote books comparing the legal systems of Japan and Russia to that of the United States. Belli was a popular

speaker and is credited with training scores of lawyers, judges, and the public about the evolution of tort law. In his article "The Adequate Award," information from plaintiff's lawyers across the country was used to illustrate the point that tort verdicts were substantially less than cost-of-living indicia. It was the first meaningful study of actual damage awards and their relationship to plaintiffs' lives.

Belli's flamboyant nature found outlets in artistic pursuits other than writing. He played the role of an evil superbeing disguised as "Friendly Angel" in episode 60 of the television program *Star Trek,* "And the Children Shall Lead," which first aired on October 11, 1968. He appeared as himself in the 1968 film *Wild in the Streets*. He lived a life of extravagance and was arguably the most flamboyant lawyer of his generation. His San Francisco office has been described as resembling a bordello more than a lawyer's office, with its heavy Victorian interior and outer walls constructed of glass so that passers-by could glimpse in. When Belli won a case, he would hoist a Jolly Roger flag and fire a small cannon from the top of his office building. His courtroom attire often drew criticism, with leanings toward snakeskin boots, suits lined with red silk, and heavy gold chains across his considerable girth.

Belli died July 9, 1996, in his San Francisco home of complications resulting from pancreatic cancer. The autopsy reported hypertension and cardiovascular disease as the cause. His monument, in his hometown of Sonora, California, bears his likeness and the title "the King of Torts." He was survived by six children and a widow, his fifth wife, Nancy Ho Belli, whom he had married on March 29 of the year of his death. Each of his previous four marriages had ended in an acrimonious divorce. Almost immediately upon his death, clashes broke out among his heirs regarding his estate and even the cause of his death. The last years of his life were embroiled in financial, professional, and health problems. He had declared personal bankruptcy in December 1995, and a federal judge had ordered that his practice be taken over by an independent examiner one week before his death. He fought with former partners and employees and had been the target of malpractice and tax evasion charges in the years preceding his death.

Throughout the beginnings of his career in the 1940s, Belli took on all kinds of personal injury cases involving such diverse matters as medical malpractice and product liability. The awards he won for his clients continually grew as a result of his innovative and often controversial techniques. He did not gain national notoriety, however, until the 1950s. He started writing then and lecturing across the country about torts and trial practice. Belli was given the title "King of Torts" by *Life* magazine in 1954, the same year that his *Modern Trials* was first published. He is pictured on the cover of the magazine in a convertible automobile with "Elmer," a skeleton he

used for jury demonstrations during trials. Elmer, one of his favorite props, even became the subject of a dispute among his heirs shortly after his death.

Belli became the scourge of the medical profession because of his aggressive pursuit of medical malpractice claims. In 1949, in one of his early and more controversial cases, a beautiful English woman claimed that a plastic surgeon who had operated on her breasts had replaced several of the parts unevenly. During the trial of her case, Belli asked the trial judge if his client could display her breasts to the judge and jury. She was permitted to do so, and the jury returned a substantial award. When asked later by a reporter what he had been thinking when his client had her head bowed and the tears dropped on her scars, Belli replied, " I could hear the angels sing and the cash register ring."

The 1944 case of *Escola v. Coca-Cola* helped to expand corporate liability for defective products. The case involved an exploding Coke bottle. In it, Belli established the idea that Coke was responsible even if it could not be proved what was wrong with that particular bottle. *Res ipsa loquitor,* "the thing speaks for itself," became a legal theory frequently applied in many product liability cases. It helped set the stage for later consumer product litigation. Consumer advocate extraordinaire Ralph Nader has called Belli "the Babe Ruth of Torts."

Belli was part of the legal team that represented Jack Ruby, a Dallas nightclub owner, in his murder trial. Other members of the team included Joe Tonahill and Phil Burleson, both Texas lawyers. President John F. Kennedy had been killed by an assassin's bullet in Dallas, Texas, on Friday, November 22, 1963. On the following Sunday, the nation was riveted to television screens as the alleged assassin, Lee Harvey Oswald, was transferred between jails. Ruby darted from the crowd and fired a single fatal bullet into the torso of the handcuffed Oswald. Bail was denied in the case, as was a defense team motion for a change of venue. Jack Ruby's Dallas trial opened three months later. Eleven of the twelve jurors had seen the shooting on television. The issue was not whether Jack Ruby had done it, but why. Ruby's defense was brain damage. Belli's psychiatric experts testified that Ruby's uncontrollable explosiveness was a symptom of psychomotor epilepsy. Prosecutors presented Ruby as a glory seeker who was simply in the right place at the right time. The jury took two hours and nineteen minutes to find Ruby guilty of murder. His sentence was death in the electric chair. In 1966, Ruby's conviction was reversed by an appeals court, which ruled that the motion requesting a change of venue should have been granted and that some statements made by Ruby to police should not have been admitted into evidence. Ruby had fired Belli, and a new defense team was set to retry the case in February 1967 in Wichita Falls, Texas. The trial never

Fanny Holtzmann

Known as "the Greta Garbo of the bar" (Berkman 1976, x), Brooklyn-born Fanny Holtzmann (1902–1980) established herself as a counselor to celebrities and royal families in New York, Hollywood, and England. Even before she graduated from night classes at the Fordham Law School, Holtzmann had gained an entrée into the entertainment world after persuading the firm for which she was working to contact performers who had failed to pay their advertising bills to the *Morning Telegraph*.

Rather than focusing on the bills, Holtzmann found ways that she could help authors and performers with negotiating contracts, putting their financial houses in order, and taking care of other legal problems. She proved so adept that many began treating her as their attorney even before she passed the bar. Holtzmann, who set up practice in New York with her brother Jack, was better known for her behind-the-scenes negotiations than for her courtroom advocacy. She developed a good grasp of the entertainment industry (as well as a good feel for lucrative plays and movies) and was often able to find common ground between her clients and those with whom they were in disagreement rather than going to court.

Holtzmann's biggest victory, which was actually argued by English barristers, was a suit that she brought on behalf of the Romanov family against MGM Studios for false portrayals of the Russian royal family in a movie about Rasputin. The English lawyers obtained the highest libel award to that date, and Holtzmann settled other claims outside of court for an undisclosed sum.

Deeply influenced by her grandfather, Rabbi Hirsch Bornfeld, who had lived with her family in Brooklyn, Holtzmann was strongly committed to the Jewish people. Holtzmann did her best to save fellow Jews—especially relatives—from Hitler's holocaust, and as a friend of Winston Churchill and members of the English royal family, she tried to foster support for Britain prior to the entry of the United States into World War II. During this time, she also helped transport English children to the United States, where they would not have to endure the fear of bombings.

After the war, Holtzman served as counsel to the Chinese delegates at the United Nations. Like her grandfather, she was also a strong Zionist who supported the establishment of Israel. In addition to her friendships with entertainment and literary figures as diverse as Eddie Goulding, Fred Astaire, and George Bernard Shaw, she knew Eleanor Roosevelt, Adlai Stevenson, Golda Meir, Dwight D. Eisenhower, and John F. Kennedy. Holtzmann also impressed U.S. Supreme Court justices Benjamin Cardozo and Felix Frankfurter.

Although she could be shy, Holtzmann made friendships easily (especially when she could find individuals familiar with Yiddish phrases), and she carved out a unique legal niche at a time when few if any American women were as prominent in the profession of law as she was.

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occurred. Jack Ruby died of cancer on January 3, 1967, in Parkland Memorial Hospital, where four years earlier John F. Kennedy had died.

Belli was dubbed "the Father of Demonstrative Evidence." Demonstrative evidence is defined as the depiction or representation of something. It has always been a part of trial practice. However, Belli's often controversial use of this technique took it to new heights. He turned the courtroom into theater with the use of props, wardrobe, and his stentorian oratory. His sometimes graphic technique of demonstratively presenting evidence to a jury became one of his trademarks. In his 1976 autobiography, *My Life on Trial,* Belli states, "Jurors learn through all their senses, and if you can tell them and show them, too, let them feel and even taste or smell the evidence, then you can reach the jury." Belli claims he literally stumbled on to the value of demonstrative evidence early in his legal career. He tripped and dumped dozens of prison-made knives in front of a jury trying Ernie Smith, a San Quentin inmate, for murder. The panel, convinced of self-defense, came back with an acquittal.

In a 1941 case, Katherine Jeffers's leg had been severed by a San Francisco streetcar. During the trial, an oblong object wrapped in butcher's paper lay on the plaintiff's table. The courtroom was horrified when, during closing arguments, Belli unwrapped the object and tossed it into the lap of a juror. "Ladies and gentlemen of the jury, this is what my pretty young client will wear for the rest of her life. Take it. Feel the warmth of life in the soft tissue of its flesh, feel the pulse of the blood as it flows through the veins, feel the marvelous smooth articulation of the joint and touch the rippling muscles of the calf," he exhorted, as the jury passed around the woman's new artificial leg. The award of $120,000 was ten times the usual amount for similar injuries of that era.

Belli has been called a pioneer, a pacesetter, a legend in his time; brilliant at law, spellbinding in court, and voracious in his appetites. He led a life of passionate enjoyment and fierce combat, both in and out of court. Most of his battles were fought on behalf of individuals against establishment powers, the insurance industry, the medical profession, or great corporations. His inventiveness in the courtroom, his imaginative use of demonstrative evidence, and his successful quest to raise the levels of personal injury awards have made him arguably the most imitated trial lawyer in the world.

—Sarah Bartholomew

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BENJAMIN, JUDAH P.

(1811–1884)

Judah P. Benjamin, best known for serving as Confederate president Jefferson Davis's right-hand man during the American Civil War, had previously distinguished himself as an outstanding Louisiana attorney and politician. After fleeing the South, Benjamin went on to become a prominent member of the bar in Great Britain.

Judah P. Benjamin
National Archives

Of Sephardic Jewish ancestry, Judah Benjamin was born to Philip Benjamin and Rebecca de Mendes in Christiansted, St. Croix, in the West Indies. His parents later settled in Charleston, South Carolina, where his father proved relatively unsuccessful in business but his mother managed to provide for the family through a shop where she sold dried fruit. She also secured aid from relatives to educate her son, the oldest living male of seven children. Judah's education included two years at Yale University, where he left under still-disputed circumstances.

After a brief return to Charleston, Benjamin went to New Orleans, where he was apprenticed to Greenburg R. Stringer, a notary with a commercial law firm. Benjamin was admitted to the bar in 1832 and shortly thereafter married Natalie St. Martin, a young Catholic Creole girl whom he had tutored in English. Natalie's religion and primary language were but two of the many differences between them (Benjamin does not appear to

have been an observant Jew, but, although he was given Catholic last rites at his wife's request, he does not appear to have affiliated with any other church either). They spent much of their married life apart after Natalie moved to Paris, where she raised their only child, a daughter named Ninette, born ten years into the marriage.

Two years after being admitted to the bar, Benjamin wrote, with Thomas Slidell, an influential digest of the twenty-five volumes of Louisiana cases, and thereafter his business and reputation grew rapidly. Benjamin focused primarily on civil and commercial law. He subsequently built a massive plantation house, Bellechasse, with 140 slaves, where he experimented with raising sugar cane and even wrote a book on the subject. Faced with financial difficulties, Benjamin would later sell the farm.

Unlike many Southerners of the day, Benjamin did not appear to believe that slaves were inherently inferior or that their slavery could be justified through the Bible. Although his arguments were undoubtedly tailored to the case he was arguing, Benjamin, in one of his most famous cases involving a revolt aboard the *Creole*, argued that slaves were human beings and that, as in institution, slavery was against the law of nations. In language subsequently published as an abolitionist brochure, Benjamin asked, "What is a slave?" and responded:

> He is a human being. He has feeling and passion and intellect. His heart, like the heart of the white man, swells with love, burns with jealousy, aches with sorrow, pines under restraint and discomfort, boils with revenge and ever cherishes the desire for liberty. (Evans 1988, 38)

Slaves who found themselves on free British soil after a mutiny aboard ship were therefore free, and the insurance company Benjamin was representing should not be responsible for paying damages to their masters. Benjamin's argument against Louisiana's use of the three-fifths ratio for slave representation appears to have been more designed to favor New Orleans (where slaves were less plentiful than in more rural parts of the state) than to reflect concerns over the morality of slavery, and, indeed, Benjamin appears to have later switched sides on this issue.

Benjamin did sometimes take unpopular stances. Although pubic opinion was reflected in a number of hung juries that refused to convict, Benjamin aided the government in prosecuting prominent New Orleans citizens who had attempted to foment trouble in Cuba, a practice then known as filibustering. In this case, Benjamin painted a picture portraying Cubans as a contented people who did not care for outside interference.

After service as a delegate to the Louisiana Constitutional Convention of 1842, as a Whig presidential elector in 1848 (he would later become a

Democrat), and as a Louisiana legislator, Benjamin was chosen in 1852, with the help of Slidell's New Orleans machine, to the U.S. Senate. Benjamin was the first person to so serve who did not hide his Jewish ancestry (the one prior Jewish senator, Florida's David Yulee, had claimed to be a descendant of a Moroccan prince). Had Benjamin accepted the appointment to the U.S. Supreme Court that was first offered to him, and later to two of his law partners by Millard Fillmore in 1853, he might have become the first Jewish justice as well, but, at the time, he was more interested in his political career.

Benjamin pushed hard for Southern railroads and tried to spearhead efforts to develop a rail line that would go from the South through a Mexican isthmus to the Pacific Ocean. Benjamin did not find his service in the Senate to be incompatible with continuing legal work. In 1854, Benjamin argued on behalf of relatives of a bachelor seeking to have his bequest to educate poor children reversed in *Murdoch v. McDonough*. Although succeeding in the Louisiana circuit court, Benjamin lost before the U.S. Supreme Court in a decision generally attributed to the weakness of his case rather than to his own presentation. Thus, a newspaper reporter observed that "whoever was not in the Supreme Courtroom this morning missed hearing one of the finest forensic speakers in the United States." He noted that Benjamin's address was "refined, his language pure, chaste and elegant; his learning and reading evidently great; his power of analysis and synthesis *very* great" (Meade 1943, 70). Maryland attorney Reverdy Johnson observed that "Benjamin had a power of argument rarely, if ever, surpassed" (Evans 1988, 103). Benjamin spent four days arguing *United States v. Castillero* (1860), a case involving a California silver mine, and, although he lost, he collected a fee of twenty-five thousand dollars.

Benjamin's argumentation and speaking skills were manifested in the Senate, where the official reporter of forty years identified Benjamin as the ablest and best-equipped senator he had known (Evans 1988, 103). Although he supported the Southern cause, Benjamin was recognized as a moderate. The orations Benjamin made in departing from that body after Louisiana's secession from the Union were widely praised and reprinted. Although Benjamin and Mississippi's senator Jefferson Davis had once had a personal dispute in the Senate that very nearly led to a duel, they had subsequently become friends, and Davis, as president of the Confederacy, chose Benjamin to sit on his cabinet, first as attorney general, and later as secretary of war and secretary of state. Benjamin established close relations with both Davis and his wife, Varina, and appears to have been one of Davis's closest advisors, even his alter ego, during the war. Benjamin rarely spoke out in public, and he sometimes took the blame for crises that might otherwise have been pinned on Davis or explained by circumstances that were

better not publicized. Unlike most cabinet members, Benjamin believed from the beginning that the war would be long, and he tried unsuccessfully to get the South to sell large amounts of cotton to foreign governments at the beginning of the war to enlist their support.

Benjamin's pragmatic approach contrasted with Davis's more rigid ideology. Among Benjamin's most daring plans was one for the emancipation of either all Southern slaves or those who agreed to take up arms on behalf of the Confederacy; on this occasion, Benjamin advocated and ably defended his views before a public audience in a display of oratorical talents that had undoubtedly been polished in the courtroom. As one who spent much of the war trying, usually without success, to secure help from foreign governments, Benjamin was motivated largely by his belief that such a policy could prove effective in securing such support. Not surprisingly, Benjamin was often targeted for criticism, especially in the South, not only for his willingness to advocate emancipation (for which he escaped censure by the Confederate Congress) but also because of his Jewish ancestry. Andrew Johnson was among those who had negatively focused on the fact that Benjamin was a Jew; another congressman called him "Judas Iscariot Benjamin" (Evans 1988, 235). In *John Brown's Body,* poet Stephen Vincent Benét would refer to Benjamin as "the dapper Jew," "a dark prince" (Evans 1988, vii).

After the fall of the Confederate capital at Richmond, Virginia, Davis and Benjamin headed south and later separated. Although Davis was captured, Benjamin escaped. He successfully disguised himself as a Frenchman and, after a series of harrowing escapes and brushes with death, which brought him south to Florida and through a number of Caribbean islands, he arrived in England, where he was a citizen because of his birthplace. One of the agents that Benjamin had commissioned for sabotage during the war had some links to one or more of Lincoln's assassins, and, with rumors abounding, Benjamin's life was probably even at greater risk than Davis's at a time when children were singing, "We'll hang Jeff Davis from a sour apple tree."

Although Davis would spend much of the rest of his own life reliving and seeking to justify the past, Benjamin preferred to look to the future. After arriving in England, Benjamin displayed the remarkable resiliency and cheer that is often reflected by his slightly upturned smile in pictures and reiterated in Stephen Vincent Benét's description of him in *John Brown's Body.* Benjamin took up the study of English law at Lincoln's Inn and served an apprenticeship to Charles Pollock.

Benjamin was admitted to the English bar in six months, and, much as he had done in Louisiana, in 1868 he used his extensive knowledge of French, Spanish, English, and American laws to publish *Treatise on the Law of Sale of Personal Property, with Reference to the American Decisions, to the French*

Code and Civil Law (usually called *Benjamin on Sales*) that was a standard text for thirty years (Evans 1988, 344). In 1868, Benjamin successfully argued a case on behalf of a former Confederate agent in London in *United States v. McRae*.

By 1872, Benjamin had been appointed as queen's counsel. From 1872 to 1882, he participated in more than 136 cases before the House of Lords and the Judicial Committee of the Privy Council (Evans 1988, 375). These included *Queen v. Keyn* (1876), also called the *Franconia* case, in which he successfully denied British jurisdiction in defending a German captain who had run down an English vessel. When after several days of intense questioning, the judges inquired how much longer he would take, Benjamin responded that it depended on how many more questions they asked! Acknowledging Benjamin's great command of international law, Lord Chief Baron commented, "You might pertinently ask us the questions" (Evans 1988, 376).

Although he arrived in Britain, as he had once come to New Orleans, virtually penniless, Benjamin was soon earning a substantial income, with which he continued to support his wife in Paris and other family members in America. Benjamin's high reputation at the English bar was similar to that which he acquired in America, and a number of stories circulated about his legal prowess. On one much-reported occasion, after hearing the lord chancellor mutter "Nonsense!" in response to an audacious opening proposition, Benjamin immediately folded his papers and left the courtroom, eliciting a subsequent apology from the chancellor and impressing all observers with Benjamin's own sense of dignity. Baron Pollack reported that Benjamin "thoroughly knew the rules of the game [and] presented his client's case with great force to a jury" (Evans 1988, 373). British observers sometimes commented negatively on Benjamin's American accent, and there are some indications that, as he aged, his voice was not quite as sonorous as it had once been, but British observers were just as impressed with his legal skills as Americans had been earlier. Despite his knowledge of languages, Benjamin does not appear to have used foreign words either in written or spoken speech for effect, but he was quite skillful in painting pictures with words. A fellow barrister noted that "he makes you see the very bale of cotton that he is describing as it lies upon the wharf in New Orleans" (Evans 1988, 377). Benjamin may have profited in part from the fact that, as a Louisiana lawyer, he had not only become familiar with Continental law, but he had also exercised functions that were divided in England between English barristers and solicitors. In England, as in America, his reputation had been given a boost by his writing skills.

The short and portly, but generally spry, Benjamin was injured when jumping off a trolley car in 1880, and he retired in 1882 after suffering a

heart attack, apparently brought on by diabetes. In an extraordinary display of respect, Benjamin was feted to a banquet at the Inner Temple in his honor by more than two hundred lawyers and judges, including most notables of the British bar and bench. Benjamin moved to Paris, where he had recently constructed a magnificent new house. He died on May 6, 1884, at age seventy-three, and was buried in Paris under the name Philippe Benjamin.

Benjamin, who kept an uncluttered desk, made it a practice to destroy personal papers, and little survives outside of official orders issued as a cabinet member during the Civil War and reports of cases in which he served as counsel. Benjamin published no memoirs, and, curiously, Jefferson Davis's own fifteen-hundred-page memoir (*The Rise and Fall of the Confederacy*, 1881) made only a single reference to Benjamin: "Mr. Benjamin of Louisiana had a very high reputation as a lawyer, and my acquaintance with him in the Senate had impressed me with the lucidity of his systematic habits and capacity for labor. He was therefore invited to the post of Attorney General" (Evans 1988, 386). In addition to achieving several firsts as an American Jew and serving in the Confederate cabinet, Benjamin will long be remembered for rising to the top of the bar in two countries.

—John R. Vile

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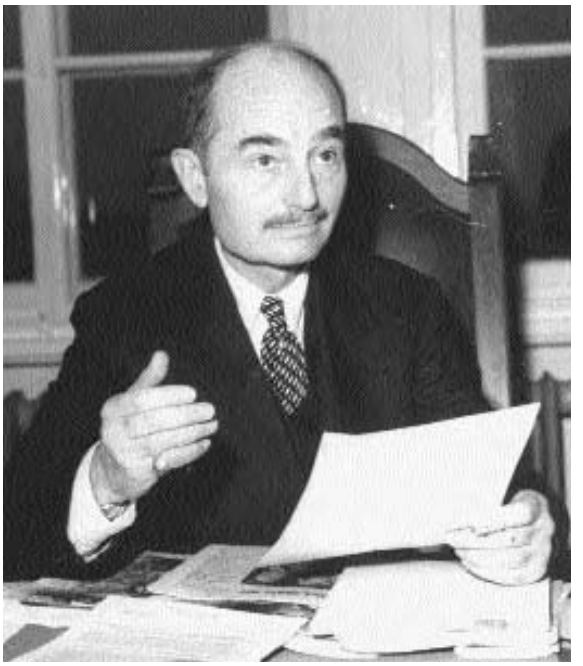
BIDDLE, FRANCIS BEVERLY

(1886–1968)

Francis Beverly Biddle was a successful Philadelphia corporate attorney, but it was his performance as a public attorney that distinguished him from other lawyers. During his professional life, Biddle served as an assistant U.S. attorney, a federal appellate judge, solicitor general, and attorney general of the United States. He was born in Paris, France, on May 9, 1886, while his parents, Algernon Sydney Biddle and Frances Robinson Biddle, were living abroad. The Biddles were a prominent Philadelphia family and had roots in the legal profession going back several generations, which prompted an observer to suggest that "Philadelphia plus law equals Biddle, and always has." One of the Biddle family ancestors was Edmund Randolph, who played a highly significant role at the Constitutional Convention in Philadelphia and was the country's first attorney general. Biddle's father built a very successful private practice and later became a member of the law faculty at the University of Pennsylvania. Biddle attended Groton Academy from 1899 to 1905, received his B.A. cum laude from Harvard University in 1909, and earned his LL.D. cum laude from Harvard Law School two years later.



Francis Beverly Biddle

Former U.S. Attorney General Francis Biddle, tribunal judge for the Nuremberg trials, photographed in Paris, 19 November 1945. (AP Photo)

Biddle served a year as secretary to Supreme Court justice Oliver Wendell Holmes. He would later say that the experience "roused and stimu-

lated" him more than anything "since the first exciting plunge into common law" at Harvard. Biddle, admitted to the Pennsylvania bar following his year in Washington, accepted a position with the Philadelphia law firm of Biddle, Paul, and Jayne. This was the firm founded by his father, and Biddle admitted the "weight of his father's achievements at times became hard to bear" (Biddle 1961, 293). He knew the firm was "antiquated if not moribund" but was determined to "change all that." He was soon to learn that his new associates "had not asked me to join them with the idea of my reorganizing their firm" (Biddle 1961, 293). Coming from Harvard and his year with Holmes, he was "pretty well pleased with the daydream of my future, and blithely unconscious of my shortcomings." The time with the firm his father had founded was a "sheer waste"; he had "no hard work to do" and received "no criticism and no encouragement" (Biddle 1961, 294). Two years later, he joined the practice of Barnes, Biddle, and Myers, also in Philadelphia. In 1918, he married Katherine Garrison Chapin, who became a well-known poet. The Biddles had two sons.

Biddle specialized in corporate law throughout his private practice. Almost immediately after joining Barnes, Biddle, and Myers, he was defending the Pennsylvania Railroad in accident claims cases. The opposing lawyers sought to get accident claims to sympathetic juries, while the "railroad solicitor—as we were officially designated" sought to keep cases away from juries (Biddle 1961, 336–337). Nonetheless, Biddle was a highly skilled and effective trial attorney and was particularly adept in the use of cross-examination. The secret of successful cross-examination, he suggested, was to know where to stop. Knowing where to stop, in turn, was a product of preparing the opponent's case as carefully as one's own in order to know exactly what questions to ask witnesses (Biddle 1961, 338).

Biddle came from a conservative background, but he eventually subscribed to a more progressive life view. In 1912, he supported the Bull Moose Party candidacy of Theodore Roosevelt and unsuccessfully sought election to the Pennsylvania state senate. Biddle interrupted his private practice in 1922 to serve as assistant U.S. attorney for the eastern district of Pennsylvania for three years, and gained "invaluable experience, particularly in trying cases" (Biddle 1961, 344). After several years in private practice and three years as a government attorney, Biddle "got to know the active bar well." He said there was "no pleasanter feeling for a lawyer than the sense of being at home in his profession, of handling the techniques of practice with confidence, and knowing the bar's traditions and talking shop" (Biddle 1961, 349). As his court practice became more extensive, Biddle became more active with the state and local bar associations. He found this experience "deeply satisfying," giving him a "sense of escaping from the loneliness of forever living with my own egotism." He served on the board

Francis L. Wellman and the Art of Cross-Examination

Few attorneys have done more to promote thinking about cross-examination than Francis L. Wellman (1854–1942). Wellman's *The Art of Cross-Examination* was published in four editions from 1903 to 1936 and continues to be reprinted and to have an impact on the legal profession. The book's trademark is Wellman's deft use of examples, many drawn from his own practice as an assistant corporation counsel and an assistant district attorney in New York (and later in full-time private practice), to illustrate appropriate and inappropriate cross-examination strategies.

Although Wellman put primary emphasis on thorough preparation and knowledge, some of his most striking examples involve subtle trickery. The author's favorite involves a laborer injured in an electric car collision who alleged that a dislocated shoulder had permanently impaired his ability to raise his arm above his shoulder. When Wellman asked the witness to illustrate his current condition, he reported that "the plaintiff slowly and with considerable difficulty raised his arm to the parallel of his shoulder."

Wellman then requested, "Now, using the same arm, show the jury how high you could get it up before the accident."

Before he realized what he was doing, the plaintiff responded by extending the arm above his head, bringing the entire court to laughter, and presumably helping Wellman win the case (Wellman 1962, 64).

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of governors of the Philadelphia Bar Association and the County Board of Examiners (Biddle 1961, 349–350).

Biddle was deeply affected by the plight of the poor and unemployed during the Great Depression. He had a "singular noblesse oblige" that took him into reform politics and ultimately Roosevelt's New Deal agenda (Whitman 1968). He switched his affiliation from the Republican to the Democratic party, and in 1932 became an enthusiastic supporter of Franklin D. Roosevelt, with whom he had attended Groton and Harvard. In February 1934, Biddle accepted appointment to a commission created to investigate coal and iron policies and learned much of the "intolerable conditions" under which the miners and steelworkers of Pennsylvania were living (Biddle 1961, 353). "I saw the dark and dismal conditions under which the miners lived; and the brutality that was dealt them if they tried to improve things" (Whitman 1968). His work on this committee was "my first affront" to two of his law firm's most important clients, the Berwynd-White Coal Company and the Pennsylvania Railroad (Biddle 1961, 353).

Several months later, Biddle was appointed chair of the newly created National Labor Relations Board (NLRB). Since Biddle came from a corporate law background and had little experience in labor relations, some of Roosevelt's advisers were skeptical of his capacity to deal effectively with such "militant labor leaders" as John L. Lewis and "hard-boiled, recalcitrant industrialists." Biddle proved equal to the task, however. He brought to the position a "lively sense" of the legal difficulties involved in investigating and adjusting controversies arising under the code-making section of the National Industrial Recovery Act between employers and employees. He also took on the Roosevelt Justice Department about its inaction on NLRB cases, testifying before the Senate Labor Committee in support of the Wagner Act provision that allowed NLRB attorneys to appear in court instead of the Justice Department attorneys. Biddle reminded the committee that in the NLRB's two years of operation, the Justice Department had brought suit in fewer than ten percent of the cases in which he had sought litigation. Biddle suggested that this failure to advance NLRB cases amounted to a "complete nullification of the law" (Irons 1982, 221).

Under Biddle's leadership, workers secured the right to decide if they wanted to be represented by a union and the right to collective bargaining between the designated employee unions and employers. The NLRB under Biddle's leadership was not administratively strong, but it was successful in defining federal labor laws to the benefit of workers. The NLRB wrote a number of thoughtful decisions, which became invaluable for the second NLRB created by the Wagner Act. Within a year, however, the Supreme Court declared the National Industrial Recovery Act unconstitutional, and Biddle resigned his position on the NLRB to return to private practice. His work as chair of the NLRB increased the "extent and variety" of his practice, but when he returned to Philadelphia to resume his private practice and become a director of a Federal Reserve Bank, he missed the "sense of freedom, the feeling of power, and the experience of the enlarging horizons of public work" (Biddle 1961, 366). During this period, Biddle served as chief counsel for the congressional investigation of the Tennessee Valley Authority. In 1939, Biddle gave up his partnership in his Philadelphia law firm and became a judge of the U.S. Court of Appeals for the Third Circuit.

Biddle found the judicial position unrewarding, and the following year he left the life-tenure judgeship to become U.S. solicitor general. The solicitor general represents the United States in cases reviewed by the Supreme Court—the United States is "his only client." Biddle wrote that the work "combines the best of private practice and of government service." The solicitor general determines what cases to appeal but is "responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration" (Biddle 1962, 97). Furthermore, there are none of the

"drawbacks that usually go with public work, no political compromises, no shifts and substitutes, no cunning deviations, no considerations of expediency." In short, the solicitor general "has no master to serve except his country" (Biddle 1962, 97–98). Biddle averaged a case before the Supreme Court every two weeks and spoke of the many long evenings he worked "to be ready to answer Justice Frankfurter's questions, [and Frankfurter] had the ability to swallow records like oysters" (Biddle 1962, 98). As was the custom for newly appointed solicitors general, Biddle called on the members of the Supreme Court. Chief Justice Stone, he recalled, "could not understand why I resigned from the Circuit Court." On the other hand, Justice McReynolds, who was not without a "certain cunning insight," did understand. He suggested to Biddle that "lawyers, not judges, make the law" (Biddle 1962, 96).

Most of the cases testing the constitutionality of New Deal legislation had already been argued before the Court before Biddle's appointment, but there were still a "few undetermined issues," which he presented. He felt a "certain historical pride in winning" the argument in *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). *Darby* determined that federal commerce power could reach manufacturing that precedes actual transport and extended the reach of federal regulatory power. Similarly, in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Court gave the government "sweeping control over water power, expanding the former test that the particular stream must in fact be navigable to include waters that could be made so" (Biddle 1962, 102). Biddle also helped write Roosevelt's statement approving the Smith Act, under which leaders of the Communist party were later prosecuted. He later expressed regret over his endorsement of this law. During his brief tenure as solicitor general, Biddle won fifteen of the sixteen cases he argued before the Supreme Court.

When Robert H. Jackson was appointed to the Supreme Court in 1941, Roosevelt nominated Biddle to replace Jackson as attorney general. Biddle served as attorney general until Roosevelt's death. World War II largely defined his priorities. For example, he was in charge of the registration of aliens during the war and defended this measure as protecting loyal aliens. Furthermore, far fewer people were prosecuted for sedition by Biddle's Justice Department than had been the case during World War I, in part because "local United States attorneys were not permitted to bring charges without Biddle's personal approval" (Polenberg 1972, 47). Criminal acts of enemy aliens were an altogether different matter. Biddle was the chief prosecutor of eight German spies and saboteurs who landed from submarines on the coasts of Florida and Long Island and were caught by federal agents. He was also responsible for structuring the military commission before which they were tried. The commission could impose the death penalty on a two-

thirds vote of the judges, and the president "alone had power of review" (Polenberg 1972, 44). Six of the eight were ultimately executed following their convictions.

Biddle was very critical of the effort by Congress to deport radical labor leader Harry Bridges, an action subsequently blocked by the Supreme Court in *Bridges v. Wixon*, 326 U.S. 135 (1945). Biddle's views earned him the praise of some laborites and the distrust of conservatives. His attempt to enforce an order of the War Labor Board against Montgomery Ward, the giant mail-order and retailing corporation, reinforced this perception of Biddle. Sewell L. Avery, the vehemently antiunion president of Wards, refused to deal with a Congress of Industrial Organizations (CIO) union, arguing that a majority of the work force no longer favored it. In April 1944, the union went on strike. The president, under terms of the Smith-Connally (War Labor Disputes) Act, had the power to take over a strikebound plant if it was "useful" to the war effort. Secretary of War Henry Stimson argued that because Wards was not doing "war business," federal intervention was inappropriate. Biddle disagreed. Wards supplied the army and millions of farmers, and it seemed to Biddle to fall clearly within the scope of Smith-Connally. Roosevelt agreed with him and ordered troops to execute the seizure of the company (Goodwin 1994, 498). When Avery refused to leave his office, Biddle ordered the military police forcibly to remove him from the premises. As Avery was carried out, he turned to Biddle and shouted, "You New Dealer," the harshest words he could summon at the moment. Media coverage of this incident generated much sympathy for Avery and unleashed a torrent of anti–New Deal rhetoric. Biddle's assertion of federal power, however, had "potently demonstrated to labor the indispensable importance of its wartime partnership with government" (Kennedy 1999, 642).

Three months after Biddle's elevation to attorney general, the Japanese attacked Pearl Harbor. Biddle immediately began to intern enemy Japanese aliens. This process was extended to German and Italian enemy aliens three days later when these nations declared war against the United States. Biddle was determined, however, to avoid "mass internment, and the persecution of aliens that had characterized the First World War." He issued an appeal to state governors urging them to join him against any "molestation of peaceful and law-abiding aliens, whether Japanese, German, or Italian." His request was "backed almost universally" (Biddle 1962, 209–210). He later commenced a program to naturalize aliens who were loyal to the United States who were citizens of the countries against whom the United States was at war.

Biddle sought to intern aliens on a selective basis, but there was a great deal of sentiment in favor of moving the West Coast Japanese on an "im-

mense scale" and holding them in relocation camps. The necessity for mass evacuation was, in Biddle's view, based primarily on public and political pressures rather than on evidence of criminal conduct. Public hysteria and, in some instances, the comments of the media brought tremendous pressure on government officials and military authorities. Biddle told Secretary of War Henry Stimson, an advocate of mass evacuation, that the Justice Department would have nothing to do with interfering with the rights of U.S. citizens, including those of Japanese ancestry. Roosevelt was predisposed toward unlimited evacuation and had Stimson prepare a plan to that end, which was later contained in Executive Order 9066. This order required the forced removal of all Japanese from designated military areas on the West Coast. Biddle had urged Stimson not to engage in mass internment of the Japanese but wrote that "I was new to the Cabinet, and disinclined to insist on my view to an elder statesmen whose wisdom and integrity I greatly respected" (Biddle 1962, 226). In late 1943, Biddle requested that Roosevelt institute a liberal release and return program that would have examined the loyalty of all interned and released those found to be loyal. This request was rejected, but Biddle continued to press for "accelerated releases" for internees certified to be loyal by the Justice Department. Anything else, he argued, "is dangerous and repugnant to the principles of our government" (Kennedy 1999, 755). Roosevelt agreed. Biddle later regretted that he had not opposed mass evacuation more forcefully.

When Harry S Truman became president in April 1945, he asked Biddle to resign so that he could replace him with Tom Clark. Soon thereafter, Biddle served as a member of the International Military Tribunal, which tried former Nazi leaders at Nuremberg. As a private citizen in the last two decades of his life, Biddle maintained his commitment to liberal causes. From 1950 until 1953, Biddle was head of Americans for Democratic Action, a liberal organization, and he served as an advisor to the American Civil Liberties Union. He also served as chair of the Franklin Delano Roosevelt Memorial Commission for ten years. During this period, he authored a number of books, including *In Brief Authority* (1962), *The Fear of Freedom* (1951), *Democratic Thinking and the War* (1944), *The World's Best Hope* (1949), and *Justice Holmes, Natural Law and the Supreme Court* (1961). In *The Fear of Freedom,* Biddle strongly argued against guilt by association, the House Un-American Activities Committee, censorship of textbooks, banishment of nonconformist teachers, the federal loyalty programs, and the vilification of those who stood up to the so-called subversive inquiries. Biddle was vocal in his condemnation of the way Senator Joseph McCarthy treated witnesses testifying before his Senate committee.

Biddle became a practicing liberal and a legal pragmatist. Biddle believed that the duty of the law is to "draw the line between the individual's rights

and the protection of society." That line must "necessarily vary as the needs of the one or the other seem at any particular time to be more imperative." His national political life spanned twelve years. Biddle died at his summer home on Cape Cod on October 4, 1968. He was survived by his wife of fifty years, Katherine Garrison Chapin Biddle.

—Peter G. Renstrom

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BLACK, JEREMIAH SULLIVAN

(1810–1893)

Jeremiah Sullivan Black served as chief justice of the Pennsylvania Supreme Court, as U.S. attorney general and secretary of state, and as reporter for the U.S. Supreme Court. However, his chief fame was as a litigator and Supreme Court advocate who brought fiery rhetoric and reasoned arguments against Reconstruction policies.

Jeremiah Sullivan Black
Library of Congress

Jeremiah Sullivan Black, oldest of the three children of Henry Black and Mary Sullivan, was born January 10, 1810, on his family's farm near Stony Creek, Pennsylvania. Henry Black served in the Pennsylvania legislature, as a lay judge of Somerset County for more than twenty years, and in the U.S. Congress. Patrick Sullivan, Jeremiah's maternal grandfather, had achieved the rank of captain during the American Revolution and was a Federalist member of the Pennsylvania legislature.

As a youngster, Black attended village schools until he transferred to a classical academy in Bridgeport. He later indicated that, although he had hated school and being confined, he loved books. By age fifteen, he had memorized the works of Horace and translated them first into English prose and then to verse from the original Latin. He also devoured the works of Shakespeare and the Bible and later frequently quoted the three in court-

room oratory. On leaving the Bridgeport school at age seventeen, Black wished to establish a career in medicine; however, Henry Black had different plans for his son—a career in law.

Black duly began his legal studies under the guidance of Chauncey Forward, a renowned lawyer and Democratic member of Congress. Three years later at age twenty, Black was sufficiently proficient to take and pass the bar examination. The congressman then departed for Washington, leaving his practice to his former student. Forward etched indelible imprints on Black's life as his teacher, his political mentor, his religious guide, and as his father-in-law. Mary Forward and Black were married on March 23, 1826. The couple had five children: Rebecca, Chauncey Forward, Henry, Mary, and Anna.

Black's thriving legal practice was further bolstered by his appointment as deputy attorney general for the county of Somerset. Between his own practice and that appointment, Black appeared frequently in court, often against such nationally known opponents as Charles Ogle and Joseph Williams, later a federal judge and chief justice of Iowa. In addition, Black served as deputy sheriff for the county.

The son and father differed not only about Black's career but also in political viewpoints. Henry Black was an active Whig, but his son established his Democratic credentials as early as 1828 through his support of Andrew Jackson. This political participation led both to acquaintances with prominent activists such as James Buchanan and to Black's appointment at age thirty-two as president judge of the Sixteenth Judicial District.

In 1851, Black was elected to the Supreme Court of Pennsylvania, chosen as chief justice, and reelected in 1854 as the sole statewide winner in the Democratic party. Of the 1,200 opinions issued during his tenure on the bench, Black wrote more than 250 of them. His opinions were couched in distinguished, distinct, and sometimes stinging language. One of his satirical dissents almost caused him to be cited for contempt of the court. His chief contribution as a justice was the formulation of jurisprudence relating to corporate charters, powers of corporations, and the authority of the government to regulate them.

Black was serving on the Pennsylvania Supreme Court when he was chosen as attorney general of the United States by his friend President James Buchanan. Black was unaware of his nomination or appointment until he was advised by the president in a letter that his commission as attorney general had been signed on March 6, 1857.

The new attorney general's initial argument before the Supreme Court was in *United States v. Cambuston* on January 7, 1858—Black's first appearance as an advocate in fifteen years. The United States had obligated itself to recognize valid Mexican land grants in California, but there were a num-

ber of forged deeds and fraudulent claims that had been ratified by the U.S. District Court in California. Under Black's guidance, seventeen grants were rejected by the Supreme Court, and more than one thousand square miles of land were restored to the public domain or to the rightful owners. *Cambuston* was merely the first of the "California land title" cases that Black would be involved with as attorney general and later in private practice.

As attorney general, Black enforced controversial and locally unpopular laws dealing with the slave trade and fugitive slaves. Slavery was accepted under the Constitution, in the statutes, and in the Bible. Aspects of slavery, especially the separation of families, personally troubled Black, but, for him, the law was the law and should be enforced.

On another volatile issue, secession, Black was every bit as steadfast. "The Union is necessarily perpetual. No state could lawfully withdraw or be expelled from it." Anticipating events, President Buchanan formally asked the attorney general for an opinion of the powers of the president to protect property of the United States in case of rebellion. As the president's constitutional legal advisor, Black responded on November 20, 1860, that "The right of the Central Government to preserve itself . . . by repelling a direct and positive aggression upon its property or its officers, cannot be denied. But this is a totally different thing from an offensive war, to punish the people for the political misdeeds of their State Government." Black viewed the question as a constitutional and legal issue rather than a political one, but his was the minority stance. The opinion created a storm of controversy, and clearly it was a political issue, especially in light of Abraham Lincoln's election two weeks earlier.

Despite the disagreement between Buchanan and Black about the president's failure to strengthen certain garrisons, Black was appointed as the new secretary of state when Lewis Cass resigned. He took office on December 17, 1860, the same day that the South Carolina convention met to consider the Ordinance of Secession.

This was not the office that Black and others had anticipated him assuming. There had been a vacancy on the Supreme Court since May with the death of Justice Peter V. Daniel, and there was a widespread belief that the retirement of eighty-four-year-old Chief Justice Roger B. Taney was imminent. Buchanan had withheld Black's nomination to the Court in expectation of Taney's retirement, but finally, on February 5, 1861, Buchanan forwarded the nomination of Black as associate justice to the Senate. The delay was most unfortunate because twelve Southern senators who might have supported Black had withdrawn from that body, and both the Douglas Democrats and the Republicans strongly opposed the nomination. In the end, the Senate decided by a stormy vote of 26 to 25 to decline consideration of the appointment, effectively killing the nomination.

At age fifty-one, Black returned to private life, suffering both from poor health and financial woes because of unwise investments. To support his family, Black became the reporter to the Supreme Court, a position of much lower prestige than he had expected at the Court. Black published two volumes of reports before he resigned to meet the pressures of his very large and substantial practice.

Black's initial appearance as attorney general before the Supreme Court involved land titles in California, and his return to the Court as a private lawyer replicated that. During the next four years, he appeared sixteen times as counsel for either the claimants or the government as special counsel in suits about California land titles; he was totally victorious in thirteen of the cases and partially successful in another. Black's extensive knowledge and expertise about the titles stemming from his term as attorney general allowed him to reestablish his fortune and his reputation as a successful litigator.

That reputation led to his selection, along with J. E. McDonald, David Dudley Field, and James A. Garfield (arguing his first case at any level), for the defense in *Ex parte Milligan*. James Speed, Henry Stanbery, and Benjamin F. Butler presented the government's case. The arguments lasted a week, from March 16 to March 23, 1866, against a background of tumultuous public discussions and congressional debate over continuing military control beyond the close of the war.

The writ of habeas corpus had been suspended during the Civil War, first by presidential proclamation and then by congressional act in 1863. The 1863 legislation mandated that a list of detained prisoners was to be provided to federal judges, who were authorized to discharge all unindicted prisoners within twenty days after the next session of the grand jury, but the procedure was often ignored.

Lambdin P. Milligan, a resident and citizen of Indiana and a U.S. citizen, was arrested at his home on October 5, 1864, by order of a military commander and placed in military prison although the civil courts were open, no state of rebellion existed in Indiana, and no enemy troops were within the borders. On October 21, Milligan and two others, Boles and Horsey, were tried and convicted by a military commission of conspiracy, inciting insurrection, giving aid and comfort to the enemy, engaging in disloyal conduct, and violating the laws of war. All three were sentenced to death by hanging.

In Milligan's appeal, he invoked the 1863 law and demanded his rights under the Constitution and the congressional acts rather than focusing on the military trial. Black's two-hour concluding argument, given without notes, focused on the right to jury from the Magna Carta to the Constitution, drawing extensively on history, the writings of great legal commenta-

tors, and precedent; he concluded by reminding the Court that the civil courts were open and military tribunals were therefore powerless over civilians in areas that had not been the scene of hostile actions. The Court agreed.

Black's fight against Reconstruction continued on two fronts. First, he acted as advisor to President Andrew Johnson and assisted in drafting Johnson's veto message of the Reconstruction Acts that would establish martial law in the South, but the measures were passed over the veto. He also counseled the president in the initial proceedings over impeachment. Second, just as *Milligan* ended military control in the North, Black sought in *Ex parte McCardle* to end it in the South.

In Vicksburg, Mississippi, William McCardle offended the military commander by the opinions he expressed in his newspaper. On November 13, 1867, military troops arrested McCardle and placed him in a military prison. A military tribunal tried and convicted McCardle; he appealed to the circuit court for a writ of habeas corpus, which was denied on the basis that the Reconstruction Acts were constitutional. Under a statute permitting appeal of all habeas corpus proceedings, Black invoked the jurisdiction of the Supreme Court.

The initial proceeding before the Court involved the question of the Court's jurisdiction. The attorney general refused to act for the government, and Senator Lyman Trumbull, James Hughes, and Matt A. Carpenter presented the argument that the Court lacked jurisdiction. Black and William L. Sharkey persuaded the justices otherwise, and the case proceeded to hearing on the issues on March 2, 1868. Black's arguments, resounding with the same fervor that produced *Milligan,* averred that the rebellion did not permit government to govern contrary to the law any more than it could have previously. After oral arguments but before the Court released its decision, Congress passed a law withdrawing the jurisdiction of the Court to hear proceedings involving the writ of habeas corpus—even those already made, thereby mooting Milligan's appeal.

Black's opposition to Reconstruction continued in *Bylew v. United States* and the *Slaughterhouse Cases,* both dealing with states' rights during Reconstruction. The *Bylew* case arose from an assault and murder in Kentucky involving African-American victims and witnesses and white perpetrators. The surviving members of the attack were statutorily prohibited from testifying as witnesses in trials against whites because of their race; therefore, the federal court assumed jurisdiction under the Civil Rights Act of 1866, even though criminal proceedings had begun in state court. Kentucky perceived this as usurpation of its traditional powers, and the governor retained Black and Isaac Caldwell for the Supreme Court appeal. Representing the United States was the first solicitor general, Benjamin H. Bristow,

and the attorney general, Amos T. Akerman. A year later, the Supreme Court announced its decision, essentially agreeing with Black that the national government had deprived Kentucky of one of its basic attributes of sovereignty and that federal jurisdiction did not accrue solely because of the race of the witnesses. The decision greatly impaired the potency of federal protections and remedies under the Civil Rights Act, a key piece of Reconstruction legislation.

In the *Slaughterhouse Cases*, Black, Matt A. Carpenter, and Thomas Jefferson Durant were chosen to represent the state of Louisiana. The state had passed a regulatory statute requiring that all butchering of animals in New Orleans occur at a particular slaughterhouse; the effect was to create a monopoly. Former Supreme Court justice John A. Campbell and J. Q. A. Fellows, representing the butchers, unsuccessfully sought an injunction in state court claiming that the butchers had been deprived of their property in violation of the Fourteenth Amendment's privileges and immunities clause. On appeal, the U.S. Supreme Court rejected that position and effectively nullified the privileges and immunities clause of the Fourteenth Amendment, again weakening one of the centerpieces of Reconstruction legislation.

Black's practice was truly a general one involving patents, fraud, land titles, will contests, and other matters. It was usually a solo practice, although at various times he entered into partnerships with his son-in-law, James F. Shunk, and with Ward H. Lemon, Lincoln's former law partner. From the time of *Milligan*, Black frequently practiced with James A. Garfield, although there was no formal partnership agreement. For example, the two appeared together in the will contest of Alexander Campbell, one of the founders of the Disciples of Christ Church. Black's father-in-law had been a staunch adherent of the denomination, and Black himself had been baptized by Campbell. Another prominent client was Cornelius Vanderbilt, who was seeking to overturn the will of his father, Commodore Vanderbilt. Settlement of the case resulted in a substantial payment to the son.

Black also engaged in business litigation. Railroads were frequent clients and adversaries. He won the right of railroad companies to consolidate in Pennsylvania and then caused the railroads to lose land grants in Kansas to the settlers already homesteaded there. Black represented the Providence Rubber Company in its losing battle against the Goodyear Rubber Company's allegations of patent infringement. Joining him were Caleb Cushing, Garfield, J. H. Parsons, Abraham Payne, and W. W. Boyce; W. E. Curtis, W. M. Evarts, E. W. Stoughan, and J. H. Ackerman represented Goodyear. The printed arguments before the Supreme Court covered more than seven hundred pages. Another business client was H. S. McComb, who claimed to have purchased corporate stock that was never delivered to

him. The subsequent investigations and resulting evidence at trial led to the revelation of congressional corruption (and the ensuing taint on Garfield's reputation), because the corporation was none other than the infamous Credit Mobilier Company.

Black frequently traveled across the nation to meet his speaking commitments and for various trials. He was also a prolific writer of articles and editorials, ever willing to challenge those with whom he disagreed, often using strong invective. At the time of his death on August 19, 1893, at his Pennsylvania home, he was fashioning a rebuttal to an editorial by Jefferson Davis and had completed preparations and briefs for another Supreme Court case involving the disenfranchisement of former polygamists in Utah.

Although he held high public offices and advised presidents, Black's chief legacy was that of a litigator who shaped the constitutional and legal history of the nation.

—Susan Coleman

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BOIES, DAVID

(1941–)

David Boies
Reuters NewMedia Inc./Corbis

As George Bush and Al Gore contested the electoral votes for Florida in November 2000, attorney David Boies emerged as a point man for Gore. Not only did he argue successfully for Gore in the Florida Supreme Court that the state's secretary of state could not certify the ballots for Bush until an additional week of recounting (a decision later called into question by the U.S. Supreme Court), but he also led the trial court team before Judge N. Sanders Sauls in the Leon County Circuit Court petitioning for additional voting hand counts. In addition, Boies appeared frequently on television to explain Gore's case to the nation (Harvard law professor Laurence Tribe, another lawyer described in these volumes, argued the first of two historic appeals of the Florida Supreme Court decision before the U.S. Supreme Court). Although the fifty-nine-year-old Boies was not as initially recognizable as Warren Christopher and James Baker (also spokesmen for Gore and Bush, respectively), he was well known among fellow lawyers and was hardly a stranger to the limelight.

Noting his "steel-trap mind, a laser-sharp memory, a head for chess and a skill with words," the *National Law Journal* had during the previous December named Boies as its Lawyer of the Year ("Boies Wonder" 1999, A8). Similarly, Boies had been featured in publications like *People Magazine* and *Van-*

ity Fair that are better known for highlighting celebrities than lawyers. Stephen Gillers, a New York University law professor, observed that "David Boies is on the cusp of becoming one of those lawyers who has achieved legendary status, like Webster or Darrow" (Bryant 2000, 50). Making another celebrity connection, the *National Law Journal* has likened Boies to the "Michael Jordan of the courtroom" ("Boies Wonder" 1999, A8).

Boies was born on March 11, 1941, in Sycamore, Illinois, the oldest of five children born to parents who were both school teachers. The family moved to Fullerton, California, during Boies's youth, and one of his early jobs was delivering newspapers in the Watts section of Los Angeles. Hindered by dyslexia, Boies did not start out as a particularly good student; indeed, he did not learn to read until he was in the third grade. Boies decided to marry Caryl Elwell shortly after graduating from high school, and he worked in construction and as a bookkeeper before gaining admission to the University of Redlands, Redlands, California, and later to Northwestern University in Chicago. Subsequently entering the graduate program in economics at Yale University (education that has served him well in subsequent antitrust cases), Boies transferred to the law school, earning his LL.B. degree in 1966 and graduating magna cum laude and second in his class.

At one time interested in becoming a full-time law professor (Boies has taught at New York University and the Benjamin Cardozo School of Law in New York City), Boies instead took his first job with the prestigious New York firm of Cravath, Swaine & Moore, and was, by his second year, involved with partner Tom Barr in the firm's mammoth 13-year defense of IBM against antitrust charges (Barr is described in Vinson 1994, 7–10). Promoted ahead of schedule to a partnership in 1972, by 1976 Boies was handling IBM cases on his own and won a stunning victory against California Computer Products and its attorney, Maxwell Blecher, who has been described as "one of California's savviest and most experienced litigators" (Reich 1986).

In 1977, Boies left Cravath to spend two years working for the Senate Antitrust Subcommittee and the Senate Judiciary Committee, for which he became chief counsel before returning to Cravath. In 1984, Boies was involved in the defense of CBS News against libel in a $120 million case brought by General William Westmoreland alleging inaccuracies and malice in a story that CBS did about him alleging that he had underreported enemy troop strength in Vietnam. Even though Boies had not previously handled a First Amendment case (Responding to the question, "What does David know about libel? About the First Amendment?" his wife replied, "Well, it's a very short amendment" [Vinson 1994, 24]), his meticulous reconstruction of the research that had gone into the CBS report, as well as his skillful cross-examination of General Westmoreland, resulted in Westmoreland's dropping his case. Boies's cross-examination was so effective

that members of the press corps reportedly began humming the theme of *Jaws* during his examinations (Vinson 1994, 26). In 1986, Boies successfully negotiated a settlement for Texaco against a $10.6 billion suit by Pennzoil for interfering with its purchase of Getty. (For the impressive work on Pennzoil's behalf by attorney Joseph D. Jamail, see Vinson 1994, 43–46).

In 1997, although reportedly making close to $2 million a year ("Boies Wonder" 1999, A9), Boies decided to strike out on his own after refusing to drop George Steinbrenner, owner of the New York Yankees, as a client (Perine 2000). Boies founded Boies, Schiller & Flexner in Armonk, New York, in Westchester County—a firm that has now grown to 55 to 60 attorneys and is earning kudos for its corporate and litigation work that match or exceed the reputation of Cravath.

The same year that he founded his new firm, Boies accepted an offer from Joel Klein, the deputy attorney general for antitrust matters in the U.S. Department of Justice, to lead its case against Microsoft. Boies, who can command as much as $600 to $700 an hour in other cases, agreed to work on the IBM case for a mere $50 per hour in what has been described by one government official as "the bargain of the century" ("Hang 'em High" 1999, 100). To date, Boies's leadership in the Microsoft case (the government's first monopolization case since its failure in the IBM case) has been credited with his team's success in leading to a trial court decision that might eventually result in the breakup of the huge corporation. Boies, who followed massive cramming sessions digesting the case by delivering an impressive three-hour opening without notes, also distinguished himself as one who was able to put an appropriate spin on developments for the local media and as one who could use the media to test the credibility of some of his legal theories. In addition, he showed himself to be a canny cross-examiner able to impeach the credibility of witnesses, including Bill Gates the founder and owner, with statements and concessions that he gained from them during extensive depositions. The *New York Law Journal* likened Boies's performance to putting on a "legal clinic" (Donovan 1999).

In 1999, Boies helped win an antitrust settlement of more than $1 billion from the vitamin industry (the largest such antitrust award in history); he successfully represented the state of Alaska in an antitrust case against BP Amoco; and he took on suits against health maintenance organizations Humana and Aetna-US Healthcare as well as a price-fixing suit against Sotheby's and Christie's prestigious auction houses in New York (Kahn 2000, 75). In 1999, Boies also helped a real estate magnate, Sheldon Solow, win an $11.5 million claim for asbestos damage against W. R. Grace & Company, and, apparently largely at the urging of his children, he chose to represent the Napster music service in its controversy with the Recording Industry of America over violations of copyrights.

Olson, Theodore B. (1940-)

Few who knew him were surprised when President George W. Bush nominated Theodore Bevry Olson in February 2001 to serve as solicitor general—the government's lead lawyer responsible for arguing cases before the U.S. Supreme Court—under newly appointed Attorney General John Ashcroft. Olson already had plenty of experience as an appellate lawyer, including the two oral arguments he made before the U.S. Supreme Court in *Bush v. Gore* (2000), which ultimately brought the Florida presidential election recount to an end, giving a slim state voting majority, Florida's electoral votes, and a majority of the national electoral college vote to Bush.

Olson was born in Chicago on September 11, 1940. He graduated from the University of the Pacific and attended law school at the University of California. He was employed with Gibson, Dunn & Crutcher in Los Angeles, and when firm partner William French Smith was appointed by Ronald Reagan to be attorney general, Olson was appointed as head of the Office of Legal Counsel. Accused of misleading Congress during its investigation of the Iran-Contra controversy (a charge that was later dropped), Olson was one of the named parties in the historic Supreme Court decision in *Morrison v. Olson* (1988) that upheld the constitutionality of the federal Independent Counsel Statute—a law that has since lapsed—against Olson's challenge.

Primarily responsible for appellate litigation in the Washington office of Gibson, Dunn & Crutcher after he rejoined the firm in 1984, Olson appeared before the U.S. Supreme Court eight times before successfully arguing *Bush v. Gore*. Olson unsuccessfully defended the Virginia Military Institute before the Supreme Court in the 1996 case that resulted in the admission of women to that institution, but he succeeded in a 1999 Hawaii case in convincing the Court to void a law restricting voting of trustees of a social welfare agency to original islanders (Schmidt 2000).

Olson unsuccessfully argued to reduce the sentence of Jonathan Pollard, who was convicted of passing secrets to the Israelis (Lane 2001). He also helped prep Paula Jones's lawyers for their appearance before the U.S. Supreme Court. In 1994, Olson successfully argued the pathbreaking case of *Hopwood v. Texas*, which led a U.S. Circuit Court to strike down an affirmative-action program

(continues)

As of November 1999, Boies was credited with losing only one case—defending Continental Airlines for predatory pricing against American Airlines—of the 45 major cases he had taken (Taft 1999). This record may, however, be overstated, since another observer noted that Boies lost a case in August of that year when a jury awarded $18.5 million against the Florida Power & Light Co. whom Boies had defended against breach of contract ("Boies Wonder" 1999, A9). Then too the verdicts in many cases are compromises rather than all-or-nothing victories or defeats.

(continued)

operated by the University of Texas. In a case that may come before the Court during his tenure, Olson recently filed a suit arguing that a section of the Endangered Species Act prohibiting landowners from killing wolves who come on their property is unconstitutional (Lewis 2001).

Long associated with conservative Republican causes, Olson serves on the board of directors of, and writes columns for, the *American Spectator* magazine, which has been particularly critical of President Clinton. Olson has jokingly told the Federalist Society that he is "at the heart" of "the vast right-wing conspiracy" (Tapper 2000). Olson is a friend of former prosecutor Kenneth Starr and of Justices Antonin Scalia and Clarence Thomas. Olson's wife Barbara Bracher, a one-time federal prosecutor, wrote a book critical of Hillary Rodham Clinton entitled *Hell to Pay*.

As assistant attorney general and head of Reagan's Office of Legal Counsel from 1981 to 1984, Olson authored numerous decisions, some of which did not always support the President's policies. This has led some observers, among them Walter Dellinger, who served as an acting solicitor general under Clinton, to predict that, as solicitor, Olson will be independent and might be willing to uphold some laws that are not to his own personal liking (Lane 2001). As a specialist in appellate cases, Olson is said to have "a clear, direct speaking style, devoid of rhetorical flourishes" ("At the Podium" 2000). Reflecting on his experience in arguing cases before the U.S. Supreme Court, Olson has said that:

> Before the Supreme Court, it doesn't work to have the emotional content that lawyers get away with at the trial level. There's no lack of passion about the case, but the justices want to have a conversation with you. You have to meet and discuss their questions, and they don't want you to bob and weave. ("At the Podium" 2000)

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Perhaps in partial compensation for his early problems with dyslexia, Boies has the reputation of working only from a bare outline and for drawing from what *People Weekly* somewhat hyperbolically described as "a memory that could be measured in megabytes" ("Making His Case" 1999, 88). Partner Jonathan D. Schiller has joked about Boies's extraordinary concentration and memory by noting that, "He blinks a couple of times and he's got a new cassette in place" ("Boies Wonder" 1999, A9).

Observers have noted that Boies's courtroom demeanor is calm and me-

thodical rather than blustery and that transcripts of his trials do not necessarily make for riveting reading. Former partner Tom Barr of Cravath, Swaine & Moore notes that "the one talent of David's that stands out is his ability to lay out a course of action that would take into account any sort of complicated facts and develop a far-reaching scenario. It's a chess player's sense: if I do this, the following 15 things are going to happen, and if step 11 goes so, I'll do this rather than that. It's a fantastic game-playing ability" (Reich 1986, 74).

Boies is also credited with his "ability to take calculated risks" (Reich 1986, 74), as when, in the Westmoreland libel case, he chose to attempt to demonstrate the truth of the CBS commentary rather than simply defending CBS against charges that it had maliciously aimed at destroying the reputation of the general (Reich 1986, 74).

Boies is also known for emphasizing major points on cross-examination rather than nit-picking. Speaking of his role in the IBM case, Boies observed that "I want to get to the handful of central points that are at issue, while pausing to hit items that illustrate problems with the testimony. I don't want to nibble at the edges" ("'Hang 'em-High' Boies" 1999, 101). Although Boies is quoted as saying that, "I never want people to say, 'That's a great lawyer,' I want them to say, 'He sure has a great case,'" an observer has noted that Boies is "too much the showman to let his audience get bored" ("'Hang 'em-High' Boies" 1999, 101).

It has been said that Boies's casual cross-examinations are conducted without notes, as though he were "casually following the natural course of interrogation as if rafting down some lazy river" (Bryant 2000, 50). Boies has an uncanny way of using innocuous early admissions gathered during the first hour or so of such examinations to fashion a verbal noose that will successfully impeach a witness. One observer has said that Boies has "the understated canniness of a courtroom Columbo" (Sandberg 1999, 56), while another has likened his skill at cross-examination to a taste for blood ("Boies Wonder" 1999, A9).

Boies has had two children by each of three successive wives; his current wife, Mary, is herself an antitrust attorney, and of his four grown children, all of whom are attorneys, three work in the New York firm that he founded. A prodigious worker who told a colleague that he would rather win cases than sleep, Boies owns a wine cellar and an 86-foot sailboat (Thomas 2000, 43). He is known for enjoying good food and wine, for his skill at bridge, and for his gambling trips to Las Vegas. In contrast to many other high-paid lawyers, Boies typically dresses in black sneakers and suits bought off the rack at Sears or from a Land's End catalog; he also wears a Timex watch.

Responding to a critic who observed that, "He's got the whole Jimmy Stewart thing going on that makes him seem very normal and one of us when he's really a New York millionaire," one of Boies's associates responded that, "It's not a false image. David has the ability to know what's going to be important and then focus on just that. Everything else doesn't matter. Clothes don't matter" (Taft 1999). Comedian Garry Shandling, who hired Boies for a case that was later settled without trial, noted that he was "taken" by Boies's "earthiness and his authenticity" ("Boies Wonder" 1999, A9). Pointing to his mastery of the courtroom, Boies's attorney wife points instead to his artistry and likens watching him in action to seeing "Baryshnikov at the ballet" (Thomas 2000, 43).

—John R. Vile

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BRANDEIS, LOUIS DEMBITZ

(1856–1941)

Louis Dembitz Brandeis was a lawyer, social activist and reformer, and associate justice of the U.S. Supreme Court. Brandeis was born in Louisville, Kentucky, the youngest of four children of Adolph Brandeis and Frederika Dembitz, both first-generation immigrants from Prague. Adolph established a successful wholesale grain business and oversaw a household in which lively conversation about current events was common. The senior Brandeis was also a prudent businessperson and correctly anticipated the economic depression of 1873. Shortly before it hit, he sold his business and moved the family to Europe for three years. There Louis received some education, although he failed to gain admission to the highly competitive Vienna Gymnasium. After months of travel with his father, Louis enrolled in the Annen-Realschule in Dresden, Germany, studying there from 1873 to 1875. In later years, Brandeis attributed much of his skill at legal analysis to the demanding education he received in Dresden. He returned to the United States in 1875 to begin study at Harvard Law School. His decision to do so was influenced by his uncle, Lewis Dembitz, a noted Louisville attorney. So strong was Dembitz's influence on the young Brandeis that he changed the middle name given him at birth (David) to Dembitz.

Louis Dembitz Brandeis
Bettmann/Corbis

Brandeis arrived at Harvard just as one of the great changes in legal education was taking place. Christopher Columbus Langdell, the new dean, had introduced the case-study method. This new technique replaced the traditional practice of professors lecturing from legal treatises; instead Langdell emphasized the analysis of selected cases in depth in an effort to isolate key legal principles. This scientific approach to the law suited Brandeis particularly well given his German education, and he excelled. He finished his legal studies and did an additional year of graduate work, graduating in 1877 as the class valedictorian.

Brandeis was initially uncertain about where to begin his law practice. He decided to move to St. Louis to join the firm of his brother-in-law, James Taussig. The arrangement lasted only a year; Brandeis returned, lonely and unhappy, to Boston. There he opened a practice with Samuel Warren, a law school classmate and a prominent Boston socialite. Their firm quickly prospered, both in stature and income; within a decade it was one of the largest in the city. Brandeis also found Warren intellectually compatible, and together they published in the *Harvard Law Review* a path-breaking essay on the law of privacy.

Brandeis specialized in commercial law, and the firm, which ultimately became known as Brandeis, Dunbar & Nutter, built a reputation for knowing more about the business of its clients than they did. Much of Brandeis's time as a lawyer was spent consulting with clients about business strategies to pursue rather than mounting defenses once action had already been taken. At the same time, Brandeis was uniformly recognized as one of the toughest, smartest, and most knowledgeable lawyers in the city, a position that fueled his reputation as a litigator to be feared in the courtroom. That reputation served Brandeis well; by the 1890s he was hailed as one of the nation's most accomplished lawyers. The average salary of a lawyer during these years was five thousand dollars a year; Brandeis regularly earned ten times that much.

A stream of moral commitment also ran throughout Brandeis's career. He summed up his views about the relationship of law to public service in an article originally given as a speech to the Harvard Ethical Society in 1905. Entitled "The Opportunity in the Law," the essay exhorted his colleagues to develop careers that would place them in an independent position between the people and the huge industrial corporations then forming. The lawyer, according to Brandeis, was responsible for curing the excesses of either. This role meant that the lawyer had to use the law as an active instrument to shape the nation's social, economic, and political future. Recognizing these responsibilities, Brandeis reminded his peers to confront two realities. First, that the individual was the key force in society; second, that individuals, no matter how talented, all had limited capabilities. That meant that

government in general and lawyers in particular had a strongly paternalistic role, one in which the state, operating through the law, had a responsibility to help people make the best of themselves. Brandeis's paternalism did not require that government coddle the individual; to the contrary, it meant that government had to foster regulated competition that would allow all persons to realize their full potential. Brandeis also reminded his fellow lawyers that individuals were most likely to realize their potential through small rather than large communities and that democracy itself was threatened by the development of giant corporations.

These themes of individual commitment and the value of small communities in control of their own destinies made Brandeis one of the nation's most influential Progressive lawyers. With his practice secure, Brandeis took the then-unorthodox step of providing his services for free to reform causes he supported. His role as a public advocate began in Boston. For example, with Edward Filene in 1900 he formed the Public Franchise League, which ultimately reached a compromise over the consolidation of all of the city's public utilities, including the subway. He was instrumental as well in developing the savings bank life insurance program for workers. Brandeis believed that large insurance companies sapped the average person of an inefficiently high proportion of their income with little real protection in the case of disaster. Instead, he proposed the establishment of savings banks that offered similar services at lower cost and with a guaranteed rate of return. The new arrangement was adopted not only in Boston but in other parts of the nation. So proud was he of this new scheme that close to the end of his life he remarked the savings bank life insurance program was his most important achievement.

Brandeis's fame quickly spread beyond Boston as he became known nationally as "the People's Attorney." In 1908, for example, Brandeis successfully argued the case of *Muller v. Oregon* before the U.S. Supreme Court. *Muller* involved an Oregon statute that limited women to ten hours of work per day in laundries and other industries. Curt Muller, the owner of the Grand Laundry in Portland, Oregon, required one of his female workers to stay on the job for a longer period. He was subsequently tried and fined ten dollars, and the Oregon Supreme Court upheld his conviction on appeal. Muller then turned to the U.S. Supreme Court, claiming that the Oregon law violated the principle of freedom to contract that the justices had recently proclaimed in *Lochner v. New York* (1905). Brandeis was brought into the case at the request of the Oregon attorney general and through the aegis of Josephine Goldmark, his sister-in-law and the head of the National Consumer's League.

Brandeis recognized that, given the precedent in *Lochner,* he had little chance of winning by demanding a strict application of precedent. Instead,

he pioneered a new kind of legal brief that had long-term consequences for legal analysis and Supreme Court litigation. Brandeis's brief devoted a mere two pages to the discussion of the legal issues; the remaining 110 pages addressed the consequences of having women work overly long hours. Brandeis argued that the health, safety, and general welfare of working women would suffer if they were forced to toil too long. To buttress this position, he turned to a wide array of evidence, much of it drawn from studies of the impact of the industrial revolution in England and Europe. This evidence was taken from medical reports, psychological treatises, statistical compilations, and legislative studies. Brandeis mustered this broad range of social scientific evidence to demonstrate the importance of taking account of the impact rather than the strict letter of the law.

From these materials Brandeis persuaded a unanimous Supreme Court that the Oregon legislature had acted reasonably in passing the ten-hour law. He also asserted that legislative bodies were more appropriate forums for determining reasonable social needs than were courts. Judges were required, as a result, to take account of the evidence used by state legislatures in drafting laws to deal with the impact of the industrial revolution. A court might well conclude that legislators had used faulty data to draw unreasonable conclusions about social conditions, but at least judges had a duty to weigh such information. Lawyers, at the same time, had a duty to assess for the courts what the impact of a particular piece of legislation might be on the social fabric. This new approach opened the evaluation of any law to its policy implications rather than just its inherent legal logic.

The Brandeis brief became one of the central features of the new sociological jurisprudence. This new approach quickly gained a following among lawyers, such as Brandeis, who were eager to support a wide range of economic and other reform legislation. Not surprisingly, even Brandeis's staunchest conservative critics decided that the best way to fight this new approach was to adopt it. Over the longer term, the technique of using social scientific evidence to frame legal arguments was adopted by practitioners in contexts far removed from economic regulation, such as abortion and the death penalty.

Brandeis's national reputation also grew as a result of his leadership against the proposed merger by wealthy financier J. P. Morgan of the New Haven and Hartford Railroad Company with the Boston & Maine Railroad. Brandeis's objection to the proposed merger was based on his assessment that the combined railroads would concentrate too much power in the hands of one person. What concerned Brandeis most, however, was his growing realization that bigness in and of itself was antithetical to democracy. His solution was to regulate competition, so that all businesses could play on a level field. This position put Brandeis at odds with the other great

trustbuster of the Progressive era, Theodore Roosevelt, who believed that the best approach was to regulate particular monopolies.

Brandeis became a leading opponent of industrial concentration in the years leading up to World War I. His opposition to bigness was rooted in what he viewed as a sound approach to business practices and not just a philosophical disagreement about the best way to promote democracy. For example, he sharply criticized large railroad companies because they increased shipping rates without explanation. Brandeis charged that the managers of these companies owed their shareholders the best possible return on their investments. Borrowing from the writing of Frederick Taylor and other advocates of greater industrial efficiency, Brandeis developed the concept of scientific management. By this idea he meant that the managers of any business should precisely determine the resources and time necessary to complete any task. If they did so, then the use of capital would be maximized, thereby benefiting shareholders, and costs would be kept in check, thereby benefiting consumers. What Brandeis wanted from business was a reduction in waste, a softening of the struggle between capital and labor, and a commitment to a new gospel of efficiency.

Brandeis stirred national attention in other ways. During the administration of President William Howard Taft, for example, Secretary of the Interior Richard A. Ballinger came under attack for his stewardship of the nation's natural resources. Much as he had criticized J. P. Morgan for corruption in cooking the books of the railroad companies he sought to merge, so Brandeis turned his lethal legal gaze on charges of corruption by Ballinger. Brandeis led a team of lawyers who successfully demonstrated that Ballinger's decision to open certain lands to public entry had been motivated, at least in part, by a desire to serve major corporate interests. Even though a congressional investigation exonerated Ballinger, Brandeis had so successfully focused public attention on the matter that the secretary of the interior resigned in March 1911.

As a result of these actions, Woodrow Wilson, the Democratic candidate for president in 1912, eagerly sought Brandeis's counsel on a host of economic and social reform matters. That relationship grew even stronger after the former New Jersey governor entered the White House. The new president had originally wanted to offer Brandeis the position of solicitor general, but that idea faded when the business wing of the party raised objections. Ever the realist, Brandeis refused to let this opposition color his attitude, and he continued to interact regularly with Wilson. As Brandeis explained to his brother, the "future has many good things in store for those who can wait, . . . have patience and exercise good judgment" (Paper 1986, 144).

Wilson ultimately rewarded Brandeis for his loyalty by nominating him to the Supreme Court in January 1916 to replace Justice Joseph R. Lamar.

A combination of conservative forces drawn from corporations, a bar resentful of Brandeis's public advocacy, and anti-Semites coalesced in opposition to the nomination. The result was one of the most bruising confirmation processes in U.S. history that was notable for being the first one to be fought through open rather than closed hearings. President Wilson remained steadfast in support of his nominee, as did the major reform groups. Finally, in June 1916 the full Senate confirmed him by a vote of 46 to 22, making Brandeis the first Jew to sit on the high court.

On the bench, Brandeis exercised fidelity to the same causes and methods that guided his law practice for more than three decades. Brandeis was a consummate legal craftsman, perhaps the finest to sit on the high court in the twentieth century, and he was also the Court's greatest authority on commercial law. He also recognized that justices could not act as legislators and, as a result, he became one of the leading exponents of judicial restraint. He also remained mindful of the need to weigh the facts in a particular case, much as he had done as a lawyer. Through much of his judicial career, however, such a stance often placed him at odds with his colleagues and promoted regular dissents. As a justice, Brandeis wrote 528 opinions, 454 on behalf of the Court, and the rest in concurrence or dissent. Brandeis's dissents were invariably longer, and crammed with detail reminiscent of his earlier work on *Muller,* than his opinions for the Court.

Although Brandeis believed that the justices should defer to the legislature in matters of economic policy, he often took a different stance in cases involving civil liberties and civil rights. In *Whitney v. California* (1927), for example, he eloquently defended free expression rights against intrusion by the government. In *Olmstead v. United States* (1928), he objected to the Supreme Court's finding that wiretapping did not constitute a violation of the Fourth Amendment. Through his dissent he instructed his fellow justices on the right of privacy, about which he and Warren had written years earlier. "The makers of our Constitution," Brandeis wrote, "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man" (277 U.S. 438, 478). Much of Brandeis's thinking on the subject of privacy as a constitutional matter was adopted by the Court in *Griswold v. Connecticut* (1965). Brandeis believed strongly in the value of dissent generally, because he saw it as a way to speak to future generations about what might be done with the law when social circumstances had changed. As he once told Felix Frankfurter, "My faith in time is great" (Urofsky 1992, 85).

Brandeis's most important contribution on the bench was his majority opinion in *Erie Railroad Co. v. Tompkins* (1938). He believed that the federal judiciary should have only limited jurisdiction and that it should apply only to matters that went beyond the concerns of any one state. As both a

commercial lawyer and later a justice, he repeatedly argued that the historical rule in *Swift v. Tyson* (1842), that allowed federal courts to ignore state law in favor of a federal common law of commercial relations, was wrong because it confused the law and prompted litigants to engage in wasteful forum shopping. In *Erie* he finally carried the day in a decision that required lower federal courts to follow state rules.

Brandeis continued his political contacts even while a justice, a practice that has stirred recent criticism from students of the Court. On the one hand, Brandeis set a strict standard for his behavior, refusing to comment publicly on the work of the Court or even to accept an honorary degree. On the other hand, Brandeis repeatedly consulted directly with President Franklin D. Roosevelt and other members of the administration and used his good friend and Roosevelt confidant, Professor Felix Frankfurter of the Harvard Law School, to serve on other occasions as an intermediary.

Few American lawyers have had the impact that Brandeis did, either in practice or on the bench. He not only redefined the nature of legal argument through the adoption of the Brandeis brief, but he also demonstrated both on and off the bench the value of social scientific information as a way of adapting the law to meet social change. Perhaps the greatest testament to Brandeis's influence is that much of what he urged as a Progressive reformer and later as a justice in dissent has become commonplace today.

—Kermit L. Hall

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BUGLIOSI, VINCENT T., JR.

(1934–)

Vincent T. Bugliosi Jr.

A crowd of reporters surround Los Angeles prosecutor Vincent Bugliosi as he leaves the courtroom during the trial of Charles Manson, 3 August 1971. (Bettmann/Corbis)

Vincent T. Bugliosi Jr. spent eight years as a prosecutor with the Los Angeles County District Attorney's Office, trying nearly 1,000 cases, and winning 105 out of 106 felony jury trials. Bugliosi achieved his greatest fame as lead prosecutor in the early 1970s trial of Charles Manson and four members of his "family" for the brutal 1969 murders of seven people. Bugliosi won convictions in those trials, as he did in all of the twenty-one murder trials he prosecuted. Since 1972, Bugliosi has been in private practice and has continued to achieve a string of courtroom victories. He has also established a very successful career as a writer of several best-selling books based on his own career as a prosecutor and defense attorney, as well as two novels and several works on contemporary legal issues.

Bugliosi was born in Hibbing, Minnesota, on August 18, 1934, the son of Vincent and Ida Bugliosi. Bugliosi senior was an Italian immigrant and the

owner of a grocery store in Hibbing before he began working as a conductor for the Great Northern Railroad. Vincent Bugliosi Jr. moved to Los Angeles for his last year of high school and then attended college at the University of Miami, Florida, where he received a B.A. degree in 1956. He achieved the rank of captain in the U.S. Army in 1957. Bugliosi then entered law school, graduating with an LL.B. degree in 1964 from the University of California at Los Angeles, where he was the president of his class. After graduation, he was admitted to the California bar and joined the Los Angeles district attorney's office, where he remained for eight years before becoming a partner in the Beverly Hills law firm of Steinberg & Bugliosi. From 1968 to 1974, he was a professor of criminal law at the Beverly Hills School of Law. Bugliosi twice ran for elective office, losing both times, first in 1972 when he sought to become the Los Angeles district attorney (DA), and then in 1974 in an election for the California attorney general. He has been married since 1956 to his wife Gail (Talluto), and they have two children, Wendy and Vincent.

Bugliosi's success as both a prosecutor and defense attorney has made him one of the most well-known authorities on trial practice in the United States. In addition to giving numerous lectures and appearing in seminars, he has written several essays explaining his techniques in preparing for and handling criminal trials. According to Bugliosi, preparation is the most essential factor in success at trial. He credits his achievement as a trial lawyer to detailed preparation. Most important, he advocates that lawyers write down everything they know about a particular case, and then write down the way they intend to proceed at trial. Accounts of his most famous cases include numerous references to his detailed note-taking on all phases of the trial, from the initial investigation and discovery phases, to questions for witnesses, to the final arguments. He has said that he determines the evidence and testimony he will need to win a lawsuit, and then, based on what he has found, he carefully plans the best way to present his case to a jury, having much of his final argument drafted even before jury selection begins. Even as a prosecutor, Bugliosi joined in the investigation of the crime, working with the police to seek out evidence and witness testimony himself. Bugliosi believes that such intense preparation allows attorneys more control over the events that follow, even allowing for unexpected developments. He describes the trial as "the acting out of the scenario or script you have already written."

Bugliosi achieved national prominence through his investigation and successful prosecution of Charles Manson, Susan Atkins, Patricia Krenwinkle, and Leslie Van Houten in the brutal 1969 Tate-LaBianca murders. The trial was complicated by the brutal nature of the murders, the presence of multiple defendants and their attorneys, and the DA's removal of Bugliosi's

co-prosecutor shortly after the beginning of the trial. Adding to the confusion was the often disruptive behavior of Manson and his followers throughout the nine-and-a-half-month trial, and the fact that all of this took place under the glare of the media spotlight. Nonetheless, Bugliosi and the prosecution team convinced the jury of Manson's guilt despite the fact that he had not been present during the murders. The prosecution focused on Manson's part in the conspiracy to commit each atrocity, with Bugliosi skillfully establishing Manson's motive and his control over his followers while still proving Atkins, Krenwinkle, and Van Houten's own culpability in committing the crimes.

Given the seemingly random nature of the Tate-LaBianca killings, as well as Manson's nonparticipation at the murder scenes, Bugliosi has described his search for a motive as one of the key elements he sought to uncover during his investigation of the case. After interviewing the many people who had interacted with the Family in prior months and years, Bugliosi eventually began to focus upon Manson's belief in "helter skelter," a complex philosophy created from, among other things, the book of Revelation and lyrics by the Beatles. Although he had difficulty at first convincing his co-prosecutor to accept this theory, Bugliosi eventually presented evidence and arguments to the jury showing that Manson hoped to spark an apocalyptic race war by implicating African-Americans in the Tate-LaBianca murders. During "helter skelter," the African-American race would murder all of the white population except for the Manson Family, who would be hidden away in Death Valley. At that point, according to Manson, the victors would turn to him for leadership. After months of testimony, argument, and courtroom disruption, the jury convicted Manson and the three women on all charges. Later in 1971, Bugliosi successfully prosecuted the fifth member of the Manson family accused in the Tate-LaBianca murders, Charles Watson, who was convicted of seven counts of murder and one count of conspiracy to commit murder, and, like the other four defendants, sentenced to death (although the California Supreme Court subsequently overruled the state capital punishment law).

Although the Manson trial established Bugliosi's national reputation, he had already won a large number of high-profile courtroom victories and had been recognized for his determination, courtroom skill, and flair for publicity in his previous four years with the Los Angeles DA's office. One of Bugliosi's earlier murder trials became the basis of a 1978 book. In a scenario that has been compared to the film *Double Indemnity,* Alan Palliko, a former Los Angeles police officer turned automobile insurance investigator, and his girlfriend, Sandra Stockton, were charged with murdering her husband for insurance money. Palliko was also charged with murdering his wife for the same reason. No physical evidence tied Palliko or Stockton to the

crimes, yet prosecutor Bugliosi successfully built a case on circumstantial evidence, including Palliko's and Stockton's extravagant expenditures after the death of Mr. Stockton, and Palliko's dogged search for a wife—one that he quickly insured—in the months that followed. In his jury summation, Bugliosi compared circumstantial evidence to different strands of rope that when bound together create enough strength to establish guilt. The jury accepted the prosecution's case and convicted both defendants.

Although Bugliosi has said that he is happiest in a courtroom and has spoken of his wish to become a leading criminal defense attorney, he has only sporadically taken cases since he entered private practice in 1972. His courtroom success, however, has continued in the cases he has handled, as he has won acquittal for his clients in each of the three murder trials he has handled for the defense. Despite this, he has perhaps failed in his stated ambition to find a case that would do for his defense career what the Manson trial did for his reputation as a prosecutor. His representation of accused murderer Jennifer Jenkins has received the most attention because of his subsequent book on the case and the movie that followed. A great deal of circumstantial evidence tied Jenkins to the 1974 murder of a woman on an island in the South Seas, including the fact that she and her ex-lover had shown up in Hawaii in a boat owned by the victim and her husband, who had both disappeared. The prosecution also focused on the vicious nature of the murder, arguing that this made it unlikely that Jenkins's lover could have committed the crime without her knowledge. Furthermore, Jenkins was a troublesome client, with both a criminal record and a seeming reluctance to aid her attorneys in her defense. Still, after speaking with her and investigating the case, Bugliosi believed in her innocence. During the trial, he successfully refuted the circumstantial evidence presented against his client, and through his examination of Jenkins convinced the jury to distinguish between her and the ex-lover who had already been convicted of the crime, despite Jenkins's insistence that he also was innocent. Bugliosi took Jenkins's actions, including her lies and her sometimes less-than-savory actions, and created a convincing argument that, rather than supporting her guilt, substantiated her lack of culpability in the murder.

Nonetheless, Bugliosi's participation in criminal defense work has been limited by his unwillingness to represent persons charged with murder or other violent crimes unless he is convinced of their innocence or finds substantially mitigating circumstances. For example, he investigated and turned down the opportunity to represent Dr. Jeffrey MacDonald, accused of murdering his wife and children. Later he refused to defend Dan White, who was charged in the San Francisco Moscone-Milk murders. When asked whether his reluctance to take on certain defendants denies them the right of counsel, Bugliosi has said that if a situation arose where he was indeed

Defending the Innocent

Lawyers throughout the Anglo-American world are often confronted with the ethical dilemma of defending those accused of heinous crimes. Canadian defense attorney Edward L. Greenspan was confronted by his eight-year-old daughter Julie after he agreed to represent a man accused of raping and killing a six-year-old girl named Lizzie Tomlinson.

When Julie asked, "Dad, why are you defending the man who killed Lizzie?" Greenspan first considered a legal explanation.

He settled instead for the following: "I'm not defending the man who killed Lizzie. Do you understand, Julie? I'm defending the man who didn't kill her" (Greenspan and Jonas 1987, 128).

At trial, Greenspan succeeded in showing that the accused killer had been mistakenly identified and was not guilty of the crime of which he was accused.

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the only attorney available, he would willingly take on the representation of such a client. Apart from that, he does not believe that the canons of ethics require him to represent every client who asks for his help, and he has said he believes his conscience would not allow him to help a guilty murderer win an acquittal.

Nonetheless, Bugliosi's reputation as an attorney has grown over the years, in large part because publishers and the entertainment world also recognized Bugliosi's fame in and out of the courtroom. Even before the Manson trial, he had served as the inspiration for two television movies and then a short-lived television series called *The D.A.*, starring Robert Conrad. Bugliosi was the show's technical advisor, and he edited scripts for the two movies that aired in 1969 and 1971. The series debuted in September 1971, but it ended the following January. *The D.A.* followed young deputy district attorney Paul Ryan as he investigated a crime and then prosecuted the accused.

Although the television series lasted only three months, Bugliosi himself achieved much greater success as the author of three books detailing his role in three of his most notable trials. All three were later turned into well-received television movies. Three years after the Manson trial, Bugliosi and coauthor Curt Gentry penned the bestseller *Helter Skelter: The True Story of the Manson Murders*. *Till Death Us Do Part: A True Murder Mystery*, cowritten by Ken Hurwitz, was published in 1978 and received the Edgar Award from the Mystery Writers of America the next year. Two novels followed: *Shadow of Cain* (with Hurwitz) in 1981, and *Lullaby and Good Night: A Novel Inspired by the True Story of Vivian Gordon* in 1987. Bugliosi returned

to his own legal exploits in 1991's *And the Sea Will Tell,* coauthored by Bruce B. Henderson. The movie *Helter Skelter* aired in 1976, *And the Sea Will Tell* in 1991, and *Till Death Us Do Part* in 1992. As in the three books, Bugliosi was a central character in the movies, and he was portrayed in the films by George DiCenzo, Richard Crenna, and Arliss Howard, respectively.

Invariably in the last twenty years, Bugliosi has been called upon as a leading authority and commentator on trial advocacy and other legal issues, including some of the most controversial of the last forty years. In one rather unique instance, Bugliosi successfully "prosecuted" accused assassin Lee Harvey Oswald in an unscripted 1985 televised docudrama, which was played out before a real judge and jury and involved real witnesses to the 1963 shooting. He and defense attorney Gerry Spence—who had not lost a jury trial in seventeen years—participated in a three-day trial, with Bugliosi spending almost five months engaged in his usual pretrial preparation. In recent years, with the explosion of television legal commentary, Bugliosi has often been seen on various news programs discussing issues ranging from the parole requests of the Manson defendants to the O. J. Simpson case. He has been an outspoken critic of the parties involved in the Simpson trial and has published a book on the trial and a twelve-hour videotape pointing out where he thinks the prosecution went wrong and how he would have tried the case. He has also penned works discussing the nation's drug problem and criticizing the Supreme Court's ruling in the Paula Jones case. He remains an outspoken advocate for the rights of both the people and the accused and one of the most respected trial attorneys in the United States.

—Ruth Anne Thompson

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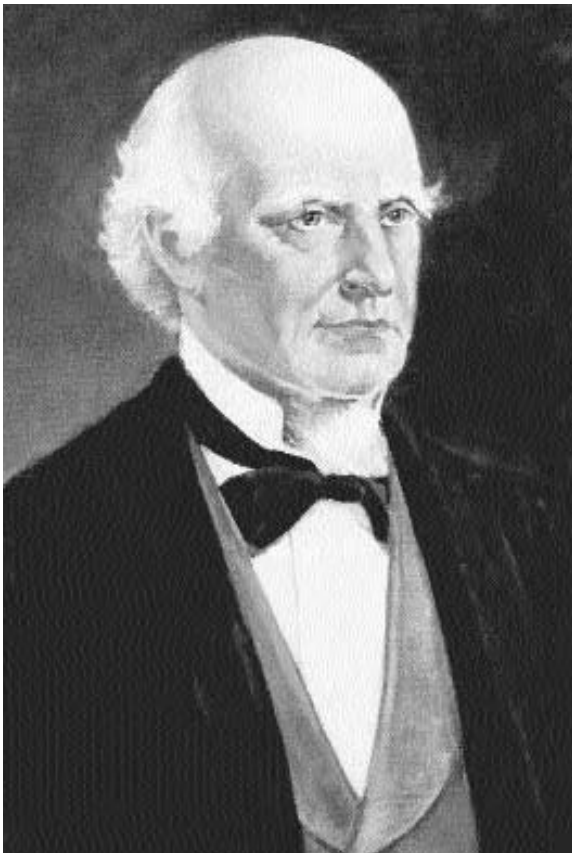
CAMPBELL, JOHN ARCHIBALD

(1811–1889)



John Archibald Campbell
Collection of the Supreme Court of the United States

Born in Washington, Georgia, to lawyer and state legislator Duncan Green Campbell and his wife, Mary Williamson, in 1811, John Archibald Campbell was recognized as a prodigy. He enrolled in what is today the University of Georgia at age eleven, graduated with honors, and subsequently enrolled in the U.S. Military Academy at West Point. After his father died the day before he hoped to be elected governor, John left West Point for a one-year teaching job in Florida and subsequently returned to Georgia, where by special act he was admitted to the bar at age eighteen in 1829, a year before he moved to Alabama and found similar acceptance there.

In Alabama, Campbell married Anna Esther Goldthwaite, by whom he would father a son and four daughters. In 1836, Campbell was elected to the state legislature and moved from Montgomery to Mobile, where he began his study of civil law. Although he twice refused nominations to the state supreme court (the first offer coming when he was but twenty-four years of age), in 1850 Campbell served as a delegate to the Nashville Convention, where he represented Southern views. In 1852, he opposed Daniel Webster in arguments in an inheritance case, *Gaines v. Relf,* before the U.S. Supreme Court, one of six cases that he ar-

gued that term (Connor 1971, 11). The next year, after failing to replace Justice John McKinley, who had died, with Senator George Badger, President Franklin Pierce appointed Campbell to the U.S. Supreme Court, then headed by Chief Justice Roger Taney, after Justices James Catron and Benjamin Robbins Curtis wrote a letter urging the President to do so. Commenting at the time on Campbell's "learning," "industry," "analytical" mind, and "temperate" and "just" character, *The New York Times* ranked him with former Supreme Court justice Joseph Story (Connor 1971, 17).

On the Court, Campbell established a reputation as a moderate Southerner whose best-known decision, apart from his concurrence in *Dred Scott v. Sandford* (1857), was his dissent in *Dodge v. Woolsey* (1856). In that case, Campbell argued, somewhat contrary to Marshall's decision in the *Dartmouth College Case*, for state legislative discretion over state-chartered corporations.

Campbell, who had freed his own household slaves, worked both on the Supreme Court and while riding circuit to moderate the growing conflict between the North and South. He ruled that the slave trade was illegal, and he prosecuted those engaged in filibusters (military expeditions) designed to foment revolution in Cuba and other Latin American nations to add them to the Union. Campbell believed that slavery was a transitory institution, but in an article in the *Southern Quarterly Review*, he did argue for changes in the law of slavery designed to protect slave families (Connor 1971, 105–107).

As war approached, Campbell was sometimes suggested as a compromise Democratic candidate for president. He counseled his state against secession and tried to avert war by attempting to convince Abraham Lincoln not to reinforce Fort Sumter, but, when war came, he joined Alabama when it seceded and resigned from the Court shortly after the start of the Civil War. In 1862, he became assistant secretary of war for the Confederacy, a position in which he chiefly exercised his legal and administrative skills. He resigned in 1865, thereafter meeting with Abraham Lincoln in Richmond in an unsuccessful attempt to reconvene the Virginia legislature to end the war. He was imprisoned for four months at the end of the war but was released by President Andrew Johnson, after which he moved to New Orleans and resumed legal practice in partnership with his son, Duncan (who preceded him in death), and with Judge Henry M. Spofford.

Campbell's postbellum career was every bit the equal of his previous work, and, like fellow former justice Benjamin Curtis, to whom he is often compared, Campbell appeared frequently before the U.S. Supreme Court. Campbell continued to be known for his wide reading in, and knowledge of, both common and civil law and for his thorough preparation of cases.

When confronting a difficult case, his fellow citizens were known to say, "Turn it over to God and Mr. Campbell" (Twiss 1962, 43).

A fellow New Orleans attorney, Carleton Hunt, said that "he threw himself into the contests in which he became engaged, with a degree of intensity which it is difficult to express." Hunt continued:

> He became absorbed in his professional undertakings. He would sit for hours in his great library lost in thought, without turning the leaves of the volume before him. At other times, he would walk in the streets gesticulating, as he went, to the surprise of all who passed him. He spoke in Court customarily from the many books spread out before him. His language seemed to be borrowed from the books and was apt to be technical and quaint, as the authorities themselves. His style, for the most part, was measured and grave, as became his years and standing at the Bar. From time to time, however, as he caught fire from the concussion of debate, he became inflamed and fierce in his assaults upon his adversary's side. (Connor 1971, 207)

Cases that Campbell argued before the U.S. Supreme Court included *Waring v. The Mayor* (1869), involving the validity of city taxes on imported goods, and the *Tonnage Cases*, in which he succeeded in helping to invalidate state taxes on steamboats (Connor 1971, 208).

It is generally recognized that Campbell's finest hour as a lawyer came in a case that he lost. After the Civil War, the nation had adopted three constitutional amendments. These were the Thirteenth Amendment, which eliminated involuntary servitude, the Fourteenth Amendment, which defined who citizens were and what rights they exercised, and the Fifteenth Amendment, which prohibited race from being used to deprive individuals of their right to vote.

The *Slaughterhouse Cases* (1873) were the first in which the U.S. Supreme Court was asked to interpret the first two of these amendments. Opposing attorneys Matthew Hale Carpenter and Jeremiah S. Black, Campbell used these amendments to argue against the state's granting of monopoly privileges to a slaughterhouse operation in New Orleans. In so doing, Campbell argued for an expansive interpretation of these amendments. Far from being limited to protecting the rights of former slaves, he contended that the Thirteenth and Fourteenth Amendments were designed to guarantee rights to everyone, including those in this case who could no longer operate out of their own abattoirs. In this case, Campbell mustered his considerable knowledge of law in both England and France to argue that limitations on economic freedoms amounted to "servitude" as outlawed by the Thirteenth Amendment and to a denial of the "privileges

and immunities" guaranteed to all citizens under the Fourteenth Amendment. Campbell, the former Confederate, now argued for broad federal protection of individual rights:

> The tie between the United States and every citizen in every part of its jurisdiction has been made intimate and to the same extent the Confederate features of the Government have been obliterated. The States, with their connection with the citizen, are placed under the oversight and enforcing hand of Congress. The purpose is manifest to establish, through the whole jurisdiction of the United States, one people, and that every member of the empire shall understand and appreciate the constitutional fact that his Privileges and immunities cannot be abridged by State authority. (Connor 1971, 215)

Further evoking the importance of the economic rights to run one's business that he was defending, Campbell contended that "the rights of a man, in his person, to the employment of his faculties and to the product of those faculties, do not come to him by any concession of the State. They are his inviolable prerogative" (Connor 1971, 216).

Although the Court voted 5 to 4 against this broad interpretation of the privileges and immunities clause (which continues to this day to be narrowly interpreted), within a decade or so the Court increasingly began to interpret the due process clause of the Fourteenth Amendment as providing just this sort of protection for economic rights, so it could be argued that Campbell lost this legal battle only to win the larger legal war.

In any event, even though he lost, the *Slaughterhouse Cases* undoubtedly enhanced Campbell's own reputation as a lawyer, and he continued to argue about six cases per year before the U.S. Supreme Court. Campbell's most notable advocacy centered in *New York v. Louisiana* and *New Hampshire v. Louisiana* (1883), in which he successfully established the immunity of states under the Eleventh Amendment to suits to which they did not consent. Again, Campbell's arguments were distinguished both by their logic and by their many references to history. Campbell also argued a number of cases on behalf of railroads seeking to avoid state regulations (Connor 1971, 250–251). In a case, that Campbell won before the U.S. Supreme Court after a loss before the Louisiana Supreme Court, *New Orleans Gas Light Co. v. Louisiana Light Co.* (1885), Campbell defended the continuing legitimacy of a state grant to an original light company against a grant to a new company sought by the state's attorney general. Showing his ability to use rhetoric to evoke emotions, Campbell argued that

> in the stock of this "defendant" corporation is reposed the property of the widow and the orphan. Brothers have given it to unprovided sisters. Mothers

and fathers have bought it for the support of their young daughters. The object of this suit is to make these deposits a spoil and booty for the greedy. (Connor 1971, 256)

Similarly, in arguing a case before Justice Joseph Bradley in Circuit Court, Campbell referred to the Eighth Circle of Dante's Inferno as the place most appropriate "for those people who traffic in the public interest for their own private advantage" (Connor 1971, 266). He further argued that

this open, flagrant, public, shameless traffic, in acts of legislation, in corporate rights obtaining monopolies and exclusive grants of the public domain of various kinds, infringing the personal rights, the individual rights of men, by bribes and corruption, is the most frightful of all the circumstances that attend the present condition of society. (Connor 1971, 267)

Those who knew Campbell as a lawyer frequently commented on his wide knowledge, his love of books, and his hard work. A reporter for the *Philadelphia Record* who heard him argue *New Hampshire v. Louisiana* noted that

Mr. Campbell is absorbed in his work. He has no eyes or ears for anything or anybody not immediately concerned in the case in hand. He lives quietly in New Orleans, surrounded by one of the finest law libraries, in all languages, in the world. He is a profound civil lawyer, with Justinian at his tongue's end, and, at the same time, a common-law lawyer, competent to battle with the best of that class. His memory is as wonderful as [the historian] George Bancroft's. He apparently remembers every scrap of law he ever saw or heard, and he has his resources so classified and catalogued that he can bring them forth at will. . . . Once retained in a case, he becomes a recluse. When he emerges from his books, he has absorbed that case with all its bearings, either his own side or the other. (Connor 1971, 261)

Lawyer George Tichnor Curtis further said of Campbell that

he ranks with the greatest advocates of our time, not for eloquence, not for brilliancy, nor for the arts of the rhetorician, but for those solid accomplishments, for that lucid and weighty argumentation, by which a court is instructed and aided to a right conclusion. The day of mere eloquence has passed away from this forum. What is effectual here now is clearness of statement, closeness and accuracy of reasoning, and the power to making learning useful in the attainment of judicial truth. These accomplishments were pos-

> sessed by Judge Campbell in a very uncommon degree. He has lived to a great age, and in the whole of his long life there has never been a public act or utterance that is to be regretted. (Connor 1971, 284–285)

Campbell retired from general practice in 1884 after the death of his wife and moved to Baltimore to be near two of his daughters, but he continued to argue select cases before the U.S. Supreme Court. Campbell died in Baltimore in 1889 before being able to attend the centennial celebrations of the U.S. Supreme Court, to which the Court had invited him. In answering his invitation, the man who had once resigned from that body wrote, "Tell the Court that I join daily in the prayer, 'God save the United States and [its] honorable Court'" (Connor 1971, 280).

—John R. Vile

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CHASE, SALMON P.

(1808–1873)

Salmon P. Chase
Library of Congress

A major figure during the middle third of nineteenth-century America, Salmon Portland Chase pioneered use of the courtroom as a forum and litigation as a force for change on the most pressing moral and social issue of that day: slavery. He did more than fight for the freedom of fugitive slaves and the acquittals of those who abetted them. He formulated and articulated a theory for antislavery activists that was a respectable alternative to extreme abolitionism. He was convinced that a centrist position, which he abandoned only after the Civil War began, would lead to slavery's extinction. The antislavery part of Chase's law practice in turn rewarded him with the visibility, the contacts, and a base that led to a career in public office spanning a quarter century. Without his antislavery practice, Chase might well have had no political career; like other talented and pros-

perous attorneys from that era, he would today rest among the ranks of the long forgotten.

The eighth child of Ithamar and Janette Ralston Chase, Salmon was born on January 13, 1808, in Cornish, New Hampshire, a town founded by his grandfather. Ithamar was a successful farmer with an extended family that was also prosperous and precocious. Most of Salmon's uncles were educated professionals, including Philander Chase, an Episcopal minister, and Dudley Chase, later U.S. senator from Vermont. His pretentious name, which he came to dislike, derived from Salmon Chase, another uncle who had been the leading lawyer in Portland in what is now the state of Maine. Young Salmon's comfortable childhood and promising future were placed in jeopardy in 1817, however, when his father suffered a fatal stroke. After struggling to provide education for her children, Janette arranged for Salmon to travel to Ohio in 1820 to live with his uncle Philander, who was by that time Episcopal bishop of the state and director of an academy for boys. With a regimen of discipline, hard work, religiosity, and instruction, Bishop Chase had a profound impact on Salmon's upbringing in emphasizing the importance of accomplishment. Briefly studying at Cincinnati College after his uncle became its president, Salmon returned to New Hampshire in 1823 and in 1824 enrolled at Dartmouth College, where he was graduated as a member of Phi Beta Kappa in 1826.

Although he considered entering the Christian ministry in New England, Chase shortly moved to the District of Columbia and found a position as schoolmaster. Among his pupils were two sons of William Wirt, the distinguished lawyer, friend of Thomas Jefferson and James Madison, and President John Quincy Adams's attorney general. Wirt gave Chase access to the upper levels of Washington society, where he learned, if he had not known before, that his overly refined sense of humor and large, muscular build made him enormously attractive to women and that he could write puppy-love poetry. Chase also nurtured the useful habit of making friends with those who might later serve him well.

In the estimate of more than one biographer, Wirt became a role model, even a father figure, and, with Uncle Philander, was the second of the two men most influential in shaping Chase's future. If his uncle had stressed achievement, Wirt imparted humanitarian concerns (although he was also a slave owner) and demonstrated the rewards and stature that a well-lived public career could bring. Both men contributed to the complex personality that Chase developed: piety alongside pomposity; demanding standards for himself and others that made him a difficult person with whom to work; and ambition, vanity, and pride coupled with caring for, and generosity toward, others.

Chase's relationship with Wirt and his family led very soon to a realiza-

tion that he could more easily achieve the life he wanted to lead as a lawyer than as a teacher. Chase therefore asked Wirt to tutor him in law. Entering into an informal apprentice-type relationship with an established attorney was the route almost everyone took into the legal profession in Chase's day. One "read law" under another's tutelage—typically for three years in Washington—and learned by asking, by doing, and by observing. Education in law schools would not become the preferred preparation for practice until the twentieth century. But given the demands on Wirt's time, it seems likely that Chase was mainly self-taught.

But for Andrew Jackson's victory (and Adams's defeat) in the presidential election in 1828, Chase might never have left Washington. Not only did Chase detest Jackson, but Jackson's ascendancy sharply curtailed Wirt's influence in Washington. Chase decided to seek his legal fortune elsewhere, but he first needed to be admitted to the bar. So on December 7, 1829, Chase appeared before an examining panel in Washington headed by the noted jurist William Cranch. Although he answered questions competently, he admitted that he had not studied the full three years. When Cranch (a fellow New Englander and a friend of Chase's uncle Dudley) advised him that he would have to prepare for yet one more year, Chase replied, "Please your honors. I have made all my arrangements to go to the Western country and practice law" (Hart 1969, 13). After a brief discussion with the panel, Judge Cranch decreed, "Swear in Mr. Chase" (Niven 1995, 27).

The "Western country" proved to be Cincinnati, where Chase arrived on March 13, 1830. With its population and wealth on the increase, this Ohio city of nearly twenty-five thousand was already an important Ohio River port just opposite the slave state of Kentucky. Because of its economic ties to the South, Cincinnati was also the most proslavery city in Ohio.

As a fledgling practice developed, Chase quickly displayed both public spirit and intellectual energy. In October, he organized the Cincinnati Lyceum, comparable to a community enrichment program that a university might sponsor today. Two of his four lectures at the lyceum were published in the *North American Review,* a major periodical that circulated widely, especially in the East. One of the two lectures approvingly portrayed British statesman Henry Brougham's fight against the slave trade and was Chase's first recorded public comment on slavery. Within five years, he was known throughout the Ohio bar after he published a three-volume set that for the first time compiled the laws of Ohio and of the Northwest Territory (prior to statehood). His commentary praised the Northwest Ordinance of 1787 for its ban on slavery, yet it reported (without condemning) later legislation and customs that excluded African-American males from the franchise, jury duty, and public education.

Connections he nurtured with notable Cincinnatians paid off profession-

ally and personally. By 1832, his clients included the local branch of the Bank of the United States, and in 1834 he was elected solicitor and a director of Cincinnati's Lafayette Bank. Beginning about 1834, Chase had a succession of young men studying law in his office, as he had done in Wirt's. Several, like future Supreme Court justice Stanley Matthews, achieved positions of prominence. The *Ohio Reports* indicate that Chase was in demand chiefly for commercial law, land law, and chancery but also on other matters ranging from murder to patent law. After three short-lived partnerships, Chase acquired a new partner in 1838 who possessed the improbable name of Flamen Ball. Chase & Ball did business until 1858; after 1849 most of the firm's litigation tended to be in the federal courts, as illustrated by *O'Reilly v. Morse* (1854), a landmark telegraph case.

O'Reilly was a newspaper editor turned telegraph entrepreneur. After erecting telegraph lines for Samuel F. B. Morse, O'Reilly strung his own lines to offer a competing service. When a court concluded that O'Reilly had infringed on Morse's patents and enjoined construction of his lines in Kentucky, Chase was one of several counsel who took over the case and argued it before the U.S. Supreme Court in December 1852. Their principal contention was that Morse had used his patents not only to shield particular telegraphic devices but to control all use of electromagnetism for communication. Although the Court found that O'Reilly's equipment had infringed on the Morse patents, the justices narrowed the scope of those patents to exclude the technology from which they were derived. The decision thus left open the option for competing companies to construct devices not covered by Morse's patents.

Chase was far less fortunate familially than professionally. True, his marriage to Catharine Jane ("Kitty") Garniss in 1834 linked him to one of the city's leading families, but she died a year later. His marriage to Eliza Ann ("Lizzie") Smith in 1839 was cut short by her death in 1845. He married Sarah Bella ("Belle") Dunlop Ludlow the following year but was left a widower for the third time in 1852. Chase's three unions yielded six daughters, yet only two survived infancy or early childhood: Catharine Jane ("Kate") Chase (1840–1899) and Janet Ralston ("Nettie") Chase (1847–1925). Such mortality was appalling even by the standards of the nineteenth century, when medicine lagged well behind the progress of other sciences. It may be that the antislavery side of his law practice, involving as it did the anguish of others, provided a healthful diversion from the calamities of his own life.

"When a moral conviction was once established in Chase's mind," declared one biographer, "it never could be removed" (Hart 1969, 54). Yet Chase's antislavery views had less to do with the evils of slavery than with the harm it did to white society. The galvanizing event occurred in July 1836, when a mob of five thousand, including city officials, sacked the edi-

torial office and smashed the press of James G. Birney's *Philanthropist*, an abolitionist newspaper, and then went on a rampage through the black quarter. Although he did not share Birney's extreme views, Chase was outraged by the lawlessness and brought a successful suit for damages on Birney's behalf against some of the ringleaders.

Their paths soon crossed again in the first of a series of career-altering cases that earned Chase the epithet "Attorney General for Runaway Slaves." In 1836, a light-skinned slave named Matilda escaped from a boat moored at a Cincinnati wharf. Birney (who would be the Liberty Party's candidate for president in 1840 and 1844) took her into his household as a servant. Matilda's owner (and father) hired a detective, who found and seized her under the terms of the Fugitive Slave Act, passed by Congress in 1793. Chase intervened on her behalf in a state court, claiming that she was neither a slave nor a fugitive. Freedom, not slavery, was the natural or default status for all Americans. Slavery was therefore unique as a species of property in that it could exist only by the positive law of a state (hence its designation as the "peculiar institution"). On this point the law of a state was final. Ohio, where slavery was forbidden, was as sovereign as Maryland, where slavery was allowed and from which Matilda had come. Thus, the national government was as powerless to interfere with the status of slavery within a state that recognized or prohibited it as that state's recognition of slavery was to determine a person's status outside its borders. Arriving on free soil, Matilda became free, and having been freely brought there by her owner, she was not a fugitive. Moreover, Matilda's recapture violated at least two provisions of the Bill of Rights: the Fourth Amendment guaranty against unreasonable searches and the due process clause of the Fifth Amendment. For Chase, the significance of his reasoning went well beyond Matilda's freedom. Without protection elsewhere, slavery as an economic institution could not survive.

His elaborate argument was to no avail. Before an appeal could be taken against an adverse court ruling, Matilda was returned to her captors, ferried to the opposite shore, and literally "sold down the river." Birney's opponents then sued him for sheltering a fugitive. Pressing arguments similar to those he had advanced in Matilda's case, Chase appealed Birney's conviction to the state supreme court, which, bypassing Chase's fundamental argument, held for Birney on the technical ground that he lacked knowledge ("scienter") that Matilda was a fugitive. Nonetheless, the court took the unusual step of ordering that Chase's argument be published, presumably believing it to be sufficiently meritorious to bring it to the attention of the bar (*Birney v. State*, 1837).

Chase's most extended antislavery case began in 1842. Ex-slaveholder John Van Zandt was an abolitionist and a member of the underground rail-

road who inspired the character John Van Trompe in Harriet Beecher Stowe's *Uncle Tom's Cabin*. On April 22, as Van Zandt hauled a load of vegetables to market in his wagon, he met a band of fugitives. He agreed to carry them to a destination north of Cincinnati, but slave catchers soon overtook the party and whisked all but one of the fugitives back to Kentucky. Their owner, Wharton Jones, sued Van Zandt to recover the value of the one who had escaped recapture and the cost of recovering the others. A federal marshal charged Van Zandt with harboring fugitives in violation of the 1793 act. Waiving his fees as he usually did in such cases, Chase defended Van Zandt in a three-hour argument before Supreme Court justice John McLean (with whom Chase had been friends since he lived in Washington and who would become his uncle-in-law in 1846) and the district judge who sat together as the U.S. Circuit Court. After the jury returned a damage assessment against Van Zandt of twelve hundred dollars and the court imposed a penalty on him of five hundred dollars for violating the law, Chase asked William H. Seward of New York to join him in presenting the case to the Supreme Court.

Chase's 108-page brief to the Supreme Court (*Jones v. Van Zandt,* 1847) expanded on his Matilda arguments by forthrightly attacking the Fugitive Slave Act of 1793. Among other claims, he argued that Article IV of the U.S. Constitution was not, as commonly considered, sufficient authority for the Fugitive Slave Act. Slavery was entirely a matter for each state to decide. If the Constitution did not recognize slavery, Congress could not support it. The point was bold but risky. Chase was assailing the Court's own recent decision in *Prigg v. Pennsylvania* (1842), which had upheld the statute.

The unanimous bench that ruled against Van Zandt underscored a reality of Chase's pro bono practice: Inventive arguments and tireless efforts for runaways and those who aided them made him a hero among antislavery activists and a sought-after speaker in Ohio and elsewhere, but only occasionally did those arguments prevail. True, his thinking rejected the one theme shared by both abolitionists (who loathed it) and slave owners (who celebrated it): that the Constitution and the judges who interpreted it both recognized and condoned slavery. Yet, ironically, his courtroom defeats seemed to validate precisely what he denied, that the Constitution and the courts were at one with the slave interests.

Perhaps the failure of courtroom remedies pushed him to pursue political ones. His early political identity in Washington had been with the National Republicans. In Ohio, he was first aligned with the Whigs and then with the Liberty, Free Soil, and Democratic parties before helping to found the Republican party. Despite this partisan pilgrimage, Chase remained close to the Democrats on most issues except their opposition to central

banking and their acceptance of slavery. And as much as any politician before or since, he craved the presidency, unsuccessfully courting the Republican nomination in 1856, 1860, and 1864 and the Democratic nomination in 1868.

His first election to major political office came in 1849 when a coalition among Democrats and Free Soilers in the state legislature sent him to the U.S. Senate. There he opposed both the Compromise of 1850 (that combined a more aggressive fugitive slave act with some extension of slavery westward and a cessation of the slave trade in the District of Columbia) and the Kansas-Nebraska Act of 1854 (that repealed the Missouri Compromise of 1820 and allowed slavery to be decided on by the settlers in those territories). In 1855, he won the governorship as a Republican by a statewide plurality of sixteen thousand votes (while finishing third in his home county with only 19 percent of the vote) and was reelected in 1857.

The state legislature favored him with election again to the Senate in 1860, service that was cut short by his appointment in 1861 as President Abraham Lincoln's secretary of the treasury. His finance policies equipped an army of one million and a navy that, briefly, was second only to Great Britain's. Upon Roger B. Taney's death in 1864, Lincoln picked Chase as the sixth chief justice of the United States, at a time when the Supreme Court's prestige still languished because of the *Dred Scott* decision (1857). The meticulous fairness he displayed when presiding over the Senate's impeachment trial of President Andrew Johnson doomed whatever hopes he may have had for the Republican nomination in 1868. A stroke in 1870 damaged his health so severely that he could neither lead the Court effectively nor pursue the Democratic nomination in 1872. A second massive stroke in 1873 ended his life on May 7. He was buried in Oak Hill Cemetery in Washington, but in 1886 Ohio officials arranged for his remains to be moved to Cincinnati, where he was re-interred alongside his daughter Kate.

—Donald Grier Stephenson Jr.

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CHOATE, JOSEPH H.

(1832–1917)

Joseph H. Choate
Library of Congress

Joseph Hodges Choate earned a reputation as an exceptional orator and advocate due to his mastery of language and ability to argue eloquently. His most famous achievement was his successful argument in the historic *Pollock* case, in which he convinced the Supreme Court to invalidate the income tax of 1894 as unconstitutional. But even more notable than any one case he argued is the fact that Choate served as counsel in so many difficult and prominent cases, winning a large number of them. Choate was often described as the greatest jury lawyer of his time.

Choate was born in Salem, Massachusetts, on January 24, 1832, to George and Margaret Manning Hodges Choate. His father was a native of Salem and a well-known physician. The Choate family's presence in Massachusetts dated back to the early seventeenth century, with the first American ancestor emigrating from England in 1643. George Choate sent all four of his sons to Harvard, and all became successful professionals.

One of Choate's brothers was president of the Old Colony Railroad, another brother was a physician, and the third was a U.S. district judge for the Southern District of New York. Perhaps the most notable of Choate's relatives was his father's first cousin, Rufus Choate, a congressman who was recognized for his skill as a lawyer and as an orator.

Receiving his primary education in the public schools of Salem, Choate then attended Harvard College, from which he graduated fourth in his class in 1852. His brother William gave the valedictory address, and Joseph delivered the salutatory address, being the first brothers at Harvard to give both speeches for the same class. Choate attended Harvard Law School, earning a living tutoring boys preparing to enter college, and graduated in 1854. He studied an additional year in the Boston office of Hodges and Saltonstall and was admitted to the Massachusetts bar in 1855.

Although he began the practice of law in Massachusetts, Choate did not remain in his native state long. He soon relocated to New York City, where he practiced for most of his career. He first joined the firm of Scudder & Carter in 1855 and afterwards was invited to join the firm of William M. Evarts in 1856 as an apprentice. In 1858, he became partners with William H. L. Barnes, and he briefly practiced in this partnership until 1859, when he returned to the Evarts firm as a partner. The firm then became Evarts, Southmayd & Choate, and Choate remained a partner in the firm for the rest of his career.

The majority of Choate's cases were heard in New York, but he also argued at least sixty-five cases before the U.S. Supreme Court. His record as a litigator includes cases spanning a wide range of substantive law, including wills, trusts and estates, patent law, contract law, tort law, fraud, securities law, international law, admiralty law, and interstate commerce. This broad assortment of substantive law, together with his roles as advisor, trial counsel, and appellate advocate, underscored Choate's versatility and skill.

Choate was an industrious man who thought of success as always having enough work to do, and he had the highest regard for the law, which he considered to be a science. He had an independent nature and would not allow himself to be bullied by a judge. Choate was unafraid politely to point out when a judge was acting improperly, but at the same time he never treated a judge with disrespect. Choate was calm and relaxed in the courtroom, and he spoke to the jury in this manner, having a conversation with its members rather than giving a performance. His courtroom appearances gave the impression that he had not given the case much thought, but this was only part of his mastery of the art of litigation. Each case received careful preparation, and this allowed Choate to conduct himself at trial with such apparent ease. He did not harass hostile witnesses but rather used seemingly benign questions to draw out just the testimony he wanted with-

out the witness even being aware of the trap into which he was being led. Technical arguments were not part of Choate's style, which was based on simple language and targeted the listener's sense of reason and justice.

Choate was a founder of the New York City Bar Association and was president of this association from 1888 to 1889. He served as president of the American Bar Association from 1898 to 1899, and he also served as president of the New York State Bar Association, of the New York County Lawyers' Association, and of the Harvard Law School Association. He was a founder of the American Museum of Natural History, and he served as one of its trustees from 1869 to 1917. Choate was also an incorporator of the Metropolitan Museum of Art and served as a trustee for forty-seven years. He was elected a Bencher, or partner of the governing body, of the Middle Temple (one of four that train and admit members of the British bar), London, in 1905. A life-long Republican, the only political office Choate ever held was as president of the New York State Constitutional Convention of 1894. In January 1899, President William McKinley appointed Choate as ambassador to Great Britain, and he served in this capacity from 1899 to 1905. He also served as ambassador and first delegate of the United States to the Hague Peace Conference of 1907.

Choate donated a considerable amount of his time to public causes or to individuals who were not able to pay for his services. One example was his pro bono representation of Union general Fitz-John Porter, who had been stripped of his rank and command, court-martialed, and convicted of treason in 1863. General Porter continued to profess his innocence, and in 1878 President Rutherford B. Hayes appointed an advisory board of officers to reexamine the charge. Choate, fifteen years after the underlying events and the original conviction had transpired, convinced this board to reverse the general's conviction. Consequently, Congress reinstated Porter's rank and he regained at least part of his honorable reputation. Choate considered this case to be his greatest victory.

On at least one occasion, Choate cited the Bible during a trial. He was representing his client, Mr. Laidlaw, against the defendant, Mr. Sage, for damages in tort. Sage was a wealthy older man, and Laidlaw had come to his office to discuss business. During this visit, a man entered the office with a bag containing a bomb and demanded money from Sage upon the threat of dropping the bag and exploding the bomb. Just before the man dropped the bag, Sage grabbed Laidlaw and used him as a human shield against the explosion. Laidlaw sued Sage for injuries caused by the explosion. After reading the story in Luke of the rich man and the beggar, Choate then turned to the defendant and said, "There comes the rich man, and here is the poor man still bearing sores he suffered in protecting him" (Strong 1917, 220). This tactic won his client a considerable damages award.

An example of his trademark use of humor as a weapon was demonstrated in the case in which Choate represented the architect Richard M. Hunt against Mrs. Paran Stevens for payment relating to construction of a hotel. The contract had been made between Hunt and Mr. Stevens, but Mr. Stevens had died before he could make the final payment to Hunt. Mrs. Stevens had not been born wealthy but had gained a considerable fortune and was determined not to relinquish any of it to Hunt. Choate described her rise in social status to the jury: "And at least the arm of royalty was bent to receive her gloved hand, and how, gentlemen of the jury, did she reach this imposing eminence? [pronounced pause] Upon a mountain of unpaid bills" (Strong 1917, 187). In his final bit of humor, he incorporated the facts of the case into the nursery rhyme "The House that Jack Built."

Until he was forty-four, Choate was largely in the shadow of Evarts. He was known as an outstanding jury lawyer but had played only a junior role in appellate cases. When Evarts joined President Hayes's administration, Choate had the opportunity to display his ability as an appellate advocate. His simple style of calm explanation, making his side of the case seem natural, served him just as well before appellate benches as with juries and trial courts. His extensive knowledge in various areas of law was especially imposing with respect to constitutional law. During the 1880s and 1890s, Choate often appeared before the Supreme Court and many state courts in cases involving constitutional questions.

The most important case argued by Choate before the Supreme Court was *Pollock v. Farmers' Loan & Trust Co.* (1894). The income tax of 1894 levied a 2 percent tax on personal income in excess of four thousand dollars and on all corporate net profits. Taxable income included interest on state and municipal bonds, rents from real estate, and income from personal property. Claiming that the income tax was unconstitutional, Charles Pollock brought a stockholder's suit to prevent the Farmers' Loan & Trust Company of New York from filing a tax return and paying the levy. Attorney General Richard Olney represented the government. Choate and his legal team offered three arguments against the income tax act: a tax on income from land was effectively a tax on the land itself, a direct tax, and so required to be apportioned among states based on population under Article I, Section 2 of the Constitution; a tax on income from other property was either a direct tax and likewise unconstitutional or, if not a direct tax, unconstitutional for lack of uniformity required by Article I, Section 8 [due to its four-thousand-dollar exemption]; Congress could not tax income from state and municipal bond interest.

Choate's oral argument revealed his strong belief in individual private property rights and in government's fundamental duty to protect these rights. He characterized the tax as "communistic in its purposes and ten-

dencies" and pictured the measure as an invasion of fundamental property rights (*Pollock,* 157 U.S. 532 [1894]). Choate also stressed the regional implications of the levy. The four-thousand-dollar exemption for personal income, with no exemptions for corporate income, was simply a confiscation of property of the residents of a few high-income states by the other states. Because 90 percent of the tax collected would come from just four states, Chaote stressed that the tax law purposely divested the wealthy individuals in these states of their property and redistributed it to the less wealthy in other states. He characterized the attorney general's argument in support of the law as an argument that men who were affected by the tax were too rich—hence, his reference to communism. He also stressed that allowing Congress to enact this type of law would render the Court powerless against future tax laws that could be much more confiscatory. Choate appealed to the Court as the guardian of minority rights against majoritarian tyranny; his strategy avoided focusing on the technical constitutional requirements on which the holding was ultimately based, but rather centered on sensitive social and political ideas of the time.

In an opinion by Chief Justice Melville W. Fuller, the majority held that taxes on income from land were direct taxes, which were unconstitutional because not apportioned, and that Congress could not tax income from state and municipal bonds. The eight sitting justices were evenly divided on the issue of an income tax from other sources, and the entire case was reargued before all nine justices. As a result of this rehearing, Fuller declared that the entire act was unconstitutional because taxation of income from personal property was a direct tax, requiring apportionment among the states according to population.

It is revealing that Choate credited his retired senior partner, Charles F. Southmayd, with his victory in the *Pollock* cases. Southmayd had a strong sense of private property rights, and when he learned that Choate was representing Pollock, he offered to prepare a brief. This brief, according to Choate, was the foundation of his entire argument to the Supreme Court.

Even in defeat, Choate's gift of persuasion was not without positive effect. In *Mugler v. Kansas* (1887), another leading case, the Supreme Court ruled against Choate's client, a brewer, by upholding Iowa's prohibition act. However, in response to Choate's argument that the statute deprived Mugler of property without due process of law required by the Constitution, the Court emphasized that it had the authority to scrutinize state regulations to determine whether the means they employed actually related to the given purpose behind the regulation. This was a major step toward the Supreme Court's eventual use of substantive due process to preserve private property rights.

Although frequently representing propertied interests, Choate sometimes

appeared before the Supreme Court on behalf of underdogs. In *Fong Yue Ting v. United States* (1893), for example, he unsuccessfully defended a Chinese alien in an attack on Chinese exclusion legislation.

Choate's legal skills and persuasive abilities served him well in other areas besides the courtroom. When he arrived in England as ambassador, the Joint High Commission of 1898 for the settlement of disputes between the United States and Canada was at a deadlock concerning the Alaskan boundary. The setting of this boundary had financial implications, because it would determine which country owned gold-producing land. Choate secured the agreement of all involved to a treaty that created a tribunal of an equal number of members from each country that would hear the evidence and render a decision. The tribunal sat in London in 1903 and decided the Alaska boundary dispute, as well as all of the other issues between America and Canada that the Joint High Commission had been unable to resolve.

Choate was also instrumental in the construction of the Panama Canal. At the time when the United States had recognized the need for a canal across Central America, the Clayton-Bulwer Treaty of 1850 was in effect. The treaty required that a canal in this location would be under joint control of the United States and Great Britain. The United States desired to maintain exclusive control over the Panama Canal that it was to build, so Choate secured the substitution of this treaty with an agreement that any canal under exclusive American control would be equally open to commercial and military ships of every nation.

Toward the end of his life, Choate actively urged U.S. intervention in World War I. He died in New York City on May 14, 1917.

—James W. Ely Jr.

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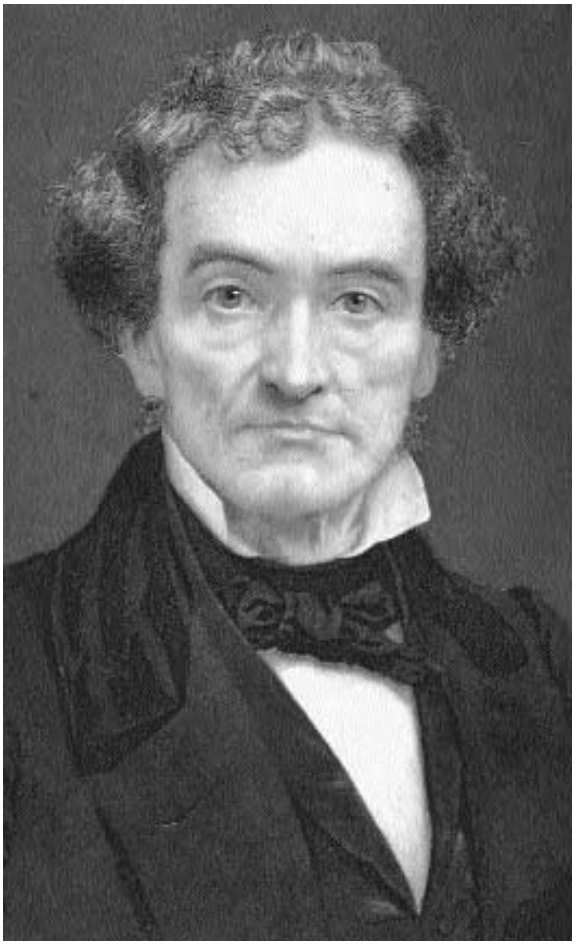
CHOATE, RUFUS

(1799–1859)



Rufus Choate
Archive Photos

Rufus Choate was New England's premier trial lawyer of the antebellum period and was America's first celebrity defense attorney. Controversial in his day, Choate pioneered many of the techniques modern lawyers use. He was expert in front of juries. His powerful oratory and ability to win cases packed courtrooms and brought him unusual notoriety. Choate's reputation did not develop from his involvement with landmark legal cases; rather, it stemmed from his spectacular victories in a number of widely covered trials. Choate's theatrical style and his extravagant oratory created the American taste for courtroom drama.

Born in Essex County, Massachusetts, on October 1, 1799, Choate was the fourth of Miriam Foster and David Choate's six children. Choate entered Dartmouth in 1815 during the college's famous legal controversy with the state legislature of New Hampshire (*Trustees of Dartmouth College v. Woodward,* 4 Wheaton 518). The case and the college's attorney, Daniel Webster, captivated Choate, who decided to

Judge or Jury?

Theophilus Parsons of Massachusetts (1750–1813) distinguished himself both as an attorney and as chief justice of the Supreme Court of Massachusetts. Gifted in astronomy, mathematics, and the classics, Parsons spent his last minutes considering his life in the law. The son of a minister, Parsons may not have intended any theological commentary, but he seemed to place his fate not in the hands of a judging God, but rather in those of juries of his peers, to whom he had made so many previous arguments. His closing words, as reported by his son, are reported to have been, "Gentlemen of the Jury, the case is closed, and in your hands. You will please retire and agree upon your verdict" (Parsons 1859, 354).

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become a lawyer. After giving the valedictory oration at his graduation in 1919, Choate entered Harvard Law School. He left Harvard in 1821 to study law at the office of William Wirt, the attorney general of the United States, but he left after less than a year because of his brother's death. He then completed his legal studies with Judge Cummins of Salem, Massachusetts, and was admitted to the bar as an attorney in September 1823. He opened an office in South Danvers and practiced there for about five years. During this time he married Helen Olcott, with whom he had seven children (Brown 1879, 11–33; Matthews 1980, 5–20).

Choate moved his law office to Salem in 1828. There his fame as an orator and courtroom dramatist spread. Large crowds began attending his trials. When his growing reputation enlarged his practice, Choate moved his offices to Boston in 1834. During these early stages of his legal career, Choate was involved in Whig politics on the local and national level. After election to the state house and senate, Choate served in the U.S. House of Representatives from 1831 to 1834. In 1841, Massachusetts selected Choate to replace Daniel Webster as senator when Webster became secretary of state. Choate left the Senate in 1845. Although he remained an active leader of the Whig party until his death, Choate did not have either the temperament or the inclination for a political career (Brown 1879, 41–67, 173; Matthews 1980, 38). After his resignation from the Senate, Choate devoted his time to building his practice, first in partnership with William Crowninshield, then with his nephew and son-in-law Joseph M. Bell. Bell proved a good partner for Choate, whose skills as a businessman did not equal his skills as a lawyer. Bell was the partnership's financial manager, balancing Choate's careless and forgetful money practices. Choate relished his successful private practice and never found fulfillment outside the

courtroom. His brief stint as attorney general of Massachusetts in 1853 ended his legal career as anything other than a trial lawyer (Brown 1879, 215, 260, 287; Matthews 1980, 147, 152, 160).

Choate built his reputation as New England's premier trial lawyer on his power in front of a jury. Choate's successes with juries stemmed from a carefully cultivated strategy. He analyzed the background and position of each individual juror picked for his cases. He then focused his attention and arguments on those jurors whom he thought would be hostile to his view of the case. Often Choate directly confronted hostile jurors and tried to intimidate irresolute jurors by speaking to them individually. As Choate's fame spread, jurors in his cases were aware of his reputation in manipulating a jury and came into the case determined to resist him. This made his successes even more impressive.

Choate relied heavily on his powers as an orator in swaying a jury and convincing them of his view of the case. He was a master of rhetoric and of organization. Believing the first fifteen minutes made the critical impression with a jury, he always began his remarks in a conversational tone and slipped unobtrusively into his arguments. He presented the jury with a rapid and comprehensive view of the whole trial. He grouped together and emphasized the circumstances of the case that would make the strongest impression in his client's favor. Then he took the jury through a detailed analysis of the case. He centered his argument on a theory of the case and led jurors to an easily understood conception of it.

Observers credited Choate's power over a jury in part to his mastery of rhetoric. A scholar and compulsive reader, Choate worked on his rhetorical skills daily. He read aloud, practiced expression, and cultivated the ability to feel emotion. Choate thought that an orator achieved effect through choice and arrangement of words. He used long, descriptive sentences designed to steer an audience to his desired conclusion. Believing that jurors needed repetition mixed with variety to capture their attention, he alternated his notoriously flowery language with popular slang, anecdotes, and common illustrations. His dominant style was theatrical and took advantage of his exotic persona. Working himself into passions, Choate overwhelmed his audience with excited emotions, torrents of words, and exaggerated mannerisms. At first many ridiculed his style, but Choate created a taste for his dramatics that changed the American courtroom.

His two most famous cases of the 1840s amply illustrate his talent. The first was the 1843 case of William Wyman, who was indicted for embezzlement as president of the Phoenix Bank of Charleston. Choate was part of an all-star defense team that consisted of Daniel Webster, Ebenezer Hoar, and Franklin Dexter. After a hung jury and a conviction, Choate bore the major responsibility for the defense on appeal. Here Choate displayed his

abilities in cross-examination. On the stand he forced each of the bank directors, all witnesses for the government, to deny that he had given Wyman the right to dispose of the bank's funds. Choate then argued that since the funds had never been under Wyman's control or in his possession, he could not be convicted of embezzlement. The court agreed and directed an acquittal (Feuss 1928, 147).

By far Choate's most famous trial was his 1846 defense of Albert J. Tirrell. This celebrity case demonstrated many of the tactics that built Choate's reputation. Tirrell, a well-connected young man, was accused of murdering his mistress, Maria Bickford, in a brothel where the two lived together. The government's case against Tirrell seemed compelling, but it was circumstantial. Early one morning, residents of the brothel heard a cry coming from Bickford's room and the sound of someone going down the stairs; they found her in a blazing room with her throat cut. Later that morning, Tirrell, apparently in a great hurry and claiming that someone had tried to murder him in his room, appeared at a livery stable asking for a vehicle and driver to take him out of town. Tirrell was later arrested in New Orleans and brought to trial. The case drew great public attention and universal assumptions of Tirrell's guilt.

Choate, in defending Tirrell, relied on the fact that the burden of proof lay with the prosecution. His favorite technique in defense cases was to present the jury with alternative hypotheses that fit the evidence yet showed his client to be innocent. He appealed to the jury's imagination through creating new motives and new explanations for the evidence.

Basing his case on the circumstantial nature of the government's evidence against Tirrell, Choate offered the jury two theories that he claimed were as compatible with the evidence as the government's case. Maria Bickford might have committed suicide. Claiming this was the natural end of a prostitute, Choate offered witness who testified to Bickford's emotional problems and her propensity to threaten suicide. Reputable physicians testified that her wounds could have been self-inflicted. Another possibility was that Tirrell had been sleep walking. Choate presented indisputable evidence that Tirrell was a life-long somnambulist. Along with these two alternate theories, Choate emphasized that there was no motive for this murder and no evidence that ruled out a third party.

In Tirrell's defense Choate relied heavily on the testimony of witnesses. Choate always tried to impress on juries the worthiness of his clients and the contrasting dubious character of people on the other side. He ruthlessly destroyed the character of hostile witnesses to undermine their credibility and thus dispose of their evidence. He used sarcastic humor to make elements of an opposing witness's testimony seem ridiculous. Choate rarely

asked many questions of a witness; he discovered a witness's weak points and aimed a choice few questions in that direction.

The jury acquitted Tirrell. The trial caused a public sensation and propelled Choate to fame. Although some questioned his tactics in the case, most lawyers of the day respected the verdict as a sound reflection of the government's circumstantial case (Brown 1879, 174–183; Parker 1860, 219–225; Matthews 1980, 157).

Choate was now the most famous trial lawyer in the country. His rival for celebrity was Daniel Webster, known as much for his oratorical and political skills as for his legal cases. New England's two great lawyers often shared a courtroom in the late 1840s and 1850s—as partners and as opponents. After serving as co-counsel in *Rhode Island v. Massachusetts,* 45 U.S. 591 (1838), a boundary dispute before the Supreme Court, Choate and Webster teamed again for the landmark legal case *Norris v. Boston,* 48 U.S. 283; 45 Mass (4 Met.) 282 (1842), decided in the Supreme Court as the *Passenger Cases*. Acting for the plaintiff, Choate and Webster challenged the legality of a Massachusetts law that taxed aliens entering the state. In a 5–4 decision, the Supreme Court ruled the law unconstitutional as an infringement on Congress's exclusive power to regulate foreign commerce, even in the absence of congressional legislation.

Choate and Webster were on opposite sides in one of New England's local-interest trials, the 1847 Oliver Smith Will Case. Rather than trying to match Choate's oratory, Webster used simple statements to undo his opponent's use of rhetoric to weave a spell over a jury. This strategy won Webster the case (Fuess 1928, 149–150). The two great attorneys faced off in *Goodyear v. Day,* 10 F. Cas. 678 (No. 5569) (C.C.D.N.J. 1852), an important 1852 patent dispute before the Supreme Court. Choate, acting for the defendant, tried to impugn the plaintiff's patent on vulcanized rubber. His strategy failed. Choate later remarked that the successful way to handle the defense in a patent dispute would be "to insist on the non-infringement, and not to rely too much on the non-novelty of the plaintiff's invention." This is now the commonly accepted position. This case also involved an important point of law. Choate wanted a trial by jury, but Webster argued that the court had authority on grounds of equity. This case thus established the possibility of removing a technical class of cases from the purview of a jury (Matthews 1980, 165).

Choate worked on a staggering number of cases—by the 1850s he averaged seventy cases a year. Choate was not a specialist; his cases covered nearly every aspect of law. A large number, however, were criminal cases, a fact that was unusual for a lawyer with Choate's reputation in the 1850s. Choate prepared by researching every conceivably relevant legal point for

each case. He believed in marshaling as much evidence as possible on points of law. To hone his skills, Choate read each volume of the *Massachusetts Reports* and made a full brief for opposing sides on every question in every case.

Choate's final celebrated trial cases both occurred in 1857. In *Shaw v. Boston and Worcester Railroad,* 74 Mass (8 Gray) 45 (1857), Choate was counsel for the plaintiff, a woman who had been crippled when a train crashed into her horse and buggy at a crossroads. The accident killed her husband, who was driving the buggy. Both parties alleged negligence. Choate argued that the train did not give sufficient notice of its approach; the railroad claimed the plaintiff's husband had been drinking. Choate won the case, largely through his use of exaggerated rhetoric and humor to discredit opposing witnesses and the claims of the railroad company: "This witness swears he stood by the dying man in his last moments. . . . Was it to administer those assiduities which are ordinarily proffered at the bedside of dying men? Was it to extend to him the consolations of that religion which for eighteen hundred years has comforted the world? No, gentlemen, no! He leans over the departing sufferer; he bends his face nearer and nearer to him—and what does he do! What does he do? *Smells gin and brandy!*" The jury found for the plaintiff, and Choate won both appeals (Matthews 1980, 166).

One of his most celebrated defenses was the 1857 Dalton divorce trial. As usual for Choate's cases, the courtroom was packed with observers and news coverage was extensive. Mr. Dalton, counseled by R. H. Dana Jr., accused his wife of adultery and sued for divorce. Choate, acting for Mrs. Dalton, used ridicule to expose improbabilities in the testimony of two witnesses who swore that Mrs. Dalton confessed. In his famous closing argument, Choate, as he did in the Tirrell case, claimed the burden of proof had not been met. The evidence, Choate argued, showed indiscretion, but indiscretion consistent with innocence. He asked the jury to draw a line between Mrs. Dalton's erring and imprudent behavior and her innocence of adultery. Choate charged the jury with the responsibility for the future happiness of the couple. He told jurors that their verdict of innocence would assure Mr. Dalton that he could take his wife back without dishonor. Choate won the case (Brown 1879, 335; Parker 1860, 477).

Choate died on July 13, 1859, two years after the Dalton case. Ending his career as New England's foremost trial lawyer, he enjoyed equal fame as an orator at the time of his death. In an age when Americans held orators in the highest esteem, his contemporaries considered him in the top echelon. Antebellum Americans judged his eulogy for Daniel Webster one of the great pieces of rhetoric produced in the period. Some of Choate's well-known orations and addresses are collected in *The Works of Rufus Choate*

(1862) and *Addresses and Orations of Rufus Choate* (1878), but the texts of his arguments in his most famous jury trials have been lost.

—Lorien Foote

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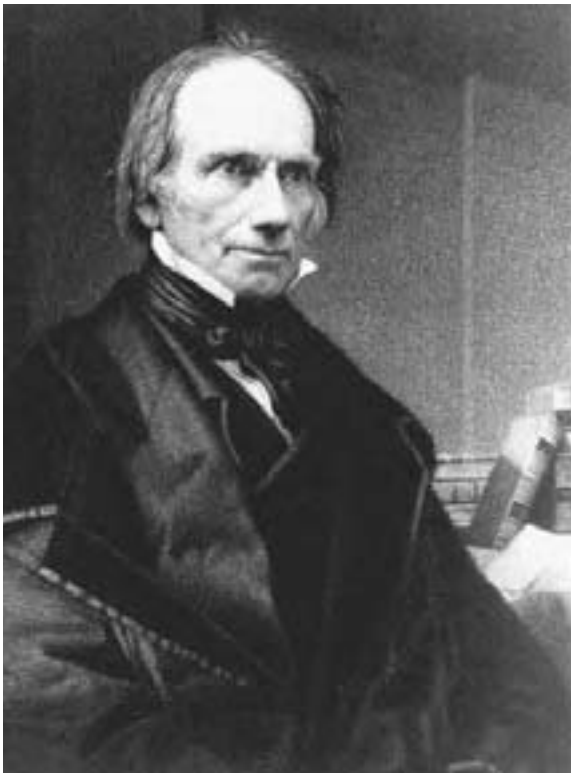
CLAY, HENRY

(1777–1852)

Henry Clay made his mark on American history as Speaker of the House, U.S. senator, secretary of state, and presidential candidate. He earned the titles the "Great Compromiser" and the "Great Pacificator" for his service to the Union in times of sectional crisis. The Henry Clay of the history books would never have existed, however, if it had not been for Clay's earlier successes as a trial lawyer in Kentucky. Clay's stature as one of the leading lights of the Kentucky bar opened the way first for state office and then for Congress. Once in Congress, Clay displayed many of the same talents and abilities that made him an outstanding attorney. Clay continued the practice of law while in Congress, even while serving as Speaker of the House. He argued a number of cases before the U.S. Supreme Court, including such important cases as *Osborn v. Bank of the United States* (1824) and *Groves v. Slaughter* (1841). Like his contemporary Daniel Webster, Clay was one of the nation's most accomplished attorneys as well as one of its leading statesmen.



Henry Clay
Library of Congress

Henry Clay was born on April 12, 1777, in Hanover County, Virginia. His father, the Reverend John Clay, was a tobacco planter and Baptist preacher known for his eloquence. After Clay's father died in 1781, his mother, Elizabeth Hudson Clay, soon married Captain Henry Watkins. Al-

though in later years Clay described his background in modest terms, his parents and stepfather were solidly middle-class. Clay's formal education as a child consisted of three years in the Old Field School under Peter Deacon, an English schoolmaster with a colorful reputation. In 1791, Watkins and Clay's mother decided to move to Kentucky. Before leaving, however, Watkins was able, through connections, to secure a place for his stepson in the office of the clerk of the Virginia High Court of Chancery, Peter Tinsley.

While working in the clerk's office, Clay favorably impressed Chancellor George Wythe. A signer of the Declaration of Independence and law professor to Thomas Jefferson and John Marshall, Wythe was Virginia's most eminent jurist at the time. Because his trembling hands made it virtually impossible for him to write, Wythe needed a private secretary and amanuensis, and he selected Clay for that position. Clay spent four years as Wythe's personal secretary, during which time he studied law, history, classics, and literature under Wythe's supervision. This amounted to an "irregular" education at best, as Wythe was "an old and busy man," and Clay was dividing his time between Wythe and his duties in the clerk's office (Van Deusen 1937, 13–14). Clay's association with Wythe also had an added benefit—during this time, he was introduced to Richmond society and developed the social graces and manners that were lacking from his upbringing.

With Wythe's assistance, Clay acquired a place in the office of Virginia's attorney general, former governor Robert Brooke, in 1796. According to Van Deusen (1937, 14), Clay's time with Brooke was "the one period of systematic training in his whole life." After a year with Brooke, Clay, then twenty years old, presented himself to the Virginia Court of Appeals for admission to the Virginia bar on November 6, 1797. After being examined by the panel, which included Spencer Roane, Clay was licensed to practice law in Virginia.

At this point, Clay decided to leave Richmond and follow his mother and stepfather to Kentucky. Although family connections certainly played some role in this decision, it also made sense given Clay's ambitions. After all, there were many lawyers in Richmond, and it would have been difficult for a young attorney to make a name for himself there. Kentucky, on the other hand, was the frontier, where a bright young man could distinguish himself much more quickly. Kentucky was also "a paradise for lawyers" given the chaotic condition of land titles in the newly admitted state (Van Deusen 1937, 15). At times, as many as six grants covered the same parcel of land, much of which had never been surveyed, and some parcels were identified by such warrants as "two white oaks and a sugar-tree" (Clay 1910, 25). This confusion of titles provided a fertile field for litigation.

Clay arrived in Lexington, the "Athens of the West," in late November 1796. Rather than setting out immediately in the practice of law, Clay took

a few months to familiarize himself with Kentucky law and politics. The Fayette County Court of Quarter Sessions admitted Clay to the Kentucky bar on March 20, 1798.

Clay quickly became a leading member of the Kentucky bar. Although he divided his practice between civil and criminal cases, his handling of criminal cases established his reputation. According to local legend, no client of Clay's ever received capital punishment. Although this is not quite accurate—Remini (1991, 22) points to at least two of Clay's clients who were sentenced to death—Clay was a great criminal defense attorney. In one of his first cases, Clay defended an ordinary, respectable woman, Mrs. Doshey Phelps, who had killed her sister-in-law in "a moment of 'temporary delirium'" (Mayo 1937, 99). The crime had been committed in front of several witnesses, and thus the only question was whether the crime was murder or manslaughter. As one admirer of Clay's summed up the outcome of the case: "Mr. Clay not only succeeded in saving the life of his client, but excited in her behalf such intense pity and compassion, by his moving eloquence, that her punishment was mitigated to the lowest degree permitted by law" (Prentice 1831, 13).

Writers have attributed much of Clay's success as a trial lawyer to "his knowledge of human nature, intuitive sense of what affected men, an instinctive dramatic flair, and his gift of speech" (Mayo 1937, 88). This ability to play to and move an audience made him particularly effective with juries composed of rough Kentucky frontiersmen, but Clay was also able on occasion to overwhelm the bench as well as the jury. There can be little doubt that Clay's legal training, as irregular as it was, was much superior to that of most of the frontier judges before whom he appeared, and Clay was not above using his quick wits to bluff these judges while zealously representing his clients.

This point is well illustrated by Clay's defense of another accused murderer, Willis. Despite the weight of evidence against Willis, Clay was able to divide the jury. The prosecutor then requested a second trial, to which Clay did not object. At the outset of this second trial, however, Clay argued to the new jury that, "whatever opinion the Jury might have of the guilt or innocence of the prisoner, it was too late to convict him, for he had been *once tried,* and the law required, that no man should be put twice in jeopardy for the same offense" (Prentice 1831, 15). The court immediately ordered Clay to desist from making this specious argument, given that the protection against double jeopardy was clearly inapplicable. With a dramatic flair, Clay stated that, "if he was not to be allowed to argue the whole case to the Jury, he could have nothing more to say" (Prentice 1831, 15). Then he gathered his papers and left the courtroom. A messenger from the court soon arrived to inform him that, if he would return to court, he would

John C. Calhoun, Congressman and Political Theorist

Few attorneys have achieved the public reputations of three attorneys—Daniel Webster, Henry Clay, and John C. Calhoun—who served in Congress in the first half of the nineteenth century. Each represented a different section of the nation (the North, the West, and the South), articulated a different political philosophy, and unsuccessfully sought the presidency. Each grappled with the problem that slavery posed for the Union, and each, in his own way, attempted without success to prevent the breach that ultimately resulted in the Civil War.

This book includes full essays on Webster and Clay but not on Calhoun (1782–1850). Although no less brilliant than his colleagues, Calhoun's courtroom reputation was not on a level with theirs. Calhoun was educated in Tapping Reeve's law school at Litchfield, Connecticut. Although Calhoun established a successful practice on his return to his native South Carolina, he detested riding the frontier circuit and preferred to appeal to the intellect of his audience rather than to their emotions or sense of humor. A historian notes that Calhoun regarded much of contemporary legal practice as a distasteful form of "pettifoggery" (Peterson 1987, 24). Soon after returning to South Carolina, Calhoun was elected to public office, eventually serving as vice-president under Andrew Jackson (a position from which he resigned) and as a South Carolina senator. Calhoun preferred this service, and farming, to legal practice and thus, despite his legal abilities, did not participate in as many important cases as his two colleagues.

Calhoun was a strong apologist for the institution of slavery and an advocate of the doctrine of nullification. Despite Calhoun's defense of these discredited doctrines, his *Disquisition on Government* and *Discourse on the Constitution and Government of the United States* (1851) are still highly regarded works of political theory.

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be allowed to proceed with the case as he saw fit. The jury in this second trial acquitted Willis based on Clay's double jeopardy defense, despite the weight of the evidence against him.

In civil cases, Clay's work in title suits brought him prosperity as well as fame. By 1805, he owned more than six thousand acres of land. Clay represented prominent Kentuckians in land suits, including John Breckinridge, a fellow lawyer who went on to become a U.S. senator and later U.S. attorney general. Within a few years, Clay was representing merchants from the eastern states in Kentucky, and in 1806 he became Noah Webster's legal representative in the West.

Although Clay represented a number of prominent individuals during his years as a trial attorney, his most famous client was none other than Aaron Burr. In 1806, the federal prosecutor in Kentucky, Joseph Hamilton Daveiss, an ardent Federalist, sought to indict Burr for conspiring against the Union and planning to attack Mexico. Burr approached Clay, who agreed to represent him. Clay clearly believed at the time that the charges were a Federalist attempt to discredit Burr, an extremely popular figure in the West. In his first attempt to indict Burr, however, Daveiss did not have enough evidence against Burr to proceed and the grand jury was dismissed. Before Daveiss could try to indict Burr again, the state legislature elected Clay to the U.S. Senate to fill out the remaining term of John Adair, who had resigned after being defeated for reelection. Clay was reluctant to continue representing Burr, worrying that it was inappropriate for a senator to represent a man accused of conspiring against the laws of the United States. Apparently, Clay had started to doubt Burr. Burr assured Clay in writing, however, that the charges were completely unfounded and that he had no designs against the Union. Clay continued as Burr's attorney, and, once again, the hapless Daveiss was unable to indict Burr. After arriving in Washington, D.C., however, Clay met with President Jefferson, who showed him conclusive evidence of Burr's treachery.

Clay's political career began in 1803, when he was first elected to the Kentucky state legislature. He quickly became a leader in the general assembly and was selected to fill out remaining terms in the U.S. Senate in 1807 and 1809. In 1810, Clay was elected to the U.S. House of Representatives; in 1811, he was selected as Speaker of the House, a position he held for most of his House career, which spanned the years 1811 to 1814, 1815 to 1821, and 1823 to 1825. In 1814 and 1815, he served as a delegate to the peace conference that resulted in the Treaty of Ghent, which ended the War of 1812. After Clay's unsuccessful bid for the presidency in 1824, President John Quincy Adams appointed him secretary of state in 1825, a position he held until 1829. He then served in the Senate from 1831 until 1842, and again from 1849 until his death in 1852. During his congressional career, he was a principal architect of the Missouri Compromise and the Compromise of 1850 and a key player in the Nullification Crisis of the 1830s. Clay also sought the presidency, but despite repeated attempts the office eluded him. He ran unsuccessfully for president in 1824 and was the Whig candidate for president in 1832 and 1844.

The skills that had made him a great trial lawyer—especially his oratorical skills and his intuitive sense for human nature—contributed greatly to Clay's success on the national political stage. Clay's eloquence and debating skills served him as well on the floors of the House and Senate as they had in court. This is not to say, however, that Clay gave up the practice of law

when he embarked on his political career. To the contrary, during this period Clay argued many cases before the Supreme Court and established himself as one of the most prominent attorneys in the nation. Much of Clay's energy as an attorney during these years was dedicated to representing banking interests, including the second Bank of the United States. Clay served as counsel for the Bank of the United States in Ohio and Kentucky from 1820 until he became secretary of state in 1825. During this period, he, with others, including Webster, represented the bank in the important case of *Osborn v. Bank of the United States* (1824), dealing with the jurisdiction of the federal courts, among other issues.

In the first half of the nineteenth century, oral argument before the Supreme Court was as much a social as a legal event. When prominent lawyer-statesmen like Clay appeared before the Court, Washington society would pack the courtroom, then located in the Capitol, for days at a time. In February 1841, for example, Clay appeared before the Supreme Court in the case of *Groves v. Slaughter,* the first case involving state laws regulating the introduction of slaves into a state. As such, the case involved the commerce clause and states' powers to regulate interstate commerce. The Mississippi Constitution of 1832 prohibited the introduction of slaves into the state as merchandise. In violation of this constitutional provision, Slaughter had entered the state with slaves in 1836 and sold them, on credit. When the note came due, however, the purchasers claimed that it was void because it violated the state constitution. Representing Slaughter, Clay was again paired with Webster; the two great lawyers were described as "the Ajax and Achilles of the Bar" by their co-counsel in the case, Walter Jones (Warren 1922, 342). During the seven days of oral arguments in this case, every seat in the courtroom was occupied, many of them by Clay's admirers. One reporter described Clay's performance in *Groves* in the following manner: "Mr. Clay spoke for some three hours, and with a patient audience to the end. With a jury, he would be irresistible. With grave Judges, to address, of course he is less successful; but many who heard him today pronounced his argument to be a very able one" (Warren 1922, 342). As was often the case, Clay's client prevailed before the Supreme Court in *Groves.*

Clay's last noteworthy appearance before the Supreme Court was in the case of *Houston v. City Bank of New Orleans,* argued in 1848. As Swisher (1974, 145) notes, "it seemed as if the population of Washington went en masse to the Courtroom to hear him," despite the fact that the case dealt with a highly technical issue under a statute that had been repealed five years earlier. Of his performance on this occasion, one reporter remarked: "It has been often said . . . that [Clay] never was and never could be, reported successfully. His magic manner, the captivating tones of his voice, and a natural grace, singular in its influence, and peculiarly his own, can

never be transferred to paper" (Warren 1922, 440). Another reporter noted that, even at the age of seventy-one, Clay "exhibited as much vigor of intellect, clearness of elucidation, power of logic and legal analysis, as he ever did in his palmiest day" (Warren 1922, 441). The Court was unanimous in holding in favor of Clay's client.

After *Houston v. City Bank of New Orleans*, two notable events mark the last chapters in Clay's political career. In 1848, he was passed over for the Whig nomination in favor of General Zachary Taylor. In the Senate, he was one of the principal architects of the Compromise of 1850, which proved to be his last important service to the Union. Clay fell ill while returning to the capital from Lexington in late 1851 and resigned his seat in the Senate. He spent his last days largely confined to his rooms in the National Hotel, in Washington, D.C., where he died on June 19, 1852.

—Emery G. Lee III

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COCHRAN, JOHNNIE L., JR.

(1937–)

JOHNNIE L. COCHRAN JR.
Defense attorney Johnnie Cochran puts on a pair of gloves to remind the jury in the O.J. Simpson double murder trial that the gloves Simpson tried on did not fit, 27 September 1995. (AP Photo/Vince Bucci/Pool)

JOHNNIE L. COCHRAN JR., the Shreveport, Louisiana, native who became a prominent defense counsel, civil rights advocate, and television presence, is the grandson of a Louisiana sharecropper, Alonzo Crockrum, who changed his surname. Crockrum's death in 1935 as the result of faulty medical procedures forced his articulate son, John Cochran Sr., to forgo a college education. Nonetheless, John Cochran Sr. went on to flourish in the insurance business. In 1943, he joined the massive African-American migration to the San Francisco Bay area that enabled the nation to build its arsenal for victory over Germany and Japan when he decided to move his young family to Oakland, California, to secure lucrative work in the Alameda Shipyards.

After V-J day and its concomitant reduction in the war industries workforce, Cochran moved the family to San Diego, and by 1949 he returned to work in the insurance industry, this time with Golden State Mutual in Los Angeles. His office was located next to what still remains the city's

leading African-American newspaper, the *Los Angeles Sentinel* (Cochran and Rutten 1996, 37).

In the early 1950s, Johnnie Cochran Jr. matriculated in Los Angeles High, which not only had an outstanding academic reputation but had a student body considered "the best dressed in the city" (Cochran and Rutten 1996, 51). Receiving tutorials on fashion from parents of Jewish friends in the garment business, Cochran began to develop his fashion sense, which, like his cross-examination techniques, became one of his trademarks. Cochran continues to cut a dashing figure sartorially and verbally, whether appearing on national media outlets or presenting himself to a high school assembly in Oklahoma. "Johnnie Cochranisms" such as "If it doesn't fit, you must acquit," used in closing arguments in reference to the infamous glove introduced by prosecutor Chris Darden in the O. J. Simpson case, have become part of the national consciousness.

After high school graduation, Cochran entered the University of California at Los Angeles (UCLA), where as a freshman he pledged to Kappa Alpha Psi, the leading African-American fraternity on majority-white college campuses. Initially chartered at the University of Indiana at Bloomington early in the twentieth century, Kappa Alpha Psi has had other prominent members, including the late Thomas Bradley, former mayor of Los Angeles (Crump 1991, 635). Bradley, also a native southerner who had migrated to California, was Cochran's fraternity big brother and remained close to Cochran for the remainder of his life.

Cochran earned his B.S. degree at UCLA in 1959. Loyola University of Los Angeles awarded him a law degree in 1962. About the same time that he matriculated at UCLA, Cochran also passed the state licensing examination for selling insurance and went to work with his father, from whom he absorbed his qualities of optimism and empathy as they served clients, many of whom were fellow African-American migrants from the South. Service to the African-American community and a commitment to civil rights continue to be emblematic of Cochran's endeavors. These were views nurtured by his and his family's strong lifelong involvement with the Baptist Church.

Inadvertently, Mayor Bradley had a profound influence on Cochran's family life. Bradley, who had served as a member of the Los Angeles Police Department and concurrently attended Southwestern Law School at night, had been elected to the city council and subsequently won the mayor's office after an initial loss to Sam Yorty. Bradley appointed Cochran to the Los Angeles International Airport Commission, where he served from 1981 until 1994, including three terms as its president. On a commission business trip to Portland, Oregon, Cochran met and, after a whirlwind courtship,

The Case of the Gloves that Didn't Fit: Déjà vu All Over Again?

Few observers of the O. J. Simpson murder trial can forget the dramatic moment when it appeared that Simpson's hands did not fit into the gloves that the prosecution had accused him of wearing when he allegedly murdered his wife and a friend. There was a similarly dramatic incident in an earlier California case. Attorney Jerry Giesler, who had established a reputation for defending celebrities, was defending Paul Wright for the murder of his wife and his best friend, whom he had discovered at night engaged in a sexual act on a piano bench in his house.

Far from denying the crime, Wright had immediately called the police to confess. At trial, he testified that his mind had become a "white flame" when he saw his wife cheating on him and that he had snapped. However, he also reported that he had fired two sets of shots, two from the door where he had first observed them and three when he had come closer to the bodies. A neighbor seemingly called Wrights's credibility into question by reporting that she had heard all five shots had been fired sequentially one after the other, and Giesler had done his best to ask her a minimum of questions so as not to reinforce her testimony.

The prosecution, who had been taught to use audio and visual displays to reinforce the effect of such testimony, proceeded on redirect examination to ask the woman to use a pencil to tap out what she had heard. Instead of tapping out five even shots as her testimony had seemed to require, she instead made two taps, then paused and followed with three others.

Giesler quickly stipulated that this demonstration indicated "that there was a noticeable interruption between the second and third shots" (Giesler and Martin 1960, 169). Although the jury found his client guilty of manslaughter, it subsequently decided that he had not been sane at the time of the act.

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married Sylvia Dale, a New Orleans native. (Cochran divorced his first wife, Barbara Jean Berry—who, in a book, *Life after Johnnie Cochran* (1995), accused him of abuse—and was sued for palimony in 1995 by his mistress, Patricia.) The couple traveled to New Orleans to secure the blessing of her parents before marrying, and they currently reside with his surviving parent, Johnnie L. "The Chief" Cochran Sr.

One of Cochran's civil cases paralleled an unfortunate experience of his own. While driving with his children in his Rolls-Royce bedecked with "JCJR" license plates in 1979, Cochran was stopped by police officers with drawn guns. Although they later apologized when Cochran showed them

his badge from the district attorney's office, Cochran recognized the role that race had played in his being stopped. A far greater tragedy befell the family of college athlete Ron Settles, who was stopped in 1981 while driving his Triumph TR-7 by police of the Los Angeles–area municipality of Signal Hill, taken into custody, and later found hanged in his cell. After an autopsy of his exhumed body showed that Settles had been strangled rather than hanged, Cochran was able to secure an out-of-court settlement in a civil case for the young man's grief-stricken parents. The settlement was announced on Martin Luther King's birthday (Cochran and Rutten 1996, 224).

Questions of racial justice have usually intertwined with most of Cochran's civil and criminal litigation efforts; by 1995, Cochran was estimated to have secured over $45 million against California police departments (Creager 1997, 100). For nearly thirty years he worked to overturn the murder conviction of former Los Angeles Black Panther Party leader Geronimo Pratt. Cochran's persistence paid off, as Pratt's murder conviction was overturned in the spring of 2000, and the former Black Panther received a $4.5 million settlement ("Winners" 2000). Cochran also brought Reginald Denny's suit against the police department for failing to come to his aid after Denny, a white man, was severely beaten in riots that occurred after police were acquitted for the beating of Rodney King.

Cochran is especially known for his debonair courtroom manner, which the *New York Times* has called "disarmingly smooth, confident, and captivating," and which a Los Angeles Superior Court judge has characterized as being persuasive and charming. An attorney told a newspaper reporter that "if Johnnie tells jurors that a turkey can pull a freight train, they'll look for a rope" (Creager 1997, 99). Cochran's life and legal work have been influenced both by the automobile culture of Los Angeles and by Hollywood celebrity. Cochran worked to win an acquittal for attempted murder for actor Todd Bridges of the *Different Strokes* television series. Similarly, Elizabeth Taylor turned to Cochran when her friend Michael Jackson was accused of child molestation. He negotiated an out-of-court settlement for Jackson shortly before the fateful day of June 13, 1994, when he learned through news reports of the stabbing deaths of Nicole Brown Simpson and Ronald Goldman (Creager 1997, 226).

The notoriety wrought by his involvement with *California v. Simpson* (1995) brought Cochran fame as a fixture on cable television during the trial. He was also featured on his own program, as well as on *Both Sides with Jesse Jackson* and *Larry King Live*. Cochran emerged as the lawyer most emblematic of the television age. He was the obvious role model for the character of Cosmo Kramer's attorney on the television comedy *Seinfeld*. Before

being retained as lead counsel for the defense of O. J. Simpson, Cochran had been contacted about being a legal commentator on the case for NBC. Instead, Cochran led the defense for the well-liked and widely admired former professional football player, Heisman trophy winner, Hertz rental car spokesman, and costar of several *Naked Gun* films. Cochran was hardly the first member of the bar to become a household name through his association with a television-saturated criminal trial. That distinction went to F. Lee Bailey, who had defended Dr. Sam Sheppard in the mid-1950s in a case that inspired the *Fugitive* television series of the 1960s and the film of the same name of the 1990s. Appropriately enough, F. Lee Bailey played a pivotal role as a member of the legal team that Cochran led in defense of O. J. Simpson. The *Simpson* case marked the first time the two lawyers worked together. As they did, Cochran's respect for Bailey grew (Cochran and Ruttan 1996, 265). Bailey's cross-examination of Mark Fuhrman elicited the statement that he had not said the word "nigger" in the previous ten years. This statement strained Fuhrman's credibility with the jury, which included eight African-American members, and was impeached months later by Fuhrman's own tape-recorded words in an interview that had previously been conducted by screenwriter Laura Hart McKinney (Cochran and Ruttan 1996, 294). Bailey's major task in the case was to undermine the prosecution's credibility by casting reasonable doubt on its timeline for Simpson's alleged commission of the murders.

The attorney who was pivotal in questioning DNA evidence put forth by the prosecution was Brooklyn-born Barry Scheck. Cochran describes Barry Scheck and Scheck's coworker Peter Neufeld as "America's leading authorities on the forensic application of DNA." Although such evidence can be quite reliable, Scheck argued effectively that the "anarchic crime scene" undermined the credibility of the prosecution's DNA evidence. While the court proceedings generated controversy—three hundred complaints were filed with the state bar against the attorneys involved in the case (Chemerinsky 1997, 1)—Scheck was one of the few lawyers to be reproved by the California Bar Association. He participated in the case even though his California law license had lapsed. Nancy McCarthy has written the following:

> After an exhaustive investigation of ten attorneys involved on both sides of the O. J. Simpson murder trial, one of the former football star's defense lawyers was disciplined by the State Bar last month and another was negotiating a settlement with the bar at press time. Carl Douglas, an associate of lead attorney Johnnie Cochran, was publicly reproved for misusing his subpoena powers. The bar was attempting to negotiate a public reproval for New York–based

Barry Scheck, who is a member of the California bar but participated in part of the trial while on inactive status. (McCarthy 1997, 3)

Although Cochran had assembled what came to be popularly known as the "Dream Team," the resources of the prosecution were ample. More than forty-two deputy district attorneys and dozens of clerks were assigned to *California v. Simpson*. Although the prosecution had the same access to the scientific jury selection techniques used by the "Dream Team," strangely they did not avail themselves of them.

In his opening statement, Cochran went through what he described as a "laundry list" of defense witnesses and the anticipated significance of their testimony (Cochran and Rutten 1996, 285). He believed his efforts were hindered by the failure of co-counsel Robert Shapiro to comply with California's reciprocal discovery statutes and provide the statements of defense witnesses to the prosecution. Shapiro, another celebrity lawyer who had once successfully defended F. Lee Bailey in a case in which he was accused of driving under the influence of alcohol, was one member of the "Dream Team" in whom Cochran lost confidence as the case progressed.

As one who had held the third-highest position in the Los Angeles prosecutor's office (Cochran had been the first African-American law clerk to work there), Cochran was sympathetic to the plight of prosecutor Marcia Clark and to that of fellow African-American Chris Darden, with whom he came into conflict in court. Cochran had raised funds for the initial election of Clark and Darden's boss, District Attorney Gil Garcetti, and had introduced Darden to the Second Baptist and African Methodist Episcopal churches in Los Angeles, both prominent in the realm of political activism. Clark brought a wealth of experience to the *Simpson* case, having won nineteen homicide convictions, including one in 1991 that had featured DNA evidence ("Clark" 1998, 15).

Cochran is generally credited with—and blamed for—"playing the race card" in the *Simpson* case by suggesting to the jury that Simpson had been framed for the murders because of his race. Questions about the character of police investigator Mark Fuhrman, as well as the complexity of the state's DNA evidence, both aided Cochran's case. The acquittal that resulted was generally applauded by African-Americans but disdained by whites. In a subsequent civil trial, in which Simpson could no longer invoke his Fifth Amendment right to silence and in which the burden of proof was lower, Simpson was ordered to pay restitution to the families of the two victims.

After his victory in the *Simpson* case—which began in January and lasted until October 1995—Cochran continued his activism. He traveled to Bogalusa, Louisiana, in October 1995 to assist the Gulf Coast Tenants Association in its efforts to assist citizens endangered by a chemical leak in a case of

environmental injustice. He has spoken extensively on high school and college campuses. Cochran considers promoting conversations about race to be one of his major goals. He also continues his fight against police brutality.

Cochran is well known for being outspoken about his opinions. He criticized the "erratic behavior" of Mayor Rudolph Giuliani of New York in responding to the police killings of Amadou Diallo and Patrick Dorisman, maintaining that these incidents were provoked by "stereotypical thinking" (*Both Sides* 2000). Cochran continues to decry that "people are being targeted by the color of their skin" and treated brutally for "breathing while black" (*Both Sides* 2000). He provided legal advice to the Diallo family and provided the following observation concerning the notable absence of the topic of race in the trial that led to the acquittal of the officers who killed Amadou Diallo: "It was like there was a big pink elephant in the room and everyone acted like it wasn't there" (White 2000, 28). Cochran praises cities such as San Diego and Boston that have reduced crime and minimized or eliminated police brutality by promoting police-community relations.

Cochran has been honored by Kappa Alpha Psi by being chosen as their Man of the Year. He was also chosen as Man of the Year by the Brotherhood Association of Los Angeles in 1994. Cochran's activism has involved not only fraternal and community associations, but professional associations as well, including the California Assembly of Black Lawyers, on whose twentieth-century anniversary program he served as a moderator. In 1984, when the Democratic National Convention was convened in San Francisco, Cochran served as special counsel to the chairman of its rules committee (*Marquis* 1999, 824).

In April 2000, Cochran traveled to Nigeria in an effort to reconcile Islamic law with civilian law. There he met with that nation's minister of justice and attorney general and with representatives of Amnesty International. In March 2001, Cochran was on the team that successfully defended rapper Sean "Puffy" Combs against charges of weapons possession and bribery in connection with a shooting in a Manhattan dance club. That same month, Cochran agreed to join a team handling the appeal of Lionel Tate, a 14-year-old Florida youth who was given a life sentence for the murder two years earlier of a six-year-old girl (CNN 2001).

—Henry B. Sirgo

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CONKLING, ROSCOE

(1829–1888)

Roscoe Conkling
Library of Congress

Without doubt Roscoe Conkling of New York is much better known today as an influential nineteenth-century politician, whose patronage system rankled many a political opponent and rewarded friendly allies, than as an attorney. Nonetheless, during his lifetime he was equally well known for his trial skills. He was an eagerly sought-after advocate in cases ranging from simple assault and battery to momentous arguments before the U.S. Supreme Court. In fact, it was Conkling's oratorical skill, alongside a dogged fidelity to preparation and use of aggressive cross-examination techniques, that propelled him to a preeminent position in both law and politics. These attributes led U.S. Supreme Court justice Samuel F. Miller to say of him, "For the discussion of the law and the facts of the case Mr. Conkling is the best lawyer who comes into our court" (Jordan 1971, 417).

Conkling's family originally came from Nottinghamshire, England. Elizabeth (Allseabrook) and John Conklin moved to Salem, Massachusetts, in 1635. Roscoe Conkling was the seventh in direct descent from Elizabeth and John. His father, Alfred Conkling, the first in his family to receive a college degree (Union College at Schenectady), moved first to Albany,

then to Utica, later serving in the U.S. Congress and for twenty-seven years as U.S. district judge in the Northern District of New York. Alfred married Eliza Cockburn; they had three daughters and four sons. They named Roscoe, the youngest son, after William Roscoe, the English historian, poet, and barrister, whom Alfred extremely admired. Although Roscoe Conkling had no formal education beyond high school, he was considerably well read. It was during his formative years that he read *The Art of Speaking,* by James Burgh, a book first published in the early eighteenth century, that was to have a significant influence on his career as an orator.

Fresh from the Auburn Academy in New York, which he attended while living with his brother Frederick, Conkling began to read law under two of New York's foremost attorneys, Joshua A. Spencer and Francis Kernan. Spencer was a Whig, and Kernan a Democrat whom Conkling opposed again and again at trial and as contestants for the congressional seats in 1862 and 1864. Kernan and Conkling eventually become colleagues in the U.S. Senate. Conkling was barely twenty years old when he was admitted to the New York bar in 1850 and tried his first case before his father (which he won). That same year, as he entered a five-year partnership with the city's former mayor, Thomas R. Walker, Governor Hamilton Fish appointed the young Conkling to be district attorney for Oneida County. From that time, although he had some partnership relationships, he remained for the most part a loner at the bar.

Conkling's long and illustrious careers spanning nearly four decades shifted so much between law and politics it is impossible to say which were sojourns and which was his dwelling. His political career was prodigious: he was elected mayor of Utica, New York, in 1857, served for nearly a decade in the U.S. House of Representatives (serving on the historic Joint Committee on Reconstruction, the principal architect of postwar reconstruction, and casting weighty votes on the Civil War amendments and the impeachment of President Andrew Johnson), and as a member of the Senate, where he cast a "vigorous" vote to convict President Johnson in his Senate trial.

In summarizing Conkling's illustrious legal career, many cases can illuminate his oratorical skills, tenacious propensity for preparation, and pugnacious cross-examination style. An early case, *Doe v. Roe,* established his reputation as a fierce cross-examiner. Conkling represented the plaintiff, who was resisting repayment of a loan on the grounds that the interest rate was usurious. The defendant's counsel produced several sworn documents executed by the plaintiff in which he had expressly affirmed the lack of any "fraud and usury." Despite the fact that Conkling's associate had recommended dismissing the case, Conkling remained undaunted, insisting that the defense be required to plead. Conkling's cross-examination of the de-

fendant was so effective that the audience on two occasions applauded, and the jury returned a very quick verdict for the plaintiff (Conkling 1889, 43–44).

Conkling's insistence on thorough and meticulous pretrial preparation and his aggressive cross-examination of witnesses were continually rewarded, but never more so than in a notable 1861 murder trial in which he represented the Reverend Henry Burdge. Burdge's wife was found dead with her throat slashed from ear to ear in the family's home. The initial coroner's report ruled that the death was a suicide. Later, when Burdge accepted a position with a church at Port Leyden, some disgruntled congregants, who were displeased with his hiring, began to circulate a poem that accused him of murdering his wife. When Burdge sued one of the congregants for libel, the disgruntled group managed to have Mrs. Burdge's body exhumed by a highly reputed physician, Dr. Swinburne, who was one of Burdge's church enemies. Swinburne instigated Burdge's indictment for murder and became the main witness against him at the trial. Since Dr. Swinburne claimed that Mrs. Burdge's assailant first suffocated her and then cut her neck, Conkling conducted a studious examination of the effects on lungs by suffocation. In fact, so thorough was his preparation that he obtained a cadaver and had it dissected to study pertinent anatomical parts of the human body. A local physician, Dr. Alonzo Clark, who spent an entire night just before the trial coaching Conkling, stated, "Mr. Conkling learned in a few days what it took me thirty years to find out" (Conkling 1889, 131).

Conkling used the services of a noted physician from New York City to prove that a struggle always accompanied suffocation—a fact that was noticeably absent in this incident. He went on to show that even small, weak women were capable of tremendous struggles while being suffocated by strong men, a most significant point, since Burdge was barely larger than his wife. Moreover, Conkling effectively used demonstrative aids to refute the prosecution's claim that suicide victims could not make an ear-to-ear incision. Even so, Conkling's most effective maneuver was his cross-examination of Dr. Swinburne's direct testimony that claimed the postmortem examination unequivocally showed suffocation to be the cause of death. Conkling disproved this account by getting the physician to admit that one side of the lungs was not congested—an absolute necessity when suffocation occurs—and also that he had negligently performed several forensic procedures during his postmortem examination.

A very interesting case, and one that illustrates Conkling's oratorical skill, was an 1864 case involving another clergy member—but this time Conkling was on the opposite side. The cleric, Reverend Sawyer, sued Conkling's client for comments the latter had made about the plaintiff's book, entitled *Reconstruction of Biblical Theories: Or, Biblical Science Improved*. The

defendant, Mr. Van Wyck, the proprietor of a New York periodical, the *Christian Intelligencer,* had penned a scathing critique of Sawyer's book, saying, among other things, that "the author [should] go without delay, to Natal [a British colony in South Africa], and assist the bewildered bishop of that enlightened colony, or else remove to England and take orders in the Established Church" (Conkling, 1889, 209).

Conkling's summation in *Sawyer v. Van Wyck* contained a quintessential example of his elocution:

> The temple has till now been open since free government began, but the hinges so long rusted must creak again, and the doors be closed, if this action stands before an American jury. . . . The plaintiff chooses to become a theological pugilist . . . he takes refuge in court and asks damages against a man who has scratched him with a pen—a pen! the very weapon he himself has wielded to destroy tranquility, to unsettle faith, to darken hope, to put out the only light which burns unquenched amid the deadly vapors of the tomb. (Conkling 1889, 209–210)

This appeal to the jury is all the more impressive because it accuses a member of the clergy, who claims himself to be attacking the profane, of profanity.

We can read more of Conkling's eloquence in a summation to the jury in an 1853 murder trial:

> Dark and dreary as is the day, it is far too bright for such a deed. "Hung be the heavens with black" and let the courthouse and all Herkimer County be hung in mourning on the day when twelve of her sons will take from their fellowman his life or his liberty on such testimony as this. . . . The day is too bright and too beautiful for such a deed. Nature and man should shudder! Heaven and earth should give note of horror; the skies should be weeping; the winds should be sighing; the bells should be tolling; the court-house should be hung in mourning; the jury-box should be covered with crape on the day when a father, a husband and a citizen of Herkimer County is sent to a prison or a gallows upon such testimony as this. (Conkling 1889, 379)

One final instance of his oratory—regarding espousal of unpopular causes—comes from a closing argument made in an 1874 railroad tax case while he was still a member of the U.S. Senate:

> In this country the *morale* of the profession in this respect has not yet reached the standard which has long been maintained in Westminster Hall; but I would hold myself unworthy a place on the rolls if, on being asked to argue a

> case involving a great sum of money, the reputations of many and the interest of many more, and involving also grave questions of law, I should shrink from standing at the bar of the country and vindicating as best I could the Constitution, the law and the right, even for an unpopular or hated client, because political opponents or slanderers might defame me for doing it. I give my gage that if the time shall ever come, politics or no politics, when I am afraid to brave such dangers—afraid to hew to the line of professional integrity and fidelity, let the chips fly where they may, I will confess myself unworthy membership of the Bar, unworthy the association of men who place truth and honor above the passionate discords, the groveling resentments, or the acclamations of the hour. (Conkling 1889, 390)

Just as Conkling's closing in the railroad tax case involved both his legal and political careers, so did his involvement with the passage and implementation of the Fourteenth Amendment to the U.S. Constitution. This venture also places his laudatory self-image in stark contrast with reality. It begins in 1865 with service on the Joint Committee on Reconstruction, whose most notable progeny was the Fourteenth Amendment. Ostensibly, the Fourteenth Amendment attempted to thwart the so-called Black Codes enacted by Southern states in their efforts to continue the subjugation of African-Americans. A narrow construction of the amendment was that it related only to matters affecting freed slaves, a point of view initially adopted by the Supreme Court in the *Slaughterhouse Cases*, 83 U.S. 36 (1873). A more radical view, the one shared by Conkling, was that the amendment should guarantee and protect the rights of all people equally. Indeed, some, Conkling included, went so far as to claim that "people" should be defined so as to even include juridical entities such as corporations as well.

Conkling's legislative role shifted to legal advocacy with his involvement in *County of San Mateo v. Southern Pacific Railroad Co.*, 116 U.S. 138 (1885), which, along with a companion case, *County of Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), represent some of the earliest opportunities seized by the Court to enunciate (albeit as *obiter dicta*) the notion that corporations were entitled to protection under the Fourteenth Amendment. These cases involved a tax levied by county governments in California on real property. Although the law permitted taxpayers to deduct the amount of any mortgage from the taxable basis, railway companies were specifically prohibited from doing so. Railway companies filed a multitude of cases that contested the distinction on various grounds, including the claim that it violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. Mr. Justice Field, sitting on circuit in both cases, 13 Fed. 722 (C.C.D. Cal. 1882) and 18 Fed. 385

(C.C.D. Cal. 1883), ruled in favor of the railway companies, holding that private corporations are persons within the meaning of the Fourteenth Amendment and entitled to its protection, in this case the equal protection clause. When the California governments petitioned the U.S. Supreme Court for writs of error, the railway companies retained the noted California attorney John Norton Pomeroy to write the brief of law, and Conkling to present the oral argument before the Supreme Court in the *San Mateo* case, which he did on December 19–20, 1882.

While legal scholars have generally credited the *Santa Clara* case with establishing corporate protection under the Fourteenth Amendment, it is nonetheless tenable that Conkling's argument in the *San Mateo* case was instrumental in the Court's general movement toward that position. In fact, the Court decided neither *San Mateo* nor *Santa Clara* on the basis of a Fourteenth Amendment claim. Agreement of the parties dismissed the former; the latter was decided on the basis of state law. Nevertheless, they structured the dismissal of *San Mateo* on the assumption that the Fourteenth Amendment was applicable, and the *Santa Clara* opinion, which was written on the heels of Conkling's *San Mateo* argument, contained a matter-of-fact, almost incurious, footnote, declaring, "The court does not wish to hear argument on the question whether . . . the Fourteenth Amendment . . . applies to these corporations. We are all of the opinion that it does" (118 U.S. 394, 396). Indeed, one noted legal historian goes so far as to give Conkling's argument direct credit for persuading the Supreme Court to adopt the natural entity theory of corporate existence along with protection under the Fourteenth Amendment (Twiss 1962, 61).

Although Conkling's presentation of the law and facts may have duly impressed Justice Miller, the great orator was apparently at times capable of a bit too much factual innovation if not downright factual invention—before the Supreme Court, no less. This was evident during his *San Mateo* argument when he exhibited what he represented as a copy of an unpublished journal of the 1865 proceedings of the Joint Committee on Reconstruction. Conkling quoted a portion that clearly suggested the committee's understanding that corporations were to be beneficiaries of the Fourteenth Amendment's protection. Historians have roundly discounted the authenticity of Conkling's claim, and to this day no such journal has apparently been found (Jordan 1971, 418).

In any event, whatever may have been Conkling's ethical shortcomings in this one situation, his reputation as an aggressive and talented advocate certainly does not include a general propensity unethically to exaggerate, much less fabricate, facts. On the contrary, his skills repudiate the necessity. Indeed, Conkling's meritorious reputation as a premier trial advocate can

only be appreciated today, particularly as we witness ever more emphasis on logical presentations by retinues of narrowly focused experts.

—Clyde Willis

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COVINGTON, HAYDEN C.

(1911–1978)

Hayden C. Covington

Cassius Clay (Muhammad Ali) laughing with attorney Hayden Covington (right). (Bettmann/Corbis)

Hayden C. Covington was lead counsel for the Jehovah's Witnesses at a time during which the exercise of their beliefs resulted in an extraordinary number of appearances before the courts. Often defeated at the local level, where prejudices were strong, Covington succeeded in winning numerous victories at the U.S. Supreme Court for the Witnesses on First and Fourteenth Amendment grounds, including at least two dramatic reversals (Abraham 1994, 235; Martin 1993; Harrison 1978, 13). Covington is said to have presented 111 petitions and appeals to the Supreme Court (*Jehovah's Witnesses* 1993, 697) and to have won 85 percent of the 44 cases he brought before the Court (Quackenbush n.d.). Covington was assisted in the United States by Louisiana's Victor V. Blackwell (see Black-

well 1976), another gifted attorney, and Covington sometimes assisted W. Glen How, who successfully represented the Witnesses' legal interests in Canada. Covington is also known for helping boxer Muhammad Ali get a ministerial draft exemption as a Muslim.

Standard biographical sources contain little information about Covington, whose life was largely dominated by his services to the Witnesses. Born in Hopkins County, Texas, in 1911, Covington reported in an interview with two fellow Witnesses that his father was a Texas Ranger who hoped that his son would go into politics. Indeed, Covington reported that, when he became interested in the Witnesses, he was working in a political job in a Texas county clerk's office, apparently at the same time he was pursuing a law degree at the San Antonio Bar Association's School of Law (now St. Mary's). Covington further reported that he passed the Texas bar a year before completing his law degree and joined a law firm. After moving to another law office defending suits for the Maryland Casualty Company in San Antonio, Covington became involved in defending a few Witnesses who had been arrested for conducting a meeting as well as for helping Witnesses in San Antonio, who, like Witnesses elsewhere, carried signs affirming their leaders' beliefs that religion was a "snare" and a "racket." In addition to their intolerance of religion in general, Witnesses often specifically identified the Catholic Church as the "whore of Babylon" described in the Biblical book of Revelation.

Covington was invited by the Witness leadership to attend their convention at Madison Square Garden in New York, where anti-Witness rioting, largely led by the followers of Roman Catholic radio personality Father Charles Coughlin, erupted. Covington's testimony proved helpful in exonerating the Witnesses who had physically defended themselves, and group leaders invited Covington to come to the Jehovah's Witnesses' "Bethel" headquarters in Brooklyn in 1939, where he served until 1963. Initially, J. F. Rutherford was arguing most Witness cases, but Covington took an increasingly leading role as the primary Witness attorney, and he was a member of the board of directors and vice-president of the Watchtower Bible and Tract Society at the time of Rutherford's death.

Few roles could have done more to immerse a modern lawyer in the intricacies of constitutional law than such service. The Jehovah's Witnesses (who did not formally adopt this name until 1914) grew out of the millennial movements in nineteenth-century America when Charles Taze Russell, a former Pittsburgh merchant, began a series of Bible studies in which he began to predict the imminent second coming of Christ. Although several dates for this physical coming proved false, these dates were subsequently reinterpreted and spiritualized, and the movement continued under the leadership of "Judge" J. F. Rutherford, a one-time Missouri circuit judge,

who increasingly proclaimed the Witnesses to be the exclusive means of salvation and other religious leaders to be frauds. The authoritarian Rutherford—who, with most other American Witness leaders, was jailed under the Espionage Act of 1917 during World War I but released after the war—was also responsible for centralizing increasing power in the Witness headquarters in Bethel, Brooklyn, where the Watchtower Society's major printing operation—the publisher of *The Watchtower* and *Awake!* magazines—was also located. Jehovah's Witnesses developed a number of unique doctrines related to the end times, including the belief that 144,000 Witnesses would rule in heaven while others would live in an eternal earthly paradise. Witnesses also developed distinctive views of the relation of their members to governmental authorities and popular culture (members do not give gifts on Christmas or other holidays or celebrate birthdays), and they rejected a number of tenets of Christian orthodoxy, including belief in the physical resurrection of Christ, the trinity, the equality of Jesus with God, and the existence of hell.

Expecting the imminent return of Christ, who was to usher in his millennial rule in a new earthly Eden, the Witnesses under Rutherford and his successor, Nathan Homer Knorr—a less educated leader with whom Covington was a rival for power and for whom he had little esteem (Bergman 1999, 9)—became increasingly evangelistic and helped expand the Witness presence to other countries, where they were often treated much more harshly than in the United States. In addition to street preaching, their members engaged in aggressive door-to-door solicitations and sales of materials published by the Watchtower Bible and Tract Society, sometimes descending en masse on a town to finish their solicitations before local authorities had an opportunity to try to enforce antisolicitation laws and licensing requirements against them. Members often played phonograph records of recordings by their leaders denouncing other religions, especially Roman Catholicism, and not surprisingly raising the hackles of those of other faiths.

Although this belief has since been somewhat modified to acknowledge the legitimate role of governments in keeping order, the Witnesses believe that governments, like established churches, are largely under the influence of Satanic powers. The Witnesses accordingly oppose participation in wars; they also view all Witnesses as full-time ministers whose kingdom activities preclude such service. In addition, Jehovah's Witnesses regard saluting the flag as a form of idolatry forbidden by the Ten Commandments and prohibited their children from participating, despite a host of laws making flag saluting compulsory in public schools.

Judge Rutherford took the lead in the first flag-salute case to appear before the Supreme Court in *Minersville School District v. Gobitis* (1940). The dramatic reversal of this decision in *West Virginia Board of Education v. Bar-*

nette (1943) was probably as attributable to the widespread acts of violence against the Witnesses that this decision sparked and to the change in the world situation brought about by U.S. entry into World War II as to the efforts of Hayden Covington in the latter case (Rutherford died in 1942). Covington noted that "the reason that [the *Minersville* case] was lost was not because of Brother Rutherford, but because of the times we were in" ("Interview" 1978, 4).

During this same period, Covington represented Witnesses who were denied permits to solicit from door to door (see *Cantwell v. Connecticut* [1940] and *Jones v. Opelika [II]* [1943], overturning an earlier negative ruling against the Witnesses in *Jones v. Opelika [I]* [1942]), or to solicit in company towns (*Marsh v. Alabama* [1943]) or to preach on street corners; who were accused of using "fighting words"; who were denied the right to demonstrate, to use public gathering places, or to use sound trucks; who were accused of violating child labor laws for using their children to sell Witness literature (one of the rare instances in which the Jehovah's Witnesses lost; see *Prince v. Massachusetts* [1944]); who were accused of sedition; who were denied draft exemptions; who had been victims of mob violence, etc. In the period when Covington was most active in arguing cases before the Supreme Court, that body was paying increasing attention to the defense of civil rights and liberties against both state and federal action, so many of its decisions might have been the same no matter who argued the cases, but Covington undoubtedly highlighted the legal issues involved, and he took the lead in arguing that the Bill of Rights should apply equally to state and national governments (Newton 1995, 133–135).

Covington, a tall, handsome man described in a *Newsweek* article as a "Texas tornado with sea-green eyes," was known as a dapper dresser who engaged in animated arguments. A Supreme Court clerk noted that, "He may not have done more talking than anyone I've heard here, but he did more calisthenics" ("Witness's Angle" 1943, 70; for a similar view, see Manwaring 1962, 224). Like many of his Witness counterparts going door to door, at least in his early years as an advocate, Covington apparently valued forthrightness more than tact. The *Newsweek* article noted that Covington thought that the dignity of the Supreme Court was "irrelevant to the legal process" and observed that Covington glowered directly at Catholic Supreme Court justice Frank Murphy when noting that "They [the Witnesses] don't preach in a dead language" ("Witness's Angle" 1943, 68).

The reference to Murphy is fascinating, because, in an interview he gave two days before his death, Covington noted that Murphy "got a good name among us because he was always dissenting in cases in our favor." Covington observed that an unnamed law review article had noted that, "if Justice Murphy is ever sainted, it will be by the Jehovah's Witnesses, not the

Catholic Church. He was a notorious Catholic" ("Interview" 1978, 6). Covington also referred favorably to General Louis B. Hershey, head of the selective service system, whom Covington described as "honorable and fair in his dealing with Jehovah's Witnesses" ("Interview" 1978, 8; see also Macmillan 1957, 186; and Blackwell 1976, 122, 133). By contrast, Covington identified Justice Felix Frankfurter—a Jewish justice who wrote the opinion in *Gobitis*, was the lone dissenter in *Barnette*, and who generally advocated a doctrine of judicial restraint that led to deference to legislative judgments—as "adverse," "hostile," "vicious," "a hypocrite," "an enemy," and "a pawn in the hands of the devil" ("Interview" 1978, 7, 14).

Covington reported one meeting in which he and Knorr met with President Harry Truman about a pardon for a Witness who had been convicted of evading the draft. Covington claimed that Truman cursed and claimed to have no use "for that SOB who didn't want to die for his country in time of war." Apparently, Truman softened this view under the influence of Attorney General Tom Clark, whom Truman later appointed to the Supreme Court and whom Covington also regarded as a fair justice ("Interview" 1978, 11).

In 1950, Covington authored a pamphlet for the Watchtower Bible and Tract Society entitled *Defending and Legally Establishing the Good News*. The pamphlet, designed to help Witnesses who encountered legal problems, is fascinating both for the range of issues it deals with and for its numerous references to opinions throughout state court systems as well as in the U.S. Supreme Court and foreign courts. In advice that may well have reflected his own strategy in arguing before the courts, Covington urged Witnesses who read his pamphlet to "be respectful and courteous" while showing no "fear of men" (Covington 1950, 18). Indeed, Covington likened such appearances to successful "back-calls" on prospective converts and advised that Witnesses were permitted to rise when the judge entered the room and to take an oath to testify to the truth (Covington 1950, 19). Covington further noted that, "In democratic lands we have found, as a refuge from tyranny, the courts of the land. The foremost court to render aid by extending the constitutional shield of protection to Jehovah's witnesses is the Supreme Court of the United States" (Covington 1950, 30; for similar sentiments, see Blackwell 1976, 102). Moreover, although Witnesses did not believe in military service or in such acts of civic participation as voting, serving on juries, or saluting the flag, Covington noted that they "respect the flag and the things for which it stands." In arguments he apparently used in his own appearances before the Supreme Court, Covington tied the legal defenses of the Witnesses to a larger public good: "They have valiantly fought on the [home front] in many lands for liberty for which the flag stands, namely, freedom of speech, press, conscience, and worship of

Almighty God, and they push these fights through the courts so as to maintain these liberties for all" (Covington 1950, 61; for an author who cites similar arguments of Covington, which she views as somewhat "disingenuous" in view of the Witnesses' negative attitude toward secular governments—a way of "using the Devil's weapons against the children of darkness"—see Harrison 1978, 205–206; for similar arguments, see Blackwell 1976, 171).

Although Covington dealt in his pamphlet with many issues, he inexplicably did not address the emotional cases involving blood transfusions, which most Witnesses reject as part of the Biblical prohibition against "eating" blood.

While acknowledging that such teachings had sometimes proved false in the past, Covington believed that, for the sake of unity, Witnesses were obligated to accept and obey Witness doctrines and policies until they were changed (Franz 1991, 24–25). The irony of an intolerant and authoritarian religious group grounding its arguments in the Bill of Rights has not been lost on some scholars (McAninch 1987), but, given that Puritan settlers in America valued their own religious freedom while denying it to others, Witnesses are hardly unique in this respect.

The hard-driving Covington's flamboyant style, and an alcohol problem, possibly exacerbated by intense headaches (Quackenbush n.d.) or an inner ear disease (Penton 1985, 324, n. 7), apparently brought him into increasing conflict with Nathan Knorr, to whom Covington had conceded the presidency of the Witnesses after Judge Rutherford's death. In the early 1960s Covington left the Watchtower headquarters, moved to Cincinnati, Ohio, with his wife and children and was for a time disfellowshipped, or excommunicated, before later being reinstated into the Witnesses. An interview with Covington posted on the Internet is said to have taken place on November 19, 1978, two days before his death ("Interview" 1978, 1); Covington's memorial service at Bethel was not preached until the spring of 1980 (Penton 1986, 324, n. 7).

—John R. Vile

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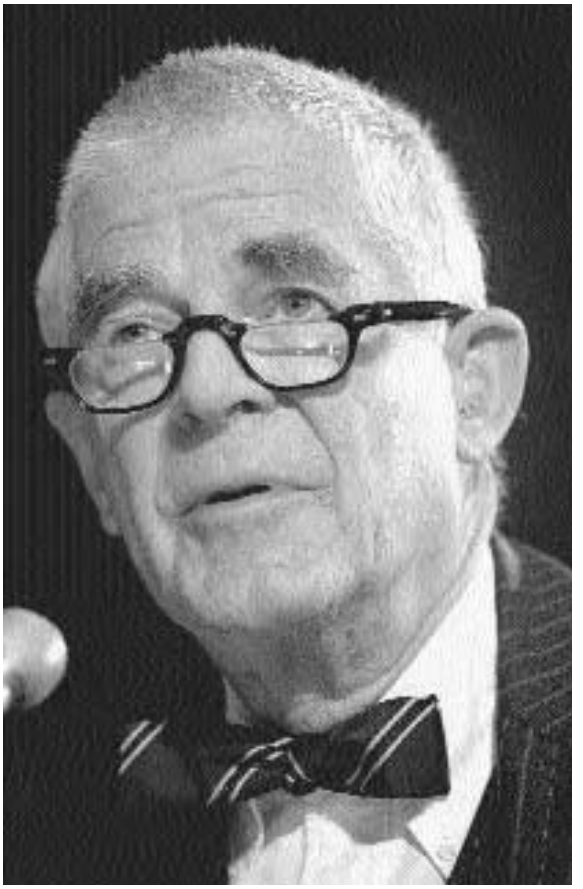
COX, ARCHIBALD

(1912–)



ARCHIBALD COX
AP Photo

ARCHIBALD COX IS CONSIDERED one of the great Supreme Court lawyers of the twentieth century. He earned that reputation as President Kennedy's highly principled solicitor general, arguing dozens of landmark cases in the nation's highest court. In the 1970s, Cox achieved even greater national fame as the first Watergate special prosecutor. His trademarks were his bristly crewcut, his stiff New England bearing, his bow ties, and his absolute integrity. Cox stood up to President Richard M. Nixon in demanding the release of tape recordings that ultimately proved Nixon's complicity in the Watergate scandal. He took the position that no man (not even the President) was above the law, and convinced the courts to adhere to that principle. Cox came to represent, during a particularly troubled time in U.S. government, the embodiment of honesty and integrity in public service.

Archibald Cox was born in Plainfield, New Jersey, on May 17, 1912. From both sides of his family, Cox inherited a reverence for law and public service. His fa-

ther, Archibald Cox Sr., was a well-respected copyright and patent lawyer in New York City who helped to establish the "red cross" symbol as the trademark for Johnson & Johnson. On his mother's side, Cox was a direct descendant of Roger Sherman, signer of the Articles of Confederation, the Declaration of Independence, and the Constitution. (Sherman forged the "Connecticut Compromise," which broke the deadlock in the Constitutional Convention.) Cox's mother (née Frances Perkins) was the granddaughter of William M. Evarts, famous nineteenth-century lawyer and public servant from New York, who served as U.S. attorney general, secretary of state, and U.S. senator from New York. Ironically, Evarts represented President Andrew Johnson during his infamous impeachment trial in 1868 (see entry for William M. Evarts, below). The Evarts tradition of public service would have a major impact on Cox throughout his life.

Archibald Cox grew up in the affluent town of Plainfield, New Jersey. However, there was a decidedly New England component to his character. His family spent summers in Windsor, Vermont, living in the old Evarts homestead, a portion of which his mother had inherited. After attending St. Paul's preparatory school in Concord, New Hampshire (his great-grandfather Perkins had helped establish that school), Cox attended Harvard College. He did not excel academically, at least initially, satisfying himself with "gentlemanly C's" (Gormley 1997, 21). Yet Cox slowly resolved to become a lawyer, and doubled that resolve when his father (at age fifty-six) died unexpectedly during Archibald's sophomore year.

At Harvard Law School, which he entered in 1934, Cox found his niche. He earned the Sears Prize for achieving the highest grade average in the first-year class. Cox also developed a great admiration for Professor Felix Frankfurter, who later became a Supreme Court justice. Frankfurter emphasized the importance of government service and instilled in Cox a respect for "great figures in the law" (Gormley 1997, 35). During Cox's third year, Frankfurter recommended Cox for a clerkship with the famous Judge Learned Hand of New York, who had known Cox's father in New York. The clerkship with Judge Hand, in the federal district court in New York City, became a turning point in Cox's life.

Hand taught "not by precept, but by example" (Gormley 1997, 46). He admonished his young clerk to revere the law, to respect legal precedent, and to remain true "to these books about us" (Gormley 1997, 46). Although his clerkship with Learned Hand lasted only a year, it influenced Cox for the rest of his career.

In 1937, the same year he clerked for Judge Hand and was admitted to the Massachusetts bar, Archibald Cox married Phyllis Ames, whom he had met after a Harvard football game. Professor Felix Frankfurter sent a note, which read, "My God, what a powerful legal combination!" (Gormley 1997,

33). On one side, Phyllis Ames was the granddaughter of James Barr Ames, noted dean of Harvard Law School in the 1890s. On the other side, her grandfather was Nathan Abbott, founder of Stanford Law School.

After a brief stint at the prestigious Ropes Gray firm in Boston, with World War II escalating, Cox took a series of government jobs in Washington as his own way of contributing to the war effort. In 1941, he was hired as an assistant solicitor general under Charles Fahy. Professor Felix Frankfurter had referred to this office as the "Celestial General"—it provided an opportunity to represent the government in the nation's highest court. Cox viewed it as the ultimate honor for a lawyer in government service.

In Cox's first case before the Supreme Court, *Weber v. United States*, 315 U.S. 787 (1942)—a California case involving the denial of old-age pensions to resident aliens—Cox was directed to "confess error" on behalf of the U.S. government. This was tantamount to the government admitting it had erred in the court below, and requesting the Supreme Court to reverse its victory. Confessing error was considered an easy "win." Cox presented the *Weber* argument in the Supreme Court, and, as he later recalled, "eight justices jumped down my throat. . . . It must have verged on being a very pathetic scene if you were at all sympathetic to the young man" (Gormley 1997, 52). The Court refused to accept the government's "confession" of error. Cox lost the case. But it would be one of Archibald Cox's few defeats in the Supreme Court over the next forty years.

After World War II, Cox returned briefly to the firm of Ropes Gray in Boston, thinking it would be for life. Within five weeks, he was invited to join the faculty at Harvard Law School, where he would teach for a half century. Cox became (initially) a leading labor law expert in the country, authoring the first modern labor law textbook in print—*Cases on Labor Law* (1948)—and handling labor arbitrations across the country. But he gradually merged his academic work with assignments in the public sphere.

Based on this growing reputation, in 1952 President Harry Truman named Cox chairman of the Wage Stabilization Board, which was designed to impose wage and price controls on defense-related industries and prevent the country from slipping into economic chaos during the Korean War. Cox remained chairman for only six months: When President Truman overturned Cox's board on a critical decision involving John L. Lewis of the United Mineworkers, Cox resigned in protest, informing the president that he could not in good conscience abide by the decision. In December 1952, Cox returned to Harvard, believing that his excursions into public service were over for good.

But Cox attracted the attention of a young senator from Massachusetts, John F. Kennedy, who turned to Cox for labor advice. Between 1957 and 1959, Cox traveled to Washington (in between teaching classes) to help

Perry Mason in Novels and Films

When many Americans think of a trial attorney, they may be most likely to think of Perry Mason, the fictional invention of novelist Erle Stanley Gardner (1889–1970). Gardner was born in Massachusetts but grew up in Oregon and California, where he "read law" and was admitted to the bar in 1911.

Gardner practiced law in Oxnard, California, until 1918, worked as a salesman for Consolidated Sales Company until 1921, and then practiced in Ventura, California, where he began writing for pulp magazines, eventually abandoning his practice in order to write full-time. Gardner enjoyed traveling and could speak Chinese fluently. When defending Chinese clients for gambling, Gardner, who knew police could rarely distinguish one Chinese person from another, asked his clients to move. Police who arrived at the house of one of his clients named Wong Duck ended up arresting someone else, leading to a headline that read, "Wong Duck May Be Wrong Duck," and causing an embarrassed district attorney to drop charges (McWhirter 1998, 382).

Gardner's first Perry Mason stories appeared in 1933. By the time of his last novel, published in 1973, Gardner had published more than eighty. The popular television series, in which Raymond Burr starred as Perry Mason, began in 1957.

Much of the action in Gardner's stories takes place in the courtroom, with Mason often dramatically eliciting unexpected confessions from the guilty and almost always using the skills of his secretary Della Street and private detective Paul Drake to foil District Attorney Hamilton Burger. Although modern trials, with their extensive discovery rules, rarely embody such high drama, Mason as embodied by Raymond Burr has still become something of a folk hero, presenting a positive view of a lawyer with personal integrity who believes in, and fights for, his clients.

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Kennedy draft labor legislation and shepherd it through Congress. This effort culminated in the Landrum-Griffin Act, one of the landmark pieces of labor legislation of the twentieth century. It turned out to be John F. Kennedy's only major legislative accomplishment before running for president in 1960.

During the 1960 campaign, Kennedy appointed Cox to head a group of academic advisors known as the "Brain Trust." This group of "academic eggheads"—led by Cox—produced hundreds of speeches and position papers on behalf of the candidate. Cox was dispatched by Kennedy to sit with his pregnant wife, Jackie, during the first televised debate with Richard Nixon, as a symbol of the trust Kennedy reposed in his academic advisors.

When Kennedy was elected president in the fall of 1960, he named Cox to serve as his solicitor general—one of the top appointments in the Kennedy administration.

It was as solicitor general that Cox left an indelible print as one of the great Supreme Court lawyers of the twentieth century. Although Cox was initially skeptical of the appointment of the president's brother, Robert F. Kennedy, as attorney general, Cox soon developed a warm relationship with Robert Kennedy. Working in tandem with Robert Kennedy's Justice Department, Cox argued and won a host of landmark constitutional decisions, many of them furthering the civil rights movement of the 1960s.

Cox made his debut as solicitor general in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In that case, he convinced the Court that the Fourteenth Amendment equal protection clause was broad enough to outlaw racial discrimination by a privately owned coffee shop, located in a state-owned parking garage in Wilmington, Delaware. Nervous at the prospect of his first appearance as solicitor general, Cox drove to the parking garage and noticed the flag of the United States and that of Delaware flying above it. When Cox stood before the Supreme Court, he highlighted this fact—although it appeared nowhere in the record. "Anyone who was the victim of discrimination in this coffee shop," Cox told the Court, "could not escape the fact that the discrimination took place in a public building and, literally, here, under the flag of the United States and of Delaware" (Gormley 1997, 150).

When the Supreme Court handed down its decision in *Burton*, it noted the existence of the flags flying over the roof. "The State has so far insinuated itself into a position of interdependence with (the coffee shop)," wrote Justice Tom Clarke, "that it must be recognized as a joint participant in the challenged activity" (Gormley 1997, 151).

Cox quickly earned a reputation as one of the great solicitors general of all time, the "Willie Mays" of Supreme Court lawyers (Gormley 1997, 181). He argued more cases in the Court than any other lawyer of his era, more than anyone since John W. Davis in the 1920s. Dressed in striped pants and swallow-tail coat (the same formal attire that he had been married in), Cox cut an impressive figure at the wooden Supreme Court lectern. He prevailed in 80 percent of the cases he argued, and won 87.7 percent of the cases in which government was amicus curiae, many of them important civil rights victories (Gormley 1997, 191). Law clerks were known to line up along the sides of the courtroom to watch him argue. He was often known to lecture the Court in a professorial style. But his complete mastery of the facts, his powerful brief-writing ability, his deep respect for legal precedent, and his absolute honesty in presenting cases to the Court combined to make him a rock-like figure in the well of the Supreme Court.

A vacancy occurred on the Supreme Court in 1962, after Felix Frankfurter suffered a devastating stroke. Robert Kennedy suggested Cox for the vacancy. President Kennedy instead selected Arthur Goldberg, his secretary of labor—stating that he had made a commitment to Goldberg. It was understood, however, that Cox would be next in line. Explained Kennedy confidant Arthur Schlesinger Jr., "Had Kennedy lived, he would have appointed [Cox] to the Supreme Court. He had it on his mind" (Gormley 1997, 181).

In a series of "sit-in" cases—involving protests at Southern lunch counters that had refused to serve African-Americans—Cox initially found himself at odds with Attorney General Robert Kennedy. Kennedy was sympathetic with the sit-in protestors and wanted to take swift action to support them. Cox, however, was troubled by the *Civil Rights Cases* of the 1880s, which held that the Fourteenth Amendment did not reach purely private conduct (which included discrimination by private lunch counters). Cox felt uncomfortable telling the Court to ignore one hundred years of precedent, however distasteful. Instead he proceeded to win each of the sit-in cases on narrower grounds, waiting for Congress to enact comprehensive civil rights legislation to moot the issue. He accomplished his goal in *Bell v. Maryland,* 378 U.S. 226 (1964), and *Griffin v. Maryland,* 378 U.S. 130 (1964), persuading a slim majority of the Court to sidestep the nettlesome *Civil Rights Cases* and rule on behalf of African-American demonstrators on narrower grounds.

In the landmark reapportionment cases, Cox once again clashed with the Kennedy Justice Department and the White House that had appointed him. Cox had convinced the Supreme Court in *Baker v. Carr* (1962) that the Fourteenth Amendment was broad enough to allow the Court to hear challenges to state reapportionment plans, many of which had become greatly skewed in terms of population. But Cox was haunted by Justice Frankfurter's vehement dissent in *Baker,* arguing that the federal government should stay out of state "political questions."

The Kennedy administration favored an aggressive stand in the reapportionment cases. In many states, legislative districts had not been redrawn for decades, disadvantaging urban populations that were predominantly Democratic turf.

Yet Cox proceeded cautiously. For two centuries, the Supreme Court had stayed out of state reapportionment matters. He refused to advocate abrupt change, which might jeopardize the Supreme Court as an institution. In his view, it was up to the Court to decide if (and when) to break with precedent in the reapportionment cases. Attorney General Robert Kennedy declined to second-guess Cox—he knew that Cox was viewed as "integrity incarnate"; he had enormous credibility within the Court. Robert Kennedy

thus allowed the solicitor general to argue on narrow grounds and remain true to his convictions.

In the historic case of *Reynolds v. Sims,* 377 U.S. 533 (1964), the Court struck down a particularly skewed Alabama legislative apportionment scheme, easily endorsing the "one person, one vote" principle—which required that all legislative districts be roughly equal in population. Cox had stuck to his principles. And the Court had made its own break with precedent.

Throughout the truncated Kennedy administration, Archibald Cox maintained a close working relationship with the president. When Kennedy was faced with a particularly thorny legal issue, he would jokingly instruct his brother the attorney general, "Bobby, ask Archie" (Gormley 1997, 163).

The last telephone call that President John F. Kennedy ever made from the White House was to his solicitor general, Archibald Cox, on November 21, 1963, at 6:45 P.M. The next day the president left for Houston, and then Dallas (Gormley 1997, 182).

After President Kennedy's assassination, Cox won a pair of major victories in the Supreme Court—in *Heart of Atlanta Motel,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964)—upholding the landmark Civil Rights Act of 1964. Cox took the unusual step of defending the Civil Rights Act under the commerce clause, to avoid the "state action" issue that had plagued him in the sit-in cases. He argued that Congress had broad authority under its commerce power to enact sweeping prohibitions against racial discrimination by hotels, restaurants, and other places of public accommodation. Cox won these cases unanimously, paving the way for implementation of the greatest civil rights legislation in American history.

In 1965, Cox assisted Attorney General Nicholas Katzenbach in drafting the Voting Rights Act, then successfully defended that piece of civil rights legislation in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). He argued that case even after tendering his resignation and leaving behind the office that he loved, believing that President Lyndon Johnson should be permitted to name his own solicitor general.

Shortly after his return to Harvard, Cox found himself heading a commission to examine the sources of campus unrest and violence at Columbia University in New York, writing a report entitled "Crisis at Columbia." From 1969 through 1972, Cox became de facto president and troubleshooter at Harvard, as protests over the Vietnam War and student riots swept across his own university.

By 1973, student disruptions had subsided; Cox was looking forward to returning to quiet teaching duties. On the day before his sixty-first birthday, Cox received a telephone call from Elliot Richardson—a former student

who had become President Richard M. Nixon's newest attorney general—asking him to serve as special prosecutor in the case involving the Watergate scandal. Seven prominent lawyers and judges had already turned Richardson down. Cox told his wife, Phyllis, "Somebody clearly has to do it . . . maybe there's no one better to do it than a sixty-year-old tenured law professor who isn't going anywhere (in public life) anyway" (Gormley 1997, 240).

Cox was appointed with bipartisan support in the Senate. As Watergate special prosecutor, he worked doggedly to unravel the mystery of the Watergate break-in and determine if President Nixon (and other top administration officials) had participated in a criminal cover-up. After the existence of a White House taping system was revealed, Cox subpoenaed nine critical tape recordings that he believed were essential to prove (or disprove) the president's complicity in the Watergate cover-up.

President Nixon's attorneys refused to turn over the tapes, citing executive privilege. Cox appeared in front of Judge John J. Sirica, in the sixth-floor ceremonial courtroom of the federal district court in Washington, arguing forcefully that no citizen—not even the president of the United States—should be above the law.

"This is a grave and dramatic case," Cox told the hushed courtroom. Under the U.S. legal system, "judges apply the same law whether the case is great or small." Cox quoted from the great English jurist Bracton, "*Non sub homine sed sub Deo et lege*" ("Not under man, but under God and the law").

Judge Sirica sided with Cox, directing the president to turn over the tapes. The U.S. Court of Appeals affirmed. On the eve of the deadline for President Nixon's lawyers to file an appeal in the Supreme Court—October 20, 1973—Nixon ordered Attorney General Elliot Richardson to fire Cox. Richardson refused and resigned, as did his deputy, William Ruckelshaus. Solicitor General Robert Bork executed the order to fire Cox, in what came to be known as the "Saturday Night Massacre." This action unleashed a firestorm of public protest, which led to the appointment of a new special prosecutor (Leon Jaworski), the release of dozens of damning White House tapes, and the ultimate unraveling of the Nixon presidency.

Archibald Cox, who had stuck to his principles, became a national hero.

After Watergate, Cox continued to argue important cases before the Supreme Court, often appearing pro bono. He represented the citizens' group Common Cause in defending the Federal Election Reform Act of 1974, culminating in a partial victory in *Buckley v. Valeo*, 424 U.S. 1 (1976). He represented the University of California in the celebrated *Bakke* case, 438 U.S. 265 (1978), establishing that affirmative action programs in higher education were constitutional, under appropriate circumstances.

Cox served as chairman of Common Cause for twelve years, urging the passage of comprehensive campaign finance reform. In 1987, Cox published *The Court and the Constitution*, which received glowing reviews. He continued to teach at Harvard Law School and Boston University School of Law until age eighty-five. Although he was passed up for federal judgeships several times and was never appointed to a seat on the Supreme Court, Cox was widely regarded as one of the great Supreme Court lawyers in U.S. history. His absolute integrity and his adherence to the rule of law gave him a powerful credibility that was unmatched in the history of the highest court.

Like his great-grandfather, William M. Evarts, Archibald Cox was the rare public servant "who did not seek office, but let it seek him." He did not promote himself for career advancements or federal appointments. Yet when called upon (during the Kennedy years and Watergate) to protect the institutions of government, he did so forcefully and masterfully. Having risen to the challenge, on each brilliant occasion, he indelibly shaped the future of U.S. history.

— Ken Gormley

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CUMMINGS, HOMER STILLE

(1870–1956)

Homer Stille Cummings, who would serve as U.S. attorney general during the introduction of the New Deal, was born in Chicago, Illinois, on April 30, 1870. He received his Ph.B. from Yale University in 1891 and an LL.B. in 1893. He was admitted to the Connecticut bar in 1893 and practiced in Stamford, Connecticut, where he also served as mayor from 1900 to 1902 and from 1904 to 1908. He was state's attorney for Fairfield County, Connecticut, from 1914 to 1924 and was a corporation counsel from 1908 to 1912 and from 1925 to 1932. He was chair of the Democratic National Committee from 1919 to 1925 and a delegate to the Democratic National Conventions of 1900, 1904, 1924, 1932, 1936, 1940, and 1944. He was appointed attorney general of the United States by President Franklin Roosevelt on March 4, 1933, and served until January 2, 1939. He died on September 10, 1956.

Homer Stille Cummings
Library of Congress

Homer Cummings was the only child of Uriah Cummings and Audie Stillé Cummings. His mother traced her ancestry back

to Emma Smith (Van) Ostrom and the famous Knickerbocker Dutch Van Nostrom family of New York. His father's family had come to Massachusetts in 1627 and traced their lineage back to "Red" Comyn, a rival of Robert Bruce's for the crown of Scotland in the early fourteenth century. Uriah Cummings was an unusually talented individual. An industrialist, writer, historian, successful inventor, leading scientific expert on cement, he was also an avid supporter of the American labor movement and one of the most prominent Indian specialists in the United States. Uriah Cummings's versatile accomplishments, his civic awareness, and his humanitarian qualities profoundly influenced his son (Mazza 1978, 1–10).

Cummings received his early education at Heathcote School in Buffalo, New York. As a student at Yale, Cummings began to struggle with the questions of law and politics that would later dominate his life and career. Influenced by his father's championship of labor, Cummings focused his studies on the history of American capitalism. He was concerned that large trusts and monopolies posed a threat to the free-enterprise system and exploited workers. Not only should corporations be required to adhere to fair business codes and market regulations, Cummings concluded, but American prosperity ultimately rested on protection of the working classes and a more equitable distribution of the wealth generated by capitalist enterprise (Mazza 1978, 12–13). He would later champion these causes in his politics and his legal advocacy.

After completing his legal studies at Yale in 1893, Cummings was admitted to the Connecticut State Bar Association and began practice as an associate in the law offices of the state's attorneys, Samuel Fessenden and Galen Carter. Two years later, Cummings was named partner in the firm of Fessenden, Carter, and Cummings. On June 27, 1897, he married Helen Woodruff Smith, the daughter of a talented New York financier and leading reform Republican, and the couple had a son, Dickinson Schuyler Cummings, born June 17, 1898.

Inasmuch as his partners spent a large part of their time as prosecutors for the city and state, Cummings handled a high percentage of the firm's cases. The firm was regarded as one of the elite appellate firms in the state, and Homer Cummings gained a reputation as a brilliant litigator, handling many of the most important cases in the state (Swisher 1972, xv). In one early, well-publicized case in 1896, Cummings successfully represented the town of Darien, Connecticut, in a suit against its own town selectmen, who refused to hold a town meeting to elect a new tax collector as required by the city charter. In another case, involving his defense of a woman who was the victim of an assault, Cummings's eloquent closing led to an ovation from courtroom spectators (Mazza 1978, 20).

In 1900, Cummings left his partners and began a solo practice. He had

become a prominent silver Democrat and an avid supporter of William Jennings Bryan, a position that was at odds with the Republican views of his former partners. That same year, he was elected mayor of Stamford, a position that he held for three terms. At the time of his election he was thirty years old, the youngest individual to ever hold the office of mayor. Joining other major urban progressives of the era, Cummings championed government reform and challenged corporate structures when necessary to protect public interests. He broke the local utility's monopoly, secured safety regulations for public transportation, professionalized and modernized the city's fire and police departments, established public swimming facilities and parks, and reorganized the municipal government. In addition, he initiated investigations into meat slaughterhouses and butcher shops in the city, urged the city to pass legislation regulating the humane treatment of animals, and argued for food inspectors to ensure that products sold in the city were safe (Mazza 1978, 73). In July 1902, Cummings proposed that the city acquire land for a public park, but the Common Council split on a 4–4 vote over whether to purchase the land. Cummings broke the tie with his own vote. As a tribute to Cummings's progressive reforms as city mayor, the park was named in his honor in 1927.

Despite Cummings's growing political and professional prominence, his marriage to Helen Smith ended in divorce in March 1907. Two years later, on December 16, 1909, Cummings married Marguerite T. Owings, an heir to a silk manufacturing fortune. Continuing his private practice while serving as mayor, in 1909, Cummings also organized the law firm of Cummings & Lockwood with his close friend, Charles D. Lockwood.

On July 1, 1914, Cummings was appointed state's attorney for Fairfield County, a position he held until he resigned in 1924. Cummings gained national notoriety as a prosecutor for entering a nolle prosequi in the 1924 case of *State v. Israel*. Harold Israel was accused of shooting a priest. The evidence against him was staggering. He had been identified by witnesses, he was in the area of the murder at the time it occurred, he was found with the gun used in the crime, and, after extensive interrogation, he confessed to committing the murder, although he later recanted and professed his innocence. In the face of what appeared to be an open-and-shut case, Cummings conducted his own exhaustive investigation and eventually decided not to prosecute. In a lengthy statement to the court explaining his decision, Cummings meticulously rebutted the circumstantial evidence against Israel and discounted his confession as the product of a coercive interrogation of a defendant with diminished mental capacity. Cummings argued to the judge that "it is just as important for a state's attorney to use the great powers of his office to protect the innocent as it is to convict the guilty." The dramatic case and Cumming's courtroom performance was later drama-

tized in a 1947 movie, entitled *Boomerang!,* starring Dana Andrews and Arthur Kennedy.

Cummings's growing reputation as a brilliant litigator, a progressive mayor, and later an effective state's attorney eventually catapulted him into national politics. In 1900, he was elected as chair of the Connecticut Democratic party and the state's national committeeman, where he was an avid supporter and important advisor to Democratic presidential candidate William Jennings Bryan. In 1902, he ran for an at-large Connecticut seat in the U.S. House of Representatives and successfully molded the state party platform around the progressive ideals he had come to accept: direct election of senators, direct primaries, the secret ballot, condemnation of special interest groups, stronger antitrust enforcement, and a forty-hour workweek. Following a national trend, however, Republicans swept Connecticut in 1902, and Cummings was defeated. During the next fourteen years, Cummings served in various capacities in the national Democratic party. He was elected vice-chair of the party in 1913 and head of the Democratic Speakers Bureau in 1916; he served as an important campaign advisor to Alton Parker during the 1904 presidential election, to Bryan again in 1908, and to Woodrow Wilson in the 1912 and 1916 elections. He ran for the U.S. Senate in 1916 but was again narrowly defeated in a state that went solidly Republican. Despite this, his close ties to Wilson led to his selection as chair of the Democratic National Committee in 1919. In that capacity, he delivered the keynote address to the 1920 Democratic Convention in San Francisco, a speech that won him national acclaim as a gifted orator and prominent figure in Democratic politics. He continued to chair the party until 1925, when he decided to rededicate himself to his private law practice.

After a seven-year absence from politics, in which Cummings concentrated on corporate law and litigation, he returned to the national political arena in 1932 as an advisor to the campaign of Franklin D. Roosevelt. Cummings and Roosevelt had been close friends and political allies in Democratic party politics since they first met during the Wilson campaign in 1912. On March 28, 1933, Cummings resigned from Cummings & Lockwood, and Roosevelt appointed him to become the fifty-fifth attorney general of the United States. During his six years as attorney general, Cummings transformed the Department of Justice and was the crucial figure in the battle between the Court and the Roosevelt administration over the constitutionality of New Deal programs and policies.

Cummings reorganized the Justice Department and modernized its operations. He abolished or merged several of its divisions, reorganized and strengthened the Federal Bureau of Investigation, and created the Office of Legal Counsel, a new division that was given responsibility for drafting the formal legal opinions of the attorney general and rendering legal advice to

executive department officials. These responsibilities were transferred from the solicitor general's office, and the latter was given exclusive control over the federal government's appellate litigation. By centralizing control over appellate litigation, Cummings transformed the solicitor general's office into a strategic resource for controlling agency policymaking and a powerful force in shaping federal judicial policy. Cummings also began a comprehensive review and update of the federal rules for practice and procedure in federal courts and reformed the federal prison system, establishing the Alcatraz Island prison in San Francisco Bay in 1934 as a model prison for hardened criminals.

As attorney general, Cummings personally argued few cases before the Supreme Court, but he was closely involved in overseeing the government's most important litigations. During his first three years as attorney general, the Supreme Court invalidated more than thirteen major pieces of legislation at the heart of the administration's New Deal agenda. Indeed, the Court's opposition to the New Deal was so broad based that between 1934 and 1936 the Justice Department, for the only time in history, lost more cases than it won before the Court. Undeterred, Cummings hoped to convince the Court to reverse its *Lochner*-era jurisprudence, which had supported laissez-faire individualism, and uphold key elements of the New Deal, or, short of that, to see resignations from the Court so as to allow change through appointments. But after the Court struck down three more major pieces of New Deal legislation in early 1936, Cummings agreed to lead a more overt assault on the Court. He and Assistant Attorney General Robert H. Jackson advanced the administration's infamous Court-packing bill, aimed at expanding the size of the Court from nine to fifteen members. Although Cummings defended the plan as a measure to promote efficiency on the Court, it was a clear attempt to mute Court resistance to the administration's policy agenda. Cummings admitted in Senate testimony to the Senate: "We are facing not a constitutional but a judicial crisis . . . (in which) the deciding vote of one or two judges has nullified the will of Congress, has overruled the approval of the President . . . and has run counter to the sentiment of the country" (Clayton 1992, 124).

Cummings also delivered a series of public addresses attacking the Court and its *Lochner*-era jurisprudence. In a 1935 address to the American Bar Association, Cummings argued that the Court "does not operate in a legalistic vacuum," that it is only one of several interpreters of the Constitution in the U.S. system (Cummings 1936). Later, in a 1937 radio address defending the Court-packing bill, he argued that the Court was "but a coordinate branch of Government. It is entitled to no higher position than either the legislative or the executive. If the Constitution is to remain a living docu-

ment and the law is to serve the needs of a vital and growing nation, it is essential that new blood be infused into our judiciary" (Cummings 1937).

The administration's efforts to expand the size of the Court proved unnecessary in the end; the Court began upholding key elements of the New Deal in spring of 1937. Cummings's litigation and public-relations strategies, however, were crucial for pressuring the Court and forcing its eventual reversal. Cummings's tenure as attorney general also ushered in a new era in the relationship of that office to the White House. Previous attorneys general had been more removed from White House policymaking. Cummings's close personal relationship with the president, his unabashed advocacy of New Deal programs, and his creation of the Office of Legal Counsel as an institutional mechanism for harmonizing White House policy with Justice Department legal positions became the model for a more partisan style of attorney general in contemporary U.S. politics (Clayton 1992). Many of Cummings's accomplishments as attorney general are recounted in a 1937 book, coauthored by Cummings while he was attorney general with historian Carl McFarland, entitled *Federal Justice*. The book was at that time the most extensive history of the office of attorney general and the Department of Justice and has been an important resource for subsequent scholars and historians.

Homer Cummings resigned as attorney general on November 15, 1939. Thereafter he reorganized the firm of Cummings & Lockwood in Washington, D.C., and continued as counsel until the time of his death in 1956. The firm of Cummings & Lockwood is still thriving in Connecticut.

—Cornell W. Clayton

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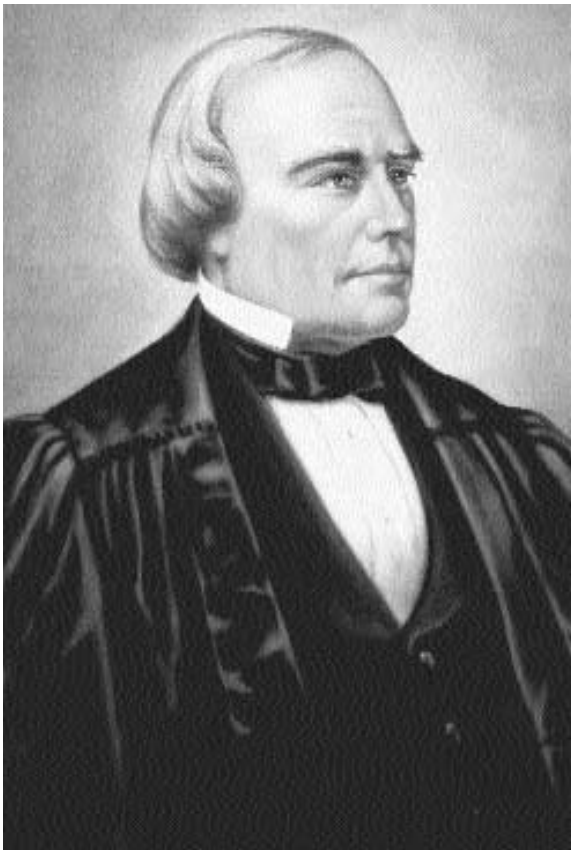
CURTIS, BENJAMIN ROBBINS

(1809–1874)



Benjamin Robbins Curtis
Collection of the Supreme Court of the United States

Benjamin Robbins Curtis, best known for his dissenting opinion in *Dred Scott v. Sandford* (1857), practiced law in Boston both before and after his six-year tenure on the U.S. Supreme Court. His contemporaries considered him to be the foremost attorney in Boston, in Massachusetts, and perhaps in the United States. The Curtis family was descended from William and Sarah Curtis, who emigrated from England in 1632 on the ship *Lyon* and settled in Massachusetts in 1639. They were an old family, respected, and of solid Puritan stock.

Benjamin Robbins Curtis was born November 4, 1809, in Watertown, Massachusetts. He was the son of Benjamin Curtis III and Lois Robbins. He had one brother, George Ticknor Curtis, who was born November 28, 1812. His father was a ship captain whose ship was lost at sea when Benjamin was five years old. His mother, the daughter of a manufacturer and storekeeper in Watertown, supported the family by operating a dry goods store and a small circulating library.

As a boy, Benjamin took full advantage of his mother's circulating library. He read widely and demonstrated from a young age superior intellect and reasoning ability. He first attended a school run by Samuel Worcester in

Newton, Massachusetts, then Mr. Angier's school in Medford. There, he was a classmate of John James Gilchrist, who became the chief justice of the Superior Court of New Hampshire and then chief justice of the U.S. Court of Claims. One of Benjamin's teachers was John Appleton, who became chief justice of Maine.

His early years were spent reading and engaging in the usual activities and pursuits of boys at that time. He was a well-rounded young man, but his voracious appetite for books, both fiction and nonfiction, set him apart from his peers. It was obvious that he had extraordinary potential. He was destined for Harvard College and a legal career.

Curtis entered Harvard in 1825, when he was sixteen years old. His mother could not afford the tuition, so she moved to Cambridge and ran a boarding house for Harvard undergraduates. She also received financial assistance from Benjamin's uncle, George Ticknor. Ticknor was Benjamin's father's half brother and a professor of belles lettres at Harvard. Benjamin had a close, lifelong relationship with his uncle. They corresponded regularly until George Ticknor's death in 1870. While at Harvard, Curtis was a member of several clubs, and he won the Bowdoin essay competition prize in his third year. He graduated second in his class in August 1829 and entered the law school at Harvard the following month. He won a second Bowdoin award in 1830, while studying law.

Curtis entered the law school the same month Joseph Story began lecturing there. Story was instrumental in strengthening the law curriculum and instituted the practice of holding moot courts. Curtis excelled in the moot courts. In 1831, about a year and a half before completing his degree, Curtis left Harvard to practice law in the small country town of Northfield, Massachusetts. He assumed the law practice of John Nevers, who became sheriff. Since he was not yet admitted to the bar, he practiced in the offices of Wells & Alvord in Greenfield. He and James C. Alvord became close, life-long friends. His motive for leaving Harvard stemmed in part from his desire to court Eliza Marie Woodward, of Hanover, New Hampshire. She was the youngest daughter of Curtis's paternal aunt, who was the wife of William H. Woodward, treasurer of Dartmouth College during the famous legal dispute *Dartmouth College v. Woodward* (1819). He and Eliza were married May 8, 1833. They were married for eleven years and had five children. Eliza died in 1844. Two years later, Curtis married Anna Wroe Curtis, a distant relative. They were married for sixteen years and had three children. Anna died in 1860, and the following year Curtis married Maria Malleville Allen, grandniece of the Reverend Eleazar Wheelock, D.D., founder of Dartmouth College. The couple had four children.

As was his family, Curtis was a member of the Unitarian faith. In the 1860s, he joined the Episcopal church. Curtis studied religion as he studied

law—seriously and with dedication. Once, when he was practicing law in Northfield, a visitor noticed an open Bible in his office and commented (in jest) that it was a strange book for a lawyer to read. Curtis replied, "Then I pity the lawyers; for those who are ignorant of the principles inculcated in that book cannot be thoroughly furnished for the duties of the profession" (Curtis 1879, 1:326). Throughout his life he always offered a silent prayer for wisdom and guidance before taking his seat on the bench or charging a jury (Curtis 1879, 1:326).

While at Northfield, Curtis developed a diverse practice. He also read widely in the law. He attended the spring and summer 1831 terms at Harvard, then returned to Northfield, where he continued his studies while practicing law. He completed his legal studies, graduated from Harvard, and in September 1834 was admitted to the bar at Northampton. Shortly thereafter he moved his family to Boston, where he practiced law with Charles Pelham Curtis, a distant relative and the father of his second wife, Anna. In 1836, he was admitted as a counsellor before the Supreme Judicial Court of Massachusetts.

Curtis excelled at the bar and quickly became known as one of Boston's finest attorneys. He practiced law in Boston from 1834 to 1851, when he became a U.S. Supreme Court justice, then again from 1857 until his death in 1874. In a letter to a friend in 1831 he described the law as a "noble science," which he loved "unaffectedly" and which he "studied closely" (Leach 1955, 255). He also became one of the leading members of Boston society. He was elected a fellow of the Harvard Corporation and, along with Joseph Story, was a founding member, officer, and trustee of the Mt. Auburn Cemetery Corporation.

Although he was not active in party politics, he became embroiled in the politics of the times. He was a fervent supporter of the Union and defender of the Constitution when abolitionism and secessionism threatened both. He firmly and unyieldingly defended the rule of law embodied in the Constitution throughout his legal career. Whenever possible, he sought to prevent sectional strife and to keep the Union intact.

In 1836, when he had been in Boston for only two years, he argued the case *Commonwealth v. Aves* before the Massachusetts Supreme Court, presided over by Chief Justice Lemuel Shaw. In this case he defended the right of a slaveholder from Louisiana to hold a slave while visiting Massachusetts, a free state, and to take the slave (a six-year-old girl named Med) back to New Orleans against her will. He argued that the rule of comity among nations gives the right of private property in a slave that Massachusetts must recognize. Although he personally believed that slavery violated natural rights and could be enforced only by positive law, he also believed that since Article IV of the Constitution embodied the concept, it was his

duty to support it. The Massachusetts Supreme Court ruled against him. Chief Justice Shaw asserted that the concept of property following the owner applies only to commodities that are considered everywhere to be property. This did not apply to slaves.

Curtis may have lost the case, but his eloquence, lucid arguments, careful analysis, and comprehensive discussion of the issue were impressive and reinforced his reputation as a first-rate attorney. Throughout his professional life he always prepared thoroughly, exhaustively researched his topics, carefully developed his arguments, and delivered clear, reasoned presentations from premise to conclusion, all without a superfluous word. His dignified demeanor and the force of his arguments captivated his audiences. He was a legal craftsman and orator of consummate skill. Daniel Webster wrote of him in 1849: "His great mental characteristic is clearness; and the power of clear statement is the great power at the bar" (Curtis 1879, 1:83).

Curtis continued to hone his legal skills and master new legal fields. He built a comprehensive law practice that included commercial law in the state courts, and maritime, insurance, bankruptcy, and patent law in the federal courts. He represented primarily large private corporations that were engaged in trade and manufacturing and were concerned about government regulation of commerce. His legal practice helped foster the development of marine insurance corporate law. Between 1836 and 1851, he argued many cases before the Circuit Court of the United States for the First Circuit, with Justice Joseph Story presiding, many cases before the U.S. District Court, and 138 cases before the Supreme Court of Massachusetts

He was elected to the lower chamber of the Massachusetts legislature in 1851 and served on the judiciary and conference committees. He drew up a plan to revise the state's judicial proceedings and chaired the commission that implemented it. His commission framed a new code of court procedure, the Massachusetts Practice Act of 1851, which put the state, along with New York, in the forefront of state legal reform efforts.

As a conservative Whig, he supported Daniel Webster's 1840 presidential election bid. In 1844, he wrote a treatise for the *North American Review* supporting Webster's argument that states could not repudiate their public debt. He also gave public addresses supporting Daniel Webster's position in favor of the Compromise Acts of 1850, including the controversial Fugitive Slave Act of 1850.

When U.S. Supreme Court justice Levi Woodbury died in 1851, President Millard Fillmore, with the wholehearted concurrence of Secretary of State Daniel Webster, nominated Curtis to fill the seat. Their first choice was Curtis's friend and fellow attorney Rufus Choate, but Fillmore and Webster knew Choate would not accept the position. Curtis was nominated to the Court on September 22, 1851, as an interim appointment, was

formally nominated on December 11, and was confirmed by the Senate on December 20, 1851. He served six terms on the Court, from September 1851 to September 1857. He left a lucrative law practice to sit on the Court, and very early in his tenure he realized that the salary would be insufficient to support his large and growing family. Although he was popular in Washington society, he did not particularly enjoy his life there, and he missed his family and his newly purchased farm. In addition, his temperament was more suited to the practice of law than to the work of the Court.

Justice Curtis began his tenure as a U.S. Supreme Court justice riding circuit. He was assigned to the First Circuit, Justice Story's former circuit, which comprised Maine, New Hampshire, Rhode Island, and Massachusetts. His belief in the supremacy of the Constitution and national law, including the Fugitive Slave Act of 1850, earned him the nickname "the slave-catcher judge."

Judicial and legal scholars agree that, had he remained on the bench, Benjamin Curtis would have become one of the great justices. His opinion of the Court in *Cooley v. Board of Wardens of the Port of Philadelphia* (1851), in which he articulated the doctrine of selective inclusion when interpreting the commerce clause of the Constitution, is a fine example of his legal craftsmanship. In that opinion, he asserted that the commerce clause does not exclude states from exercising authority over minor, local commerce, such as pilotage. States have the authority to regulate pilotage into bays, rivers, and harbors, until Congress decides to regulate it. In other words, local problems should be addressed locally and national problems should be addressed in Congress.

He considered serving on the Court much less taxing and time-consuming than practicing law. Thus, he had the opportunity to pursue other interests. He edited *Reports of Cases in the Circuit Courts of the United States* (1854), and one of the earliest compilations of condensed Supreme Court decisions, the 22-volume *Decisions of the Supreme Court of the United States* (1856). He is best remembered, however, for his dissent in *Scott v. Sandford* (1857), the case in which Chief Justice Roger Taney ruled that blacks were not citizens, that Congress did not have the authority to regulate slavery in the territories, and that Dred Scott's status as a slave did not change by his residence in a free state.

In his dissent, Curtis refuted each point in Chief Justice Taney's opinion. He demonstrated that blacks had been citizens under the Articles of Confederation and also under the Constitution. He concluded that Congress had the power to regulate slavery in the territories, and Dred Scott's freedom should be established. This is a reversal of his argument for the defendant in *Commonwealth v. Aves* in 1836. In that case he asserted that the rule of comity among nations gave the right of private property in a slave

that Massachusetts must recognize. In his *Scott* dissent, he argued essentially Chief Justice Lemuel Shaw's opinion in the 1836 case—that the concept of property following the owner applies only to commodities that are considered everywhere to be property, and this does not apply to slaves. Slavery can only be enforced through positive law, and should a slave owner remove his slaves to a locality in which slavery is not sanctioned by law, the relationship of master and slave no longer applies. The laws of the local jurisdiction apply. These conflicting positions can be reconciled by viewing them in the light of Curtis's firm belief in the supremacy of the Constitution and his staunch defense of the Union. In each case he believed that his argument was the appropriate one to achieve his goal of preserving the Union from secessionist threats.

After the *Dred Scott* decision was announced and all of the opinions read in open court, Curtis gave a copy of his dissent to a reporter. Unbeknownst to him, the other opinions were not immediately made public. This created a furor in the press. When he discovered that his was the only opinion made public, he wrote to Chief Justice Taney requesting a copy of Taney's opinion. Taney refused. The resulting conflict made him lose confidence in the Court and cemented his decision to resign.

Upon his resignation from the Court in 1857, Curtis again practiced law in Boston. By now his legal reputation was affirmed, and his practice thrived. The majority of his work was as a consulting attorney. His sterling reputation and sound advice earned him large fees. Between 1857 and his death in 1874, he argued fifty-four cases before the U.S. Supreme Court, seventy-nine before the Supreme Court of Massachusetts, and many in the lower courts. Three of his most significant arguments before the U.S. Supreme Court were in *Paul v. Virginia* (1868), *Hepburn v. Griswold* (1869), the most noted of the legal tender cases, and *Virginia v. West Virginia* (1870).

During the Civil War he firmly adhered to the Nationalist Whig philosophy, although by that time the Whig party was in disarray and he had become a Democrat. He strongly supported the Union, although in 1862 he published a pamphlet, *Executive Power,* in which he criticized President Lincoln's Emancipation Proclamation and his suspension of the writ of habeas corpus. He argued that no emergency justified such a loss of liberty or sanctioned such an increase of the president's war powers.

In 1869, President Andrew Johnson was impeached for, among other charges, violating the Tenure of Office Act of 1867 by firing Secretary of War Edwin M. Stanton. William Evarts, Thomas Nelson, Henry Stanbery, and Benjamin Robbins Curtis were Johnson's attorneys. Curtis presented the opening arguments in defense of Johnson's actions, speaking for five hours on April 9 and 10, 1869, before the Senate and Chief Justice

Salmon P. Chase. He argued that impeachment was not a political process but a judicial one under Article III, Section 4, of the Constitution. President Johnson did not violate the Tenure of Office Act of 1867 when he fired Stanton, because Stanton was a Lincoln appointee and the Act did not cover that specific situation. He also asserted that Andrew Johnson became president in his own right when Abraham Lincoln died; as president, he had the right to fire political appointees; and the Tenure of Office Act would be declared unconstitutional were it to be challenged in court.

History records the result of the trial. After Johnson was acquitted, he offered Curtis the position of attorney general, but Curtis declined. Five years later he also declined to be an attorney in the Geneva Arbitration. Instead, he continued to practice law. In 1872 and 1873, he gave a series of lectures at the law school at Harvard on the jurisdiction and practice of the federal courts. His health failed, and he died at his residence in Newport, Rhode Island, of a brain hemorrhage on September 15, 1874. He is buried in Mt. Auburn Cemetery in Cambridge, along with members of his family, his friends, including Joseph Story, and other luminaries of the bench and bar. His papers are at the Library of Congress, the American Antiquarian Society, and the Harvard Law School Library.

—Judith Haydel

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CUSHING, CALEB

(1800–1879)

Caleb Cushing
Corbis

Caleb Cushing was known throughout his life as much for his controversial views on slavery as for the role he played as a statesman and political leader. Cushing negotiated important international treaties and served in the legislature of his home state of Massachusetts and in the U.S. Congress. He organized and led a force in the Mexican-American War, served as the attorney general of the United States, and acted as legal advisor to four presidents.

Cushing's family could trace its lineage directly back to Matthew Cushing, who came to the colonies in 1638 from Hardingham, England. His grandson, the second Caleb in the line, was a delegate at the Constitutional Convention of 1778. This Caleb was John Newmarch Cushing's grandfather. John Newmarch was drawn to the seas early in his life, leaving formal education to pursue trading in Europe and the West Indies. He met and married Lydia Dow, and their firstborn and only surviving son was the third Caleb in the family, born on January 17, 1800.

In 1802, John Cushing moved the family from Salisbury, where the family had lived since coming to the colonies, to Newburyport, where Caleb would spend much of his life. Caleb began studies at Harvard College in

1813 at age thirteen, and four years later he matriculated as one of Harvard Law School's first students. After his first year of law school, Caleb decided that what interested him about the law were the applied elements of its practice. So, in September 1818, he entered an apprenticeship with Ebenezer Mozeley, a distinguished attorney and statesman. After three years of study and work, Cushing was admitted to the Massachusetts bar.

By 1821, Cushing was a regular contributor to the influential *North American Review* in addition to publishing several volumes, both original and translated, on contracts and maritime law, most notably his translation of Robert Pothier's *A Treatise on Maritime Contracts of Letting to Hire* (1821). In 1821, on his return to Newburyport, he met his future wife, Caroline Elizabeth Wilde, daughter of Judge Samuel Sumner Wilde (a Federalist who presided over the Supreme Court of Massachusetts and would later take issue with his son-in-law's version of democracy), although the couple did not marry until three years later.

In 1824, the same year as his wedding, Cushing was selected to the Massachusetts General Court as a representative from Newburyport, where he was known for his sharp wit and powerful debating skills. In the fall of 1825, Cushing was elected to the state senate, where he served on the judiciary committee and was recognized for his "knowledge of the law, soundness of judgment, and effective presentation of a case" (Fuess 1923, 65). However, in his early career, Cushing was not always successful in his litigation, due in part to his inability to connect with those in the jury.

After two failed attempts at gaining a seat in Congress, Cushing again took a seat in the General Court in 1828. The following year, Cushing and his wife took leave for a year, traveling throughout Europe. He returned to the United States in 1830 with renewed vigor and energy, but within two years he had again lost a campaign for Congress and had also lost his young wife. Cushing remained a widower until his own death in 1879.

In 1834, on his third attempt, Cushing was finally elected to Congress as a member of the new Whig party. It was around this time that Cushing began to write and speak on the issue of black servitude. Although Cushing was not in favor of slavery, he denounced the abolitionist movement because of its potential ill effects on the Union. He argued that it was not the place of the North to interfere with the South's interpretation of the still rather new Constitution. As the new opposition Whig party entered the government, Cushing—as a strong political player in this new opposition—was sure that at age thirty-four he had secured his place on the national political scene. Having acquired his seat in the House of Representatives, he remained at the Capitol for four terms, from 1834 to 1842. During his terms in the House, Cushing was chair of the Committee on Foreign Affairs. He was known to participate in virtually every debate that went to the legisla-

Splitting Hairs

Philadelphia lawyer George Wharton Pepper, one-time law professor at the University of Pennsylvania and a Pennsylvania senator, married the daughter of Dr. George Park Fisher, a Yale history professor who enjoyed telling stories about old New England attorneys. One of his favorites centered on Roger Sherman, who told the court that his adversary was no more able to make an attempted distinction than to split a hair with a penknife.

After his opponent plucked a hair from his beard, split it with his pocketknife, and held it up for the court to observe, Sherman retorted, "I said a *hair,* sir—not a bristle" (Pepper 1944, 37).

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tive floor and was considered a persuasive and influential orator and a leader of his party.

In 1842, Cushing found himself twice acting as counsel to President John Tyler before the House. The first of these occasions resulted from a debate over a tariff increase. When the president's secretary, John Tyler Jr., appeared in front of the House to summarize the chief executive's objections to the bill, Cushing rose to his defense both in the chamber and in subsequent writings. Fuess writes that Cushing, "who was now recognized as Tyler's spokesman in the House, rose to justify the President, quoting extensively from *The Federalist* to prove that the President's course was in full accord with the plan of the founders of the republic" (Fuess 1923, 1:350).

The second incident arose from a resolution "requiring the Secretary of War to communicate certain reports relative to the affairs of the Cherokee Indians" (Fuess 1923, 350). When the secretary stated that such disclosure would not be in the best interest of the public, Tyler's political opponents in the House took issue with this withholding of information. Cushing once more defended the executive's decision, acting in his capacity as an attorney. In a debate that clearly outlined the Whig's political views of the day in regard to the proper balance of the executive and the legislative branches, Cushing argued that the secretary of war was fully within his rights to withhold information of national import and that the House had neither the right nor the means to compel disclosure.

In 1843, President Tyler sent Cushing's name before the Senate three times for confirmation as secretary of state. Each time, the Senate strongly defeated the nomination. After this series of failures, Cushing was relieved to receive an appointment as minister to China. He left the United States, spending seventeen months traveling through the Far East and securing

several treaties that opened important Chinese ports to American trading vessels. On his return, Cushing took an extended trip through the Northwest Territories to settle boundary disputes and secure protection for traders. Not long after he returned from this expedition, Cushing, at age forty-five, raised a regiment and headed south to fight in the Mexican-American War. Before leaving on this venture, he was again chosen as a representative to the General Court of Massachusetts and took his seat that autumn before leaving for the war. He left for the war in 1847, but by the time he and his troops reached Mexico City, the fighting had come to an end.

In May 1851, Cushing helped to pass a bill in the Massachusetts legislature incorporating Newburyport as a city, at which point Cushing was elected its first mayor. In 1852, Cushing was appointed associate justice to the Supreme Court of Massachusetts. In preparation for taking his seat on the bench, Cushing read the entire series of the *Massachusetts Reports* in only six weeks. Those who sat on the bench with Cushing commented on his extensive knowledge of the law and his ability to recall obscure parts of the legal code. He often eagerly took on written opinions that the other justices viewed as tedious and dull. That same year, he took part in the successful presidential campaign of Democratic candidate Franklin Pierce. On February 25, 1853, Cushing was rewarded for his work in the Pierce campaign, receiving an appointment as the attorney general of the United States.

Cushing made several important changes to the office of attorney general. He was the first attorney general to give up his private practice on entering his new office and the first to be paid the same salary as other cabinet officers (Baker 1992, 57). In addition, he expanded the duties of the office. Although he did so partly at the request of the secretary of state, the *New York Evening Mirror* noted that he was referred to as "Richelieu" for aggrandizing his power (Baker 1992, 73). At Secretary Marcy's behest, pardons, legal and judicial appointments, and extraditions were relocated to the office of the attorney general. He also wrote voluminously on issues of political import during this time. Unlike his predecessors, who often offered brief opinions on political and legal questions, Cushing went beyond a brief statement of the facts. At the end of his four years in office, his writings filled three full volumes (about 760 pages each) in the *Official Opinions of the Attorneys General of the United States*, more than any other attorney general before or since.

Among these opinions were suggestions on how to expand the federal judiciary. He argued that the then-current circuit court structure, in which the Supreme Court judges literally rode circuit around the states to hear cases with two district court judges, was ineffective. The justices found the

additional task of riding circuit arduous and often could not make it to all the necessary venues, forcing the district court judges to hold court themselves. Cushing suggested a modification to the system, with nine judges appointed to sit permanently at the head of each circuit, leaving the Supreme Court justices on the bench in Washington, D.C. Although the politics of the time held up the reformation of the circuit court system, when the circuits were reformed in 1869, the system mirrored the suggestions put forth by Cushing a decade earlier.

Of particular significance during his time in office (1853–1857) was the question of slavery. Cushing argued that, although slavery was not necessarily a "positive good," he viewed the servitude of blacks as "an economic system which the southern plantation owner should be allowed to maintain if he so desired" (Fuess 1923, 2:153). More important, Cushing argued that radical abolitionists were as much a threat to the union as were the slave owners. He chose to frame the issue in terms of states' rights and economics, avoiding the morality of servitude altogether. At the president's request, Cushing authored an opinion addressing the issues that would later be addressed in the *Dred Scott v. Sandford* case of 1857. In addition to his writing on the slavery issue, Cushing also wrote and published opinions on whether an aggressive force can "rightfully make use of the territory of a neutral state for military purposes, without the specific consent of the neutral government" (Fuess 1923, 2:168). This published opinion, entitled *Concerning British Recruitment in the United States,* is considered to display his "legal knowledge and argumentative powers at their best" (Fuess 1923, 2:167).

During this period, Cushing was considered one of the most powerful cabinet members of Pierce's administration. In his first year, he prepared and argued seventeen cases on behalf of the United States involving claims to the gross amount of $45 million against the United States. On completing his term as attorney general in 1857, Cushing had single-handedly taken what had previously been considered a rather unimportant cabinet position and transformed it into a powerful tool for political change. It was said that "his training as a lawyer and judge, his long experience in legislation, his intimate association with great men, had all provided him with a background which was incalculable value to the government" (Fuess 1923, 2:186).

On his return to New England in 1858, Cushing entered into private practice with Sidney Webster. Not long after, he again found himself in the lower chamber of the Massachusetts legislature. Meanwhile, the slavery question was coming to a climax nationwide. After the Supreme Court issued its decision in *Dred Scott,* Cushing felt confident that his approach to this debate would become the law of the land. However, Abraham Lin-

COLN's victory in the presidential election of 1860 changed his mind, and he became convinced that there would be no way to save the Union, which was at the core of his antiabolitionist position. In the time between the November election and Lincoln's inauguration, Cushing was sent to the South by President Buchanan to request a delay in the passing of the secession ordinance. By the time he arrived on December 20, the Southern states had signed the order. The act of secession hit at the very heart of Cushing's pro-Union sentiments and signaled his official break with Southern sympathizers.

As the Civil War progressed, Cushing acted as legal assistant to Lincoln, consulting in various affairs of war. Throughout the war, in addition to his role as legal advisor to the president, Cushing was called in to act as counsel and issue written opinions for various members of the cabinet.

Between 1861 and 1865, Cushing also argued several interesting and important cases before the Supreme Court. Most important among these was *McGuire v. Massachusetts* (1865). Cushing argued this case before the Supreme Court in December 1865 and reargued it the following February. McGuire was accused of keeping a dwelling exclusively for the storage and sale of liquor, and under a Massachusetts statute he had been convicted and severely fined. It was Cushing's contention that the Massachusetts statute under which McGuire had been convicted was unconstitutional, as it was contrary to the notion of contracts established by the Constitution. He argued that the prohibition of intoxicating liquors would be both impossible and inadvisable, causing greater harm than good. Although Cushing's argument was vigorous and caught the attention of the public, his claim was denied and the conviction was upheld. The Court argued that, although the provision may have seemed outdated, it was properly enacted and violated no provision of the federal Constitution.

Having reentered private practice, Cushing came to be called "the representative public lawyer in the country." At this stage he accepted few retainers and confined his practice almost exclusively to arguing before the Supreme Court. He had reached a level in private practice that had rivaled the work he had done in public service. Even as his private career flourished, Cushing still took on even the most menial of public service tasks.

In 1866, Cushing argued *DeHaro's Heirs v. United States*. The case involved a claim for a large tract of land in the city of San Francisco. The legal talent drawn into this case included two U.S. senators, the attorney general, and two ex-cabinet members. The case, which was argued over the course of 1866 and 1867, dealt with legal documents that had been drawn up in Spanish by the claimant's father. Cushing's command of the Spanish language dominated the courtroom argument and ultimately helped his clients win their case.

In *Goodyear v. Providence* (1868), Cushing acted as counsel for the defendants, protesting that the hard rubber patents held by Goodyear resulted in a practical monopoly. This suit was an outgrowth of an earlier dispute in which Daniel Webster, who was attorney for Goodyear, secured a favorable verdict that gave his client control over the production and use of vulcanized rubber. Again, Cushing was successful in securing a victory for his clients.

Probably the most famous case of Cushing's career was *Gaines v. New Orleans* (1868). Cushing argued this case, forty years in the making, before the Supreme Court in 1861 for the sixth time. Mrs. Myra Gaines was the daughter of wealthy Southern landowners. Her father abandoned her and her mother not long after she was born, although he returned a few years later and placed his daughter in the care of a friend. On his death, there was a question as to whether Mrs. Gaines could properly claim the lands her father had left behind. Her husband, General Gaines, pursued the matter, and although she lost much of her wealth in pursuing this real estate, she eventually won title and recovered her lost assets. The length and notoriety of the case held the public interest for years, although it was ultimately Cushing's ease and grace in the courtroom that secured the favorable verdict.

In 1871, at age seventy-one, Cushing was once again called into service by the government. President Ulysses S. Grant asked Cushing to issue an opinion on the claims made against the *Alabama,* the *Florida,* and other vessels that had been built under British registry and later flew under the Confederate flag. On issuing his opinion in this matter, Cushing was appointed senior counsel for the United States and attended an international conference in Geneva, where he brokered a compromise that enabled both the United States and Great Britain to come away from the hearings without loss of dignity.

In December 1873, President Grant nominated Cushing to be chief justice of the Supreme Court. The nomination was offered to two individuals before it fell to Cushing. However, Cushing's earlier antiabolitionist writings and the grudges of old political enemies quickly rose to the surface, so Cushing asked Grant to withdraw his name from the confirmation process. According to one source, this is the "most notable instance in our history of a rejection for high office on purely partisan grounds" (Hough 1964, 628). Soon thereafter, Cushing took leave to Spain, where he had been appointed ambassador. He retired from this post in 1877 and died of a prolonged illness two years later, on January 2, 1879.

Cushing's command of the law was unparalleled in his day. Although his courtroom appearances tended to be matters of civil litigation and claims, his work as an attorney went far beyond the courtroom. His role as political and legal advisor to four presidents, his work in foreign countries as negotia-

tor and treaty maker, and his voluminous writings and legal opinions all combine to make a remarkable lawyer and statesman.

—Elizabeth Mazzara

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DANA, RICHARD HENRY, JR.

(1815–1882)

Richard Henry Dana Jr.
Corbis

Better known today for his literary accomplishments, Richard Henry Dana Jr. was also one of the most prominent American trial lawyers of the middle years of the nineteenth century, specializing in international law.

Dana was born on August 1, 1815, in Cambridge, Massachusetts, the oldest of four children of Richard Henry Dana Sr., a poet and essayist and founder of the *North American Review,* and Ruth Charlotte Smith Dana, formerly of Taunton. His grandfather, Francis Dana, had been a delegate to the Continental Congress, the first U.S. minister to Russia, and chief justice of the Massachusetts Supreme Court.

After the death of his mother in 1822, the young Dana endured the strict and sometimes cruel discipline of a succession of local private grammar schools until, in July 1831, he entered Harvard College. During his junior year, the shy, sensitive youth suffered an attack of measles, which so weakened his eyesight that he could not read. Restless, he enlisted in August 1834 as a common sailor on the brig *Pilgrim,* a

sailing vessel bound around Cape Horn for California. Returning home two years later much matured, a hardened and healthy young man of twenty-one resumed his undergraduate studies and graduated from Harvard College in June 1835, taking prizes in English prose composition and elocution.

Long-haired, bronzed, and broad-shouldered, the short, stocky Dana was at this stage of his life robust, both physically and intellectually, and radiated charm and sincerity. He enrolled in the law school presided over by Supreme Court justice Joseph Story and simultaneously assisted Professor Edward T. Channing in teaching elocution to Harvard undergraduates. In February 1840, he entered the Boston law office of Charles G. Loring, who later became a prolific publicist in the field of international law. Utilizing extensive notes kept during his time at sea, he took time from his continuing legal studies to author a manuscript published by Harper Brothers later that year as *Two Years before the Mast,* an unconventional account of maritime life from the perspective of an ordinary sailor, a work that soon brought the twenty-five-year-old Dana considerable fame, even more in England than in the United States.

A year later, in 1841, Little, Brown of Boston published Dana's 225-page treatise, *The Seaman's Friend,* which at once became a standard reference work on maritime law, both in the United States and in England. Meanwhile, Dana opened his own law office, specializing in admiralty cases. Success was almost immediate, and the young author-lawyer soon felt prosperous enough to marry. Sarah Watson of Hartford, Connecticut, became Mrs. Dana on August 25, 1841, and in time they had six children.

During the first two decades of his adult life, Dana, in keeping with his family's Federalist heritage, remained a conservative Whig, an admirer of Daniel Webster, and a severe critic of the local radical abolitionists. In June 1848, however, friends talked him into chairing a Free Soil Society meeting in Boston, which led to his becoming a delegate to the national Free Soil party convention in Buffalo, at which he played a prominent role in the vice-presidential nomination of Charles Francis Adams, a family friend. Accepted thereafter as a leader among Massachusetts Free Soilers, and later influential among the Republicans of his state, Dana continued sporadically to allow politics to draw him away from his law practice, which had the effect of diminishing his eminence within his profession without satisfying his incessant craving for appointment and sometimes for election to high public office. Too fastidious, proud, and rigid to adapt to the rapidly increasing democratization of American politics, he was useful as an advisor and speaker for others who sought elective office, but he made a poor candidate himself. And, despite his need to support a growing young family and a sizable contingent of impecunious relatives, he continued his involvement in the liberal Free Soil movement, which so alienated many wealthy

New Englanders that it limited his ability to earn more than an average income for his time and location. According to a sympathetic biographer, he was for many years known as "the counsel of the sailor and the slave—persistent, courageous, hard-fighting, skillful, but still the advocate of the poor and the unpopular" (Adams 1890, 1:129).

Perhaps the best example of Dana's determination always to put principle before expediency was his connection with the famous Boston fugitive slave cases of the period 1851–1854. After Congress passed the controversial Fugitive Slave Act of 1850, it was inevitable that Southern slaveholders would attempt to compel enforcement of that law in Boston, the center of the abolitionist movement. In 1851 a black man called Shadrach was arrested on the charge of being a fugitive slave. Dana represented him pro bono before the local U.S. commissioner, but a trial never took place because Shadrach was set free by a mob and escaped to Canada. Dana then devoted considerable time to five separate trials defending local citizens accused of participating in the affair (Adams 1890, 1:179–183, 195–198; Gale 1969, 155).

In 1854, Dana eloquently defended Anthony Burns, charged with being a fugitive slave from Virginia. Burns was nevertheless returned to slavery and Dana, for his trouble, was assaulted on a Boston street by thugs and seriously injured, an occurrence that for the first time made him locally popular among a majority of Bostonians. Indeed, by dramatizing the issues involved in the seizure and return to Southern slavery of alleged fugitives, he had greatly assisted the antislavery cause in New England (Gale 1969, 155–156; Adams 1890, 1:262–288, 300–330, 344–346; Shapiro 1961, x).

Elected a delegate to the 1853 Massachusetts constitutional convention, Dana emerged that summer as the dominant force at the convention among many distinguished lawyers and political leaders, including Rufus Choate, Charles Sumner, Henry Wilson, Anson Burlingame, Joel Parker, and Benjamin F. Butler. Again his law practice suffered from his public-spiritedness and all for naught; the revisions recommended by the convention were defeated in the November election (Adams 1890, 1:229–230, 233–251, 290–295).

Restoring his debilitated law practice to good health, Dana damaged his own health. Although he won a famous victory in the landmark case of the *Osprey* (1854), establishing the maritime rule governing the passage of steamships and sailing vessels (Dana 1968, 2:662–663), most of his practice was not lucrative, impelling him to devote most of his waking hours to legal labors, which led to his falling ill in July 1859, essentially from overwork. On the advice of his physician, he embarked at once on a round-the-world tour by way of Panama, California, Hawaii, China, Japan, Egypt, Greece, Italy, and England, which absented him from the United States for 433

days, until his arrival in New York City on September 27, 1860, at which time, refreshed, he resumed his law practice (Adams 1890, 2:176–247).

Soon after Abraham Lincoln became the first Republican president early in 1861, Dana was appointed to the position of U.S. attorney for Massachusetts, in which capacity he prepared and tried the celebrated Boston *Prize Cases* of the Civil War era, including the case of the *Amy Warwick,* which resulted in a decision of inestimable importance (Veeder 1903, 2:907–928).

From the time that seven Southern states seceded from the Union during the winter of 1860–1861, and an attack on Fort Sumter in South Carolina precipitated civil war, President Lincoln and his advisors persistently maintained that the subsequent struggle was no more than a widespread insurrection, or rebellion, and thus an internal matter, undeserving of recognition or any other action by foreign governments. At the same time, the Lincoln administration claimed belligerent rights under international law, not only against the Southern "rebels," but also against foreigners who attempted to assist them, including the right to close Southern ports by a naval blockade and the right to seize and condemn as prizes of war all foreign vessels and their cargoes violating the blockade, even though the exercise of such belligerent rights was bound to imply the existence of a state of war between two nations.

Called to Washington in 1863 to defend the government's maritime policy, Dana was faced with a daunting task. He had to convince skeptical Supreme Court justices that the U.S. government might, under international law, exercise belligerent rights of search, seizure, and confiscation of blockade runners without violating its claim that the Southerners were merely citizens in arms against its authority, whose so-called Confederate States government was a nullity under international law and who therefore had no belligerent rights or any legitimate claim to foreign recognition.

At the outset of the trial, in which several lawsuits by owners of foreign vessels seized by blockaders were combined, it was widely assumed that the government's two positions—that no actual war as defined by international law existed, and that while endeavoring to quell the Southern rebellion it was nevertheless entitled to exercise all of the belligerent rights recognized by international law as belonging to a nation at war—were irreconcilable. Either the Supreme Court would have to rule that the Civil War was *justum bellum* (real war)—the announcement of which would encourage foreign governments eager to grant full diplomatic recognition to the Confederate regime to do so at once, with increased military aid to follow, resulting almost inevitably in a permanent division of the American Union—or the Court would accept the administration's claim that the Civil War was not "real war" under international law, in which case it would be obliged to in-

validate the Northern naval blockade of the South and all searches and seizures of prizes of war resulting from it. This would require the reopening of the Southern ports, resulting in the exchange of hoarded cotton for vastly increased military supplies from foreign sources and the appearance in the South of foreign mercenaries, which would likely insure the success of the rebellion. Either way there was great danger that an adverse Supreme Court decision would contribute to democratic government, as Lincoln put it at Gettysburg, "perish[ing] from the earth" (Adams 1890, 2:266–270, 273–274, 332, 413–415, 418).

Richard Henry Dana's greatest service to his country was his carefully prepared argument and eloquent presentation of it before the U.S. Supreme Court that convinced a majority of the justices that the U.S. government could constitutionally, without violating international law, treat the Confederates at the same time both as rebels and as belligerents without providing the owners of ships caught in the naval blockade, or their governments, any just cause of complaint. Indeed, the majority opinion of the Court closely followed not only Dana's reasoning, but also the very language of his brief. It was a triumph with the most momentous consequences (Shapiro 1961, 119–122, 225–226).

During his tenure as U.S. attorney for Massachusetts, Dana took on the task of editing a new edition of Henry Wheaton's classic text on international law, a project on which he labored diligently for more than two years when permitted to do so by his official duties. Although the compensation he ultimately received from the publisher scarcely matched his research expenses, he performed his editorial duties with his usual thoroughness, digesting the unwieldy mass of material added to the deceased Wheaton's original work by William Beach Lawrence in editions published in 1853 and 1863. While greatly reducing the size of the treatise, Dana provided new material and contributed exhaustive essays (the most influential of which dealt with the Monroe Doctrine) comparable in learning and in concise presentation to Wheaton's own writings. Unfortunately, Dana neglected to give credit to Lawrence's massive compilations of authorities that had so weighted down the two previous editions so that both Wheaton's family and his publisher had sought a different editor. The wealthy Lawrence filed a lawsuit alleging plagiarism and literary piracy and launched a relentless public attack on Dana that lasted from 1866 until Lawrence died in 1881. Although Dana was ultimately exonerated on all but a few technical counts, Lawrence's interminable lawsuit, and his long-lasting deluge of vitriolic letters to newspapers and public figures, blighted the final fifteen years of Dana's life (Shapiro 1961, 155–159; Adams 1890, 2:282–327, 389–461).

Feeling the added burden of brief service in the Massachusetts legislature, and strongly disagreeing with President Andrew Johnson's post–Civil War

reconstruction policies, Dana resigned as U.S. attorney on September 29, 1866, and sought once more to rebuild his private law practice. He took only a short recess in 1867 when he accepted an appointment to act with his old friend William M. Evarts in representing the U.S. government in the treason trial of former Confederate president Jefferson Davis, a trial several times postponed on the recommendation of Dana and others, until the charge was finally dropped (Adams 1890, 2:338–341).

In 1868, as a reform candidate to oust the notorious Benjamin F. Butler from Congress, Dana was the recipient of a typical Butler onslaught of mendacious mudslinging, in which his nemesis, Lawrence, eagerly joined. Further handicapped by his lifelong notion that to solicit public office was dishonorable, he lost the election by a large margin (Adams 1890, 2:342–348).

From this time on, his hopes for further public service fading, Dana devoted himself with decreasing enthusiasm to his law practice. In the age of the Robber Barons, a Boston Brahmin, as Dana's friend Henry Adams lamented, was no more than an archaic irritant. Remonstrances by Lawrence with a former law partner, Secretary of State Hamilton Fish, prevented Dana's appointment as counsel to the U.S. delegation at the *Alabama Claims* arbitration at Geneva, Switzerland, in 1871 and 1872, and Dana's nomination in 1876 by President Ulysses S. Grant to be U.S. minister to Great Britain, which momentarily reinvigorated his ambition for high office, was rejected by the Senate as a result of strenuous opposition by Lawrence, Butler, and Simon Cameron, chairman of the Foreign Relations Committee, who sneered at Dana as "one of those damn literary fellers" (Adams 1890, 2:362–377).

Briefly consoled by an appointment to act as counsel to the U.S. delegation meeting at Halifax, Nova Scota, during the summer of 1877 to settle a dispute over the Atlantic fisheries, Dana vainly opposed an excessive award to Canada, made possible by the ineffectiveness of the U.S. delegate and the unethical collusion of the Canadian and British delegates. Thereafter he seemed to lack vigor or a sense of purpose. In 1878, he abandoned his law practice and moved with his wife and two daughters to Paris, and then to Rome, expressing an intention in the evening of his life to author a treatise on international law. While lackadaisically engaged in this work, he died of pneumonia on January 6, 1882 (Shapiro 1961, 183–186).

As a lawyer, Dana was notable for meticulous preparation even for trials involving the most mundane issues, totally immersing himself in judicial precedents and the opinions of publicists, and then arguing at great length the cases of his clients with such eloquence and learning that his exhortations were almost irresistible to judges and juries alike. A perfectionist, he prepared and presented all of his cases without assistance from clerks or ju-

nior colleagues, personally locating and copying every legal reference, preparing every witness, taking every deposition, and laboriously composing and reworking all of his arguments before he offered them in court. He was the most persistent and tenacious of advocates; one observer remarked admiringly that it "seemed at times as if the only way to get rid of a lawsuit in which he was concerned was to have it decided in favor of his client" (Dana 1968, 2:134–147; Shapiro 1961, 46).

Year after year, and always with cool courtesy, he relished going to court against leading members of the Boston bar, sometimes opposing two or more of them together, frequently emerging from such trials as the winner; yet his code of honor and his pride in his profession would not allow him to profit exorbitantly from his practice or to confine it to matters of great moment. Hence he remained throughout his life without great wealth, supplementing his professional practice by delivering paid lectures, struggling with debt, and shrinking from opportunities to win further fame and fortune out of fear of financial failure (Shapiro 1961, 16, 21, 53–54, 107). As a result of these limitations, Dana's work as a lawyer had but little impact on the future of U.S. jurisprudence, and his brief periods of official activity produced no great reputation as a statesman. Nevertheless, compared with contemporaries, he deserves to be considered a lawyer of the first rank, whose greatest contributions were his advocacy of human rights in the Boston fugitive slave cases and his successful defense before the Supreme Court of the government's military and foreign policies during the American Civil War.

—Norman B. Ferris

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DARROW, CLARENCE

(1857–1938)

CLARENCE DARROW

Clarence Darrow (standing), principal witness before the Judiciary Committee of the House during hearings on the McLeod Bill, which would abolish the death penalty in Washington, D.C., 1 February 1926. (Library of Congress)

PERHAPS THE FIRST TRIAL LAWYER OF NATIONAL RENOWN, CLARENCE Darrow built his reputation as a friend of labor and a fiery orator. He later became a household name for his role in both the Leopold and Loeb "thrill-killing" case, and the defense of John T. Scopes, a Dayton, Tennessee, schoolteacher who had attempted to teach the theory of evolution to his students.

Darrow was born in Kinsman, Ohio, on April 18, 1857. His father, Amirus Darrow, made a career of furniture making and was also an ardent abolitionist. Emily Darrow, his mother, worked as a homemaker and as a proponent of women's rights. Each instilled in Clarence the value of education, and at age sixteen he enrolled in Allegheny College in Meadville, Ohio. After only one year of schooling, he took a job as a district schoolteacher and did not return to college. During the next three years, as he

carried out his teaching duties, he began to study the law on his own. His family convinced him to enroll at the law college at Ann Arbor, Michigan, but he again left after only one year and took a clerical job in a Youngstown, Ohio, law firm. A year later, in 1878, he was admitted to the bar and began ten years of legal practice in Ashtabula, Ohio.

In 1888, Darrow moved to Chicago (where he lived for the rest of his life) and worked for two years as junior partner to John Peter Altgeld, the future governor of Illinois. Darrow held a series of municipal appointments, including corporation counsel for the City of Chicago (where he worked to lower transit fares).

Darrow switched sides in 1894, however, when he resigned his position as counsel for the Chicago and North-Western Railway Company to represent Eugene V. Debs, leader of the American Railway Union, then on strike against the Pullman Palace Car Company. In the *Debs* case, Darrow dismissed the notion that the court was the forum to make peace between labor and management, and instead developed a confrontational approach to labor cases. He seethed with contempt for the prosecution and its charge of conspiracy to obstruct interstate commerce and the mails. As the prosecution presented its case, Darrow, in what became characteristic fashion, slouched in his chair with a derisive expression on his face. In a case in which U.S. Attorney General Richard Olney and the special government attorney, Edwin Walker, both had extensive ties to railroad interests (Walker had only a week before represented the General Managers Association, a group of twenty-two railroad companies in Chicago), Darrow challenged the use of the conspiracy charge against labor and implied that it would be better used against the railroad companies: "Conspiracy, from the day of tyranny in England down to the day the General Managers Association used it as a club, has been the favorite weapon of every tyrant. It is an effort to punish a crime of thought. If the government does not, we shall try to get the general managers here to tell what they know about conspiracy" (Tierney 1979, 105–106). When the judge adjourned the case because of an ill juror and chose not to reopen it, Debs went to prison for six months anyway. Darrow responded by directing his ire at judges, characterizing them, too, as friends of corporate chieftains and other opponents of labor. "It's no exaggeration to say that nine-tenths of the laws are made nowadays by the judges," he said, "and that they are made in the interests of the rich and powerful and to destroy the poor" (Ginger 1958, 214).

Although Darrow did not win the *Debs* case, it established him as an uncompromising advocate for labor, one who would combat the government and industry leaders at every turn. He soon found himself in demand for many labor cases, but the one that attracted the most attention was his 1907 defense of William D. "Big Bill" Haywood and two other leaders of

the Western Federation of Miners (WFM) against charges of conspiring to assassinate Frank Steunenberg, the former governor of Idaho.

As he had foreshadowed in the *Debs* case, Darrow's primary tactic in the *Haywood* case was not to defend the defendants as much as to prosecute the prosecution in the court of public opinion. Such an approach proved especially effective in this case, because the state of Idaho had taken extralegal measures to apprehend the defendants, with Pinkerton detectives kidnapping the three men in Denver and shuttling them by overnight train to Boise. In his summation, Darrow again established a precedent for future trials by setting the case in a larger context of labor versus capital, justice versus injustice. He spoke for eleven hours, not once referring to notes, and remembered every key detail from the weeks of testimony. He told the jury that he had larger concerns than Haywood's fate. Like so many who had "worked for the poor and weak" and been sacrificed, Darrow said, Haywood "might face death, too. But, you shortsighted men of the prosecution," he charged, "you men of the Mine Owners' Association . . . you who are seeking to kill him not because it is Haywood but because he represents a class, don't be so blind; don't be so foolish as to believe you can strangle the Western Federation of Miners when you tie a rope around his neck. If at the behest of this mob you should kill Bill Haywood, he is mortal; he will die. But I want to say that a million men will grab up the banner of labor at the open grave where Haywood lays it down . . . [and] will carry it on to victory in the end" (Stone 1941, 236–237). Such statements seemed designed not to persuade the jury of weaknesses in the prosecution's case, but rather that the trial was merely another attempt by those in power, politically and economically, to defeat labor in an ongoing class war.

Some of Darrow's associates thought he went too far with such rhetoric. Harlan Garland once wrote that "as an advocate, Darrow weakens his cause by extreme expression . . . he is to me a lonely figure. In all that he writes, in all that he says, he insists relentlessly on the folly and injustice of human society" (Stone 1941, 253). Darrow's own co-counsel in the case, Edmund Richardson, remarked immediately after the trial that "preaching socialism and trying a law case are entirely different matters. If you don't believe it, look at Darrow's closing speech before the jury. It was rank. It was enough to hang any man regardless of the fact of his innocence or guilt" (Tierney 1979, 224). Yet, despite their lawyer's churlish approach, or because of it, the jury acquitted Haywood and the other WFM leaders.

The *Haywood* case proved so exhausting that Darrow promised his wife he would take no more labor cases. But in 1911, when American Federation of Labor president Samuel Gompers came to ask him to defend James and John McNamara against charges that they dynamited the *Los Angeles Times* building (killing twenty men inside), Darrow relented. He did so primarily

because Gompers convinced him that he would go down in history as a traitor to the cause of labor if he refused the call. In the end, however, Darrow's handling of the case led the labor movement to regard him as a traitor anyway. Darrow's troubles began when he realized, despite his early unequivocal pronouncements of the McNamaras' innocence, that his clients were unquestionably guilty and that the prosecution would have little difficulty proving it. After months of investigating, Darrow worked through muckraking journalist Lincoln Steffens to arrange for the brothers to plead guilty in exchange for escaping the death penalty; James McNamara (who had personally perpetrated the crime) received a life sentence, and John, a sentence of fifteen years. Darrow, a lifetime opponent of capital punishment, saved his clients' lives, but he alienated the working people of America, who were convinced of the men's innocence. To add insult to injury, the state indicted Darrow himself on charges of jury tampering; he was subsequently acquitted, but not before the McNamara case had seemingly destroyed his career.

Darrow adopted a much lower profile during the next ten years, taking on a range of criminal cases that by the middle of the 1920s would eventually lead him back into the national spotlight. Among the quieter cases, Darrow achieved some distinction in joining forces with the newly formed American Civil Liberties Union (ACLU) to defend Benjamin Gitlow, a New York communist charged under a state antianarchy law. Although the lower court convicted Gitlow, his appeal led the Supreme Court to adopt the principle that the Bill of Rights could be applied to states through the due process clause of the Fourteenth Amendment. In 1922, he also published a book, *Crime: Its Cause and Treatment*, which brought into focus many of his criticisms of the U.S. legal system but offered few concrete proposals to alleviate criminal behavior.

The two cases for which Clarence Darrow is best known, however, came a year apart, in 1924 and 1925, and could not have been more different. In the first, Darrow agreed to defend Nathan Leopold and Richard Loeb, two very rich young Chicago men (ages 18 and 19) who had confessed to the kidnapping and murder of fourteen-year-old Bobby Franks. The crime shocked the public for its senselessness, particularly when it was learned that the two men committed it purely for the thrill, in an effort to carry out the "perfect crime." Public outrage soared even higher when Darrow took the case; most Chicagoans believed that the families of the boys were trying to buy their sons' freedom and that Darrow would receive upwards of one million dollars for his services (he was paid thirty thousand dollars). Darrow, who had built his career as a defender of the poor, again heard charges of being a traitor.

In fact, however, Darrow took the case because he believed that the two

men were mentally ill and therefore did not deserve to die; here again he found an opportunity to fight capital punishment. In an unprecedented move, rather than enter pleas of not guilty by reason of insanity, Darrow, seeking to avoid a jury trial, had his clients plead guilty but asked to present evidence of their mental condition "in mitigation of their punishment." At a time when psychiatry had only recently become respectable (although much of the general public remained unpersuaded), Darrow led a long line of psychiatrists through testimony before a courtroom filled with the Midwest's leading lawyers and judges (many of whom had traveled great distances to see this unusual case unfold).

After hearing detailed descriptions of the defendants' mental illnesses, including "diseased motivations" and "pathological discord" between their intellectual and emotional life, and a lesson on the functioning of the endocrine glands and the effect of their secretions on the central nervous system, Darrow worked toward a conclusion that such levels of mental disease, while not sufficient to constitute insanity, still rendered his clients guiltless for their actions. Darrow's summation lasted three days, and it hinged on the inhumanity of killing two mentally ill men who could not "feel the moral shocks which come to men that are educated and who have not been deprived of an emotional system or emotional feelings" (Tierney 1979, 310). While scientists and criminologists investigated the causes of crime, he said, the law goes "on and on and on, punishing and hanging and thinking that by general terror we can stamp out crime" (Stone 1941, 416). In an appeal that Darrow himself later said he could never again match, he challenged Judge John Caverly to consider his place between the past and the future. "You may hang these boys," he said. "But in doing it, you will turn your face toward the past. In doing it you are making it harder for every other boy who in ignorance and darkness must grope his way through the mazes which only childhood knows" (Stone 1941, 417). Leopold and Loeb each received a life sentence for murder and a ninety-nine-year sentence for the kidnaping. Darrow had prevailed again.

The case for which Darrow is best known is the *Tennessee v. Scopes* trial of 1925. At sixty-eight years old, "the Great Defender" (as he was so often called) brought his outspoken agnosticism to Dayton, Tennessee, to face William Jennings Bryan, the former Populist, Democratic candidate for president, and secretary of war, in a great contest of science versus religion. Darrow led a team of ACLU lawyers in defense of John T. Scopes, a local schoolteacher who had volunteered to test the Tennessee law that outlawed the teaching of evolution.

Darrow did not deny that Scopes had taught evolution; rather, much of the proceedings centered on arguments for and against introducing expert scientific and theological testimony to determine if Scopes fit the law's spe-

Other Attorneys in the Scopes Trial

Clarence Darrow is the only attorney who participated in the *Scopes* "monkey" trial whose biography is contained in this volume, but almost equally famous was his primary opponent, William Jennings Bryan, "the Great Commoner," who is better known for his politics than for his law degree. The golden-throated orator from Nebraska stirred populist and Democratic passions with his "Cross of Gold" speech at the Democratic National Convention in 1896, which helped him gain his party's nomination. Bryan ran unsuccessfully for president on three occasions before involving himself in the Scopes controversy. Although a religious conservative, Bryan was also convinced that the Scopes prosecution vindicated the rights of the people to decide what would be taught in public schools. Bryan died shortly after the *Scopes* trial, and a religiously affiliated college named after him, and which still exists today, was founded in Dayton, Tennessee, to honor his memory.

Also involved in the trial as prosecutors were brothers Herbert and Sue Hicks, the latter of whom was named after his mother, who had died when he was born. Sue Hicks later served as inspiration for a hit by singer Johnny Cash entitled "A Boy Named Sue."

Among those who assisted Darrow in Scopes's defense was Arthur Garfield Hays, the chief counsel for the American Civil Liberties Union. Born to a solidly Republican family in 1881, Hays used much of the money he earned defending corporate clients in New York to represent radicals, including individuals charged in Germany with the burning of the Reichstag. The *New York Times* described Hays as "the lawyer who grew rich representing corporations and who became famous defending civil liberties without pay" (Walker 1990, 53).

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cific definition of someone who denied the Bible's story of creation. When the judge ruled out expert testimony, it appeared that the defense had lost the case. Darrow then surprised the court by calling Bryan, one of the prosecutors in the case, as a witness. Darrow quizzed Bryan, a self-proclaimed Bible expert, on whether he believed various Old Testament stories. Bryan consistently responded that he accepted the Bible literally. But Darrow soon caught Bryan in an inconsistency when he asked about the origins of the universe as described in Genesis:

"Do you think the sun was made on the fourth day?"

"Yes."

"And they had evening and morning without the sun ?"

"I am simply saying it is a period."

"They had evening and morning for four periods without the sun, do you think?"

"I believe in creation as there told, and if I am not able to explain it I will accept it." (Larson 1997, 189)

But Bryan had already acknowledged that even he at times made his own interpretation of biblical passages. This constituted a major break for the defense, for if the Bible was subject to interpretation by Bryan, couldn't a teacher introduce students to evolution without denying the biblical story of creation, *as he interpreted it?* Ultimately, the jury convicted Scopes, but not before Darrow had seemingly defeated fundamentalism with his cross-examination of Bryan.

Two years after the *Scopes* case, Darrow retired, but thanks to his notoriety, he found himself in demand for frequent lectures and debates; he published his autobiography in 1932. He did not appear in the national limelight again until 1934, when he served as chairman of a New Deal review board aimed at evaluating the fairness of the National Industrial Recovery Act. Four years later, on March 13, 1938, Darrow died at home in Chicago.

Clarence Darrow's career has been the subject of several dramatic interpretations, most notably by Spencer Tracy in the fictionalized—and flawed—depiction of the *Scopes* trial in the film version of *Inherit the Wind* (1960). Although it is kind to Darrow, the film oversimplified the issues of the case and made the Bryan character particularly unsympathetic. That said, if Darrow lingers in popular memory today, it is largely due to the film's success and not his own.

—Michael S. Foley

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DAVIS, JOHN W.

(1873–1955)

John W. Davis
Library of Congress

John W. Davis was perhaps the most celebrated and successful attorney of the twentieth century. He made 140 oral arguments before the U.S. Supreme Court, many of them while he was solicitor general of the United States. The consensus among the bench and bar of his time held him to be the most clear and effective advocate in practice. Although several political ventures drew him away temporarily from the active practice of law, Davis always eagerly returned to the bar, which remained his greatest passion.

Davis was born April 13, 1873, to John J. Davis and Anna Kennedy Davis of Clarksburg, West Virginia. He was raised in the Presbyterian faith, believed in God, but rejected organized religion from an early age and seldom attended church after reaching adulthood. Davis received his early education at a private Clarksburg seminary, and in 1887 he enrolled at a preparatory school. In the fall of 1889, Davis entered Washington and Lee University, from which he graduated in 1892. Davis married Julia McDonald on June 20, 1899. The

couple lived with Davis's parents, and Julia gave birth to a daughter in July 1900. Julia died shortly afterward. Davis's mother and sisters raised the child, whom Davis named Julia after her mother. He was remarried in 1912 to Ellen G. Bassel, the marriage lasting until she died in 1943.

In June 1893, Davis began to study law in his father's Clarksburg office. After fourteen months, he returned to Washington and Lee and enrolled in the school of law, as his father had done forty years earlier when the school was still called the Lexington Law School. Graduating after one year, Davis was admitted to the West Virginia bar in 1895 and joined his father in a Clarksburg law practice. A year later he was offered an assistant professorship at Washington and Lee, which he accepted for a one-year term. This was the first in a line of difficult decisions Davis would make to leave, even if only temporarily, the active practice of law. When one of the school's two senior professors died, Davis was offered an advancement in salary and position, but he declined in order to resume practice with his father.

Davis early entered the world of litigation. He at first handled many criminal cases but quickly grew to dislike this type of case and ceased to accept them. One of Davis's first cases was dramatic. A mining strike had occurred in West Virginia, and a court had entered an injunction against strikers who were marching along a public road that ran through a mine that was still operating. Their presence, although they marched silently, was meant as a message to nonstrikers. Thus the mine operators sought an injunction. Although he was inexperienced, Davis represented the strikers after they were arrested for violating the injunctive order and held his own against two experienced attorneys. His clients received only three days in jail, a considerable victory in light of the antiunion attitudes of the particular bench.

By 1900, the business and personal relationships between Davis and his father changed. Davis assumed the management of the office. Furthermore, John W. was gaining a reputation as a fine attorney and as the better advocate. Davis's surpassing his father in the professional arena strained their relationship, despite the regard with which the son continued to treat his father.

A lifelong Democrat, Davis held various political offices during his life, beginning with membership in the 1899 session of the West Virginia House of Delegates. In 1910, he was nominated for the U.S. House of Representatives, and it was with reluctance that he agreed to run. During the campaign he protested the drainage of government resources brought about by various social services. Davis labeled such public spending as "the wild reign of extravagance in the disbursement of the people's money" (Harbaugh 1973, 65). Elected in 1910 and assigned to the Judiciary Committee, Davis was reelected in 1912.

While a member of Congress, Davis was able to correct what he saw as an abuse of the injunction, which dated back to its use to hamper strikes in his home state. He drafted a bill that precluded federal judges from granting injunctions in labor disputes unless they were necessary to prevent irreparable injury to property. The bill also protected the right to protest as well as the right to persuade others to do so. The bill became part of the Clayton Antitrust Act of 1914.

Although political involvement was a integral part of Davis's life, the only office he actively sought was a federal judgeship on the U.S. Court of Appeals for the Fourth Circuit. Despite wide public support, Davis did not receive the nomination. Still, President Woodrow Wilson recognized Davis's talents, and a few months later, in 1913, he nominated Davis as solicitor general of the United States. Davis was pleased to receive this position because it accommodated his affection for the practice of law, and he served in this office until 1918.

Throughout his life, Davis was unwavering in his political convictions, but he was also able to put them wholly aside when making an argument with which he did not agree. This ability becomes evident on examining Davis's arguments to the Supreme Court while solicitor general. For example, Davis did not support African-American voting rights, but in *Guinn v. United States* (1915) he argued that an Oklahoma grandfather clause that effectively excluded illiterate African-Americans from the polls while allowing illiterate white persons to vote violated the Fifteenth Amendment. His personal disinterest in the result did not diminish his efforts in the courtroom. The Supreme Court unanimously agreed with Davis's argument, and for the first time it held a state statute unconstitutional under the Fifteenth Amendment.

While he was solicitor general, Davis's skill as an advocate developed greatly. An example of his improving ability is exemplified in the case of *Wilson v. New* (1917). Davis defended the Adamson eight-hour law for railroad employees. This was a controversial measure, enacted in response to a threatened strike if the eight-hour work day on railroads did not become law. Davis was opposed by Santa Fe Railroad's general counsel, Walker D. Hines, and John G. Johnson from Philadelphia, the most renowned business attorney of the time. Davis based his argument to sustain the law on Congress's commerce power, and the Court, although divided, held the law constitutional. Later, Davis himself admitted that the connection between wage regulation and the facilitation of interstate commerce was tenuous.

By 1917, Davis had grown restless in his position as solicitor general and was considering a return to private practice. However, he felt a duty to continue with his work due to the imminence of U.S. entry into World War I. Nine months after the United States entered World War I, Davis defended

the Selective Draft Act of 1917. The case aroused public feelings of patriotism, and in an opinion by Chief Justice Edward D. White, the Court unanimously upheld the act. While Davis was in office, every Supreme Court justice expressed his desire that President Wilson appoint him to the Court, but Wilson did not heed these suggestions. Davis resigned from the office of solicitor general in 1918. In that capacity he had orally argued sixty-seven cases before the Supreme Court and had won forty-eight of them.

Despite his resignation, Davis's desire to return to private practice was further postponed by his appointment in 1918 as ambassador to the Court of St. James in England. After he was appointed but before he began his work as ambassador, Davis traveled to Switzerland to serve as commissioner to the Conference with Germany on the Treatment and Exchange of Prisoners. While still ambassador, Davis became a public favorite for the presidential race, but he did not receive the Democratic nomination in 1920. When Davis resigned from his position as ambassador in March 1921, he had been in public service for over ten years.

Toward the end of his time as ambassador, Davis was offered positions with private New York and Washington firms, as well as with private corporations. With firms actively competing for his services, Davis selected Stetson, Jennings & Russell in New York. The promise of assuming the leadership of the Stetson firm was a critical inducement, and Davis became a Wall Street lawyer. The firm's clients included major businesses such as J. P. Morgan, the Guaranty Trust Company of New York, the Associated Press, and Erie Railroad.

Soon after joining Stetson, Jennings & Russell, Davis was again considered for a seat on the Supreme Court. Chief Justice William Howard Taft asked Davis to consider an appointment, but Davis declined. He had not been back in private practice long, was enjoying the practice of law in the New York courts, and was committed to becoming financially secure after his ten years in office. Thus, although Davis regarded membership on the Supreme Court as the highest honor an attorney could achieve, he never became a justice.

In late 1923, Davis was again in the path of the presidential election. He did not actively seek support; it arose spontaneously, just as it had in 1920. Backers urged him to give up his practice and actively campaign, as his connection to J. P. Morgan would be detrimental to his chances for the Democratic party nomination. On March 4, 1924, Davis wrote a public letter stating that it would be dishonorable to tailor his career to further his political aspirations. The public saw Davis as principled and honest, and appreciation for these qualities diminished the negative effect that Davis's J. P. Morgan connection would have imposed. Davis refused to take any action that would be seen as campaigning for the nomination, but after prolonged

balloting, he received the Democratic nomination for president in July. However, Republican Calvin Coolidge won the election handily.

After the election, Davis returned to work on Wall Street; his partners renamed the firm Davis, Polk, Wardwell, Gardiner & Reed. Davis led the firm for the remainder of his career. During the 1930s, Davis joined efforts to resist Franklin D. Roosevelt's New Deal program. He was an organizer of the anti–New Deal Liberty League, argued several cases challenging important New Deal laws, and informally advised opponents to Roosevelt's court-packing plan. In 1933, the Senate Banking Committee began investigating J. P. Morgan concerning the company's securities transactions. Davis, who represented Morgan during the three-month ordeal, was convinced that the investigation was unwarranted. He questioned the scope of the committee's investigation. In the end, the committee concluded that Morgan had not engaged in abusive lending practices and was prudent in making its investments.

Two of the most noted Supreme Court cases Davis argued were the last two cases of his career. The first, *Youngstown Sheet & Tube Co. v. Sawyer,* better known as the *Steel Seizure* case, arose in 1951, while the United States was in the midst of the Korean War. Negotiations between United Steelworkers and steel producers broke down, and the threat of a strike loomed. President Harry S Truman seized the mills to keep them operating, concerned that a halt of steel production would jeopardize U.S. troops abroad. Davis argued the case before the Supreme Court on May 12, 1952, at age seventy-nine. Solicitor General Philip Perlman argued for the government. Davis maintained from the beginning of the crisis that the president had neither statutory authority nor general inherent power to effect the seizure. In an oral argument that lasted eighty-seven minutes, he noted that no seizure of property in a labor dispute had ever occurred when a statute provided for an alternative. His reference was to the Taft-Hartley Act, which gave the president power to obtain an eighty-day injunction in such circumstances. Justice Hugo Black wrote the opinion for a 6–3 majority that the seizure was unconstitutional, thereby vindicating Davis's position.

The final case that Davis argued before the Supreme Court was the landmark school segregation case of *Brown v. Board of Education* (1954). In the companion case to *Brown, Briggs v. Elliott,* Davis defended South Carolina in its 1952 appeal to the Supreme Court in a desegregation suit brought by the National Association for the Advancement of Colored People (NAACP). Several partners and even his daughter suggested that he not take the case, believing South Carolina to be in the wrong, but Davis would not back down. He believed precedent and the Constitution supported South Carolina's position. Even as they headed for battle, NAACP attorney Thurgood Marshall considered Davis an idol. He regarded Davis as

the best solicitor general the country would ever see and had often lamented that he would never be as great an advocate as Davis.

Davis tried to persuade the Court that social wisdom, in addition to the law, called for segregation. Initially split 6 to 3 in favor of desegregation, the Court called for reargument of five questions on December 7, 1953. After the second hearing, the new chief justice, Earl Warren, told the justices that the Court could not evade the question of the constitutionality of segregation per se. On May 17, 1954, Warren ruled for a unanimous Court that segregation based solely on race violated the equal protection clause of the Fourteenth Amendment. Davis was greatly disappointed by the loss of his final Supreme Court argument and was equally upset because of his personal view that segregation was beneficial.

Throughout his life, Davis considered himself a conservative, and he was a delegate to every Democratic National Convention from 1904 to 1932. He was a Jeffersonian Democrat and believed that limited governmental power was needed only to suppress monopolies, preserve national security, and protect individual liberty and property. To Davis, respect for property rights was closely linked with the preservation of individual liberty. Davis espoused the political ideas of laissez-faire economics, limited taxation, and states' rights. He favored a textual adherence to the language of the Constitution, a conviction that never wavered throughout his career. Davis adhered to the concept of stare decisis and despised legal realist notions that the Constitution and common law must be organic to accommodate a changing society. Similarly, he disliked the formation of administrative law by regulatory agencies.

In "The Argument of an Appeal," a paper Davis delivered in the fall of 1940, he emphasized the need for brevity, clarity, and simplicity in legal arguments, and he set forth ten cardinal rules of oral advocacy. Quoting Daniel Webster, Davis stated that the one sentence that "should be written on the walls of every law school, courtroom and law office" was that "the power of clear statement is the great power of the bar" (Wellman 1941, 232).

In addition to the many governmental offices, Davis also held leadership positions in the bar. In 1906, he was elected president of the West Virginia Bar Association, after serving as its secretary for several prior years. He served as president of the American Bar Association in 1922, and he was elected president of the Association of the Bar of the City of New York in 1931.

John W. Davis died on March 24, 1955, after several years of deteriorating health.

—James W. Ely Jr.

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DEES, MORRIS, JR.

(1936–)

Since the early 1970s, attorney Morris Dees Jr. has fought in the courts for racial justice. By developing innovative approaches to attacking the activities of various Ku Klux Klan–affiliated organizations while representing numerous victims, Dees has expanded the legal profession's arsenal for combating organized violence. As such, Dees has helped to make the United States a safer place for all its citizens.

Born to Morris and Annie Ruth Dees in Shorter, Alabama, on December 16, 1936, Morris Dees Jr. spent his early years working in his father's cotton fields (Dees and Fiffer 1991, 65). As the son of a tenant farmer, he shared the experiences of his family's hired hands and developed many relationships that influenced his perceptions of justice and equity (Dees and Fiffer 1991, 336). The prodding of his father, coupled with the first-hand experience of injustice, pushed Dees first to obtain his undergraduate degree and then a degree in law in 1960 from the University of Alabama. Nevertheless, it was his earlier experiences—seeing his father drink from the same gourd

Morris Dees Jr.

Morris Dees photographed at a conference on bigotry in Montgomery, Alabama, 8 October 1990. (AP Photo/Dave Martin, File)

as an African-American field hand, being whipped for using the word *nigger,* and feeling used after successfully litigating a contractual dispute for a friend—that developed in Dees a "passion for justice" (Dees and Fiffer 1991, 63; Dees 1995, 548), which can be considered the true force behind all his efforts.

Certainly, it was this passion for justice that led Dees and law partner Joseph J. Levin Jr. to begin the practice that would become the Southern Poverty Law Center (SPLC) in Montgomery, Alabama, in 1971. At that time, Dees's business dealings had placed him in a secure financial position. Having been reared as a poor tenant farmer, Dees developed a distinct need to establish self-sufficiency. Starting with a plan to send birthday cakes to students on campus, Dees and partner Millard Fuller (the future founder of Habitat for Humanity) as undergraduates founded a mail-order business that had sales of nearly half a million dollars a year (Emert 1996, 139). Through their business acumen and tenacity, Dees and Fuller were able to build a small publishing company, which they eventually sold to the Times Mirror Company for $6 million. As a result of his success in business, Dees had no monetary reasons for pursuing the various discrimination cases in which the SPLC specialized (Dees and Fiffer 1991, 130). Furthermore, the SPLC's original mission, to provide pro bono representation on behalf of death-row inmates and low-income individuals, reflects Dees's belief that the effects of money hopelessly taint the justice system (Dees and Fiffer 1991, 149–150). By providing the kind of services the SPLC offers, Dees and other lawyers have advanced the cause of racial justice along a number of fronts, including the desegregation of the Alabama State Troopers, the Montgomery YMCA, and the jury system in Alabama. These accomplishments alone can be considered major contributions to the cause of justice.

Nevertheless, Dees's greatest contribution lies not with these accomplishments but with his "agency theory" tactic used in the civil case between Beulah Mae Donald and Bobby Shelton's United Klans of America (UKA) (Dees and Fiffer 1991, 222). Although Dees has employed these same strategies in several cases, this case offers the best illustration of Dees's method of connecting national extremist organizations with the illegal actions of its members (Marshall 1999; Dees and Fiffer 1991, 222; Dees 1995, 551).

In *State v. Henry Hays,* James "Tiger" Knowles testified that he, Henry Hays, and Frank Cox randomly selected Michael Donald, an African-American youth walking alone at night, "to show the strength of the Klan" and to be an example to the city of Mobile of their disgust for the outcome of the Josephus Anderson trial, a closely watched murder/self-defense case involving a white police officer, an African-American defendant, and a majority African-American jury that was unable to reach a verdict (Dees and

Fiffer 1991, 212). The verdict in the *State v. Hays* trial sent Hays to death row; however, as Dees notes, the district attorney's failure to indict any of the other conspirators effectively resulted in the vast majority of individuals involved in this crime going free (Dees and Fiffer 1991, 213, 225, 237). Given Dees's passion for justice and his personal mission of "bankrupting bigots," one should not find it surprising that the SPLC would become involved in this case (Eichel 1998).

Dees's explanation of his "agency theory" is deceptively simple. As he notes, a lending business would become liable for the illegal collection tactics of its agents only if it "had a practice of encouraging strong-arm collection tactics"; in the same way, an organization such as the Klan would be liable for the actions of its members if those members acted with (or believed they were acting with) the approval of the parent organization (Dees and Fiffer 1991, 222). In practice this strategy takes two sometimes overlapping forms, the aiding and abetting claim and the civil conspiracy claim (Dees and Bowden 1995).

In the *Hays* case, Dees established the first link in the chain of legal culpability from Hays and his compatriots to the United Klans with the deposition of Johnny Jones. According to Jones's testimony, the membership of the local Klan unit had discussed the possibility of retaliating for the outcome of the Anderson trial, and the unit's senior officer, Bennie Hays, had directed Henry Hays, the unit's secretary, to "get this down." Therefore, Dees argued, the entire unit could be held liable (Dees and Fiffer 1991, 232). Since aiding and abetting theory does not require direct physical assistance, Bennie Hays's direction of the retaliation discussion constituted "encouragement." However, aiding and abetting theory in cases involving an agent also requires demonstration of the fact that the defendant authorized the agent to engage in criminal acts (Dees and Bowden 1995). In this case, Jones testified that he consulted Frank Cox, the unit's president, about lending his gun to Hays and Knowles (Dees and Fiffer 1991, 233). Cox's encouragement while acting as a superior officer fulfills this authorization requirement.

A more recent example of this tactic can be found in the civil case against Tom Metzger, White Aryan Resistance, and East Side White Pride arising from the 1988 murder of Mulugeta Serau (Dees 1995, 551). This case also closely resembles a classic aiding and abetting claim; testimony in the case revealed that David Mazzella, one of the perpetrators of the crime, was also the vice-president of Metzger's White Aryan Resistance movement and had been dispatched to Portland with the express purpose of "encourag[ing] racial violence" (Dees and Bowden 1995; Dees 1995, 552).

However, the aiding and abetting strategy is of limited value in many hate group–related cases because it specifically incorporates the idea of *sub-*

Atticus Finch, Fictional Hero

Few individuals have better epitomized the lawyer as hero than Atticus Finch, the attorney in Harper Lee's only published novel, *To Kill a Mockingbird*. Published by J. B. Lippincott in 1960 after more than two and a half years of rewriting, this book was awarded a Pulitzer Prize in 1961 and was made into a movie starring Gregory Peck in 1962.

Lee, an Alabama native, studied law at the University of Alabama from 1945 to 1949 but moved to New York to pursue a writing career rather than joining her father's law firm. Lee patterned Atticus (Lee's mother's maiden name) Finch after her father, Amasa Lee, a one-time newspaper editor, state senator, and Alabama lawyer.

In Lee's book (which is narrated by Finch's daughter, Scout), Finch, a fearless white attorney, unsuccessfully defends an African-American man falsely accused of raping a white woman, who was romantically interested in him and had apparently been beaten by her father for crossing the color line. Dill, a friend of Scout, is patterned in part on Truman Capote, one of Lee's childhood friends, for whom she later served as a research assistant when he wrote *In Cold Blood*.

To Kill a Mockingbird is one of the legal classics reviewed in the 1999 issue of the *Michigan Law Review*.

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stantial aid or encouragement between the actors, thus limiting the range of prosecution. As Dees has suggested, truly to cripple the operations of hate groups, one must interfere with the fiscal viability of the national organizations (Marshall 1999). Demonstrating substantial aid between a national organization and an independent actor would be difficult at best.

To overcome this difficulty, agency claims usually incorporate civil conspiracy theory to link the national organizations to local criminal acts (Dees and Bowden 1995). The key to this strategy lies in establishing both close links between the various agents and an agreement between those agents to commit the act. In the *Hays* case, several pieces of evidence, including the unit's charter from the UKA (signed by Shelton) and a copy of the *Kloran Klan in Action Constitution*, and testimony established that the structure of the local unit was directly responsible to the national leadership of UKA (Dees and Fiffer 1991, 237). In the case of the Klan constitution, the sections detailing organizational charts especially strengthened the link between Shelton as the "Imperial Wizard" and Bennie Hays (the father of Henry Hays) as the local "Titan" (Dees and Fiffer 1991, 249).

However, a civil conspiracy claim requires evidence of an *agreement* between the conspiring parties to commit the specific act or to follow a particular course of action that would include the criminal act. This being the case, testimony from FBI informants regarding the UKA's repeated use and encouragement of violence to further its agenda of maintaining the "God-given superiority of the white race" (Dees and Fiffer 1991, 250) was crucial to the assertion that, even if the Donald murder was not specifically authorized by the national organization, the long-standing pattern of violence employed by the UKA produced an atmosphere in which violence was perpetually encouraged and condoned.

The *Metzger* case provides another example of this tactic. As Dees and Bowden note, the fact that Metzger provided Mazzella (one of the defendants) with both training in fomenting racial violence and a letter of introduction to the East Side White Pride establishes the close relationship between the various actors necessary to defend a conspiracy claim (Dees and Bowden 1995). Furthermore, Mazzella's testimony that he was sent to Portland with the express purpose of encouraging racial violence establishes an agreement between Metzger and his agent to follow a course of action that would include illegal acts.

In developing and honing these strategies, Dees has greatly expanded the arsenal of tools prosecutors and attorneys can use to curtail the activities of national hate groups. Even a cursory examination of the various groups that have suffered setbacks as a result of Dees's personal courtroom involvement reveals the magnitude of this contribution. Louis Beam's Texas Emergency Reserve, Bobby Shelton's United Klans of America, Glenn Miller's Carolina Knights and his White Patriot party, Metzger's White Aryan Resistance, and the Invisible Empire, Inc., have all folded or severely curtailed their operations because of civil suits brought by Dees and the SPLC.

Nevertheless, cases are not usually won through clever courtroom antics but through vigorous pretrial investigations and legwork (Dees and Fiffer 1991, 220). Therefore, one may consider Dees's establishment of the Klanwatch project as his second great contribution to the field of jurisprudence. Although one may argue that Klanwatch does not directly relate to the field of legal practice, its mission to gather information about Klan activities and related hate groups has accumulated over twelve thousand computerized photographs and over sixty-five thousand records on individuals and events (Dees and Corcoran 1996, 6). Although this activity appears seriously to infringe on individual privacy, by cataloging the associations of extremists, Klanwatch has furthered investigations into hate crimes. As such, it is a contribution to the practice of law because it provides attorneys with easy access to the facts they require to build the kind of complaints described above.

Morris Dees Jr.'s forty-year history as a civil rights lawyer is a study of landmark victories for integration, equitable sentencing, and the protection of minorities. However important these contributions may be individually, they sum to a much larger picture; through his innovations Dees has helped to change the field of jurisprudence by bringing cases that might never have been litigated without the help of the SPLC. Furthermore, the application of "agency theory" to other areas, such as linking radical antiabortion groups to antiabortion violence, has increased the scope of prosecutions in other fields (Dees 1995, 547). In short, Dees's legal innovations have affected areas of jurisprudence beyond the domain of civil rights; he stands as an example of the difference attorneys can make by litigating cases.

—Matthew Vile

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DERSHOWITZ, ALAN MORTON

(1938–)

Alan Dershowitz is a world-renowned appellate criminal lawyer and public intellectual. He has represented defendants in the highest-profile legal actions in recent history. His books have been widely read around the world, and his various writings and public appearances cover nearly every aspect of public life. Much can be said about Alan Dershowitz, but much also remains enigmatic. He is an absolutist about free speech, believing there can be no good reason for censorship. He staunchly defends the right of the accused to the best defense available and the right of criminals to fair treatment by the government. He is a media figure, and this status certainly helps his career as an attorney. A liberal and a Democrat, he nonetheless supported the right of all citizens to litigate against the president, a position opposed by many in his party.

Newsweek magazine has described Alan Dershowitz as "the nation's most peripatetic civil liberties lawyer and one of its most distinguished defenders of individual rights." The Italian news-

Alan Dershowitz
Wally McNamee/Corbis

paper *Oggi* reported that he is "the best-known criminal lawyer in the world." *Time* magazine, in addition to including him in a cover story entitled "50 Faces for the Future," called him a "legal star" and "the top lawyer of last resort in the country—a sort of judicial St. Jude." *Business Week* characterized him as "a feisty civil libertarian and one of the nation's most prominent legal educators." ABC Commentator Jeffrey Toobin characterized him as "a national treasure," and Floyd Abrams, the eminent First Amendment lawyer, called him "an international treasure." He has been profiled by every major magazine, ranging from *Life* ("iconoclast and self-appointed scourge of the criminal justice system"), to *Esquire* ("the country's most articulate and uncompromising protector of criminal defendants"), to *Fortune* (an "impassioned civil libertarian" who has "put up the best defense for a Dickensian lineup of suspects"), to *People* ("defense attorney extraordinaire"), to *New York Magazine* ("one of the country's foremost appellate lawyers"), to *TV Guide* (one of "America's top attorneys"). He has been featured on the covers of many magazines, including the *American Bar Association Journal*, *New York* magazine, the *Jerusalem Post*, Italy's *Oggi*, and *Newsday*. He has been interviewed by a diverse range of U.S. magazines and newspapers, including the *New York Times*, *U.S. News and World Report*, *Playboy*, and *Boston* magazine, as well as by the foreign media throughout the world.

Alan Dershowitz was born in Brooklyn, New York, on September 1, 1938, to Harry and Clair (Ringel) Dershowitz. He attended Yeshiva University High School and Brooklyn College, where he was president of the debate society and graduated magna cum laude in 1959. After college, he attended Yale Law School, graduating magna cum laude in 1962, having served as editor-in-chief of the *Yale Law Journal*. He is married to Carolyn Cohen and has three children, Elon, Jamin, and Ella.

After graduating from Yale, Dershowitz was offered a teaching position at Harvard Law School. He declined this position in order to clerk for Chief Judge David L. Bazelon of the U.S. Court of Appeals in Washington, D.C. Dershowitz was a clerk for Bazelon in 1962 and 1963 and was a clerk for Justice Arthur Goldberg of the U.S. Supreme Court in 1963 and 1964. In 1964, Dershowitz joined the faculty of Harvard Law School. Dershowitz recalled fondly that Bazelon and Goldberg were "two of the finest and most humane judges in American history"; he viewed these judges as having such integrity that when he entered his academic career he did so with no small amount of naiveté (Dershowitz 1982, xiii–xiv). In 1967, *Psychoanalysis, Psychiatry and the Law*, which Dershowitz co-wrote with Jay Katz and Joseph Goldstein, was published, at which time Dershowitz became, at twenty-eight, the youngest full professor in the history of Harvard Law School. In 1993, he was named Felix Frankfurter Professor of Law.

Alan Dershowitz's specialty is the crafting of appeals to higher-level courts of criminal cases decided in lower courts. As an appellate lawyer, he becomes involved in most cases only after the defendant has lost at the trial court level and has already exhausted almost every possible legal avenue. He thinks of himself as a "lawyer of last resort." He writes, "O. J. Simpson referred to me as his 'God forbid' lawyer—'God forbid there should be a conviction, you've got to get it reversed on appeal'" (Dershowitz 1996, 13). In the *Tison* v. *Arizona,* 481 U.S. 137 (1987), and *Snepp* v. *United States,* 444 U.S. 507 (1980), cases, Dershowitz became involved when the cases went to the Supreme Court.

Dershowitz takes cases that he sees as having underlying constitutional issues and that he regards as "the most challenging, the most difficult and precedent-setting cases" (Dershowitz 1982, xv). Dershowitz's focus on constitutional questions, especially on issues of improper government conduct, allows him to frequently gain dismissal of determinations of his clients' guilt in lower courts. Dershowitz seems motivated by a belief in widespread misconduct, especially by the investigative wing of the criminal justice system. He writes, "it is often necessary to put the government on trial for *its* misconduct" (Dershowitz 1982, xiv). He has employed this tactic in several cases. For example, in the trial of Sheldon Siegel for the bombing murder of a woman, Dershowitz used tapes to prove that the government had lied about offering Siegel a deal. Siegel was acquitted; Dershowitz recounts that he cried for the victim that night.

In one of the highest-profile criminal trials in the twentieth century, Dershowitz successfully argued in the trial of Claus von Bülow for the murder of his wife that there had been an illegal search and seizure. A new trial was granted, and von Bülow was acquitted. Dershowitz wrote the book *Reversal of Fortune* (1986) about the von Bülow trial, which was later made into a film that garnered an Academy Award. However, some of his cases, like that of the Tison brothers, do not present an easily identifiable government violation of rights. In *Tison,* two brothers who had helped their father escape from prison faced the death penalty for a murder in which their father subsequently took part. Arguing before the Supreme Court, Dershowitz had their death sentences vacated on the grounds that they had not actually taken part in the murder. In a high-profile case in New York City, Dershowitz unsuccessfully argued that Bernard Bergman, who was convicted of fraud in his New York City nursing homes, was denied his rights because the prosecutor had violated a plea bargain.

Dershowitz, a staunch and absolute supporter of free speech, has been involved in many cases involving First Amendment free-speech rights. Several of these cases were precipitated by the Vietnam War. Dershowitz was on the successful defense team of Vietnam protester Dr. Benjamin Spock,

and he successfully appealed William Kunstler's conviction for contempt of court for his actions as counsel for the defense in the trial of the "Chicago Eight" protesters at the 1968 Democratic convention. Later, he unsuccessfully represented former CIA analyst Frank Snepp in his bid in the Supreme Court to prevent the CIA from seizing the profits from Snepp's book about his experiences working for the agency. However, Dershowitz was successful in representing Mike Gravel, the U.S. senator from Alaska who released the Pentagon Papers.

Dershowitz has also worked as counsel for those accused of producing obscene and pornographic materials. In his first appearance before the Supreme Court, he successfully argued against the Boston ban on the Swedish film *I am Curious, Yellow,* which was considered at the time to be sexually explicit. He obtained an acquittal in 1976 for Harry Reems, star of the pornographic film *Deep Throat,* on charges of interstate trafficking in obscene materials. More recently, he represented Miramax Studios in winning an appeal to change the rating of the comedy *Clerks*. He has also represented *Penthouse* magazine.

Dershowitz is bothered by governmental attempts to use national security arguments to deprive accused persons of a full and proper defense. One of his clients, Jonathan Pollard, has been imprisoned for spying for Israel. However, he could not testify at an open public trial because of the sensitive nature of the issues. Dershowitz considers this an "abuse of the classification system to serve political rather than national security interests" (Dershowitz 1994, 219).

Dershowitz is best known for representing celebrities. He was a member of the defense "Dream Team" that won an acquittal in the murder trial of O. J. Simpson. Dershowitz's experiences and thoughts on the Simpson trial are collected in his book *Reasonable Doubts* (1996). Professor Dershowitz achieved a reduction of televangelist Jim Bakker's sentence from forty years to five years. He represented Senator Alan Cranston, one of the "Keating Five" senators, in a case involving improper influence peddling and fundraising activities; Dershowitz was able to win a reduction in sanctions. However, he was unable to overturn the conviction of Patricia Hearst, the young newspaper heiress turned terrorist, who went to jail and was later pardoned. He successfully represented Mia Farrow against Woody Allen when the two ended their long relationship. This particular case was satirized in a sketch on the television program *Saturday Night Live,* in which Dershowitz and Farrow encounter Allen on the way to a movie. Dershowitz has also represented boxer Mike Tyson, musicians David Crosby, John Lennon, Axl Rose, and Kenny Rogers, and former Louisiana governor Edwin W. Edwards.

Alan Dershowitz the litigator is quite different from Alan Dershowitz the public figure. When seeking an appeal in court, he is very respectful of the

judge and the power of a court to provide justice to rich and poor alike. As a litigator, he draws on other legal experts, forensic scientists, law school students, and social scientists to make the best case he can regarding why a lower court failed to follow the law, legal process, or the evidence that was placed before it. For appeals courts, Dershowitz prepares well, leaving no stone unturned, trying to keep the court on point as to his reasons why justice was not served in lower courts. When advising at the trial court level, Dershowitz usually plays the role of supporting trial lawyers on possible bases for appeals. This role usually makes the trial judge aware of possible avenues of appeal, which tends to ensure the best possible hearing at the trial level.

On radio, television, and in the print media, Dershowitz has a quite different persona; he is showy and argumentative and at times appears outrageous and willing to do anything to exonerate a client. This occurs because he takes cases for famous clients, many of whom are quite out of favor with the public because of the crimes of which they have been accused, their riches, their personalities, or their lack of contrition. Dershowitz is always educating the public that the United States has an adversarial legal process, that the state must prove its criminal cases beyond a reasonable doubt, and that rich and poor both have the right to the best defense, whether or not they are guilty.

Dershowitz is widely credited as being a key innovator in the use of media as a legal tool, as in the O. J. Simpson case. In addition to public appearances on issues of general interest, such as his appearance on the *Larry King Live* television program during the execution of Gary Graham, he often appears on television and writes in newspapers as part of the defense of his clients. On one occasion he purchased a full-page ad in the *New York Times* on behalf of his client, Michael Milken, who was on trial for securities fraud.

Dershowitz has been awarded numerous honors by many prestigious institutions. He was a fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford University in 1971–1972, and he was awarded a Guggenheim fellowship to pursue his work in human rights in 1979. Dershowitz holds honorary degrees from Yeshiva University, Syracuse University, Hebrew Union College, the University of Haifa, Monmouth College, Fitchburg College, and Brooklyn College.

Dershowitz's academic and social prominence have made him a highly coveted speaker in the United States and abroad. He has lectured at Rutgers Law School, the University of Pennsylvania Law School, the University of Texas Law School, the University of Cincinnati, and Brooklyn College. Dershowitz has taught at a diverse range of institutions, including Stanford Law School, McLean Hospital in Washington, D.C., the Vera Institute of Justice in New York, and Hebrew University Law School.

Dershowitz served as counselor to the director of the National Institute of Mental Health from 1967 to 1969; he was a member of the President's Commissions on Civil Disorder in 1967, the President's Commission on the Causes and Prevention of Violence in 1968, and the President's Commission on Marijuana and Drug Abuse in 1972; he participated in the Ford Foundation Studies on Law and Justice from 1973 to 1976; and he was rapporteur to the Twentieth Century Fund Study of Sentencing from 1975 to 1976.

Dershowitz has also gained international stature as an expert on criminal law. He has served as a consultant on criminal law to the Chinese government in 1981, as the John F. Kennedy Fulbright lecturer on the Bill of Rights in New Zealand in 1987, and as visiting professor of law at Hebrew University, Jerusalem, in 1988, where he lectured on civil liberties during times of crisis. In 1990, he lectured in Moscow on human rights.

Dershowitz, who has been characterized as a "public intellectual par excellence," has been a pioneer in making the legal profession accessible to the general public. He was the first law professor to write regularly for the *New York Times* in its Week in Review, op-ed, and Book Review sections. He was also the first to appear regularly on such stalwart television news and information shows as *Nightline, The McNeil-Lehrer News Hour, Firing Line, Larry King Live, Today,* and *Geraldo Rivera.* As a weekly columnist for United Features Syndicate, his articles have appeared in fifty U.S. daily newspapers, including the *Los Angeles Times,* the *San Francisco Chronicle,* the *Boston Herald,* and the *Chicago Sun-Times.* He has written more than one thousand editorial articles. His essay "Shouting Fire" was selected for inclusion in *The Best American Essays of 1990* and has been reprinted more than one hundred times. For two years, Dershowitz hosted a radio talk show about the law, for which he received the 1996 Freedom of Speech Award from the National Association of Radio Talk Show Hosts. William Buckley, a nationally respected conservative public intellectual, has described Dershowitz as a "deeply thoughtful man," "a master of the law," and "a masterful advocate." Dershowitz has even appeared as a guest star on the television show *Picket Fences,* in which, appearing as himself, he advised a small-town lawyer on how to argue before the Supreme Court.

Dershowitz is actively involved in important and controversial public issues, usually involving conflicts between politics and legal rights. During the impeachment proceedings of President Richard Nixon, he urged the American Civil Liberties Union to support President Nixon against violations of his civil liberties. He was heavily involved with the sequence of events up to and including the impeachment trial of President Bill Clinton. Unlike many liberals, he supported the appointment of an independent counsel for the Whitewater investigation and the apparently related of-

John Grisham: The Lawyer as Novelist

Few lawyers have had the popular literary success of John Grisham (b. 1955), who has published twelve novels since 1988, most of which have been bestsellers and a number of which have been made into popular films. Grisham's novels, which include *A Time to Kill*, *The Pelican Brief*, *The Client*, *The Chamber*, and *The Testament*, all deal in one or another way with the legal profession and are known for their fast-paced action.

After earning a law degree at the University of Mississippi in 1981, Grisham practiced for about a decade and served in the Mississippi state legislature from 1984 to 1990. Although he is an attorney, in his writing Grisham often plays on stereotypes that portray lawyers and politicians as greedy and crooked. As much of the action in Grisham's novels takes place within law firms and on the street as in the courtroom.

In 1996, Grisham received extensive publicity when he returned to Brookhaven, Mississippi (Grisham now splits his time between homes in Mississippi and Virginia), to litigate a case that he had accepted before his writing career took off involving the family of a railroad brakeman who was killed on the job. Admitting to being jittery after not having tried a case for seven years, Grisham won an award of $683,500 for his client, the largest of his career. Despite his success in this case, Grisham will be remembered more for what he has written about the bar than for his own cases.

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fenses. He also believed that it was proper to allow Paula Jones's lawsuit against the president to continue—and that the president should have settled early in the case to preserve the dignity of the office and keep the settlement low, an option he faults Washington lawyer Robert Bennett for not bringing to the president's attention. Dershowitz's criticism brought Bennett's wrath down on him; Dershowitz accused Bennett of not handling the case competently, a claim that Bennett has refuted on numerous occasions. Dershowitz also publicly debated Jerry Falwell, a conservative Republican and a leading supporter of Clinton's impeachment. During the impeachment trial, Dershowitz testified before Congress, vigorously defending the president and denouncing the impeachment as politically motivated. These comments were welcomed by Democrats and angered Republicans, among them Senator Henry Hyde, who made light of Dershowitz in a press conference a few days later. Dershowitz wrote about the Clinton impeachment in

Sexual McCarthyism (1998). He has spoken out on the trial of New York City police officers for the murder of Amadou Diallo, defending the change of venue of the trial from the Bronx to Albany. Dershowitz argued, against most liberals, that the status of the young Cuban boy Elián Gonzalez should have been determined by the courts. In a recent controversy, Dershowitz has claimed that he is owed $34 million for his part in the Florida tobacco settlement, saying that he would donate most of the money to charity. His views on police misconduct have earned him the ire of many in both the United States and Israel. At a press conference, Minnesota governor Jesse Ventura noticed him and said, "Look, there's Dershowitz. Now I've really gotta watch what I say." Later that day, Dershowitz was part of a roundtable discussion about the flamboyant politician. In the spring of 2000, Dershowitz argued that, notwithstanding an individual's First Amendment rights to free speech, professional baseball was within its legal rights to penalize John Rocker, an Atlanta Braves pitcher, who made offensive racial comments.

Dershowitz is active in Jewish affairs, which brought him his first case, in which he argued in support of Sheldon Siegel of the Jewish Defense League. Over the years, he has worked on behalf of religious freedom, Soviet Jewry, and a respectful place for Jews in U.S. society. The title of one of his books, *Chutzpah* (1991), suggests he is not bashful. He once said, "Anybody who votes for Pat Buchanan knowing that he is anti-Semitic, knowing of his bigotry, is committing a political sin. You cannot live with yourself and vote for a man as evil and bigoted and as anti-Semitic . . . as Pat Buchanan." Buchanan responded, "What does he do for a living? He defends guys who murder their wives—[Claus] von Bülow and O. J. Simpson. And he runs around to get all this publicity. My view of the guy is that there is nothing that can pull him away from a television camera but the distant wail of an ambulance siren."

In 1983, the Anti-Defamation League of B'nai B'rith presented him with the William O. Douglas First Amendment Award for his "compassionate eloquent leadership and persistent advocacy in the struggle for civil and human rights." In presenting the award, Nobel laureate Elie Wiesel said, "If there had been a few people like Alan Dershowitz during the 1930s and 1940s, the history of European Jewry might have been different." Rabbi Irving Greenberg included Dershowitz, along with Wiesel, as prime examples of "modern-day rabbis" who teach Torah in a secular context.

Professor Dershowitz has held many positions in legal institutions and professional organizations. He is a member of the District of Columbia, Massachusetts, and U.S. Supreme Court bars. He has served on the boards of directors of the Society of American Law Teachers and the American Civil Liberties Union, the advisory boards of the Civil Liberties Union of

Massachusetts and the International Parliamentary Group for Human Rights in the Soviet Union, and as a member of the executive committee of the Assembly of Behavioral and Social Sciences of the National Academy of Sciences.

The New York Criminal Bar Association honored Dershowitz for his "outstanding contribution as a scholar and dedicated defender of human rights." The Lawyers' Club of San Francisco has honored him as a "Legend of the Law," and the Atlanta Bar Association included him in the category of legal "superstar." NBC selected Dershowitz as a participant on the U.S. team to debate a trio of Soviet representatives on a nationally televised confrontation, and, after the debate, William F. Buckley proposed the U.S. team for Medals of Freedom.

Dershowitz is a prolific author, and his literary achievements include not only works on law but critiques of Jewish life in the United States and fiction. His books on law demonstrate great variety, ranging from his early work on psychiatry and law to his most recent title, *The Genesis of Justice: 10 Stories of Biblical Injustice That Led to the 10 Commandments and Modern Law* (2000), and include *Sexual McCarthyism* (1998), *Reasonable Doubts* (1996), *The Abuse Excuse* (1994), *Contrary to Popular Opinion* (1992), and *The Best Defense* (1982). In *The Vanishing American Jew* (1997) and *Chutzpah* (1991), Dershowitz writes about the consequences of assimilation for American Jews and their place in U.S. society.

He has also published hundreds of articles in a wide range of magazines and journals. These include the most prestigious of scholarly journals, such as the *Harvard Law Review, Yale Law Journal, Stanford Law Review,* the *Journal of Legal Education, American Bar Review Journal,* and *Israel Law Review.* His articles appear regularly in the top periodicals that emphasize commentary on public issues, such as *The Nation, New York Review, Saturday Review, Commentary, The New Republic,* and *Harper's.* Dershowitz has even been published in such diverse publications as *New Woman, TV Guide, Sports Illustrated, American Film, Good Housekeeping,* and *Penthouse.*

His novels, *Just Revenge* (1999) and *The Advocate's Devil* (1994), tell stories about complex issues in legal ethics. Dershowitz's writing on legal ethics strike many of his detractors as odd. He admits, "Almost all of my own clients have been guilty," (Dershowitz 1982, xiv). He receives hate mail, both of an anti-Semitic nature and related to his clients. He received an especially large amount of hate mail after O. J. Simpson's acquittal in the murder of his wife. Pundits on the right and the left, including radical lawyer and former friend William Kunstler, see Dershowitz as greedy and attention seeking. During the O. J. Simpson trial, Dershowitz's comments incensed the Los Angeles Police Department, whose chief, Willie Williams, called him a liar and demanded an apology. Dershowitz is rumored to

charge some four hundred dollars an hour for his services, but about half his casework is done pro bono. He claims, "I have never in my life done anything for the money."

— Ronald Kahn

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DEWEY, THOMAS E.

(1902–1971)

Better known today as a two-time unsuccessful Republican candidate for president, Thomas E. Dewey first came into the public eye as a hard-driving New York prosecutor. He served three terms as governor of New York and was a counselor to Presidents Dwight D. Eisenhower and Richard Nixon, although by the time they came to office he had resumed the full-time practice of law and generally avoided the public spotlight.

Dewey was born in 1902 in Owosso, Michigan, to George and Annie Dewey; Dewey's father was a Republican newspaper editor who eventually became a postmaster. Dewey, who had a well-trained baritone voice, initially attended the University of Michigan (and the Chicago Musical College where he met Francis Eileen Hutt from Oklahoma, whom he would later wed) with a serious interest in music, but he gradually directed his attention toward law, attending Columbia Law School after graduating from Michigan.

After visiting Europe, where he first grew his signature mustache

Thomas E. Dewey
Library of Congress

(with his boyish but handsome face and somewhat distant demeanor, Dewey would later be likened to the plastic groom on the wedding cake), Dewey returned to New York, working first with the firm of Larkin, Rathbone & Perry and then with MacNamara & Seymour. Dewey also became active in local Republican politics. Then offered a job by U.S. attorney George Z. Medalie as chief assistant with responsibility over fifty to sixty other lawyers, Dewey quickly proved himself under Medalie's able tutelage, helping to win a conviction for James J. Quinliven, a vice squad officer accused of taking bribes from speakeasies and brothels, and winning a stock manipulation case against the Manhattan Electrical Supply Company. A federal agent working with Dewey during this period described him as "the perfectionist to end all perfectionists" and noted that "his thoroughness is beyond description" (Smith 1982, 115). In addition to his reputation for meticulous combing through financial records, Dewey also developed a reputation for arrogance.

Continuously groomed by Medalie, Dewey was chosen by nine federal judges to serve out the five weeks remaining in Medalie's term when Medalie returned to private practice. Dewey was the youngest person in New York ever to serve in this capacity. In this role, Dewey was able to win an income tax evasion case (sometimes compared with the prosecution of Al Capone) against bootlegger Waxey Gordon. A Dewey biographer notes that Dewey and his agents sifted through more than two hundred thousand deposit slips "piecing together earlier transactions, tracing wealth and its sources deeply camouflaged behind Gordon's subordinates" (Smith 1982, 134). At trial's end, Dewey won the accolades of the judge, Frank J. Coleman, who said, "It is my firm conviction that never in this court or in any other has such fine work been done for the government" (Walker 1944, 43).

Democrats replaced Dewey at the end of his term, and he returned briefly to private practice, but his reputation as a prosecutor had not been forgotten, and he was named as counsel for the New York Bar in the prosecution of Judge Harold L. Kunstler for being on the take, and he was appointed as a special assistant to the attorney general to handle the appeal of Waxey Gordon. From 1935 to 1937, Dewey was appointed by New York governor Herbert Lehman as a special prosecutor charged with investigating organized crime, and it was in this capacity, as well as in his subsequent role as district attorney for New York City, that Dewey garnered his greatest encomiums and criticisms.

Appointed special prosecutor in part by pressure brought about by outspoken New York clergyman G. Drew Egbert and in part by a semi-runaway grand jury that brought pressure to bear on elected officials, Dewey had the finances and staff resources that were typically unavailable to ordinary dis-

trict attorneys. Dewey set up shop on the fourteenth floor of Woolworth's sixty-story Cathedral of Commerce, where he could seal off the operation from unwanted intruders and where he and his fellow prosecutors had 10,500 square feet of space in which to pursue their work at the frenetic pace that Dewey demanded and in which to temporarily house individuals arrested in mass roundups. Beginning with a half-hour radio address in which Dewey assured New Yorkers that he was out to prosecute racketeers and not to get labor (a particular concern among New York Democrats), Dewey developed friendly relations with the press, worked through blue-ribbon juries and judges who were free of Tammany Hall influence, utilized the element of surprise in rounding up the accused, and used the "joinder indictment," or "Dewey Law," through which he was able to combine several prosecutions into one.

As a special prosecutor, Dewey busted rackets involving the trucking industry, restaurants, the poultry industry, electrical contractors, brickmakers, and the garment trading industry. Altogether, Dewey won seventy-two of seventy-three prosecutions (Beyer 1979, 21). His most famous prosecution was that of "Lucky" Luciano, who was charged with masterminding the New York prostitution racket—and who appears to have been responsible for ordering the killing of Dutch Schultz, when, during Dewey's earlier investigations, Schultz had attempted to put out a contract on him (Smith 1982, 170–173). Initially skeptical of Luciano's influence, after being persuaded of Luciano's role by an assistant, Eunice Carter, Dewey eventually fingered him as the prostitution kingpin of New York, thereby taking some of the luster off Luciano's more glamorous connections with bootlegging. Dewey succeeded in extracting Luciano from Hot Springs, Arkansas, and returning him to New York—after Luciano's conviction, entertainer George Jessel answered the question, "What's the fastest way of getting to Hot Springs?" by answering, "Join a mob and have your name brought to Dewey's attention" (Smith 1982, 207).

During the prosecution, Dewey noted that "we can't get bishops to testify in a case involving prostitution" and "we have to use the testimony of bad men to convict other bad men" (Walker 1944, 54). Dewey succeeded in convincing New York editors and reporters that Luciano was the prostitution kingpin, although there are still those who remain skeptical about Dewey's mass arrests and continuing incarceration of prostitutes before trial, the inducements that Dewey offered to witnesses who testified against Luciano, and about the breadth of Luciano's own power. Nonetheless, Dewey's exploits captured the popular imagination and were celebrated in the movies and on the radio series *Gangbusters*.

Dewey had committed to become a senior trial attorney with John Foster Dulles in the well-heeled New York firm of Sullivan & Cromwell (Beyer

1979, 26), but he ran successfully instead for the office of district attorney of New York under the fusion ticket with the colorful Fiorello La Guardia. As district attorney, Dewey continued to focus on prosecuting governmental corruption and organized crime, and did so fearlessly. Once threatened by a caller who promised to kill him on the way home from work, Dewey carefully followed his usual route home, insisting only that the lights in the car be turned on (Smith 1982, 30). Largely due to press reports of his exploits, Dewey, who was second only to Walt Disney in being named Man of the Year in 1936 (Beyer 1979, 21) and was often referred to as "Jack the Giant Killer," launched an unsuccessful campaign against Lehman for governor of New York in 1938 and went into 1940 with some hope for the Republican nomination for president. The nomination went instead to Wendell Willkie, who was considered more experienced in foreign affairs.

Still in the limelight, Dewey successfully ran for governor of New York in 1942 and served three successive four-year terms in this office (the first Republican to be reelected in over thirty years), establishing a record as a progressive but fiscally conservative politician. His accomplishments included the establishment of New York's state university system, construction of the New York State Thruway, reform of the state's mental hospitals, reform of the state police, and the adoption of strong civil rights legislation (Rae 1999, 522).

In 1944 and 1948, Dewey ran as the Republican nominee for president. Although ultimately unsuccessful, his 1944 campaign was the Republican party's strongest showing in almost two decades. Dewey recaptured the Republican nomination in 1948, partly as a result of a successful radio debate in Oregon in which Dewey affirmed his civil libertarian principles by arguing against rival Harold Stassen's proposal to outlaw the U.S. Communist party by contending that "you can't shoot an idea." The 1948 campaign, in which he ran as head of the ticket with former New York governor and future chief justice Earl Warren of California, is the better known of his two presidential races. Dewey's apparent complacency in the face of Harry Truman's successful attacks on the Republican "do-nothing" Congress apparently contributed to Truman's successful upset and Dewey's continuation in the New York state house. Alice Roosevelt Longworth reacted acidly, "We should have known he couldn't win. A soufflé never rises twice" (Stolberg 1995, 260).

Strongly committed to a bipartisan foreign policy and to internationalism, Dewey helped Dwight D. Eisenhower beat back the threat he himself had earlier faced from the isolationist senator Robert Taft of Ohio and capture the Republican nomination in 1952. Dewey, who identified with Richard Nixon's working-class background, was also influential in the selection of Nixon as vice-president. In 1955, Dewey, who had early in his ca-

reer stated his ambition to head a major law firm, retired from elective office and founded Dewey, Ballantine, Bushby, Palmer & Wood, a successor of sorts to the Root-Clark firm originally founded by Elihu Root in 1909. Announcing, "I'm going to be a full-time lawyer," and that "when people come to see Thomas E. Dewey, he's going to be here," Dewey became an active partner and administrator and was rumored to have brought in an additional ten million dollars in business, including business from the Chase Manhattan Bank and several foreign clients (Smith 1982, 620–621).

Although Dewey focused on his legal practice, presidents often consulted him. However, Dewey eschewed the spotlight and turned down an offer by president-elect Nixon to appoint him as chief justice of the United States. (It is not clear whether Eisenhower had made a similar offer when Chief Justice Frederick Vinson retired.) (Smith 1982, 605) Dewey relished his return to the practice of law and enjoyed foreign travel.

Dewey's wife (with whom he had two sons) died of cancer in 1970; Dewey subsequently pursued a romantic relationship with Kitty Carlisle Hart, but she had turned down a marriage proposal shortly before his death of a heart attack in Bal Harbor, Florida, on March 16, 1971.

At a time when special prosecutors and the laws that created them are being reexamined, it seems clear that Dewey parlayed his successes as a prosecutor into political capital. Critics who believe that Dewey's ambitions were more prominent than his desire for justice argue that Dewey saw his prosecutorial work "as a stepping-stone to the governorship and the White House" (Stolberg 1995, 65). Similarly, such critics have argued that the Dewey trials "stand as testament to the elasticity and fragility of constitutional rights during perceived crime waves" (Stolberg 1995, 5). Dewey could alternate between extreme cockiness and self-righteousness both in the courtroom and on the stump; he also was known for his fastidiousness, often waiting for someone else to open doors and wiping his hands with a handkerchief when he had to touch the handle.

When on a roll, Dewey could be an extremely effective cross-examiner, but in a trial involving Tammany boss Jimmy Hines, Dewey arguably made a mistake in introducing improper evidence (remedied in a retrial after Dewey calmly announced, "We're going to start all over") that suggested "a weak understanding of evidential rules" (Stolberg 1995, 242). It might be argued that he was at best "a prosecutor, an administrator, the head of an office," rather than a "trial lawyer" (Stolberg 1995, 242). Dewey's inventiveness as a prosecutor and his ability to muster public opinion against crime were formidable, however, and there were times when Dewey's courtroom tactics would rival those of the best trial lawyer. Thus, during the retrial of Jimmy Hines, Dewey psychologically dissuaded him from testifying by

bringing in a large file cabinet and preparing to call Hines's mistress to contradict him had he decided to take the stand (Stolberg 1995, 241).

— *John R. Vile*

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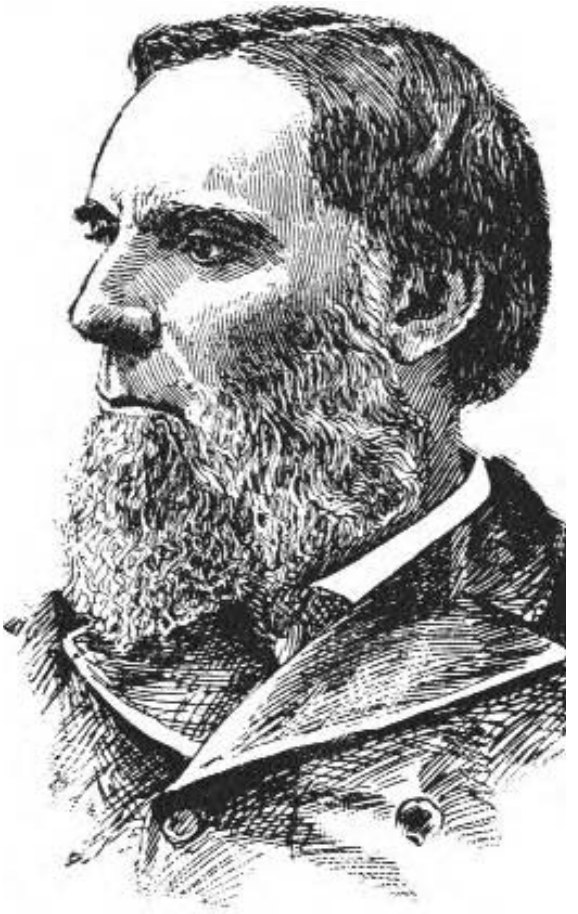
DILLON, JOHN FORREST

(1831–1914)

John Forrest Dillon's legal practice and scholarship complemented the development of the railroad industry and the Republican party, two entities that were often intertwined during his lifetime. The Irish-descended Dillon was born to Thomas Forrest Dillon and Rosannah Forrest Dillon in Montgomery County, New York. The family moved to Davenport, Iowa, when John was seven. Although he lacked a formal education, Dillon was a voracious reader, and after three years of study, he earned a Doctor of Medicine degree from a branch of the University of Iowa in Davenport in 1850. Within six months, a hernia, which rendered unsafe the horseback riding necessary for the practice of medicine in mid-nineteenth century Iowa, motivated him to emulate a friend by the name of Howe, whom he had met in Farmington, Iowa, and study law. Appropriately enough in light of his background, Dillon would go on to spend most of the winters of the 1870s lecturing on medical jurisprudence at the University of Iowa (Cushman 1928, 311).



John Forrest Dillon
North Wind Picture Archives

Struggling for a legal education in a mode similar to that of another future prominent Republican officeholder and supporter of railroads, Abraham Lincoln, by diligently studying books that Mr. Howe had recommended, Dillon gained admission to the Scott County bar in 1852. His election to the position of county prosecuting attorney came within months and was rapidly followed by both election and appointment to higher judicial positions. He won election in 1858 as judge of the Seventh Judicial District of Iowa, and in 1862—the same year he was awarded an honorary LL.D. degree by Iowa College and Cornell College of Iowa—he was elected to the Iowa Supreme Court as a Republican (Chase et al. 1976, 72). He served in the capacity of chief justice during his last two years of service on the court. During that time—first in *Clinton v. Cedar Rapids and Missouri Railroad Co.* (1868) and subsequently in *Merriam v. Moody's Executors,* 25 Iowa 163, 170 (1868)—he initially enunciated what has become known, to virtually all students of state and local government, as Dillon's Rule. This rule has been accurately summarized as "a rule that limits the powers of local governments to those expressly granted by the state or those closely linked to expressed powers" (Bowman and Kearney 1999, 37).

The already-published Dillon went on to be most noted as a prolific legal scholar and has been most frequently cited for his volume *Commentaries on the Law of Municipal Corporations,* which ran into five editions. He dedicated the fifth edition to the American Bar Association, which elected him as its president in 1891. Dillon had been elected to membership in l'Institut de Droit International in 1884. Although he was neither an original nor a philosophical thinker, he wrote well and produced renowned compilations of nineteenth-century legal thought (Twiss 1962, 184). Besides his magnum opus, *Municipal Corporations,* other works he produced include *U.S. Circuit Court Reports* (5 vols., 1871–1880), *Removal of Causes from State to Federal Courts* (1875), and *Municipal Bonds* (1876) (Johnson 1904).

In 1869, President Ulysses S. Grant appointed Dillon to a position on the newly created Eighth Judicial Circuit, where he served for a decade. From this vantage point, he became acquainted with lawyers throughout what was then the western section of the nation; this served to propel him into active participation in the newly formed American Bar Association. The circuit included Arkansas, Kansas, Missouri, Nebraska, and Minnesota during the entirety of his tenure, and Colorado, after it was admitted to the Union in 1876. All of these state bars honored Dillon when he resigned in 1879 ("Ex-Judge Dillon" 1914).

Dillon resigned to accept a law professorship at Columbia College, where he served for three years. Early in the presidency of Rutherford B. Hayes in March 1877, he was considered for a vacancy on the U.S. Supreme Court (Warren 1926, 565), but, in a practice that was common until the last

decades of the twentieth century, Hayes appointed John Marshall Harlan of Kentucky, a man who had never served in high judicial office (Warren 1926, 566). In *Atkins v. Kansas* (1903), Harlan concurred with the majority of the Supreme Court when they held, in a view thoroughly compatible with the outlook of Dillon, that municipal corporations are but agents of states. Indeed, Harlan quoted an opinion that Dillon had delivered as chief justice of Iowa to bolster his argument (191 U.S. 207, 221).

While he taught real property and equity at Columbia, Dillon opened a law office in New York City. Following his resignation from Columbia in 1882, he actively practiced law in New York until shortly before his death. In addition to teaching at Columbia, Dillon accepted the position of Storrs Professor at Yale University for the 1891–1892 academic year, in which capacity he delivered thirteen lectures. The premier theme of his lectures, as well as of his 1892 presidential address to the American Bar Association, was that it is "the peculiar function of the lawyer and jurist to uphold the 'great primordial rights' of contracts and private property, and thus to protect the people against their own temporary caprice" (Twiss 1962, 185). Law in the United States, he argued, was based on English aristocratic notions, not on French conceptions of democracy, so they did not preclude the concentration of wealth (Twiss 1962, 188–189). In addition to being influenced by English ideas, Dillon also cited and was strongly influenced by the Social Darwinist thought of Yale University sociology professor Herbert Spencer.

As one who frequently appeared before the Supreme Court, one of its decisions that appalled Dillon was its opinion affirming a New York Court of Appeals decision upholding legislation prohibiting the manufacture of oleomargarine. Dillon believed that individuals engaged in the manufacture of a legal, in this case even beneficial, product should not be impeded. Yet Dillon also reasoned that a municipal corporation could exercise no power that state legislatures did not expressly grant. It could neither fund lavish banquets without state legislative authorization (since that would lead to increased taxation that would impose on the productive members of society), nor could it purchase uniforms for individuals to participate in Fourth of July parades. Municipal corporations should always leave to private enterprise those tasks that such enterprise can perform more ably. Legislatures should exercise care as to where they grant municipalities discretion, as Dillon notes in the following passage:

> Some of the evil effects of municipal rule have arisen from legislation unwisely conferring upon municipalities, at the suggestion often of interested individuals or corporations, powers foreign to the nature of these institutions, and not necessary to enable them to discharge the appropriate functions and

> duties of local administration. Among the most conspicuous instances of such legislation may be mentioned the power to aid in the building of railways, to incur debts, often without any limit or any which is effectual, and to issue negotiable securities. (Dillon 1890, 29)

Dillon's lectures were published as a volume entitled *The Laws and Jurisprudence of England and America,* which he dedicated to his wife, Anna Price Dillon, the daughter of Hiram Price of Iowa. They had married in 1853 and had two sons and a daughter. Anna and their daughter, Mrs. Oliver, were lost at sea in the catastrophic sinking of the *Bourgogne* in 1898. Dillon was not with them because he was incapacitated with a broken leg at his estate, Knollcrest, in rural Far Hills, New Jersey. There he would live a full and socially engaged life at his beloved home in Far Hills until shortly before his death at age eighty-three on May 5, 1914. At the time of his death, he had been ailing for six months but had given up his legal practice only a month before his death. He spent his last month in the home of his daughter-in-law, Mrs. John M. Dillon. His surviving son, attorney Hiram Price of Topeka, Kansas, never left his bedside during the two weeks preceding his death.

Among other achievements that Dillon attained at Knollcrest was his editing of and writing a fifty-eight-page introduction to his masterful volume, *John Marshall: Life, Character and Judicial Services,* which he completed in December 1902. Dillon also worked on numerous addresses there, including "The Inns of Court and Westminster Hall," "Iowa's Contribution to the Jurisprudence of the United States," "Chancellor Kent, his Career and Labors," "Law Reports and Law Reporting," and "Bentham and His School of Jursiprudence." His legal outlook and practice certainly garnered favor from the wealthy and major corporate interests in the United States.

Among the clients of Dillon's firm of Dillon, Thomson & Clay at 115 Broadway in New York City was the railroad magnate Jay Gould. Dillon served as general counsel for the Union Pacific Railroad, of which his uncle, Sidney Dillon, was president, and he handled an important case for the Manhattan Elevated Railway Company, of which the same uncle was a director (Twiss 1962, 183). He was also general counsel of the Western Union Telegraph Company (Chase et al. 1976, 73), and he wrote extensively about both railroad and telegraph companies in his treatise on municipal corporations. He dealt with such topics as the location of telegraph poles and issues arising from the rights of way granted to horse-drawn trolleys and elevated railroads. Benjamin R. Twiss has written that "He successfully defended the Western Union against the imposition of a state tax on messages on the ground that it was an unconstitutional burden upon interstate commerce"(Twiss 1962, 183). Similarly, Dillon made notable arguments in

United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897). Benjamin R. Twiss has summarized Dillon's interpretation of the Sherman Anti-Trust Act:

> But the contribution for which Dillon was given the greatest credit in later years was his assertion that the Sherman Act did not prohibit *reasonable* restraints of trade not detrimental to public interests. He based this on a declaration that the statute merely enacted the common law on restraint of trade, which had of late come to uphold contracts similar to the railroad agreement as not contrary to public policy although in general restraint of trade. Surrounding circumstances are to be considered in determining *whether the contract is or is not unreasonable,* was the correct doctrine. (Twiss, 1962, p. 191)

Still, Dillon's outlook was about more than corporate advocacy. He agitated strongly against slavery before the Civil War. On the bench he ruled that a Memphis ordinance prohibiting African-Americans from being on the streets after dark was an unconstitutional denial of the Fourteenth Amendment's guarantee of equal protection.

In a prophesy that proved sadly incorrect, Dillon predicted in the thirteenth of his lectures delivered at Yale University that arbitration would make war a rare occurrence in the twentieth century.

Dillon was ecstatic about the development of telegraph communication and railroad transportation in the United States, particularly as they affected the practice of law. Known for his own lengthy orations, he firmly believed that printed briefs were woefully inadequate substitutes for oral presentations and arguments. Consequently, he reveled in the fact that it was now possible, due to the greater ease of transportation made possible by railroads, for lawyers to present their own cases to the U.S. Supreme Court without having to rely on members of the Washington or Baltimore bars to do so. Most laudably, he posited that the advent of the national railroad and telegraph systems were making lawyers less provincial and leading to a greater uniformity among laws throughout the nation. Dillon himself argued hundreds of cases and addressed bar associations throughout the nation. In the obituary published the day after his death, the *New York Times* observed that during his courtroom presentations, Dillon would sometimes note that "'I decided that point when I was on the bench,' whereupon he would send for a volume of his circuit court reports and quickly turn to the particular case, establishing a precedent." Dillon's interest in railroads complemented his work on municipal corporations. Municipal corporations were heavily involved in subsidizing and promoting railroad development in the nineteenth century. Indeed, municipalities as varied as Chicago, At-

lanta, and Crowley, Louisiana, would prosper as the railroads developed. Others incurred debilitating financial liabilities.

If a state legislature granted a railroad the right of way through a city, the municipality had to defer to its judgment. This was at a time when a number of state legislatures and state governments in general were considered to be under the undue influence of railroads. This was particularly true with respect to California, where Republican railroad magnate Leland Stanford served as governor of the state and was chosen by the state legislature to serve in the U.S. Senate. Concern about such influence was one reason California was a pioneer in the development of the initiative and referendum as a mechanism to circumvent state legislatures.

In *Commentaries on the Law of Municipal Corporations,* Dillon lucidly distinguished between the degrees of authority that municipal corporations may exercise. With regard to ordinary steam railroads that connect towns, he points out that explicit "legislative authority is necessary to warrant them to be placed in the streets or highways" (Dillon 1890, 878). Still, he observes, "The legislature may delegate to municipal or local bodies the right to grant or refuse such authority" (Dillon 1890, 878). With respect to the construction of horse railways that are to be used for transportation within the municipality, an express grant of power is not required for their construction, although implied power is not sufficient for a municipal corporation to "confer franchises or authorize the taking of tolls. This must come from the legislature" (Dillon 1890, 879).

The New York legislature appointed Dillon to serve on the commission that wrote the charter for the City of New York, which took effect on January 1, 1898. By uniting four boroughs, this document propelled New York ahead of Chicago to make it the largest city in the United States, a status that it still retains.

Whereas Plato and Aristotle founded the discipline of political science largely if not entirely because of their concern that an informed citizenry should be able to function properly in the polis, or city-state, Dillon took the stand that the Greek view of the polity was not pertinent to modern times, since the Greeks did not have our conception of the nation-state. Hence, the municipal corporation could in nearly all circumstances only perform functions that were clearly delegated to it by its state constitutions and legislatures.

One obvious flaw in his view that municipalities derive all their powers from states is that so many of them predate their respective states. Natchitoches, the oldest settlement in what would become the Louisiana Purchase, long predates the modern state of Louisiana and the United States itself. The same is true vis-à-vis St. Augustine and the state of Florida.

Nonetheless, the reasoning of John Forrest Dillon has become a canon of jurisprudence in the United States with no serious competitive theories about the nature of state government and local government relations. Most other state courts have upheld this precedent, which was upheld by the U.S. Supreme Court in *Atkin v. Kansas*, 191 U.S. 207 (1903) (Grant and Omdahl 1997, 305–306, 315). Undercutting the thrust of the decision with respect to municipal corporations was the increasing tendency of legislatures in the twentieth century to grant "home rule" charters, which permitted local communities to structure their local governments as they deemed most appropriate. Still, Dillon's reasoning prevails even today among members of the bench with respect to the quasi-corporations that are counties (Grant and Omdahl 1997, 320).

—Henry B. Sirgo

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DOAR, JOHN MICHAEL

(1921–)

JOHN DOAR

Sam Garrison (assistant minority council), Albert Jenner (middle), and John Doar (right) deliver the minority report during the Judiciary Committee meeting for Nixon's impeachment, July 1974. (Wally McNamee/Corbis)

PERHAPS ONE OF THE MOST influential lawyers playing a role in the civil rights movement, John Michael Doar was an effective trial lawyer whose ability to achieve results landed him a place in U.S. history. He has become famous for his accomplishments both inside and outside of the courtroom and is credited by many for helping turn the tide in the civil rights movement. Doar selected his battles carefully and won the battles that he chose to fight. His commitment to the movement led to his position as lead counsel in a jury trial that changed the course of U.S. history. That case, *U.S. v. Cecil Price* (1967), culminated in the trial that became infamously known as the *Mississippi Burning* trial. Very few jury trials in the United States had a more substantial impact on our nation, and very few trial lawyers have had as much commitment to their causes as did John Doar. Throughout his legal career, Doar perfected the art of persuading judges and jurors in hostile environments, and in the process, he persuaded our nation as well.

John Doar was no stranger to the law or to legal success. He was born into a family of lawyers on December 3, 1921, in Minneapolis, Minnesota. His father founded a law firm in New Richmond, Wisconsin, that became one of the most prominent firms in Wisconsin. It was in Wisconsin that John Doar grew up and was encouraged to pursue the law as a profession by his father.

Doar left Wisconsin in 1940 to pursue his undergraduate studies at Princeton University. He received his A.B. degree in 1944 and then attended Boalt Hall School of Law at the University of California, where he earned his LL.B. in 1949. After successfully completing his legal education, he was admitted to the California and Wisconsin bars in 1950, and he returned to Wisconsin and practiced privately for ten years. It did not take long, however, for Doar to become bored with the everyday rigors of private practice. His political mindset compelled him to leave the world of private practice behind and pursue greater legal endeavors with governmental affairs.

Doar came to the civil rights movement in an unusual manner. In 1960, he became an attorney with the U.S. Department of Justice. Contrary to popular belief, he did not join the Justice Department because he had any visions of coming to the aid of the oppressed African-American men and women. Rather, his political affiliation as an active member of the Republican party greatly influenced and prompted this move. Doar joined the Justice Department because he wanted to enforce federal voting rights laws more vigorously, and he desperately wanted to break the political monopoly that Democrats then had in the South. He experienced an epiphany when he went to Tennessee and prosecuted his first voting rights case. While there, he saw firsthand the violence and fear that southerners used to prevent African-Americans from voting. Doar left Tennessee a changed man. He knew that his calling was to help the oppressed. As one civil rights historian put it, "the experience would make it impossible for him ever to go home to Wisconsin" ("Wisconsin's Legal History" n.d.).

After his awakening in Tennessee, Doar threw himself headlong into the civil rights movement. He became a proven success as an advocate, both inside the courtroom and out. In 1962, a federal court ordered the University of Mississippi to accept James Meredith as the university's first African-American student. The governor of Mississippi, Ross Barnett, stood at the steps of the university and twice turned Meredith away, refusing to let him register. John Doar appeared with Meredith, and Doar used his advocacy skills in an attempt to convince Governor Barnett that Meredith should be permitted to register for classes. He stood with Meredith on the university's steps arguing and demanding that Governor Barnett's attempts to block the registration cease. Doar addressed Governor Barnett in an aggressive tone shouting, "I call on you [Governor] to permit us to go in and see Mr. Ellis and get this young man registered" ("Wisconsin's Legal History" n.d.). His demands were met with shouts and jeers from the hundreds of angry protesters. Doar's aggression and persistence eventually prevailed, however, and James Meredith was escorted into the university by armed troops and allowed to register for classes on that day.

Moman Pruiett

Few lawyers have lived more colorful lives than did attorney Moman Pruiett (1872–1944), who practiced law in the Indian territory in the American Southwest. If his autobiography is accurate, Pruiett defended 342 men accused of murder and won 304 acquittals and had only one client, later pardoned by President William McKinley, who received the death penalty (Pruiett 1945, 32).

Few individuals would have appeared to be unlikelier candidates for the bar. Born aboard a riverboat to parents (his father was a butcher) who always seemed to be in financial distress, Pruiett, who had only the most rudimentary education, was sent to jail in Arkansas at age sixteen for forgery and still later in Texas for robbery, after evidence of his previous offense was introduced at his trial. It was here that Pruiett, who professed his innocence, made a most unlikely threat. After attributing his conviction to the introduction of his prior record and "the trail of the serpent following me," Pruiett proclaimed,

> You think you can break me with it, but by God, you can't. As sure as I live I'll make you sorry. I'll empty your damned jails, an' I'll turn the murderers an' thieves a'loose in your midst. But I'll do it in a legal way. (Pruiett 1945, 52)

After serving his time and changing his first name from Moorman to Moman, Pruiett began hanging around courthouses and caught the attention, at age twenty-three, of U.S. district judge David E. Bryant, who fulfilled Pruiett's mother's dream by swearing him in as a lawyer.

Pruiett has been likened to P. T. Barnum (Uelmen 1982, 36), who learned from the streets rather than from books of law. In one notable case, Pruiett conducted a thorough voir dire of the jury pool that demonstrated that at least one of the jurors whom the judge had seated had come believing the defendant to be guilty and thus set the stage for a successful appeal (Uelmen 1982, 36). On yet another occasion when the evidence clearly pointed to the guilt of his client in killing his lover's husband, Pruiett was able to hang the jury on the question as to whether the husband was in fact dead or whether he was participating in insurance fraud (Uelmen 1982, 37).

In 1935, the Oklahoma Supreme Court, recognizing Pruiett's failing health and his service to the profession of law for more than forty years, gave Pruiett a one-year suspended sentence for his involvement in an extortion scheme (Uelmen 1982, 37).

Pruiett was criticized more for his role in exonerating so many defendants than for his own personal failing. Pruiett answered his critics in his autobiography:

> I made a lot of money, but I never turned down a criminal defense 'cause the accused didn't have the money to pay me. Maybe I have been indiscreet in my time. Maybe I have been a hypocrite, in some of the acts I've put on before juries, but let me tell you this. All the crookedness I ever poured into all the lawsuits I ever tried wouldn't amount to a tenth of what any of these big railroads or oil companies has crammed into a single case, just to cheat honest landholders out of their just rights. I can look 'em in the eye an' tell 'em to go to hell. I done mine for mercy. They done theirs for greedy gold. (Pruiett 1945, 574–575)

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In June 1963, Doar found himself in downtown Jackson, Mississippi, in the aftermath of the assassination of civil rights leader Medgar Evers. As tensions mounted and rioting crowds swelled, Doar became an advocate for peace and placed himself between angry African-American youths and lines of heavily armed police ready to move in with clubs and guns. "My name is John Doar," he shouted. "I'm from the Justice Department, and anybody around here knows I stand for what is right" ("Wisconsin's Legal History" n.d.). Once again John Doar prevailed by helping to prevent a full-scale riot from taking place on that day.

By 1965, Doar was the assistant attorney general heading the civil rights division of the U.S. Department of Justice and had become a key player in the civil rights movement. Doar then began making waves and achieving success inside the courtroom as well. He became known as the most forceful advocate within the Justice Department, and he aggressively prosecuted his voting rights cases. Doar declared that the Voting Rights Act of 1965 was "one of the greatest pieces of legislation ever enacted," and he worked tirelessly to combat the inequities of the law's enforcement ("Wisconsin's Legal History" n.d.). He traveled extensively throughout the South, ensuring that African-American applicants were not unfairly subjected to literacy tests, that voting registration centers remained open for required periods of time, and that local municipalities did not gerrymander African-American residents outside of voting districts. Doar experienced so much success with voting rights endeavors that he befriended then–Attorney General Robert Kennedy and began to serve as Kennedy's chief aide in the prosecution of voting rights violators throughout the South ("Wisconsin's Legal History" n.d.).

Doar's first major courtroom victory outside of the voting rights discipline occurred not in front of a jury, but in front of a federal judge by the name of Frank Johnson. In 1961, busloads of people waged a cross-country campaign to try to end racial discrimination at bus terminals. This group became known as the Freedom Riders, and their nonviolent protest was brutally received at many stops along the way. As a participant in many seminal civil rights movement events in the South, Doar witnessed firsthand the violent assaults in Alabama against the Freedom Riders, and he took it upon himself to seek an injunction based on the 1946 U.S. Supreme Court case of *Morgan v. Virginia,* which held that segregation on interstate buses was unconstitutional. This injunction was granted by Judge Johnson, and it helped prevent any future violent attacks on the Freedom Riders. This achievement, while seemingly small, was a precursor to Doar's role in the biggest civil rights trial of the era.

The stage was set for a major civil rights courtroom drama when three civil rights workers were killed in Neshoba County, Mississippi. Doar, who

was head of the Justice Department's Civil Rights Division, got the call to lead the prosecution in the case. In fact, Doar was the first federal official notified of the disappearance of the three workers near Philadelphia, Mississippi. At 1:30 A.M. on June 22, 1964, Doar received a telephone call from a Student Non-Violent Coordinating Committee worker from Atlanta who told him that the three workers were hours overdue from their trip to Neshoba County. Doar advised the worker to contact the Mississippi Highway Safety Patrol, and soon thereafter he authorized the FBI to enter the case.

After more than three years of investigation into Mississippi's deeply rooted and powerful Ku Klux Klan, Doar indicted and brought to trial eighteen men who were accused of participating in a Klan conspiracy to murder the three youths. The *Mississippi Burning* trial (*U.S. v. Cecil Price*) began on October 7, 1967, and throughout it Doar insisted that he was not accustomed to the role he had been called on to play in the case. After all, he had prosecuted several voting rights cases for the Justice Department, but those were civil matters. Remarkably, the *Mississippi Burning* trial was only his second criminal trial.

> May it please the Court, ladies and gentlemen of the jury, I'm not accustomed to the duty which I have attempted to perform here in Meridian for the last few days. Only once before have I acted as prosecutor for the government in a criminal case. I hope very much that you will understand the reasons I have come here, it's not because of any skilled experience that I am here, but only because I hold the office as head of the division with the Department of Justice, and it is my responsibility to try and enforce the law in which these defendants have been charged. (Doar "Closing Argument" n.d.)

Doar's obvious overplay of his "fish out of water" role as prosecutor in this racially and politically charged climate was somewhat disingenuous, however. It was certainly no accident that John Doar led this prosecution team. In fact, he was the obvious choice as lead prosecutor for this trial. Just two years earlier, he had successfully prosecuted a white supremacist named Collie Leroy Wilkings for the murder of Viola Liuzza in Alabama. This conviction was the first ever in Alabama for the death of a civil rights worker. As if that feat were not remarkable enough, he obtained that conviction in Alabama in front of an all-white jury. Here stood John Doar once again in front of an all-white jury attempting to convict several white supremacists in a southern town in a southern state.

This time, however, Doar had one more card stacked against him. He was not only attempting to convince an all-white jury to convict members of their own race, but he was trying this conspiracy case before one of the

most determined segregationist judges in the country, William Harold Cox. Judge Cox had been a constant source of problems for Justice Department lawyers who sought to enforce civil rights laws in Mississippi. For example, in one incident, Judge Cox referred to a group of African-Americans who were about to testify in a voting rights case as "a bunch of chimpanzees." Other examples of Judge Cox's obvious bias in favor of the white supremacist defendants were evident throughout the entire criminal process. He initially dismissed seventeen of the indictments on the ground that the men were not acting "under color of state law." The U.S. Supreme Court later overruled this decision, and eventually Doar successfully persuaded Cox to indict eighteen Klansmen.

John Doar's trial strategy was simple. Present the hard facts and evidence as in any other trial, while ensuring that members of the jury did not feel that the federal government had invaded or attempted to take over and govern this southern corner of the nation. He did a remarkable job of delivering this message and easing jurors' fears of the outside world taking over their state. He cleverly emphasized that this was a local matter, being handled by local folks, and that this was Mississippi's matter and would be handled as such.

> The federal government is not invading Philadelphia or Neshoba County . . . [but rather] these defendants are tried for a crime under federal law in a Mississippi City, before a Mississippi federal judge, in a Mississippi courtroom, before twelve men and women from the state of Mississippi. The sole responsibility of the determination of guilt or innocence of these men remains in the hands where it should remain, the hands of twelve citizens from the state of Mississippi. (Doar "Closing Argument" n.d.)

While downplaying the government's role, Doar skillfully focused the jurors on the national significance of their decision.

> This is an important case. It is important to the government, it is important to the defendants, but most of all . . . it's important to the state of Mississippi. What I say, what the other lawyers say here today, will soon be forgotten, but what you twelve people do here today will long be remembered. . . . If you find that these men are not guilty you will declare the law of Neshoba County to be the law of the state of Mississippi. (Doar "Closing Argument" n.d.)

John Doar battled not only the judge, opposing counsel, the jurors, and the rules of evidence in that Mississippi courtroom, but he also did battle with the entire southern mindset. Convincing twelve persons in a jury box

was one thing. Converting thinking that had become a way of life was an altogether different task. But Doar knew how to fight these uphill battles and to emerge victorious. After all, he had been winning one-sided fights since he joined the Justice Department in 1960. On October 21, 1967, after more than two days of deliberation, "Allen charges" (supplementary judge's instructions to a jury finding it difficult to reach a decision), motions for mistrials, and five unanswered notes to Judge Cox from the jury, John Doar got his convictions. This federal court jury convicted seven men for participating in a Ku Klux Klan conspiracy to murder three young civil rights workers.

The significance of Doar's victory cannot be overemphasized. Not only had he achieved a remarkable trial lawyer's feat by winning his case against all odds, but he had toppled one of the most powerful holdout hate groups in the South. His victory effectively brought an end to the Klan's rule and oppression of the Mississippi African-Americans and signaled the dawning of a new era in a nation of equality.

After winning what was undoubtedly the biggest case of his career, Doar left the Department of Justice in 1967 and moved to New York. There he became active in other areas of the civil rights movement, such as the local school desegregation controversy. His advocacy then again took a political turn in 1973 when he was chosen as chief counsel for the House Judiciary Committee's investigation of the Watergate scandal. Doar's ability to deliver the facts effectively in a hostile environment made him an excellent choice for this position. When he presented his proposed impeachment articles to the committee in 1974, he said that President Richard Nixon's actions constituted an obstruction of justice and involved "a continued, contrived, and continuing deception of the American people" (Aukofer 1998, 1). Doar won bipartisan praise for his efficient and effective presentation of the evidence that helped persuade many of his own Republican party that, notwithstanding party loyalty, they had to vote to impeach President Nixon. After Nixon resigned in 1974, Doar returned to private practice, and he continues to practice law in Washington with the firm of Doar, DeVorking & Reick, concentrating on general litigation in all federal and state courts. John Doar's civil rights activism and advocacy made him a living legend, which is honored each time the Justice Department presents the John Doar Award to people who have also distinguished themselves in the fight for civil rights. Fellow civil rights attorney William Taylor has said that Doar had "a clear vision of what was unjust and intolerable, and he kept focused on that." Doar is, Taylor said, "a great man, a hero" ("Wisconsin's Legal History" n.d.).

—Robert D. Howell

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DOUGLAS, STEPHEN A.

(1813–1861)

Stephen Arnold Douglas
Library of Congress

Although he is best known as one of the most influential political leaders of the 1850s, Stephen Arnold Douglas spent his early adult years as a respected lawyer and judge in Illinois, where he polished his political skills and extended his contacts, riding circuit with companions like his famous rival, Abraham Lincoln. Born of Scottish ancestry on April 23, 1813, in the village of Brandon, Vermont, Douglas was only several weeks old when his physician father, Stephen A. Douglass, died of a stroke. The infant's mother, the former Sarah Fisk, then went to live with a bachelor brother, Edward Fisk, on a nearby farm, where Stephen from an early age worked in fields and barns, apprenticed as a cabinetmaker, and attended a district school three months a year.

In 1830, after his mother married Gehazi Granger of Clifton Springs, New York, and his sister married Granger's son, Douglas followed them to Ontario County in the burned-over district, so named for its frequent religious revivals, where his stepfather en-

rolled him in the Canandaigua Academy. There he was active in political debate, arguing in favor of the reelection of Andrew Jackson as president in 1832. In January 1833, he began the study of law with a local attorney, but he soon discovered that to meet New York's requirements for a law license he would have to continue such studies for four more years. This impelled him to depart for the West in June 1833, seeking less rigorous requirements.

At that time, Douglas, having by then dropped the second *s* from his family name, was barely five feet tall and weighed no more than one hundred pounds, with an oversized head surmounting a frail body. He was ambitious and extremely assertive. A bout with malaria in Cleveland and a failure to secure clerical positions in law offices in Cincinnati, Louisville, and St. Louis kept him determinedly on the move until, sickly and impoverished, he finally managed to find employment teaching school in the village of Winchester in central Illinois. The following spring, still a month short of age twenty-one, he moved to Jacksonville, where he persuaded a justice of the Illinois Supreme Court to grant him a license to practice law, rented office space in the Morgan County courthouse, and advertised his services in the local newspaper (Capers 1959, 5–8).

In 1834, Jacksonville, described by contemporaries as "an island of New England influence" in a region of Illinois that had been settled mostly by border-state Southerners, had more lawyers than was warranted by the available legal business, and Douglas at first had few clients. His fortunes changed drastically, however, when he attended an overflow public meeting called to win support for a petition to request Congress to recharter the second National Bank, on which President Jackson had declared political war. After several of the community's leading lawyers, all Whigs, had attacked Jackson and his Democratic supporters, young Douglas spoke for an hour in the president's defense. So convincing were his arguments that the gathering proceeded to pass resolutions, presented by Douglas, backing Jackson and condemning the bank. Carried away on the shoulders of his new admirers, the "Little Giant," as they had begun to call him, soon saw his law practice flourish (Johannsen 1997, 24–26).

As a result of statewide publicity that Douglas himself did much to procure for the foregoing event, he rapidly became known as one of the leaders of the Jacksonian Democrats in central Illinois. This reputation followed him to the state capital, Vandalia, during the legislative session beginning in December 1834, at which time he worked as a lobbyist to pass laws taking the power of appointing men to certain state offices away from the Whig governor and vesting it in the legislature. After his bills passed, he was rewarded by being elected (by a margin of four votes) in a joint legislative session on February 10, 1835, to the office of state's attorney for the

First Judicial District of Illinois. Still very short and slight, and only twenty-one years old, he had little legal experience, owned no law books, and was interested mainly in politics, not in the practice of law. Nevertheless, he traveled with the court through the eight counties of his sprawling district, cementing valuable political alliances while prosecuting all criminal cases and some civil cases in which the state of Illinois was involved. Although his knowledge of the law remained meager, he was effective with juries, and his quick wit compensated for his lack of legal learning and made him more than a match for older and more experienced opponents (Pratt 1949, 12–14; Johannsen 1997, 26–33).

An early encounter with John T. Stuart made Douglas a local legal legend. Stuart—a veteran Whig attorney, law partner of Abraham Lincoln, member of the legislature, and future member of Congress—was determined to humble the obnoxious stripling who had masterminded the ouster of Stuart's Whig friend, John J. Hardin, from the state's attorney job. In a pompous and contemptuous manner, Stuart moved that all of the indictments that Douglas had hurriedly drawn up for McLean County be quashed because the state's attorney had allegedly misspelled the name of the county in each one of them. When Judge Stephen T. Logan, also a Whig and Lincoln's second law partner, and a future congressman as well, asked for Douglas's response, he was able, because of what was later proved to be an error in the locally printed version of the law establishing McLean County, to show that his spelling was identical with that enactment, and the attempt to chastise and humiliate him therefore failed. Nevertheless, his indictments and briefs continued to be carelessly composed during the short period remaining of his service as state's attorney, as he gravitated more and more toward politics and away from the law. Not required to ride circuit from late October until early March, during which time the legislature was in session, he spent most of the winter months at the capital, neglecting both his duties as state's attorney and his private law practice, working to strengthen the Illinois Democratic party and undermine the Whigs (Johannsen 1997, 32–35).

One of Douglas's achievements during this period was the successful introduction of the nominating convention system, based on the practices of New York's Albany "Regency," into Illinois Democratic party politics. As an active member of such conventions, he soon won election to the state house of representatives, joining the tenth general assembly at Vandalia in November 1836. His energetic backing of the candidacy of Martin Van Buren for president that year procured for him a presidential appointment in March 1837 to become the register of the Illinois Land Office at Springfield, the new state capital. Even though he promptly resigned both his legislative seat and his state's attorney position, the salary of this office, and

the relative leisure it provided, enabled him vastly to increase the number of his many real estate speculations and to travel freely on the far-flung Eighth Judicial Circuit promoting the Democratic party and, naturally, himself. In November 1837, although he was still a year short of the constitutional age of twenty-five for members of Congress, he was nevertheless nominated for U.S. representative by his party at a district convention at Peoria. His Whig opponent in the 1838 election was his former antagonist, John T. Stuart, who with the aid of his law partner, Abraham Lincoln, won the election by only thirty-six votes (Capers 1959, 10–12; Pratt 1950, 37).

After briefly contesting the election results, Douglas resigned his land office position in March 1839 to become virtually a full-time organizer, lobbyist, and campaigner for the Illinois Democratic party, while continuing to travel the judicial circuit. It was during the years 1839 and 1840 that he first engaged in a series of political debates with Abraham Lincoln (at the time a state legislator from Springfield), precursors of their more famous debates in 1858. Douglas's incessant campaigning resulted in his selection by a Democratic governor and his confirmation by the state senate on November 30, 1840, as Illinois secretary of state (Johannsen 1997, 73–87).

As he moved rapidly from one public office to another, Douglas had relied on his law practice to provide economic stability. Preferring to work alone, he did not form partnerships with other lawyers, except temporarily for specific purposes. One of these alliances resulted in a famous courtroom confrontation with Lincoln. One of Douglas's backers for Congress in 1838 had been Jacob M. Early, a physician and Methodist preacher. Henry L. Truett, the son-in-law of Congressman William L. May (who had been deprived of renomination on the Democratic party ticket by Douglas), accused Early of slandering May and then shot him. Three days later, Early died and Truett was tried for murder. Douglas volunteered to assist his successor as state's attorney, Daniel Woodson, in prosecuting the case. Representing the defendant were John T. Stuart, who at the time was campaigning for Congress against Douglas, and Lincoln. Much to Douglas's disappointment, Lincoln won an acquittal for his client by convincing the jury that there was reasonable doubt whether Truett had not fired in defense against a chair that Early had picked up to try to shield himself against a gunshot (Johannsen 1997, 90–91).

Between 1835 and 1841, Douglas argued twenty cases before the Illinois Supreme Court. Of these, he won fifteen and lost five. Although he was admitted to practice before the U.S. Supreme Court in 1849, there is no record of his ever appearing before that body. Indeed, once Douglas became Illinois secretary of state, his law practice languished, as he devoted himself almost entirely to politics. Although he never completely abandoned his

profession, moving his office to Chicago in 1847, his appearances as an attorney in court were rare after 1840 (Pratt 1950, 38; Johannsen 1997, 91–92).

During the winter of 1840–1841, Douglas lobbied behind the scenes in the Illinois legislature for a bill to increase the membership of the state supreme court from four justices (of those sitting at that time, three were Whigs) to nine, and requiring them to perform circuit court duties. The Democratic legislature enacted the measure early in 1841 and selected Douglas (then age twenty-seven) as one of the five additional justices. From that time forward he was widely known as "Judge Douglas." Assigned to the Fifth Judicial Circuit in west central Illinois, he moved his residence to Quincy, a Mississippi River town in his district. Later he referred to his acceptance of the judgeship as one of his "youthful indiscretions," a phrase later used by an eminent Congressman from the same area to explain an admitted adultery (Johannsen 1997, 93–98).

During Douglas's two years on the state supreme court bench, he held thirty-eight sessions in his circuit court district and attended four sessions of the high court, during which he wrote twenty-two of its opinions, in one of which he reversed his own earlier ruling in a circuit court case. Perhaps his most momentous decision, later upheld by the U.S. Supreme Court, was rendered against Richard Eells, an abolitionist accused of assisting a fugitive slave in violation of a state statute. Eells's lawyers argued that the U.S. Supreme Court decision in the case of *Prigg v. Pennsylvania* (1842), declaring that the power to deal with fugitive slaves was vested exclusively in the federal government, had invalidated Illinois's fugitive slave law. Douglas, however, ruled in circuit court that the purpose of that law was not to return fugitive slaves but rather to preserve the peace. As the exercise of the inherent police power of a state, which extended to all its civil and criminal policies, the Illinois fugitive slave act was constitutional. Moreover, Congress could not, by mere legislation, deprive a state of its right of police power. Here was the essence of Douglas's later defense of his notorious doctrine of "popular sovereignty" as the solution to all controversies regarding the place of slavery in the national territories, when it came under attack by Abraham Lincoln and others during the decade preceding the Civil War (Johannsen 1997, 99–103).

Described by an observer from the East as a "steam engine in breeches" on the bench, and "the most democratic [and informal judge] I ever knew," Douglas, despite his youth, impressed contemporaries with his judicial acumen. Justin Butterfield, a prominent Whig attorney, wrote, " . . . damn that squatty Democrat. He is the best and most acute judge in all this Democratic State. He listens patiently, comprehends the law and grasps the facts

by intuition; then decides calmly, clearly and quietly and then makes the lawyers sit down. Douglas is the ablest man on the bench today in Illinois" (Capers 1959, 17).

In December 1842, as a candidate for the U.S. Senate at age twenty-nine, Douglas lost his party's nomination in the Democratic caucus by a five-vote margin when opponents argued that he would not have reached the constitutional age requirement for serving in the Senate by the time his term would have begun. He then announced his candidacy for one of the four new seats in Congress awarded to Illinois following the 1840 census. Belatedly receiving the Democratic party's nomination in June 1843 for the fifth congressional district, corresponding roughly to his judicial district, he resigned his judgeship, campaigned hard against the Whig nominee, Orville H. Browning, and on August 7 was elected by a margin of 461 votes (Capers 1959, 116–123).

Easily reelected to a second congressional term in August 1844, Douglas concentrated thereafter on the presidential contest of that year, delivering speeches in favor of James K. Polk in both Missouri and Tennessee, as well as in Illinois, which Polk easily carried on his way to victory over the Whig candidate, Henry Clay. As the new chairman of the House Committee on Territories, Douglas supported Polk's war against Mexico, advocated war against England if the British did not yield all of the disputed Oregon region to the United States, supported the "gag rule" to prohibit any discussion of the alleviation of Southern slavery, and opposed the Wilmot Proviso to ban slavery from the western territories. In 1846, he was elected against token Whig opposition to a third term in Congress. However, he soon resigned his seat when the Illinois legislature promoted him to the Senate in January 1847, at which time he transferred his residence to the quickly growing town of Chicago and began rapidly buying up real estate there. In 1848, he married Martha Merton, the daughter of a wealthy North Carolina planter. Douglas began almost at once to manage a Mississippi cotton plantation of more than twenty-five thousand acres worked by more than one hundred slaves. Ownership of the plantation had been transferred to his new wife by her father, and Douglas received 20 percent of its annual income (Johannsen 1997, 148–217).

When he took his seat in the U.S. Senate in December 1847, Douglas was immediately made chairman of its Committee on Territories. Utilizing the leverage provided by this position, he assumed direction of the forces that enacted the Compromise of 1850, which wrote into law his doctrine of "popular sovereignty" to let each new state formed out of the western territories decide for itself whether or not to allow slavery within its boundaries. In the early 1850s he became the leader of Young America, an extreme "manifest destiny" expansionist movement. A leading candidate for the

Democratic party's presidential nomination during the decade, he lost in 1852 to Franklin Pierce and in 1856 to James Buchanan, two presidents whose deficiencies helped to bring on the Civil War (Johnson 1964, 398–401).

In 1854, Douglas sponsored the Kansas-Nebraska Act, the passage of which greatly exasperated those who opposed the introduction of slavery into the western territories. During the furor that followed, the Whig and American parties virtually disappeared, a new antislavery Republican party was born, and the notion of secession from the Union began to take hold throughout the South. Vainly Douglas tried to impede the impending "irrepressible conflict" by preaching compromise based on popular sovereignty, but the Supreme Court's decision early in 1857 declaring all U.S. territories open to slavery, the ineptness of the Buchanan administration, and the intense insistence of Southern leaders on their continued political dominance of the national government as the price of their region remaining in the Union made it unlikely that a rupture could be postponed much longer.

Campaigning for reelection to the Senate in 1858, Douglas engaged in a series of seven debates with the Whig candidate, Abraham Lincoln, during which Lincoln pushed him into expounding the idea that, despite the *Dred Scott* decision of 1857, territorial governments could still exclude slavery by denying it "police" protection, a position that was unacceptable to many Southern Democrats. After a close vote in the Illinois legislature, Douglas was able to retain his Senate seat, but Southern opposition, as well as the hostility of some Northern Democrats stemming from Douglas's refusal to support President Buchanan's efforts to turn the territorial government of Kansas over to a slaveholding minority, prevented him from receiving the 1860 presidential nomination of a united Democratic party (Johnson 1964, 400–402).

Divided between Northern and Southern factions, the one having nominated Douglas and the other Vice-President John Breckinridge for president, the Democratic party went down to defeat in November 1860 when Abraham Lincoln, the candidate of the united Republican party, won a majority of electoral votes, entirely in the Northern and Western states. Lincoln's election provided Southern secessionists with a pretext for withdrawing their states from the Union, and his inauguration was soon followed by civil war. Having labored for conciliation and compromise until the fighting began, Douglas then energetically supported the military actions of the U.S. government, but chronic alcoholism and rheumatism weakened him to the point that he was unable to fight off an attack of typhoid fever, from which he died on June 3, 1861, at age forty-eight (Johnson 1964, 402–403).

—Norman B. Ferris

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EDELMAN, MARIAN WRIGHT

(1939–)

Marian Wright Edelman
AP Photo/Bob Burgess

Marian Wright Edelman is founder and president of the Children's Defense Fund (CDF), former director of the Center for Law and Education at Harvard University, and staff attorney for the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund. She was the first African-American woman admitted to the Mississippi bar in 1965. The daughter of a Baptist minister and a church worker, Edelman grew up in an environment that emphasized the importance of family values, the sanctity of life, community responsibility, and advocacy for the poor. She turned these life lessons into a well-chronicled life of advocacy for children and government's responsibility in protecting the lives of children. In 1992, John D. Feerick, president of the Association of the Bar of the City of New York and dean of Fordham University School of Law, called Edelman the "preeminent children's advocate" for her tireless work in raising awareness about the plight of

children in the United States. Edelman's early experiences with community-based activism as a member of the executive committee of the civil rights group the Student Non-Violent Coordinating Committee (1961–1963) structured her interactions with southern culture and northeastern intelligentsia and influenced her perspectives on children's rights, education, and poverty.

Marian Wright was born in Bennettsville, South Carolina, the youngest of five children born to Arthur J. and Maggie (Bowen) Wright. She studied as a Merrill scholar at the Universities of Paris and Geneva in 1958 and 1959, and then attended the all-female Spelman College in Atlanta, Georgia, graduating in 1960. She obtained a J. H. Whitney fellowship (1960–1961) and later earned her LL.B. and an honorary LL.D. degree from Yale University in 1963.

Shortly after graduating from Yale, Wright was admitted to practice in 1963 and gained employment as a staff attorney for the New York City office of the NAACP (1963–1964). In 1963, she found herself on assignment in Greenwood, Mississippi, which was known for its anti–civil rights campaigns. Greenwood, like other southern cities and towns, was a target of NAACP pro–civil rights activity, including community empowerment and legal defense of civil rights activists. It was an intense assignment, even for an experienced civil rights activist, and Wright was soon center stage in Mississippi's turbulent struggle with civil rights. Some even attempted to use violence and intimidation to discourage Wright and the NAACP, and in one incident someone shoved the young community advocate to the bottom of the courthouse steps. In an interview of prominent female attorneys for the *American Bar Association Journal,* Wright later recalled how its "outrageousness" solidified her commitment to practice law in Greenwood, saying, "It was awful, it was a challenge, and there was a need." Noting her courage and commitment, NAACP officials made Wright responsible for opening and directing the Mississippi office of the NAACP Legal Defense and Educational Fund. She held the director's position from 1964 to 1968, stationed in Jackson, Mississippi. Wright became the first African-American woman admitted to the Mississippi bar in 1965, received the *Mademoiselle* magazine award in that year, and was later named one of the outstanding young women of America in 1966.

Wright's success in jurisprudence, community empowerment, and advocacy for the poor in Mississippi caught the attention of members of Congress, in particular then–New York senator Robert F. Kennedy. She convinced Senator Kennedy to travel to Mississippi, to see firsthand the effects of government inaction in the lives of rural poor children. Kennedy and staffers accompanied Wright to the homes of several poor Mississippians. Her efforts proved fruitful in two ways: it garnered national attention to the

plight of America's hungry, and it refocused attention on the dilemmas of the national food stamp program. Wright's efforts also helped to gather attention to the state's efforts in implementing programs targeted at children, specifically the state's first Head Start program. During Kennedy's visit to Mississippi, Wright befriended a Kennedy staff member named Peter Edelman. Their friendship blossomed into love, and they were married on July 14, 1968. The couple have three sons, Joshua, Jonah, and Ezra. During the same summer, Marian Wright Edelman moved to Washington, D.C., to assist civil rights activist Martin Luther King Jr. as the congressional and federal liaison for the Poor People's March on Washington, coordinated by the Southern Christian Leadership Conference. In the midst of planning for his 1968 Poor People's March to Washington, King took a trip to Memphis, Tennessee, in support of striking sanitation workers. On April 4, 1968, King was shot and fatally wounded on the balcony of the Memphis hotel where he was staying. The march eventually took place, led by King's successor, Ralph Abernathy, in May 1968.

From 1968 to 1973, Edelman served as partner in the Washington Research Project of the Southern Center for Public Policy, a public interest law firm. Edelman served simultaneously as an associate of the Center for Law and Education at Harvard University, becoming director from 1971 to 1973. From 1971 to 1977, Edelman also served on the Carnegie Council on Children and as a member of the Yale University Corporation. Given her commitment to advocacy and government action, coupled with her network of contacts inside and outside the Washington beltway, Edelman decided to develop the Washington Research Project into a larger children's advocacy organization, the Children's Defense Fund (CDF), to serve as a lobbying force for all children, families, and the poor. Edelman, the president and founder of the CDF, once referred to the organization as an advocate for a "constituency with no voice." Edelman and the organization have been commended numerous times for exemplary work and for the CDF's commitment to advancing children's interest by raising awareness about the connection between mental, physical, spiritual, and nutritional well-being and educational success. The CDF's programmatic focus includes numerous efforts designed to target all facets of child and family development, including Head Start and Healthy Start. It has an average annual budget over $2.5 million, funded by corporate and foundation grants with little if any financial assistance from government money. The prominence of the CDF has earned Edelman a reputation as an effective leader and has earned her numerous awards and prizes, including the MacArthur Fellow Prize in 1985, an Essence Award, and the Albert Schweitzer Humanitarian prize from Johns Hopkins University in 1987.

Edelman's jurisprudence was displayed in the courtroom and in her selec-

tion of particular court cases in which the CDF offered amici curiae briefs on behalf of children's rights. Edelman displayed her keen understanding of the law in a landmark case concerning desegregation in South Boston High School. In *Morgan v. Kerrigan*, 409 F. Supp. 1141; 401 F. Supp. 216 (1975), Edelman and other Massachusetts attorneys argued passionately that the actions of school administrators and white students supported a racially hostile environment that rebuffed the implementation of student desegregation plans, particularly one ordered by the U.S. District Court on May 10, 1975. The court ordered South Boston High School into receivership under the guidance of the superintendent, citing numerous examples of implicit and explicit overtones of racial segregation found through evidentiary hearings and two unannounced visits. The vehement opposition to desegregation and busing in Boston has been the subject of numerous books and documentaries.

In *Washington v. Davis*, 426 U.S. 229 (1976), Edelman joined five other attorneys in presenting a racial discrimination case to the Supreme Court, arguing that the recruiting procedures of the police department of the District of Columbia, which included a written personnel test, violated the due process clause of the Fifth Amendment. The case originated in 1970 when two African-American police officers and unsuccessful applicants filed a suit against members of the District of Columbia's police department and the Office of the Commissioner, who made appointments to the police department subject to the provisions of Title 5 of the U.S. Code relating to the classified civil service. The case focused on the validity of a qualifying test administered to applicants for positions as police officers and on the proper standard required to differentiate between laws written with the intention of enabling racial discrimination and laws having a racially disproportionate impact. The Supreme Court reversed a court of appeals decision that invalidated Test 21 (designed to test applicant vocabulary, verbal ability, and reading comprehension and developed by the Civil Service Commission), concluding that its disproportionate impact on African-American applicants did not warrant a conclusion that the test was indeed a discriminatory device. It further ruled that the court of appeals erred by misapplying the statutory standards enunciated in *Griggs v. Duke Power Co.* (1971), which held that Title VII of the Civil Rights Act of 1964 prohibited the use of exclusionary tests unless the employer demonstrated its substantial relation to job performance. Edelman's determination to use federal government power to protect the civil rights of "voiceless" constituents was evidenced three years later in a case before the U.S. Court of Appeals for the Fifth Circuit.

In another case, Edelman supported the role of the federal government, specifically the judicial branch, in overseeing the actions of states, particularly when such actions jeopardized the adequate protection of children's

lives. In *Gary W. v. Louisiana,* 601 F.2d 240 (1979), Edelman argued for proper enforcement of Rule 53 of the Federal Rules of Civil Procedure calling for the judicial appointment of a special master to advise Louisiana and monitor implementation of a 1976 court order forcing the state to provide mentally retarded or emotionally disturbed children medical care and treatment. In the 1976 case, the state of Louisiana's policy of placing or financially supporting the placement of such children in Texas institutions was found to violate the constitutional and statutory rights of the children. In a victory for children's rights advocates, in 1979 the circuit court ruled that the district court did not err in denying Louisiana an evidentiary hearing about the appointment of a special master, nor did it abuse its discretion in the granting of authority given to the special master. Citing precedents and statutory language, the circuit court ruled that the special master would have power to make reports and recommendations, that either party could object to the recommendations, and finally, that the district court retained the authority to reject or modify recommendations. In deciding in the appellees' favor, the circuit court affirmed the right of the plaintiffs to ask for judicial relief given their dissatisfaction with the progress toward implementation of the district court orders.

Edelman also effectively used interest group access to judicial proceedings in hopes of influencing judicial decisions. In *Goss v. Lopez,* 419 U.S. 565 (1975), the CDF filed a brief of amicus curiae urging the Supreme Court to support the ruling of a three-judge district court in Ohio affirming the constitutional right of Ohio public high school students, who had been suspended for up to 10 days, to have an administrative hearing either before suspension or within a reasonable time thereafter. The Supreme Court joined the district court in ruling the Ohio statute unconstitutional. It concluded that the statute granted high school administrators arbitrary and unilateral discretion in administering suspensions and directly violated the Fourteenth Amendment's prohibition against arbitrary deprivation of liberty (i.e., access to academic environments and due process).

In a landmark case that became the first major constitutional test of affirmative action policy, *University of California Regents v. Bakke,* 438 U.S. 265 (1978), Edelman's organization joined several other organizations in asking the Supreme Court to reverse a California Supreme Court ruling that ordered Allan Bakke be admitted to the University of California Medical School at Davis. The Supreme Court ruled that the special admissions program, by using racial classification to award admittance, violated the equal protection clause of the Fourteenth Amendment. The Court concluded that the program was not the least intrusive means of racially diversifying the medical profession and increasing the number of doctors willing to serve minority communities.

Linda Fairstein

Women have played an increasingly important role in modern law, and Linda Fairstein (1947–) helps exemplify such influence. Born to a doctor and nurse in Mount Vernon, New York, Fairstein majored in English at Vassar College and earned her law degree from the University of Virginia.

Despite being told by the Manhattan district attorney that he thought his office was "no place for a woman like you" (Calabro 1996, 141), she was nonetheless hired in 1972. She was subsequently asked by the next district attorney to head up the Sex Crimes Prosecution Unit that has subsequently been copied in many other cities. The establishment of the unit came at a time when rape laws began to change to give more credibility to the testimony of women, and Fairstein attempts to see that investigators thoroughly prepare such women for courtroom testimony so that there are no surprises.

Due to the nature of her unit, Fairstein and her department often prosecute highly controversial cases from date rape to gang rapes by strangers. Fairstein prosecuted assailants who participated in the "wilding" and gang rape of a Central Park jogger. She tried Robert Chambers, the "preppy" murderer accused of committing his crime during rough sex in Central Park (when jury deliberations stalled, Fairstein accepted a plea of manslaughter). She has tried the "Playboy Bunny Rapist," the "Greenwich Village Rapist," and the "Midtown Rapist" (Couric 1988, 42).

One of Fairstein's most difficult cases involved the prosecution of dentist Marvin Teicher, a Manhattan doctor accused of molesting patients while they were under sedation. Fairstein used evidence from a video camera hidden in the doctor's office, from an undercover agent, and from numerous expert witnesses in a case successfully prosecuted in front of a judge rather than a jury.

Fairstein has earned a reputation for professionalism and for thorough preparation. She is married to attorney Justin Feldman.

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Ever the vigilant warrior for children, in *Miller v. Youakim*, 440 U.S. 125 (1979), the CDF filed an amicus curiae brief urging the Supreme Court to affirm a court of appeals ruling that an Illinois statute distinguishing between related and unrelated foster parents, for purposes of disproportionately administering its Aid to Families with Dependent Children foster care program, was unconstitutional. The CDF argued that the law violated the intent and history of the Social Security Act and was invalid under the supremacy clause giving the Department of Health, Education, and Welfare's formal interpretations of the act primacy over state action. Later, in *Parham*

v. J.R., 442 U.S. 584 (1979), Edelman joined with members of the American Orthopsychiatric Association and William B. Spann Jr., John H. Lashly, and Daniel L. Skoler from the American Bar Association in offering briefs of amici curiae urging the Supreme Court to affirm a ruling by the U.S. District Court establishing the unconstitutionality of Georgia's procedures for voluntary commitment of children under age eighteen. The federal district court ruled that Georgia's procedures committing children to state hospitals violated constitutional rights of due process and, more important, failed adequately to protect due process rights by neglecting to include a minimal right to an adversary-type hearing before an impartial tribunal. The Supreme Court reversed the ruling and remanded the decision, ruling against the class action suit brought against Georgia mental health officials. The Court concluded that the district court erred in holding unconstitutional Georgia's procedures for admitting children for treatment and that the state's medical processes were consistent with constitutional guarantees.

In *Pickett v. Brown*, 462 U.S. 1 (1983), the CDF filed an amicus curiae brief urging reversal of a Tennessee Supreme Court ruling that upheld the constitutionality of a two-year time limitation on establishing the paternity of illegitimate children for the enforcement of obligatory support. The Supreme Court ruled that the two-year limitation denied certain illegitimate children the equal protection of the law guaranteed by the Fourteenth Amendment, particularly given idiosyncratic circumstances (i.e., socioeconomic condition, emotional strain and confusion, familial relations, affection for the father) that may prevent a mother from filing a paternity suit within two years after the birth of an illegitimate child. In *Paulussen v. Herion*, 475 U.S. 557 (1986), the CDF offered a brief urging reversal of a Pennsylvania superior court ruling that rejected an appellant's contention that the state's statute of limitations shielding the appellee from being forced to make contributions to his daughter's support after paternity was established violated the equal protection clause of the Fourteenth Amendment. In supporting children's rights, Edelman supported the appellant's decision to file a paternity and child support petition in a Pennsylvania court on behalf of her seven-year-old daughter born out of wedlock five years after the appellee's last contribution, although the state statute required that such paternity actions be commenced within six years of the child's birth or within two years of the last voluntary contribution or written acknowledgment of paternity. The Supreme Court vacated the Pennsylvania superior court judgment and remanded it for further consideration given a new law enacted in Pennsylvania providing individuals with an eighteen-year window of opportunity after a child's birth for the commencement of paternity actions.

Rounding out Edelman's accomplishments as an attorney are numerous awards, recognitions, honorary degrees, and memberships on the boards of prestigious organizations. Along with serving as president of the CDF, Edelman currently serves as a member of the advisory council to the Martin Luther King Jr. Memorial Library and the Martin Luther King Jr. Memorial Center. She is also on the board of directors for the NAACP Legal Defense Fund and the advisory board of Hampshire College. She served on the trustee board for Spelman College, her undergraduate alma mater, which she chaired from 1976 to 1987. In 1970, she was awarded the Louise Waterman Wise award and nine years later earned the Whitney M. Young Award. In 1977, Edelman was appointed to the Presidential Commission on Missing in Action and has traveled to Hanoi to assess whether the embattled region may hold the remains of U.S. military personnel. Two years later, Edelman was appointed to the Presidential Commission on the International Year of the Child, and one year later she joined the Presidential Commission on the Agenda for the 1980s. Her commitment to change earned her the John W. Gardner Leadership Award for independent-sector public service achievement awarded by Common Cause. Her leadership in furthering civil rights and the interests of the poor earned her the Hubert Humphrey Civil Rights Award and a Gandhi Peace Award in 1990. Other memberships on boards of directors include Aetna Life Casualty Foundation, the Citizens for Constitutional Concerns, U.S. Commission of UNICEF as the U.S. representative, the Leadership Conference of Civil Rights, City Lights, the National Alliance of Businesses, Skadden Fellowship Foundation, and Parents as Teachers National Center, Inc. Edelman is also an active member of the U.S. Olympic Commission.

Ever the supporter of women's issues as well, in 1980 Edelman was awarded both the Leadership Award by the National Women's Political Caucus and the Black Women's Forum Award. Three years later, Edelman was reported to have taken a privately sponsored two-week mission to South Africa to explore women's issues in the country and on the continent. This mission took place long before the celebrated conference on women attended by Edelman's long-time personal and professional associate Hillary Rodham Clinton and other foreign dignitaries interested in the role of women's issue in the process of South African democratization.

Edelman holds many honorary degrees from prestigious colleges and universities, including an LL.D. from Smith College and a D.H.L from Trinity College, Washington. Her awarders include Smith College, Trinity College in Washington, Brown University, Notre Dame University, Williams College, the University of Massachusetts, Howard University, the New School of Social Research, Lesley College, Harvard University, Duke University, and Princeton. Edelman is a member of the bar associations of the District

of Columbia, Mississippi, and Massachusetts. She also holds honorary membership in Phi Beta Kappa and is an honorary fellow of the University of Pennsylvania Law School.

Edelman is reported to have had some influence over the Clinton administration's domestic programs related to children and was very critical of President Clinton when the Democratic president signed Republican-led welfare reform legislation into law. Edelman referred to the potential damaging effect of the legislation as a "policy of national child abandonment."

Edelman is also author of several books, including *Families in Peril: An Agenda for Social Change* (1987), *The Measure of Our Success: A Letter to My Children and Yours* (1992), *Guide My Feet: Meditations and Prayers on Loving and Working for Children* (1996), *Stand for Children* (1998), and *Lanterns: A Memoir of Mentors* (1999).

—Tyson King-Meadows

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EMMET, THOMAS ADDIS

(1764–1827)

Like Judah P. Benjamin, Thomas Addis Emmet distinguished himself as a leader of the bar in two countries. Whereas Benjamin fled the defeated Southern Confederacy for a legal career in England, Emmet, after a brief European stopover, left Ireland for a career in America, where he founded a law firm in New York City that now displays information about its founder on the Internet.

Thomas Addis Emmet
Library of Congress

Born in Cork County, Ireland, Thomas was one of four of Robert and Elizabeth Emmet's seventeen children who survived into adulthood. Thomas's father was a prominent physician in Dublin, who, despite his position as a state physician, remained an ardent Irish patriot. Thomas attended Trinity College and then earned a medical degree at the University of Edinburgh in Scotland in 1784. Thomas subsequently spent two years in residency at Guy's Hospital in London and began a tour of Europe. A brother, Christopher Temple Emmet, who had, like Thomas, been an outstanding academic success at Trinity College, died soon thereafter, and Thomas, apparently in part at the urgings of his father, who doubted the capacity of medicine to support a family, decided to study law at the Inner Temple in London. Emmet was admitted to the Irish bar in 1790, and the following year he married Jan Patten, with whom he would

have eight children (two of whom also became lawyers) who survived to adulthood.

At that time, Ireland's ties to Britain were not much different than those in which the American colonies had earlier found themselves. Emmet joined the Dublin Society of United Irishmen in 1792 and, in addition to advocating independence, he supported a host of Lockean liberal reforms, including religious freedom for Irish Catholics (Emmet was Protestant) and universal manhood suffrage. His association with Irish patriots both furthered his successful legal practice and put him into jeopardy. In one dramatic case, Emmet successfully defended a client for taking an alleged test oath by swearing the same oath before the court trying the case. After an unsuccessful revolution, Emmet—who could well have become the first president of an independent Ireland—and other leaders of the United Irishmen were arrested in 1798 and incarcerated for more than three years. During that time, Rufus King, a Federalist who was then a U.S. minister to England in the same year that the Alien and Sedition Acts were adopted in the United States, opposed Emmet's immigration to America.

After being incarcerated in Newgate Prison, Dublin, and Fort George, Scotland, Emmet and his family were allowed to go to Europe in 1802. Emmet spent most of his time in France, where, as an official emissary of the United Irishmen, he was frustrated in his hope to secure military aid from Napoleon Bonaparte (similar to the aid that France had provided during the American Revolutionary War) for a revolution in Ireland. His gifted brother Robert, who was also a lawyer, returned to Ireland and was hanged by the British after another unsuccessful attempt at revolution there.

Seeing the cause of Irish liberty lost for the near future, Thomas and his family left for New York in October 1804, having decided not to live in the South, where slavery still prevailed. Emmet was forty when he arrived in New York. Overcoming some opposition by New York Federalists, including James Kent, who distrusted Irish immigrants with their generally Republican sympathies, Emmet was admitted to the New York bar in 1805 even though he had not yet obtained his American citizenship. However, by the following year, when the New York Supreme Court admitted him to practice, he had become a citizen. Emmet made forty-five appearances before this court within the next six years (Robinson 1955, 232).

Emmet's first case dealt with fugitive slaves. He soon had a thriving legal practice that brought in from ten thousand to fifteen thousand dollars a year. His practice was undoubtedly aided by the fact that although there were many anti-Federalist citizens, there were few anti-Federalist lawyers, whereas Federalist lawyers abounded (Hagan 1923, 101). In an early case, Emmet unsuccessfully defended the editor of the *American Citizen* against a libel charge brought about when the editor, an opponent of Governor

George Clinton, published resolutions accusing the governor of a variety of offenses.

Emmet spent the rest of his life in the legal profession, remaining loyal to Governor Clinton and his nephew, Mayor DeWitt Clinton, and other New York Republican supporters while also winning over a number of the Federalists who initially opposed him. He served briefly in 1812 as attorney general for the state of New York, and he wrote a pamphlet entitled *Hints to Immigrants* (1816). Emmet also served as counselor to the New York Medical Society (he was later given an honorary doctor of laws degree by the Columbia College Corporation) and the New York Manumission Society and as first president of the New York Irish Emigrant Society and of the Shamrock Friendly Society. Emmet participated in a number of political campaigns, including one in which he opposed the candidacy of his old nemesis, Rufus King, for New York governor in 1807. Emmet also joined the movement for court reform in New York. However, Emmet primarily distinguished himself as an advocate in the field of law. In this field he established a reputation as a somber, prematurely aged advocate who bent slightly forward because of nearsightedness. Emmet was known for thorough preparation, for long work hours, for his impressive oratorical skills, and for the ardor with which he defended his clients, whether he initially believed in their cases or not.

Among the significant cases in which Emmet involved himself was a dispute between John Yates and New York Chancellor John Lansing. Lansing had reincarcerated Yates for contempt after Yates had obtained release through a writ of habeas corpus from another judge. Emmet succeeded in having Yates released from custody after establishing that Lansing had exceeded his judicial authority. Emmet lost a civil case, however, in which Yates sought monetary damages, thereby indirectly helping to establish a doctrine of judicial immunity for official actions that remains relatively unchanged to this day.

Emmet first argued before the U.S. Supreme Court in 1815 in four maritime cases (the *Mary*, the *Frances*, the *Adeline*, and the *Nereide*) in which he was pitted against Maryland's esteemed William Pinkney. In one of these cases, in which Pinkney had charged that Emmet was mistaken in every statement of law and fact that he had made, Emmet offered a manly response that elicited an apology from Pinkney. An observer writing in the *National Intelligencer* compared the two legal giants:

> In amplification both Mr. Pinkney and Mr. Emmet excel: the former is more impressive, and the latter more convincing. Mr. P. improves the understanding—Mr. E. convinces it. The former is more of a logician and philosopher. The former addresses the passions, imagination—and judgment—the latter

> the judgment only. In listening to Mr. P. we seem to stroll through lanes of bliss and "to repose by the water-falls of Elysian gardens"—in hearing Mr. E. we loiter through academic bowers, or Wander along the ancient Lyceum—the mind is enchained and the senses Lose their operation. In correct and elegant pronunciation and in all the Graces and embellishments of oratory, Mr. P. had decidedly the Superiority. In short Mr. P. has more genius—Mr. E. more judgment—Mr. P. more learning, taste, and elegance—Mr. E. is a more constant and Persevering reasoner, a more skillful artificer of the weapons of logic. (Robinson 1955, 360)

If this quotation seems to indicate that Emmet appealed primarily to logic, he was nonetheless quite capable of defending his clients and himself with emotion. In one notable exchange, probably with Francis Hopkinson of Philadelphia, Emmet turned an attack on his Irish ancestry on his opposing attorney in such a way as to highlight Emmet's own love for freedom and his native country:

> I am not ashamed of my country or my political conduct. In the storms of those tumultuous scenes through which I passed, I sought to make her free, and to deliver her from that tyranny which prevented her from the enjoyment of freedom . . . and I essayed it by honorable means. . . . I discovered the value of civil liberty . . . the people were the source of all legislative power, and that for their happiness and true interest all government ought to be administered. (Robinson 1955, 360)

While serving as New York attorney general, Emmet likewise defended his honor against charges of partisanship made by a rival attorney by saying that, "The office which I have the honor to hold is the reward of useful days and sleepless nights devoted to the acquisition and exercise of my profession, and of a life of unspotted integrity,—claims and qualifications which that gentleman can never put forth for any office, humble or exalted" (Hagan 1923, 118). Legal historian G. Edward White has identified Emmet's "distinctive combination of contentiousness and grace" (White 1991, 210).

U.S. Supreme Court justice Joseph Story, who observed Emmet on a number of occasions, and who identified Emmet as being "by universal consent in the first rank of American advocates" (Hagan 1923, 116), further adds to this picture:

> That [Emmet] had great qualities as an orator cannot be doubted by anyone who had heard him. His mind possessed a great deal of the fervor which characterizes his countrymen. He was quick, vigorous, searching and buoyant. He kindled as he spoke. There was a spontaneous combustion, as it were, not

> sparkling, but clear and glowing. His rhetoric was never florid; and his diction, though select and pure, seemed the common dress of his thoughts as they arose, rather than any studied effort at ornament. Without being deficient in imagination, he seldom drew upon it for resources to aid the effect of his arguments or to illustrate his thoughts. His object seemed to be, not to excite wonder or surprise, to captivate by bright pictures and varied images and graceful groups and startling apparitions but by earnest and close reasoning to invoke the judgment or to overwhelm the heart by awakening its most profound emotion.

Story continued:

> His own feelings were warm and easily touched. His sensibility was keen, and refined itself almost into a melting tenderness. His knowledge of the human heart was various and exact. He was fairly captivated by the belief that his own cause was just. Hence his eloquence was most striking for its persuasiveness. He said what he felt, and felt what he said. His command over the passions of others was instantaneous and sympathetic. The tones of his voice, when he touched topics calling for deep feeling, were themselves instinct with meaning. They were utterances of the soul as well as of the lips. (Robinson 1955, 347–348)

The most famous case that Emmet argued before the U.S. Supreme Court was *Gibbons v. Ogden* (1824), in which Emmet represented the New York steamboat monopoly interest of long-time friend Robert Fulton and Robert Livingston. Emmet had also argued before the state legislature against claims that this monopoly interfered with federal power over interstate commerce. Although, consistent with his views in other areas, he had privately advised his clients that their case was weak in light of national constitutional powers, Emmet gave no hint of such reservations in court and argued their case to the best of his ability. He prevailed at the lower New York court presided over by Chancellor James Kent before losing to Daniel Webster and William Wirt before John Marshall's Supreme Court. Emmet made his arguments over the course of three days, and although they did not succeed in convincing Marshall that New York's monopoly was valid, they may have helped keep open the doctrine of concurrent state and federal powers over certain areas of commerce, a position eventually articulated in *Cooley v. Board of Wardens* (1851).

In 1827, Emmet took on another major case when he defended the claims of John Jacob Astor to a large tract of land in New York that the state had confiscated from Tories Roger and Mary Morris. The state had sold this land to buyers on the assumption that the Morrises had absolute title to the property rather than a mere life estate. Recognizing that the latter

was the case, Astor had cheaply purchased rights of remainderman (Robinson 1955, 404) and subsequently claimed the property. Emmet and Webster argued rival sides of the case before a federal court for five days; the U.S. Supreme Court later upheld the jury's judgment for Astor.

In 1827, Emmet suffered a stroke and fell to the courtroom floor while arguing another case before a U.S. circuit court defending a will that had established the Trustees of the Sailors' Snug Harbor. He died that same evening. His funeral was attended by the governor, both New York senators (one of whom was future president Martin Van Buren), and by leading members of the bench and bar who paid tribute to an immigrant who had reached the top of his profession in two countries. In an address to the New York Bar Association, Daniel Lord would later describe Emmet as one "whose enlarged and extensive learning was equaled by his simplicity of heart" (Hagan 1923, 137).

Thomas Addis Emmet (1828–1919), a noted surgeon and gynecologist, was born to Emmet's son, John Patten Emmet, a professor at the University of Virginia who had been invited to teach there by the university's founder, Thomas Jefferson.

—John R. Vile

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EVARTS, WILLIAM M.

(1818–1901)

William M. Evarts was considered one of the great lawyers, orators, and public servants of the nineteenth century. A New York lawyer who distinguished himself as an advocate in high-profile cases, he was most well known for his spirited defense of President Andrew Johnson during the impeachment trial of 1868. Many observers credited Evarts—through his sharp intellect, adherence to constitutional principle, and appeal to reason—with gaining the president's narrow acquittal in the Senate.

William Maxwell Evarts was born in Boston on February 6, 1818. His father, Jeremiah Evarts, was a Puritan who became editor of the *Panoplist,* one of leading religious papers of the time. Although he was trained as a lawyer, Jeremiah Evarts spent his life as a publisher and a missionary, dying when William was only thirteen. William's mother, Mehetabel Sherman Evarts, also came from a distinguished Puritan line. She was the daughter of Roger Sherman, signer of the Declaration of Independence, the Articles of Confederation, and the Constitu-

William Evarts
Library of Congress

tion. Thus, William M. Evarts was reared in an environment that emphasized culture, scholarship, and the importance of public service. (His great-grandson, Archibald Cox, would emerge from this same mold a century later. See entry for Archibald Cox, above.)

Evarts attended Bowdoin Grammar School in Boston, where he won a prize, instituted by Benjamin Franklin, for the leading pupil in each grammar school. After completing studies at the Boston Latin School, Evarts traveled 240 miles by stage coach to attend Yale for his college training, wishing to expand his horizons beyond Boston. (His father had received a degree from Yale, and his grandfather, Roger Sherman, had been treasurer at the college.) At Yale, Evarts became one of the founders of the *Yale Literary Magazine* and stood out as a formidable debater.

For a year after college, Evarts taught in a local school in the bucolic New England town of Windsor, Vermont, where his sister lived, giving lessons in Latin and reading law with Horace Everett. Thus prepared, in 1838 Evarts entered Harvard Law School (then Dane Law School), where he immediately impressed his professor, Judge Joseph Story. When Evarts decided to seek a job in New York after receiving his law degree, he carried with him a letter from Judge Story, which described him as a young man with "very uncommon talents and professional attainments for his years," who was "destined to take a very elevated rank in the profession" (Hagan 1923, 257).

Evarts began his preceptorship in law in New York City in 1840, under the tutelage of Daniel Lord, one of the preeminent New York lawyers of the time. In late 1841, Evarts was admitted to practice law in New York, opened his own office at 60 Wall Street, and was quickly retained as junior counsel in a case defending Monroe Edwards, a notorious forger. Although Edwards was convicted, Evarts delivered a two-hour opening speech to the jury that drew repeated cheers from the crowded courtroom, earning him immediate attention among the New York bar. He soon formed a partnership with Charles E. Butler, Charles F. Southmayd, Joseph H. Choate, and Charles C. Beaman Jr. This law firm (with minor changes in personnel) would remain his home until his death almost sixty years later.

Evarts formed another lasting partnership at this time. In Windsor, he had met Helen Minerva Wardner, the daughter of a local banker. Now that Evarts was able to support a wife and a family, he married Helen Wardner in 1843 and remained married to her for fifty-four years. They established their home in New York City and produced twelve children.

Evarts also acquired a farm in Windsor, along the banks of the Connecticut River situated beneath picturesque Mt. Ascutney, to escape the heat of the summers and provide a country retreat for his family. This beautiful estate he later named Runnemede, after the place where King John had signed the Magna Carta in 1215. It would later become a place where

Evarts entertained presidents and diplomats; it would also become a focal point for the Evarts family for generations.

In 1849, Evarts accepted an appointment as deputy U.S. district attorney in New York, a position that he held (while continuing his private practice of law) until 1853. In conjunction with his blossoming law practice, Evarts became active in political affairs in New York. He was a conservative Whig and a great supporter of Daniel Webster, pushing for Webster's candidacy for president in 1852. After Webster's defeat and his premature death in 1852 (Evarts attended the funeral as a representative of the New York bar), Evarts became a founder of the Republican party in New York. As chairman of that state's delegation, he supported the candidacy of William H. Seward for president in 1860, but after Seward's defeat, Evarts moved to make the nomination of Abraham Lincoln unanimous.

Evarts himself was nominated for the U.S. Senate seat made vacant, in 1861, when Seward resigned to become President Lincoln's secretary of state. But Evarts eventually withdrew and threw his votes to another candidate—Judge Ira Harris—when it appeared that the obstreperous editor of the *New York Tribune*, Horace Greeley, might secure the nomination and drive a wedge into the Republican party.

It was in the period shortly before the Civil War that Evarts established a national reputation as a lawyer, arguing the landmark *Lemmon Slave Case* on behalf of New York. An ardent abolitionist, Evarts was well suited to represent his state in this dramatic clash between North and South that foreshadowed a broader conflict within the nation. In 1852, Jonathan Lemmon and his wife had departed from Virginia, en route to Texas, taking with them a number of slaves. They stopped in the port of New York to switch boats. Here, their slaves were seized pursuant to state law, and the question was joined as to whether transient slaves could be emancipated. In the federal court of appeals, Evarts argued the case in January of 1860 against Charles O'Conor, the recognized leader of the New York bar and one of the nation's leading attorneys.

This clash between New York and Virginia, during a particularly incendiary period, captured the attention of political observers around the country. The arguments of O'Conor and Evarts were described as equally masterful. Evarts stated poignantly that "the status of slavery is not a natural relation, but is contrary to nature, and at every moment it subsists it is an ever new and active violation of the law of nature" (Evarts 1919, 1:66; Hutton 1966, 11). The court of appeals affirmed the right of New York to emancipate slaves passing through its ports, giving Evarts a resounding victory. The case would have undoubtedly made history in the Supreme Court, were it not for the arrival of the Civil War in the interim.

One noted commentator of the time, A. Oakley Hall, described Evarts's uncommon talent as an advocate and appellate oralist with poetic flair: "Evarts cut into a legal problem, as one would cut into a pineapple—laying aside deftly the skin and rind and getting at once at the pulp and juice of the controversy, and then sugaring it with a clear style" (Barrows 1941, 48).

After the arrival of the Civil War, Evarts was hired by Attorney General Edward Bates to assist in representing the United States in the controversial *Prize Cases*. In these four cases, decided together by the Supreme Court in 1863, Evarts successfully argued that President Lincoln's blockade of Southern ports and his seizure of Confederate vessels at the outbreak of the Civil War were constitutional.

When Chief Justice Roger Taney died unexpectedly in 1864, the Court of Appeals of New York unanimously signed a petition to President Lincoln urging that he appoint Evarts to fill the vacancy on the high court. However, Evarts was passed up for Salmon P. Chase, with the understanding that if Chase turned down the appointment, Evarts would be next in line. Chase accepted the appointment. (Ironically, Chase would later preside over the impeachment trial of Andrew Johnson, at which Evarts found himself a reluctant counsel.)

The assassination of President Lincoln stunned the nation; Evarts was selected as a member of a small New York delegation dispatched to attend the funeral in Washington. Upon returning to deliver a short address to the New York Historical Society, Evarts stated, "No more wonderful career than that of Abraham Lincoln is told in sacred history or furnished in romance. He has been a direct example of what any one may come to under our constitution" (Barrows 1941, 127).

In the wake of Lincoln's death, Evarts would play his most dramatic role as a lawyer, sealing his place in American history. Congress (driven by Evarts's own Republican party) sought to impeach Lincoln's successor, President Andrew Johnson—ostensibly because of his violation of the Tenure of Office Act (which made it a "high misdemeanor" for the president to remove his own cabinet officers without the Senate's consent). In reality, the Radical Republicans disagreed with Johnson's lax policy toward Reconstruction in the South—some even spread the dark rumor that Johnson was involved in the assassination of Abraham Lincoln—and seized on the Tenure of Office Act controversy to remove him from office.

Evarts agreed to represent President Johnson (a Democrat), even though they were members of opposing political parties. The Radical newspaper *Independent* called Evarts a "hireling counsel" who had "pawned his honor for a lawyer's fee." Yet Evarts believed with every ounce of his reasoning that the charges against the president were "pure political poppycock"; it was

important to defend the words and soul of the Constitution to which he had pledged adherence (Gormley 1997, xvi–xvii).

When Attorney General Henry Stanberry (who had resigned his cabinet post to act as lead counsel for the president) collapsed from exhaustion and withdrew from the case, Evarts stepped into the leading role. His oration in the Senate chambers is considered a masterpiece in political and legal rhetoric. He spoke, without prepared script, for four days and fourteen hours. After challenging the senators to adhere to their oaths of office, "for the Lord will not hold them guiltless who taketh his name in vain" (Hagan 1923, 274), Evarts proceeded to pull the articles of impeachment to shreds with his methodical logic.

Henry Cabot Lodge would later say that Evarts possessed a "phosphorescent" wit that flashed constantly (Gormley 1997, xix). He pounced on the House managers leading the impeachment and reduced them to intellectual laughingstocks. When manager George S. Boutwell of Massachusetts suggested that there was a "hole in the sky" where President Johnson should be thrown into exile, Evarts proceeded to describe this imaginary hole in the sky from which Boutwell would attempt to launch the president—shouting "*Sic itur ad astra!*"—at which point (he said) the manager would be hurled into orbit himself, making it difficult to determine "which is the sun and which is the moon."

Not only did Evarts bring shouts and laughter to the spectator seats, but he was able to speak with such power and emotion that he gradually spellbound the Senate jurors. One historian wrote that Evarts "lifted the whole proceedings, from the murky atmosphere in which it had its origin, to a region of lofty and patriotic wisdom" (Hutton 1966, 24). Evarts told the senators,

> And oh, if you could only carry yourselves back to the spirit and the purpose and the wisdom and the courage of the framers of the Government, how safe it would be in your hands! How safe it is now in your hands, for you who have entered into their labors will see to it that the structure of your work comports in durability and excellency with theirs. (Evarts 1919, 1:525)

By the end of the proceedings, the momentum of the Radical Republicans had been halted. A. Oakley Hall later wrote, "The logical strength of the Evarts argument . . . unquestionably decided wavering senators, and gave his client a majority of one for acquittal" (Hutton 1966, 24–25, n. 53).

After Evarts's historic role in saving Andrew Johnson's presidency in 1868, he remained in the public eye until his death. He served a brief eight-month stint as attorney general under President Johnson, during which

time he appeared in the Supreme Court on behalf of the U.S. government and participated (among other things) in the prosecution of Confederate president Jefferson Davis for treason. After resigning as attorney general to return to private law practice, Evarts cofounded the Bar Association of the City of New York in 1869, helping to dismantle the corrupt "Tweed Ring" that was tainting the legal profession. He saved the Republican party from defeat in the contested Hayes-Tilden election of 1876, acting as lead counsel for the Republicans and successfully battling to obtain electoral college votes in four states that ultimately gave the election to Rutherford B. Hayes. Once Hayes moved into the White House, Evarts was named secretary of state, serving from 1877 to 1881.

Evarts was again prominently mentioned for a seat on the Supreme Court when Salmon Chase died of a stroke in 1888, but he was passed over for Morrison Waite, never to have the pendulum of history swing back in his direction. In old age, Evarts was elected to the U.S. Senate by the New York legislature, serving from 1885 until 1891—a final role in public service that ended with his vanishing eyesight. Evarts died in New York in 1901 at age eighty-three; he was buried in Windsor, Vermont.

When the cornerstone was placed on the tomb of President Ulysses S. Grant in New York in 1891, Evarts had delivered a moving speech, observing that "it is difficult to understand, until the work is completed, how the fabric of great men's lives is woven, for much of the playing of the loom is unnoticed until the conciliated colors are united and presented as the complete fabric of their lives" (Barrows 1941, 485).

When it came to the life of William M. Evarts, he would be remembered as a rare public servant "who did not seek office, but let it seek him" (Barrows 1941, 493). He was a lawyer of unbounded talent who defended the integrity of the Constitution, even when it was not politically expedient. Evarts left an indelible mark on the U.S. constitutional system through a unique combination of intellectual agility, brilliance in the courtroom, enthusiasm for public service, and deep-seated moral conviction.

—Ken Gormley

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FALLON, WILLIAM J.

(1886–1927)

Willam J. Fallon
The Corcoran Gallery of Art

William Joseph Fallon, known through much of his life as "The Great Mouthpiece," has been classified along with Clarence Darrow and Earl Rogers (with whom his life shares many parallels) as one of the three greatest criminal attorneys in the first half of the twentieth century (Hynd 1960, 8). Talented, vain, and flamboyant, Fallon has been called "a beloved rogue" (Hynd 1960, 130).

Born in 1886 in New York City to Ellen and Joseph Fallon, immigrants from Ireland who owned a market, William was the third of four children whose family later moved to Westchester County, New York. The physically striking William, who had red hair and blue eyes, grew to five feet eleven inches. Maintaining an almost obsessive love of his mother, Fallon obtained both his undergraduate degree and his law degree at New York's Catholic Fordham University. In college, Fallon developed a reputation for his pranks and petty thievery, his appetite, his generosity, his beautiful singing voice, and his ability to speak. He graduated in 1906 as

the valedictorian of his class and received an award for obtaining the highest grade in philosophy (Fowler 1931, 76). After three additional years of achievements at the law school, the dean proclaimed, "Here is a new star in the constellation of law" (Fowler 1931, 79).

Fallon began his practice of law in White Plains, New York, and in 1912 he married Agnes Rafter, who would bear his two daughters. Fallon had a fairly inauspicious beginning as a lawyer in partnership with David Hunt. Fallon developed a reputation for devoting a great deal of attention to cases, especially in criminal law, that interested him and little to those that did not. Fallon subsequently became an assistant prosecuting attorney in Westchester County but apparently sometimes shared his earnings with the families of individuals he prosecuted (Fowler 1931, 96). His most dramatic case, which he lost, involved prosecution of penologist Tom Osborne for immorality with prison inmates. Fallon claimed that his defeat was instructive, helping him to understand the difference between "prosecution" and "persecution" (Fowler 1931, 126), a distinction that Fallon would later use to save himself. In making this same defense, Fallon would tell how he abandoned prosecutorial work after he discovered, as the result of a confession from another criminal, that he had sent the wrong person (for whom he later helped secure a pardon) to jail for robbery and that the mother of the accused had died of a stroke while he was imprisoned (Hynd 1960, 139).

Fallon soon moved to the Bronx, where he had a brief partnership with Edward J. Glennon before establishing a more permanent and successful partnership with Eugene F. McGee (who had taught some classes at Fordham) on Broadway. Their firm was often referred to as "the Broadway and Forty-second Street Bar Association" (Hynd 1960, 130). In the early years of their partnership, McGee treated Fallon with an exaggerated deference that impressed both jurors and members of the press with Fallon's importance. With a nearly photographic memory, Fallon was particularly impressive at appealing to juries and at bringing out inconsistencies in witnesses' testimony. However, he apparently could also cast doubt on the testimony of truthful witnesses simply by reading sinister implications into ordinary behavior. Noting Fallon's "sure, confident manner" and his ability to play "on the failure of human memory for details," a biographer cites an example of Fallon's questioning and described his demeanor as follows:

> His habit, after asking such a question, was to look terribly pained; to turn away swiftly after putting the question. To act as though he dreaded to hear the "lying" answer. To gaze knowingly at the jury. . . . (Fowler 1931, 136)

A consummate dramatist, it was no surprise that Fallon especially enjoyed the company of people from the theatre.

As Broadway's wealth expanded, so did the underworld that surrounded it. Fallon became the first lawyer to gain the confidence and lucrative fees of this group; his typical clients have been described as "gunmen, gangsters, prohibition racketeers, income-tax evaders [and] underworld big shots" (Hynd 1960, 125). Although Fallon insisted on shining his own shoes, cutting his own hair, and taking women on the subway rather than paying for taxi fares, he otherwise had a reputation as a spendthrift who could always dispose of money faster than he earned it, and who on occasion had his office furniture dispossessed. Moreover, Fallon and his partner cared little for precise bookkeeping, and, as a ladies' man, Fallon often accepted the cases of beautiful women without charge.

Once referred to as "Eleven-to-One Fallon" (Hynd 1960, 176), Fallon was perhaps better known for getting hung juries, often by a single vote, than for outright acquittals, but prosecutors often gave up after such experiences, and Fallon became known as "the Jail Robber." Although he was apparently not beyond using illegal means to buy a juror, Fallon also had an uncanny ability to divert jurors' attention to himself rather than to the defendant or to find a single member of a jury with whom he could make an emotional connection. Fallon did not always respect those whom he influenced. On one occasion he told a client's wife, "All I have to do is to pick out the dumbest of the dozen, concentrate everything on him, and my client is sure of a hung jury" (Hynd 1960, 126). On another occasion, in defending a beautiful woman accused of having tried to blackmail an Armenian rug merchant, Fallon chose his jurors largely by how distracted they were by her legs (Hynd 1960, 150).

Although many of his clients were engaged in less bloody activities, Fallon defended 126 homicide cases, including 22 capital cases, and never lost one (Fowler 1931, 212). Occasionally blamed by clients (especially those who saw evidence of Fallon's alcoholism in the courtroom) expecting near miracles, Fallon once responded to a convicted bootlegger's complaints by saying, "Well, sometimes the rabbit doesn't come out of the magician's hat" (Fowler 1931, 316).

There were certainly times when Fallon's solution seemed almost magical, if not altogether ethical. In a story credibly attributed to him, when a bank teller came to him after embezzling $10,000 that the bank had not yet discovered missing, Fallon is said to have advised the teller to secure $50,000 more. Taking $10,000 of this as his fee, Fallon then called the bank and reputedly convinced its managers that he could recover $40,000 from his client if the bank agreed not to prosecute him and if its officials would write a letter of positive recommendation on the teller's behalf so that he could secure another job (Hynd 1960, 123–125).

In addition to questions that arose over whether Fallon was using illegal

means to influence nullifying jurors, opponents sometimes found that their files disappeared during the course of a trial. As he increasingly associated with gamblers, Fallon sometimes participated in fraudulent schemes involving cards or other games of chance to catch the unwary. A teetotaler until he was twenty-nine, Fallon eventually ruined his life with alcohol, becoming increasingly susceptible to intoxication and alcohol-related diseases as he aged. Once questioned by a judge about whether he had alcohol on his breath in court, Fallon won the judge's favor by responding, "If your Honor's sense of justice is as keen as Your Honor's sense of smell, I shall have no fear that my client's bail will be reduced" (Hynd 1960, 133). The once faithful family man also felt the allure of Broadway's actresses and developed a reputation as a playboy who rarely sought to hide his extramarital indiscretions, although he did from time to time return home for forgiveness before striking out again for the thrills of high living.

Fallon's ability to read and digest books, often on highly technical subjects, was legendary, as was his proclivity for waiting for the last week, or even the day, before the start of a trial to begin preparation. During a high-profile defense of a chauffeur whose lover had bled and died during an extramarital affair in the back of his taxicab, Fallon so impressed a doctor with his knowledge of gynecology that the doctor said, "I did not know you were an M.D. When did you get your degree?" Fallon responded in characteristic cocky fashion, "I received my degree last night. I began practice this morning" (Fowler 1931, 213–214). In this case, Fallon persuaded the jury that the woman's death had been accidental and actually turned the prosecution experts as well as the woman's former husband into defense witnesses. Always the dramatist, Fallon brought the taxicab into court, helped establish his client's own honesty by having him admit that he, and not the woman, had first suggested that the couple move to the back seat of the taxi, and disposed of his confessions by introducing evidence that the police had extracted them through use of force (Hynd 1960, 165–166).

In another trial, in which Fallon was defending an individual accused of arson, a fireman testified that he had smelled kerosene on rags discovered at the site but subsequently discarded. Questioning both the fireman's predisposition in the case and his ability to distinguish kerosene from water through his sense of smell, Fallon presented the fireman with five bottles of liquid and asked him to identify each. Fallon had filled the first four with kerosene and the last with water. Fallon realized that, by the time the fireman got to the last vial, his nose would be so filled with kerosene fumes that he would identify it as kerosene also. After this misidentification, Fallon confidently took a swig and offered the same privilege to the jurors, who, not surprisingly, acquitted his client (Hynd 1960, 174–175).

Eugene A. Rerat

Born in Minneapolis in 1898, Eugene (Gene) Rerat was embarked on a career with Goodyear Tire and Rubber Company before reading a newspaper account of a murder trial that convinced him to become an attorney. He subsequently took night classes at the Minnesota College of Law, where his teachers included Floyd B. Olson, a fiery criminal lawyer and soon-to-be governor. When Rerat graduated, he discovered that he could not take the bar examination until he took a course to get a high school diploma.

Rerat spent his first fifteen years of practice in criminal law, and he is said to have achieved acquittals for 99 percent of his clients (Sevareid 1963, 32). Rerat was as famed for his persistence as for his masterful control of the courtroom. Rerat successfully defended Robert V. Newbern in one bank robbery trial only to lose a second in another state. Still not giving up, Rerat eventually helped secure a second trial that eventually secured Newbern's release. Rerat also successfully worked to get the state parole board to release Leonard Hankins, who, Rerat also believed, had been falsely identified and accused in the case.

After practicing law for about fifteen years, Rerat became a personal injury attorney, often battling the railroads and frequently obtaining record-breaking judgments for his clients. In one case, Rerat had to try a case three times, each time proving to the jury's satisfaction that his client's blindness had been precipitated by an accident at the railroad.

Rerat's work eventually resulted in charges that he had violated the American Bar Association's Canons of Professional and Judicial Ethics by soliciting business (then considered to be illegal). Rerat was exonerated in a hearing that seemed to point to railroad complicity in attempting to derail one of their most formidable legal adversaries. Far from ending Rerat's career, the hearing only brought him more publicity and more clients.

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Fallon defended Jules Arnstein, who was suspected of participating in a $5 million stock robbery, successfully appearing before the U.S. Supreme Court in the case to invoke his client's Fifth Amendment right against self-incrimination in an involuntary bankruptcy proceeding that had resulted in a citation for contempt. It was during this appearance that Fallon met a young dancer named Gertrude Vanderbilt, with whom he would maintain a long-standing romantic relationship, although not to the exclusion of others.

Long interested in sports, and particularly in the New York Giants baseball team, Fallon successfully represented former flyweight boxing champion Abe Attell, who was accused in the 1919 baseball scandal. Fallon often enraged both opposing counsel and judges, using behavior—including

numerous trial delays—that often came close to bringing him into contempt of court, to evoke inappropriate emotional reactions by opposing counsel or to lay the grounds for mistrials. Fallon would often feign illness to delay trials or engender sympathy with the jurors (a technique that he sometimes had his clients employ as well), and, on at least one occasion, he pretended to have lost his hearing in order that he might practically shout questions to an adverse witness.

One biographer identified Fallon's defense of Phil Kastel and others involved in stock fraud as having "laid a foundation for ethical dry rot and professional ruin," which the biographer describes as "the spectacle of a man failing through success" (Fowler 1931, 317). Although Fallon's cases often provided good copy in New York City, these cases led to eventual conflict with the editors of the Hearst papers, who in characteristic journalistic fashion labeled Fallon as the "King Kleagle of the Kriminal Clan" (Fowler 1931, 331). After hiding out for some time, Fallon was arrested, but, in arguments that drew on the distinction between *prosecution* and *persecution*, Fallon equaled his defense of others whom he had represented and successfully questioned and defended himself against charges that he had bribed a juror. In his characteristically brash style, after his acquittal, Fallon told a reporter, "I'll never bribe another juror" (Fowler 1931, 384).

Fallon also escaped subsequent attempts to disbar him from the practice of law, but his reputation had clearly been tarnished, and his later successes never equaled his earlier ones. Caught by one woman when he was in a compromising situation with another in 1926, Fallon had acid thrown on his face but almost miraculously ended up being neither seriously scarred nor blinded by the attack (Fowler 1931, 392–393).

As one who lived constantly on the edge and burned the candle on both ends, Fallon died at age forty-one in April 1927 after suffering a gastric hemorrhage and heart attack. More than a thousand persons, including many dignitaries and acquaintances and professors from Fordham, attended his funeral at New York's Church of the Ascension. Fallon stands as an example of a brilliant practitioner, whose many successes and innovations in and out of the courtroom were marred not only by the alcoholism that destroyed him but also by unethical and illegal conduct.

— John R. Vile

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FIELD, DAVID DUDLEY

(1805–1894)

David Dudley Field
Library of Congress

David Dudley Field was a leading business attorney, legal reformer, and constitutional lawyer from the 1840s to the 1880s. He was born in Haddam, Connecticut, on February 13, 1805.

Field's father, also named David Dudley Field (1781–1867), graduated from Yale before serving as a Congregational minister in Connecticut and western Massachusetts and receiving a doctorate from Williams College. The elder Field was the son of Captain Timothy Field of Guilford, Connecticut, who served in the American Revolution. Field's mother, Submit Dickinson Field (1782–1861), was the daughter of Noah Dickinson, who served in both the French and Indian War and the Revolution.

The younger David Dudley Field was the eldest of nine Field children, whose achievements were, as a group, remarkable. Matthew Dickinson Field (1811–1870) was a successful engineer who built the world's then-longest suspension bridge and collaborated with younger brother Cyrus in planning the trans-

atlantic cable. Jonathan Edwards Field (1813–1868) became president of the Massachusetts Senate and helped revise the laws of that state. Stephen Johnson Field (1816–1899) left a successful legal practice with his elder brother David during the Gold Rush of 1849 and moved to California, where he quickly entered public life, ascended to membership on the California Supreme Court—of which he became chief justice—and was appointed by President Abraham Lincoln to the U.S. Supreme Court, where he served more than thirty-four years and articulated a constitutional order that lasted fifty years. Cyrus West Field (1819–1892) had already retired in his mid-thirties from manufacturing paper before successfully laying the transatlantic telegraph cable. Henry Martyn Field (1822–1907) became a nationally prominent Congregational minister, editor, and author who debated with "The Great Agnostic," Robert Ingersoll. A sister, Emilia Ann Field (1807–1861), served as a missionary and was the mother of David Josiah Brewer (1837–1910), who was appointed a justice of the Supreme Court, where he served more than twenty-one years—the first seven with his uncle.

In 1821, David Dudley Field entered Williams College. After three years he was asked to leave because of his leadership of a student protest against a faculty member's treatment of another student. Although he was offered the opportunity to return to Williams, in the spring of 1825 Field took a clerk's position in an Albany law office. A few months later, Field moved to a similar position in New York City with family friends who had a growing practice. In 1828, Field was admitted to the bar as an attorney and became a partner in the firm. Field expanded the firm's predominantly admiralty practice into commercial law and real estate. Field's friends included James Kent, Samuel F. B. Morse, and William Cullen Bryant. Field once hosted a picnic attended by, among others, Oliver Wendell Holmes Jr., Nathaniel Hawthorne, and Herman Melville. By the 1850s, Field's practice involved mostly municipal law. He also defended the *New York Herald*'s publisher in several high-profile libel suits. In the late 1860s and early 1870s, Field advised Jim Fisk and Jay Gould during "the Erie Wars"—a controversial series of corporate and legal clashes with "Commodore" Cornelius Vanderbilt over the Erie Railroad and the control of rail traffic between New York and the Great Lakes. In the mid-1870s, not having been chosen to prosecute the infamous "Boss Tweed" on charges of criminal corruption, Field and his partners defended Tweed instead. In 1882, at age seventy-seven, Field presented the oral argument for New York State before the Supreme Court in *New York v. Louisiana* (1882).

Parallel to Field's highly paid legal practice was his personal campaign to demystify the law by "codification." Previously, the body of American legal procedure and substance could be known only from volumes of opinions ex-

plaining decisions in specific cases. Field was a leader in the movement to simplify and organize the law by identifying its main principles and compiling it as a written code. Codification was opposed by those in the legal profession, who had acquired their expertise by years of study and felt that changes that reduced the law to a single well-organized and clearly written book were both threatening and demeaning to their profession. In the 1840s, the New York state legislature created a commission, to which Field was appointed, to reform that state's laws. The so-called "Field Code"—nominally the product of the commission but mostly the work of Field himself—became the basis for state legal procedure in twenty-four (principally western) states and in much of the British Empire. Field's later proposed code to govern substance was less widely accepted and had less influence. In 1872, Field offered his own draft of an outline of a code of international law providing for disputes between nations to be arbitrated. Four years later, he published a revised version complete with laws of war. Field paid out of his own pocket for many of his expenses to advance codification.

In politics, Field was a states-rights Democrat who broke with his party in the late 1840s over the issue of slavery and the annexation of Texas, allying himself first with the Free Soil party and then with the Republican party. Field attended the Republican party convention in 1860—though not as a delegate—and William H. Seward's supporters blamed Field and Horace Greeley for persuading the delegates to nominate Lincoln instead. After the Civil War, Field returned to the Democratic party because of his disagreements with the Radical Republicans. When the election of 1876 resulted in a dispute over whether Republican Rutherford Hayes or Democrat Samuel Tilden had been elected president, Congress created an electoral commission to decide how disputed electoral votes should be counted. Although he had voted for the Republican Hayes, Field was elected as a Democrat to complete the remaining two months of a vacant seat in the House of Representatives, where he presented the Democrats' argument that the commission should reject several states' officially certified results and decide for itself whom to certify. However, the final vote broke along straight party lines.

As a courtroom litigator, Field left his most lasting marks by presenting to the Supreme Court persuasive arguments that national governmental powers—executive and congressional—were limited to those explicitly enumerated or clearly implied by the Constitution. In *Ex parte Milligan* (1866), Field argued on behalf of Lambdin P. Milligan, whom a military court (called a "commission") convicted and sentenced to hang for conspiring and inciting to insurrection in Indiana during 1863 and 1864. Milligan's attorney, a former attorney general of Indiana, appealed Milligan's conviction to the U.S. Supreme Court, where the defense team added Jeremiah Black (previously a chief justice of the Pennsylvania Supreme Court, U.S. attor-

ney general, and secretary of state under President Buchanan), James Garfield (previously a Union general, then congressman from Ohio, and future president), and Field. Black and Field served pro bono. Field delivered the oral argument for Milligan, beginning with a factual recitation establishing that (1) Milligan was a civilian convicted of crimes for which he could have been tried and punished in the ordinary civil courts; (2) the military court was established pursuant to executive order rather than congressional legislation; and (3) Indiana was untouched by military conflict at the time of the alleged crimes. Thus, said Field, the question was this: "Has the President, in time of war, by his own mere will and judgment of the exigency, the power to bring before his military officers any man or woman in the land, to be there subject to trial and punishment, even to death?" Field urged that no military court could have jurisdiction to try civilians in a state untouched by war when the civil courts were open, and the Court accepted Field's argument.

Cummings v. Missouri (1866) arose soon after the enactment in 1865 of a new Missouri Constitution requiring state officeholders, lawyers, voters, and even clergymen to take an oath not only that they would be loyal to the Missouri and federal governments prospectively but that they had never been disloyal to either of those governments in any way—not even by sympathetic feeling—in the past. Cummings, a young Catholic priest, preached after failing to take the oath within the prescribed time and was promptly indicted, tried, convicted, and sentenced. Unsuccessful appeals in the state courts were followed by an appeal to the U.S. Supreme Court, where Cummings was represented by Field and Reverdy Johnson, a U.S. senator from Maryland and former U.S. attorney general. In his oral argument, Field attacked the Missouri test oath as (1) requiring an affirmation of past *dis*loyalty to the federal government, since it affirmed past loyalty to the government of the State of Missouri, which had itself been disloyal at the outbreak of the Civil War; and (2) violating the Constitution's prohibitions of bills of attainder and ex post facto laws, since it effectively imposed punishment without trial for past deeds which were not unlawful at the time they were committed. In a 5–4 opinion written by Field's brother, Stephen, the Court agreed on the basis of Field's second argument.

In *Ex parte McCardle* (1869), Field raised a constitutional challenge to the entire post–Civil War military occupation and Reconstruction of the South. McCardle, a Mississippi editor, was tried and convicted by a military court for publishing intemperate white supremacist criticisms of military officers and state officials and for advising voters either to refrain from voting or to vote a particular way. Before the Supreme Court, Jeremiah Black presented the first part of McCardle's argument and was followed by Field, who

attacked McCardle's conviction because (1) the Constitution prohibited military government, since the power of Congress to substitute military government for civilian government in states was neither enumerated nor implied in the Constitution; and (2) the factual premise of the Military Reconstruction Acts—that no legal state governments or adequate protection for life or property existed in the South—were false. However, before the Court rendered a decision, there were plausible reports that the Court would overturn McCardle's conviction, and Congress passed legislation ending the Court's jurisdiction over such cases. Although President Andrew Johnson vetoed the law, Congress overrode the veto, and the Court decided it had no jurisdiction to review McCardle's appeal whatsoever. Although the case is remembered today chiefly for the Court's opinion as to the extent of congressional authority over the Court's appellate jurisdiction, at that time it was a step in dismantling the Reconstruction program of the Radical Republicans, because Congress also repealed the act under which McCardle had been prosecuted.

U.S. v. Cruikshank (1875) arose after a riot in Colfax, Louisiana, on Easter Sunday, April 13, 1873, when political opponents massacred between 60 and 150 African-Americans and three white men. Cruikshank and more than one hundred other whites were indicted under the federal Enforcement Act of 1870 of conspiring to deprive African-Americans of the free exercise and enjoyment of rights and privileges granted and guaranteed to them by the Constitution and laws of the United States. At oral argument before the Supreme Court, Field asserted the equality of the freedpeople could have been provided after the Civil War by either (1) federalizing all those rights previously enjoyed as the result of citizenship in the states; or (2) barring states from discriminating against freedpeople with regard to those already existing rights they possessed as citizens of states. He argued that the Thirteenth, Fourteenth, and Fifteenth Amendments represented the second of these possible choices. That is, the amendments (1) prohibited only action by the states and did not give Congress the constitutional power to prohibit the actions of individuals; and (2) applied only to the rights freedpeople possessed because of citizenship in states and not to rights they possessed because of citizenship in the nation. In this case, Field argued, the rights with which Cruikshank allegedly interfered were based exclusively on state citizenship, so laws exercising constitutional powers of the federal government did not apply to him. Reasoning along the lines laid out by Field, the Court ruled in favor of Cruikshank.

Field charged for his services—following normal practice—according to their value to his clients. Although Fisk and Gould disputed his fees continually, they continued to retain Field. On one occasion, a client requested

an opinion that took Field only a few days to prepare but for which he charged the considerable sum of five thousand dollars. When his client protested, Field replied,

> Why did you come to me? You knew that I am not a cheap lawyer. You knew that you could get an opinion to the same effect for a fifth of the money from any one of half a dozen lawyers which would have commanded respect, but for some reason you came to me. Now I think you came to me because you believed that my opinion would be more influential in effecting the result which you desired, and I believe that end has been accomplished, and that my opinion contributed largely toward it. Am I not right? Very well, then, gentlemen, you have benefited to a vast amount through my opinion, and you must pay me my charge, which, all things considered, is a very small one. (Bergan 1986, 50–51)

Field took satisfaction in the fact that he probably earned more money by the practice of law than any contemporary.

For more than fifty years, Field was, in the words of a contemporary member of the New York bar, "the most commanding figure at the American bar" (Hoy 1908, 132). The adjective *commanding* is important, for Field's courtroom success was not due to oratory or personality but to great learning, prodigious energy, thorough preparation, decisiveness, and persistence. Convinced his opinions were right and his conduct above reproach, the straitlaced and humorless Field saw himself as a "fighter" braving personal ridicule and hostility to fulfill obligations both personal and professional. Thus, to those outside his circle of personal friends, Field maintained a cool professional distance and gentlemanly reserve. He could be sarcastic, overbearing, and uncivil toward opponents. Many judges thought he was insufficiently respectful of the bench. But at trial, Field was master of all the minutiae of procedure, law and fact, while he reduced a dispute to its essential issues and constructed an elegant argument favoring his client. When his case was fatally weak, Field did not have the charm and sophistical skill to get away with evasion and pettifoggery. But when there was something to his case, Field went straight to the crux and overpowered by force of logic, fact, and precise statement.

Field was a founder (1873) and honorary president of the Association for the Reform and Codification of the Law of Nations, the founding U.S. member of the International Law Institute (1873), and a president of the American Bar Association (1888–1889). Blessed with excellent health, Field outlived three wives and was both mentally and physically vigorous until, only two days after returning from his annual voyage to Europe, he died at home at age eighty-nine in New York City on April 13, 1894.

Field's surviving papers are in the William Perkins Library at Duke University.

—James A. Keim

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FOREMAN, PERCY

(1902–1988)

Like the state of Texas, where he was born and died, criminal defense and divorce attorney Percy Foreman established a reputation to match his large size: he stood six feet four inches tall and weighed 250 pounds or more. Born in a small house in Bold Springs, Texas, in the piney woods area of Polk County, Foreman was a third cousin to comedian Will Rogers, with whom he shared Cherokee ancestry. Foreman's father, R. P. Foreman, was a sheriff and jailer; at age eight, Percy—who would later do so much to defend individuals accused of murder and who would later advocate resuming public executions—witnessed the public execution of an African-American man accused of killing several whites.

Believing that he "knew everything they would teach me" (Dorman 1969, 43), Foreman dropped out of school at age fifteen, but he subsequently worked shining shoes, collecting bills, delivering goods, and loading cotton and won a scholarship to the Staunton Military Academy in Virginia. Afterwards he enrolled in the University of Texas at Austin, where he continued to increase his personal fortune by giving

Percy Foreman

American defense lawyer Percy Foreman points from the assassin's hiding place to the verandah where Dr. Martin Luther King Jr. fell. (Express Newspapers/Archive Photos)

lectures on the Chautauqua circle, preparing the ground for future greatness by learning to give two-and-a-half-hour orations on such topics as "The High Mission of Women in the Twentieth Century." Not surprisingly, Foreman distinguished himself in law school by winning an oratorical contest with "A Tribute to Stephen F. Austin as the Father of Texas."

After he graduated, Houston attorney J. W. Lockett offered to take Foreman into his partnership, but Foreman later joined the Houston district attorney's office, where he worked on and off until 1935, when he established his own practice. In an early case defending Jewish peddlers who were accused of selling their wares without a license, Foreman let hundreds of indictments pile up, then brought in sixty or more bearded clients and challenged the arresting officers to identify them. The only conviction was of one Muscowitz, who apparently stood up during the proceedings to identify himself (Dorman 1969, 51).

Foreman's greatest claim to fame during his career was the fact that he handled from one thousand to fifteen hundred death penalty cases. Few of his clients served jail time, and Furman lost only one—Steve Mitchell, who was convicted of shooting his wife through a door while she was sitting on a bathroom commode—to the executioner. Foreman clearly considered criminal law to be his specialty. Defending this preference, Foreman noted that

> the civil lawyer defends money. He represents money. The criminal lawyer is primarily concerned with life and liberty. When I talk to young law students I tell them that, if they love money more than life and liberty, they should stay in their sequestered cells. But, if they value life and liberty, they should join us. (Dorman 1969, 30)

Foreman referred to many of his own cases as "misdemeanor murders" (Dorman 1969, 85). He further argued that in jail such individuals were often "the best characters—the most trusted, reliable, dependable people, the people most likely to be readjusted to society" (Dorman 1969, 318).

Early in life, his fellow Baptists—who had ordained him as a deacon—criticized Foreman for defending too many criminals. Subsequently remaining "ordained but unchurched," Foreman indicated his belief that all were entitled to a defense by asking his fellow parishioners, "Does a barber cut an infidel's hair?" (Dorman 1969, 51).

Foreman ran for district attorney in 1940 and lost, and he stuck ever thereafter to defense work, serving as one-time president of the National Association of Defense Lawyers in Criminal Cases and winning the American Academy of Achievement's Golden Plaque award for excellence (Dorman 1969, xii). His most notorious cases have involved murders and divorces.

Through the Door!

One of the stories told at the 1986 Festival of American Folklife was that of an attorney defending a client accused of murdering his wife in a case based solely on circumstantial evidence. A body had been found, but there was controversy as to whether the body that was found was that of the alleged victim.

Attempting to highlight this lack of identity, the attorney pointed to the door and promised that the wife would walk through it. When the jurors looked in that direction, the attorney noted, "the fact that you looked at the door clearly demonstrates that you didn't believe that it was the defendant's wife they found."

Nearly certain of victory, the defense attorney was shocked when the jury convicted his client after only five minutes of deliberation. Asking a juror how they could possibly have found his client guilty when all the jurors had looked at the door, the juror noted that, while they had looked, "your client didn't!"

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Many of his cases were quite dramatic. In 1962, Foreman defended Dr. Harold Eidinoff for the murder of Theodore Andress, the president of the El Paso School Board and member of the board of directors of the National School Board Association. Andress had come into possession of nude photographs of Eidinoff and his first wife (taken on their honeymoon), and Eidinoff had stalked Andress in disguise and killed him at an airport. Foreman used a novel "Ivory Soap" defense, claiming that Eidinoff was "ninety-nine and forty-four one-hundredths percent sane" but was obsessive over the nude pictures and his feud with Andress (Dorman 1969, 95). Although Eidinoff was declared not guilty by reason of insanity, he was subsequently confined to a mental institution.

Not all Foreman's cases have involved murder. In 1962, he defended conservative former major general Edwin Walker against charges that he had incited the uprising that led to rioting and death at the University of Mississippi when African-American James Meredith was admitted. Ironically, Foreman would later serve as a de facto attorney for Lee Harvey Oswald (who had tried to assassinate Walker before killing President John F. Kennedy) and briefly for Jack Ruby (Oswald's assassin), whose family later hired Melvin Belli instead.

Foreman was known for a variety of distinctive traits. Almost always in a hurry, Foreman balanced numerous cases at once and often lined up defendants almost in an assembly-line fashion. Rarely humble, Foreman reputedly said, "It's not that I'm vain, proud or egotistical. I just don't have anything to be modest about" (Dorman 1969, 29). Foreman often listed his address simply as "PERCY 77002," indicating that all the post office needed

to know was his first name and zip code. Similarly, he handed out calling cards indicating that he belonged to the law firm of "Moses, Justinian, Blackstone, Webster and Foreman" (Dorman 1969, 117).

Foreman's legendary memory was aided by prodigious preparation, which was fueled by a high energy level—he showed up for work every day, including Sundays, and worked most days from early in the morning until late at night. Foreman once told a colleague, "For me, practicing law is the be-all and end-all. I don't practice law to take vacations and play golf" (Draper 1994).

Foreman consulted with his clients as early as possible, trying to prevent them from confessing to anything, and he was an apparent master of jury selection techniques. Like Earl Rogers, Foreman reveled in courtroom demonstrations, once cracking a whip with which the murdered husband of a defendant had allegedly beaten her, in the courtroom (Barron 1988, 15). In another trial, Foreman's client, a safecracker who usually walked on a wooden leg, came into court, presumably at Foreman's direction, without the leg and was on at least one occasion carried to the stand by Foreman himself (Dorman 1969, 142).

Foreman's large height and size have helped him dominate the courtroom. One reporter referred to his "attention-getting black-and-white plaid sports jackets and bow ties" as well as to the "wisps of his iron-gray hair" that tumbled over his forehead (Barron 1988). Foreman, whose biographer described him as "vain, stubborn, and arrogant," also called him "an original" (Dorman 1969, 326).

Foreman was known as a relentless cross-examiner whose knowledge of the facts often confounded witnesses. Foreman was often able to undermine confessions by suggesting that they had been coerced by police officers. Similarly, he often suggested that police had gone easy on prosecution witnesses who were willing to tell them what they wanted to hear.

One of Foreman's chief strategies was to divert attention away from the defendant onto himself, the police, the opposing witnesses, or society itself. Foreman was quoted as saying, "You should never allow the defendant to be tried. Try someone else—the husband, the lover, the police, or, if the case has social implications, society generally. But never the defendant" (Dorman 1969, 1). During his trials, Foreman often directed attention to red herrings, which seemed at the time to be significant but often had little to do with the case.

In 1964, Foreman successfully employed this strategy in his defense of John Whitfield Bonds, a forty-two-year-old man who had shot a fifteen-year-old named William John Walden III in front of a grocery store; at the time, the trial was the longest in the state's history. Foreman portrayed Walden as a juvenile delinquent and used psychiatric analysis of an essay

Walden had written in the seventh grade to show that Walden was deeply troubled. Foreman advanced Bonds's seemingly contradictory defenses that the killing had been an accident but had been committed in self-defense. During a two-hour closing argument in which he seemingly put society as a whole on trial, Foreman sobbed convulsively at times but ended by quoting from Sir Walter Scott's *Lady of the Lake* (Dorman 1969, 26).

Similarly, in defending Mrs. Virginia Deane Thomson in the killing of her husband, Foreman accused Mr. Thomson of having tried to put out a contract on her, of sexual deviance, and of abuse of his wife and of pets. In his summation to the jury, Foreman said, "The Almighty intended Arthur Francis Thomas to die. Perhaps he died that others might live in peace. He lived by force, and he died by force and violence" (Dorman 1969, 271).

Although he lost a case to District Attorney A. C. Winborn, who was also known for his fine closing arguments, Foreman had a stenographer copy down Winborn's closing, and Foreman memorized it. In the next case, he caught Winborn off guard by telling jurors word for word in advance what Winborn planned to say and leaving him to improvise unsuccessfully (Dorman 1969, 141).

Although he frequently quoted the Bible and a host of other great works of literature, Foreman never lost the common touch. Thus, in defending individuals accused of distributing obscene literature, Foreman told jurors that prosecutors cut the defendants out of the herd "to be branded and barbequed" but that, although the prosecutors were asking for a barbecue, "they haven't given you enough firewood" (Dorman 1969, 284).

Foreman earned a reputation for aggressiveness, and, on several occasions, Foreman was challenged to fisticuffs in the courtroom by prosecuting attorneys. On one occasion, after likening two lawmen, Kern and Klevenhagen, and an associate (Kain) to the Ku Klux Klan for torturing a defendant into confessing, Foreman was physically beaten by the lawmen in the courtroom after the jury announced a not guilty verdict. On another occasion, he talked a woman defendant out of shooting him by saying, "You don't want to shoot me, honey. I'm the only one who can get you off" (Dorman 1969, 212–213).

Ironically, Foreman's defendants are often the most aggrieved with him. A Foreman biographer explained that he enraged some by his high fees, some by his contemptuous treatment, and some by the fact that he had them plead insane as a way of avoiding the death penalty (Dorman 1969, 213). Foreman, who had shown a proclivity for making money before he ever entered the legal profession, died a multimillionaire with a great deal of property. He was known for accepting insurance policies, ranches, and jewelry from his clients—on one occasion, he even accepted circus elephants. At one time, Foreman owned more than forty cars, all of which he

had received in payment from clients (Draper 1994). Foreman said, "I don't represent wealthy clients. If they weren't poor when they came to me, they are when they leave." Further indicating that his fees exacted a rough form of justice (albeit somewhat contradicting the view that defendants are innocent until proven guilty), Foreman once said that, "My fee is my client's punishment" (Dorman 1969, 60).

Despite his love of money, Foreman claimed to turn down divorce cases when he thought the couple could be reconciled. On occasion, his own insults apparently drove the couple to defend one another and reconcile. When a woman answered his query about why she wanted a divorce by saying, "I'm just not happy," Foreman saved her marriage by responding, "You don't need a lawyer! You need a pharmacist! You'll never find someone who treats you as well as this man does! Now get out of my office!" (Draper 1994).

Foreman's most controversial case may have been his defense of James Earl Ray for the assassination of Dr. Martin Luther King Jr. in Memphis, Tennessee. After consulting with Ray for more than fifty hours, Foreman was convinced that he was guilty and that a jury was likely to give Ray the death penalty. Although he convinced Ray to take a ninety-nine-year sentence in a plea bargain, Ray subsequently claimed—a claim that Foreman later disputed and for which he could find no evidence—that he was simply a pawn in a much larger conspiracy.

Through most of his career, Foreman was a sole practitioner who relied on but one solitary secretary for permanent support. He did, however, often share cases with other counselors, especially if his interest waned in a case or he found that his client was unwilling to let him run the show. In about 1976, Foreman took on some partners, including Dick and Mike DeGuerin, who have gone on to make solid reputations as criminal lawyers in their own right, but relationships were often rocky, and a number of his partners set out on their own.

Foreman was married twice. He and his first wife divorced. He married his second wife, Marguerite Obert, a native German, in 1957, a year after he met her on an overseas trip. Foreman had an adopted son by his first marriage, William Pinckney Foreman, and a daughter by his second marriage. Foreman died of cardiac arrest at Methodist Hospital in Houston in 1988.

—John R. Vile

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FORTAS, ABE

(1910–1982)

Abe Fortas had the talent to be among the twentieth century's most influential lawyers and backroom policymakers, but instead his belief that he was beyond the rules led him to be remembered as the only Supreme Court justice ever to be forced to resign from the bench.

Abe Fortas
Ehrenhaft/Collection of the Supreme Court of the United States

Fortas grew up as a marginalized Jewish boy in Memphis, Tennessee, where he was born on June 19, 1910. During this childhood and his education both at Southeastern (now Rhodes) College and Yale Law School, Fortas displayed remarkable intuitive genius, which was tempered by his realization that in anti-Semitic times he had to downplay his status as a Jew in order to get ahead. In addition, Fortas internalized the belief that holding onto one political or ideological philosophy would be a detriment, as it would limit his personal ambitions. All of this created a man lacking in strong ideological beliefs, but rather with a view of being able to mold himself to those around him to realize his personal ambitions.

Fortas's legal mentors at Yale Law School, who helped mold his legal philosophy, included such legendary professors as Walton Hamilton, Wes Sturges, Thurman Arnold, and William O. Douglas. These professors, especially Douglas, believed that law was not an end unto itself; instead, it was a mechanism through which positive social change could occur. One of

Douglas's pet projects while at Yale was the integration of the study of law and business, as he began a curriculum taught in conjunction with Harvard Business School. While Fortas was at Yale, the Great Depression gripped the world, and Douglas's integrative law-business curriculum became increasingly important, as many viewed it as the avenue through which the economic downturn could be understood and solved. When Douglas went to Washington to begin work on President Franklin Roosevelt's New Deal, he sought a capable student to take over his law/business program, and that student was Fortas. Fortas began to learn about Douglas's socioeconomic policy by doing casework in Chicago while still a student at Yale, as he studied the impact of the overextension of consumer credit by employers.

During the summer after his graduation from law school in 1933, Fortas received an offer from his former professor, Wes Sturges, to work for the newly created Agricultural Adjustment Agency (AAA) in the legal department. Fortas began his legal work in the canned peach business, and though lacking in specific knowledge of the field, he excelled in the process of setting prices and output for the government to such an extent that he became the symbol of the young revolutionary New Dealers who were making policy. It was in this service that Fortas distinguished himself from other New Dealers by using pragmatic views rather than ideological theory to solve the problems of the Great Depression in this field. In this initial venture into commercial reform, Fortas also displayed the full confidence that any societal problem could be solved using hard work and logical thinking. All of this, combined with his deft ability to mediate a compromise position between opposing sides, displayed the kinds of skills that would guide the rest of Fortas's career.

After capably serving the AAA through the summer of 1934, Fortas joined his old mentor William O. Douglas at the newly created Securities and Exchange Commission (SEC), where the two men investigated the abuses of the protective committees that were formed to resolve bankruptcy cases. Since Fortas's responsibilities at the SEC were less demanding than those at the AAA, he was also able to commute back and forth between Washington and New Haven, Connecticut, where he started his teaching career at Yale Law School. Although he was skeptical of the activities of big business in this study, Fortas was pragmatic enough to understand that for the U.S. economy to function effectively, Wall Street should not be hamstrung by strict government regulation.

In 1938, after resigning from teaching at Yale, Fortas returned to work full time as the assistant director of the SEC's public utilities division, where he regulated the large utilities conglomerates that had been broken up by the Public Utility Holding Company Act of 1935. While at this job, Fortas's role was essentially to make the extremely powerful utilities compa-

nies justify their existence or face Section 11 of the SEC code, known as the "death sentence," which empowered the SEC to dissolve companies whose existence was superfluous. Here Fortas followed the general New Deal retreat from planning economics toward the restoration of the natural competition necessary for capitalism to flourish.

When his mentor, William O. Douglas, was appointed to the Supreme Court in 1939, Fortas accepted a position in the Department of the Interior under Harold Ickes as the general counsel to the Public Works Administration in 1939. After some bureaucratic shuffling, Fortas was named counsel to the Bituminous Coal Division, where he worked to reduce competition in the industry by regulating the price of different types of coal. In the spring of 1941, Fortas was named chairman of the newly formed Division of Power, which represented the Department of the Interior on matters of public power. Here, Fortas battled once more against both the powerful utilities conglomerates and members of the National Power Policy Committee (NPPC), who were less enthusiastic toward government control over public power. Because of his excellent work in all of these positions, when Jack Dempsey resigned as undersecretary of the interior in January 1942, Fortas was appointed to the position, becoming the number two person in the department at the young age of thirty-two. Despite the conservative direction taken by much of Roosevelt's government during wartime, Fortas continued to pursue a liberal course, pressing for land reform and the support of civil liberties, as shown by his opposition to martial law in Hawaii and internment of Japanese-Americans in the western United States. During his time at the Department of the Interior, Fortas also became interested in socioeconomic reform for Puerto Rico, an island whose people he would champion for the rest of his life. Fortas's main role at the department, though, was to coordinate the war production effort, including mediating a well-reported conflict with powerful United Mine Workers union leader John L Lewis. After the death of President Roosevelt in April 1945, Fortas decided to quit government service and explore the benefits of private practice. Fortas's record as a New Deal bureaucrat from 1933 to 1945 had been exemplary, embodying the values of hard work, progressive thinking, and social conscience. For him, such bureaucratic work was a good fit as, lacking a solid ideological base from which to operate, Fortas did his best work in a legal arena. Once he left governmental service for public work, this lack of an ideological center, combined with his pragmatic and mediating skills, would serve him well in private legal practice. However, they were in direct opposition to the progressive ideology that he had pursued while working in the New Deal.

After leaving the Interior Department, Fortas, along with two other government lawyers, Thurman Arnold and Paul Porter, launched the law firm

of Arnold, Fortas & Porter. Specializing in corporate law, this firm assisted businesses in navigating their way through the web of government bureaucracy. Only five years after the founding of the firm, Arnold, Fortas & Porter had a client list that would be the envy of any corporate law firm, with notable clients such as Lever Brothers, Philip Morris, American Broadcasting Company, and Pan American Airways.

Fortas reveled in his new role as a Washington lawyer for corporate interests, aggressively representing the interests of his clients. Rather than just representing his clients, Fortas became an overt advocate of their firm's interests, never challenging their assumptions or goals. Frequently, their actions were just the opposite of the New Deal philosophy he had once espoused. Seeking to justify this change of direction, Fortas rationalized his position by compartmentalizing his life, claiming that his legal career was a separate entity from his political beliefs.

Perhaps out of a feeling of guilt because of his abandonment of progressive ideals, during the late 1940s and early 1950s, Fortas's firm was one of the few law firms to take on the courageous pro bono defense of Americans accused by the government loyalty boards of being Communists. The firm took the case of Dorothy Bailey, a personnel expert in the U.S. Employment Service who was accused of being a Communist, all the way to the Supreme Court, only to lose because of the conservative direction of that body. When Senator Joseph McCarthy accused Johns Hopkins University government professor Owen Lattimore of being a Communist, it was Abe Fortas who defended him. After waging a vigorous public relations campaign for him and preparing Lattimore for his grilling by the Senate investigating committee, the firm was able to clear the professor of perjury charges. Although Fortas's defense of these people was courageous, it also gave him even more publicity, thus allowing him to make an even better living.

Fortas's firm also did progressive work on behalf of such causes as protection of animal rights; changing legal codes for the mentally ill, thus making it easier for defendants to prove their innocence by reason of insanity; and improving conditions in Fortas's beloved Puerto Rico. Also, Fortas was counsel in the landmark Supreme Court case *Gideon v. Wainwright* (1963), which established by a unanimous decision that all those accused of a felony offense are entitled to an attorney, resulting in the creation of the position of public defender nationwide. These cases, like Fortas's pro bono defense of those before loyalty boards, showed that Fortas still had a progressive streak and social conscience from his days working on the New Deal. However, he drew criticism for his work on behalf of corporations such as tobacco giant Philip Morris.

While in private practice, Abe Fortas also increasingly spent his time as

an advisor to those in power in Washington. Fortas's most powerful ally was Lyndon Johnson, whom Fortas had helped win a legal challenge to his nomination for the Senate and who later served as Senate majority leader, vice-president, then president after John F. Kennedy's assassination in 1963. This relationship, though based on a foundation of friendship and mutual respect, also served Fortas's business concerns, as Fortas used his influence with Johnson as a selling point to potential clients. As a result of this friendship, over Fortas's objections, Johnson appointed him to the Supreme Court in July 1965.

Fortas's performance as a Supreme Court justice was very representative of his overall legal ideology. Fortas was a realist on the Court, basing his decisions on his calculations of their social consequences rather than his personal ideology. A majority of Fortas's decisions while on the Court were liberal, as he protected the rights of criminals, freedom of speech, and the right to privacy. Typical of these decisions was *In re Gault* (1967), which created a set of Bill of Rights protections for juveniles in criminal cases. Conversely, Fortas's decisions in the business law area were strongly probusiness, following his work as a corporate lawyer rather than in the New Deal. Unlike many of his contemporaries on the bench, Fortas did not view his decisions as a finite body of legal thought, rather seeing them as tools by which U.S. society could be improved. Overall, Fortas's performance as a justice was considered above average, although liberals felt he was too conservative on business issues and conservatives despised his consistent representation on the liberal Earl Warren bloc on social issues.

In June of 1968, Fortas was nominated to become chief justice, replacing the retiring chief justice, Earl Warren. Republicans and conservative Southern Democrats decided to hold up the Senate's confirmation of the nomination in the hopes that the Republican Richard Nixon would win the presidency in November 1968 and appoint a more conservative chief justice. Days of investigations by the Senate Judiciary Committee uncovered that Fortas had continued to serve as a private political advisor for President Johnson on such issues as the Vietnam War, civil rights, and various speeches as well as bills for congressional consideration. The nomination died when the Senate uncovered that Fortas had accepted money from former legal clients to teach a seminar at American University law school in juvenile justice. Because of the inability to break a Senate filibuster on the nomination, Fortas withdrew his name, Warren returned to his seat for a year, and eventually Richard Nixon replaced him with Warren Earl Burger, thus changing the entire ideological direction of the Court.

Fortas's legal ethics came under attack in the late spring of 1969 when it was uncovered that he had accepted money from a foundation dealing with civil rights for juveniles in Florida that had been established by industrialist

Louis Wolfson, who had been indicted by the SEC for stock irregularities. When the Nixon administration worked with members of the press to leak accounts of this relationship to the public, Fortas resigned from the Court in disgrace, moving the Court further in the conservative direction.

After his resignation from the Supreme Court, Fortas returned to his roots as a private lawyer. Although members of his old law firm would not take him back, he set up a small law firm in Georgetown, far from the arena of power and influence that he had once dominated. In his final years, Fortas advised some of his former clients on antitrust and securities matters and remained involved in matters of constitutional law, contributing law review articles on subjects such as antitrust law, civil liberties, the patent system, and criminal justice. Fortas even returned once to the Supreme Court, arguing a case before the Court in 1982 regarding a dispute between two of Puerto Rico's political parties involving succession of power in the legislature. Unfortunately, he did not live to learn that he had won this case, as he died of a burst aortic valve on April 5, 1982.

Abe Fortas's career was one of missed opportunity and unsuited position for a man of his legal skills. Among his contemporaries, Fortas was a lawyer of unmatched brilliance, and when he put his intelligence to good use, most vividly during the New Deal, the results were spectacular. When Fortas's legal work was motivated by monetary interests, such as in his corporate work at Arnold, Fortas & Porter, the results were better for his pocketbook than for the nation as a whole. And when he was trapped into a position on the Supreme Court for which he was not suited due to his lack of an ethical center and ideological backbone, the results were tragic.

—Bruce Murphy and Scott Featherman

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GINSBURG, RUTH BADER

(1933–)

Ruth Bader Ginsburg is best known as the lawyer and litigator primarily responsible for raising the issue of equal rights for women to the level of constitutional principle. She was "a critical participant in the Court's dialogue about the role of women in society and their status in the law, and she awakened the Court's conscience about the meaning of equality" (*Report* 1993, 5). Her imprint can be found on virtually every gender equity case decided by the Supreme Court during the 1970s. When, on June 14, 1993, President William Jefferson Clinton nominated Ginsburg to be an associate justice of the Supreme Court, he spoke of her "pioneering work on behalf of the women of this country." Having been a successful advocate and the victorious counsel of record before the Supreme Court in the first handful of gender discrimination suits, Ginsburg was, Clinton remarked, "to the women's movement what Thurgood Marshall was to the movement for the rights of African-Americans."

Ruth Bader Ginsburg
Collection of the Supreme Court of the United States

Ruth Bader Ginsburg was born Joan Ruth Bader into a Jewish family in Brooklyn, New York, on March 15, 1933. She was the second daughter of Nathan Bader, a garment manufacturer and salesman, and Cecelia Amster Bader, a homemaker. Ginsburg was raised in Brooklyn, in a nation mired in the Great Depression, in a world that discriminated against Jews and women. She received her diploma from James Madison High School in 1950. Four years later Ginsburg obtained the B.A. degree, graduating Phi Beta Kappa and "with high honors in government and distinction in all subjects," from Cornell University in Ithaca, New York. That same year, she married Martin D. Ginsburg, who had just completed his first year at Harvard Law School. (Her husband later become a well-respected lawyer and law professor at Georgetown University Law Center.) When the military required the services of her husband, the family relocated to Oklahoma. There, as a clerk-typist in a Social Security office, Ginsburg experienced firsthand discrimination in the workplace: Because of her "pregnant condition," she was denied the opportunity for promotion. The memory of that injustice later sparked her accomplishments in the field of women's rights.

After two years in Oklahoma—and the birth of her first child—Ginsburg matriculated at Harvard Law School in 1956. There, she experienced discrimination in education firsthand. Women were denied access to the old periodicals room in the library, for example. In the classroom, women were called upon more often than were men. "It wasn't harassment as much as it was fun and games: Let's call on the woman for comic relief," Ginsburg explained (Friedman 1994, 12). The dean of the law school, Erwin Griswold, even went so far as to ask the women students how they could justify taking up a classroom seat that could be occupied by a man (Gilbert and Moore 1981, 156). Ginsburg responded by being named to the law review. Following two years at Harvard, Ginsburg, for financial and family reasons, transferred to Columbia Law School, where she served on law review—the first person to be named to both Harvard and Columbia law reviews—and was named a Kent Scholar. She earned the LL.B. (J.D.) in 1959, finishing first in her class. That same year she was admitted to the New York bar.

Despite all of her academic successes, Ginsburg continued to face discrimination. Supreme Court justice Felix Frankfurter turned her down for a clerkship "simply because he wasn't ready to hire a woman" (Kaplan and Cohn 1993, A1). The legendary federal judge Learned Hand refused to offer her a clerkship because he feared that his "salty" language might be offensive to a woman (Margolick 1993, 29). Nevertheless, Ginsburg was able to secure employment from Edmund L. Palmieri of the U.S. District Court for the Southern District of New York, for whom she clerked from 1959 to 1961. In 1961, Ginsburg was admitted to the bars of the U.S. District Courts for the Southern and Eastern Districts of New York. The following

year she was permitted to practice before the U.S. Court of Appeals for the Second Circuit.

In 1961, Ginsburg became a research associate and, one year later, associate director of Columbia Law School's Project on International Procedure, where her assignment was to study and write about Sweden's procedural system and the practices of Scandinavian countries with respect to international judicial assistance. In 1963, Ginsburg joined the faculty of Rutgers University Law School as an assistant professor. As a professor she quickly established herself as a leading expert on gender discrimination law. Ginsburg rose to associate professor three years later; she attained the rank of full professor in 1969. It was during this professorship—in 1967—that she was admitted to the bar of the U.S. Supreme Court. In 1972, Ginsburg became the first female professor at Columbia Law School, where she taught until 1980.

While on the faculty at Columbia, Ginsburg became the first director of the Women's Rights Project of the American Civil Liberties Union (ACLU). This project was soon recognized as the leading women's rights advocacy group in the courts. Between 1973 and 1980, Ginsburg served as general legal counsel to the ACLU, which participated in more than sixty gender-bias cases before the Supreme Court. In 1975, she was admitted to practice before the District of Columbia Court, the U.S. District Court for the District of Columbia, and the U.S. Courts of Appeals for the Fifth and District of Columbia Circuits.

Ginsburg's only courtroom experiences were between 1971 and 1979. Although her tenure was brief, her contributions were large. During those years, Ginsburg practiced exclusively at the federal level and almost entirely in appellate courts. Although she was the author of numerous amicus curiae briefs filed in state courts and was regularly consulted by ACLU attorneys in matters pending in state courts, Ginsburg never appeared as an attorney in a state court. Moreover, although she initiated several federal district court actions, most of these "first-instance" cases were resolved at the pretrial stage. The two cases she personally argued in the district court were before special three-judge panels. Thus, not once during her legal career did Ginsburg argue to a jury. She did, however, have significant appellate experience: In fifteen cases she was the attorney of record for a party, and she was the sole or principal author of many amicus curiae briefs filed in appellate tribunals.

The bulk of Ginsburg's legal work addressed the equal protection clause of the Fourteenth Amendment and gender discrimination. She developed a brilliant legal strategy that included using men as plaintiffs in gender discrimination suits. This tactic was designed to persuade the all-male justices that gender-biased laws—discriminating against either men or women—

Leslie Abramson

Although some lawyers try to avoid murder cases, Leslie Abramson clearly thrives on them. As she writes, "In homicides you are learning about human nature at its most explosive" (Abramson and Flaste 1997, 60). Born and raised in New York, Abramson attended Queens College and went to law school at the University of California at Los Angeles. She then worked for seven years in a variety of capacities in California as a public defender before going into private practice in 1976.

In a book that she wrote, Abramson details work on behalf of parents accused of killing their children, of individuals charged with committing murder in the course of other felonies, and of women accused of killing their husbands. In a highly emotional case in which the district attorney had effectively sought to convict her client in public, Abramson was able to show that Dr. Khalid Parwez, accused of killing his eleven-year-old son, carving up his body, and leaving it in a dumpster, was on duty at a hospital as an obstetrician when the murder occurred and that the more likely murderer was Parwez's brother Sattar, who had fled to his native Pakistan.

Abramson believes that a defense attorney has an obligation to defend clients, regardless of whether they believe them to be guilty or innocent; she argues that a lawyer defending a client has no more cause to question the client's guilt than does a doctor who is about to operate (Abramson and Flaste 1997, 150). Abramson believes that solid preparation and knowledge of scientific evidence is often critical in winning verdicts. In an early case that she took while in private practice and whose outcome was likened to a Perry Mason story, Abramson was able to use neutron activation analysis to trace the bullets used in a murder pinned on her client (Shirelle Crane) to her client's accuser, Frank Ruopoli. Abramson is more skeptical of eyewitness testimony, noting that, contrary to its often positive reputation, it "is inherently unreliable, the human mind being what it is" (Abramson and Flaste 1997, 149).

Abramson acknowledges being aggressive in the courtroom, believing that jurors will respect an attorney who goes all out in a client's defense. Abramson also considers closing arguments to be important and believes that she does them well (Abramson and Flaste 1997, 14). The only major case in which Abramson's client was sentenced to death involved the conviction of Ricky Sanders for participation in the shooting of eleven people, four of whom died, in a walk-in freezer in a Bob's Big Boy restaurant in Los Angeles.

Abramson served as a commentator for ABC News during the O. J. Simpson murder trial. She had been through a similar media circus (which has persuaded her that cameras do not belong in the courtroom) in defending Eric Menendez, who along with his brother Lyle, killed his parents with a shotgun. Although evidence of longtime parental sexual abuse did not prevent the brothers from being convicted of first-degree murder, they were sentenced to life in prison rather than being given the death penalty.

The Los Angeles Criminal Courts Bar Association has twice named Abramson its Trial Lawyer of the Year, and Abramson was the first woman to serve as president of the California Attorneys for Criminal Justice.

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were incompatible with the great principle of equal protection under the law.

Beginning in 1971, Ginsburg participated either by direct argument or by assisting in the preparation of the legal brief in nine cases brought before the Supreme Court. In six cases she participated by authoring the legal brief and presenting argument; she was victorious in five. In three other cases Ginsburg prepared the legal brief; her position was affirmed in two, and an adverse lower court decision vacated in the other. These cases constitute much of the significant gender equity litigation of the twentieth century and had great constitutional and societal significance. And it was Ginsburg who "virtually steered" the Court to its current jurisprudence on the subject.

Until the 1970s, the equal protection clause of the Fourteenth Amendment offered little protection for women. Gender classifications were routinely upheld so long as they were rationally related to a legitimate government objective. Under this standard—known as the "rational basis" test—little scrutiny was involved. Thus, the justices had held, for example, that women could be barred from the legal profession (1873), had no constitutional right to vote (1875), and could be disqualified from serving on a jury (1961). By the 1970s, changing social and economic conditions demanded a reassessment of laws that discriminated against women based on stereotypical notions of women's roles and capabilities. *Reed v. Reed* (1971) provided that opportunity.

The Idaho statute challenged in *Reed* declared that between persons "equally entitled" to administer a decedent's estate, "males must be preferred to females." Ginsburg was the principal author of the legal brief for Sally Reed. Her primary argument was that the Court should analyze gender-based classifications in the same manner that it analyzed race-based classifications. Race-based classifications were upheld only if the state had a compelling state interest in the classification, and the classification was necessary to accomplish that interest. Under this higher standard—known as the "strict scrutiny" test—much examination was involved. "Legislative discrimination grounded on sex, for purposes unrelated to any biological differences between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference," her brief noted. Although the Court was unwilling to accept Ginsburg's primary argument, it did accept her alternate position—the statute failed the "rational basis" test because it lacked "the constitutionally required fair and reasonable relation to a legitimate state interest." Thus *Reed* was the first occasion on which the Court held a gender-based classification inconsistent with the equal protection clause.

Buoyed yet undeterred, Ginsburg continued to encourage the Court to elevate gender to a "suspect classification." In *Frontiero v. Richardson*

(1973), in which she was responsible for both the writing of the brief and the oral argument, she came quite close: Four justices agreed with her, one short of the requisite five needed to establish a precedent. Nevertheless, the Court held that married women in the military were entitled to the same benefits as married men. Her opposing counsel in this case was Erwin N. Griswold, then solicitor general of the United States and former dean of the Harvard Law School—the same man who, some years earlier, had questioned Ginsburg on the role of women in the legal profession. *Reed* and *Frontiero*, read together, intimated that gender was a quasi-suspect category, deserving some form of heightened scrutiny.

Ginsburg's only defeat before the high court was *Kahn v. Shevin* (1975), in which the justices sustained a real property tax exemption for widows but not widowers. In this case, in which she was the principal author of the brief and presented oral argument, the Court reasoned that women faced greater financial difficulty when their spouses died than men did when their spouses died. Ginsburg later remarked that this holding was indicative of the widely held proposition that women needed a "boost . . . because they [could not] make it on their own" (Ginsburg 1988, 25).

The following year, Ginsburg altered her methodology. Instead of requesting that gender be elevated to a "suspect classification," she argued, per her brief and in oral argument in *Wienberger v. Wiesenfield* (1975), that gender should be placed in a yet-to-be-recognized intermediate level of scrutiny. While the Court did not *officially* adopt her argument, it did strike down a section of federal law that granted survivor's benefits to widows and minor children but not to widowers. The fact that men were more likely to be employed was not a "compelling reason" to distinguish between men and women, the justices reasoned. Thus, without so acknowledging, the Court was embracing Ginsburg's argument. And, in fact, the Court would formally adopt an intermediate standard of review for gender discrimination the following year, in *Craig v. Boren* (1976). Although Ginsburg was not directly involved in this case, she did file an amicus curiae brief and advised the attorney of record of the pointlessness of requesting "strict scrutiny." Her advice was well heeded.

During the late 1970s, Ginsburg also participated in a number of other important cases: *Edwards v. Healy* (1975) and its companion case *Taylor v. Louisiana* (1975), in which the Court struck down a Louisiana law exempting from jury duty all women except those who volunteered; *Turner v. Department of Employment Security* (1975), in which the justices declared unconstitutional a Utah provision that denied to pregnant women certain unemployment benefits on the presumption that pregnant women were unable to work; *Goldfarb v. Califano* (1977), in which the Court concluded that a federal law that provided Social Security benefits for widows based

on the earnings of deceased husbands, but no benefits for widowers unless they had received half of their financial support from their deceased spouses, constituted invidious discrimination against female wage earners; and *Duren v. Missouri* (1979), in which the Court struck down a Missouri statute that permitted women to opt out of jury service and which had, in practice, produced jury venues averaging less than 15 percent female. *Duren* was Ginsburg's last participation as a lawyer before the Court.

The following year, President Jimmy Carter nominated Ginsburg for a seat on the U.S. Court of Appeals for the District of Columbia circuit. The Senate confirmed her on June 30, 1980, by a vote of 99 to 1. On June 14, 1993, President Clinton nominated Ginsburg to succeed Justice Byron White on the Supreme Court. Her nomination sailed through the Senate Judiciary Committee by an 18–0 vote. The full Senate confirmed her appointment on August 3, 1993, by a vote of 96 to 3. Ginsburg thus became the second woman to sit on the Court and the first Jewish justice since Arthur J. Goldberg's retirement in 1965. After joining the high court, Ginsburg continued to interpret the Constitution as a prohibition against artificial barriers to equal opportunity for all persons. To witness, she authored the majority opinion in *United States v. Virginia* (1996), in which the justices declared Virginia's exclusion of capable women from certain educational opportunities violative of the equal protection clause. "State actors," she wrote, "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"

During her years as an advocate, judge, and justice, Ginsburg visited several faculties, including New York University School of Law, Harvard Law School, University of Amsterdam, University of Strasbourg, the Salzburg Seminar in American Studies, Aspen Institute, and Dickinson College of Law.

Ginsburg has received numerous awards and honors, including recognition as one of the most outstanding law professors in the United States from *Time* magazine in 1977; the Outstanding Teacher of Law Award from the Society of American Law Teachers in 1979; the Woman of Achievement Award from Barnard College in 1980; and the Margaret Brent Women Lawyers of Achievement Award from the American Bar Association Commission on Women in the Profession in 1993. In addition, Ginsburg became the first woman recognized in the "Gallery of Greats" at Columbia University School of Law, when her alma mater placed her portrait next to those of former justices Charles Evans Hughes and Harlan Fiske Stone. She also received honorary degrees from more than a dozen universities or law schools.

During her career, Ginsburg has had numerous publications. She coauthored or edited four books, including *Civil Procedure in Sweden* (1965),

Swedish Code of Judicial Procedure (1968), *Business Regulation in the Common Market Nations* (1969), and *Text, Cases, and Materials on Sex-Based Discrimination* (1974). She authored or coauthored three monographs, including "The Legal Status of Women under Federal Law: A Report to the U.S. Commission on Civil Rights" and "Constitutional Aspects of Sex-Based Discrimination," both published in 1974. In addition, Ginsburg has had over seventy articles published in respected national and international journals. A fair number of Ginsburg's lectures have also been published.

—Richard A. Glenn

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GREENBERG, JACK

(1925–)

Jack Greenberg is an attorney who early in life determined that African-American citizens' civil rights and liberties must receive full constitutional protection. His principles have remained constant. Over the years he has initiated changes in judicial constitutional interpretation and has submitted new remedies for eliminating inequities. Greenberg was born in New York City in 1925. His parents, Bertha Rosenberg Greenberg and certified public accountant Max Greenberg, were immigrants, respectively, from Romania and Poland. Greenberg said, among other people, his parents were part of a "mosaic" of factors that influenced his attitude throughout his life. He grew up in a closely knit family in Brooklyn and Bronx neighborhoods. Greenberg remembers no occasion during his boyhood when he saw discrimination against African-Americans (Greenberg 1994b, 46–53). He remained oblivious to flagrant violations of civil rights and liberties while attending Columbia University. During his service in the navy after graduating from Columbia with an A.B. degree in 1945, Greenberg became concerned about the rigidity with which the lowest-level positions were assigned to African-Americans and his inability to convince superiors to promote an African-American steward mate. It was his first experience in di-

Jack Greenberg

James Meredith (center) and his attorneys, Mrs. Constance Motley (left) and Jack Greenberg (right), pause briefly to talk with reporters in front of the Federal Courts Building, 28 September 1962. (Bettmann/Corbis)

rectly trying to change a racially biased system (Kluger 1975, 274; Greenberg 1994b, 42, 46–47).

Greenberg was named Harlan Fiske Stone scholar while a student at Columbia University Law School. Professor Walter Gelhorn, who taught civil rights courses, later recommended Greenberg for an assistant counsel position in the Legal Defense Fund (LDF) of the National Association for the Advancement of Colored People (NAACP). The professor was instrumental in shaping Greenberg's intense dedication to providing constitutional protections for African-Americans. After the young attorney's brief employment in the New York State Law Revision Commission, he entered his new position in the LDF office and served thirty-five years as a member of the legal staff (1949–1961) and later as director (1961–1984). His advocacy for civil rights in the United States and other countries never wavered (Kluger 1975, 274, 436, 437; Greenberg 1994b, 45, 588; see also Greenberg 1979a, 1983a, 1997b; and Greenberg and Shalit 1993).

After Greenberg was awarded his LL.B. in 1948, his legal skills were immediately put to the test in both trial and appellate cases. Three of the following trial cases illustrate his techniques and his determination to make constitutional law viable for African-Americans. For example, when African-American students were denied admission to a white university under Delaware's de jure segregation system, Greenberg was assigned his first important case, *Parker v. University of Delaware* (1950). He and local attorney Louis Redding gathered evidence to show discriminatory administrative policies and practices by submitting expert research findings and data on Delaware State College for Negroes that included a very limited curriculum, loss of accreditation, and a library with only one-tenth the number of books in the library of a white university of equivalent size. Greenberg exposed rampant discrimination against African-American college faculty members who were denied tenure-track opportunities afforded white counterparts and who were paid less than public school teachers. Greenberg and Redding visited the University of Delaware president, who appeared embarrassed about the segregated state university system. African-American witnesses feared reprisals for their cooperation in arguing against segregation. During the trial, white state attorneys denied that Delaware State College was a state institution, although all evidence proved the contrary. The state attorneys maintained that the African-American college provided educational opportunities equal to those available in white universities. Greenberg and Redding were amazed by these blatant lies. They asked the judge to visit African-American and white campuses and compare buildings and equipment; the judge found that the Delaware State College buildings were "shabby" and decrepit." The Greenberg-Redding

plan worked. They celebrated a resounding victory when for the first time in our country a federal court ordered desegregation of university undergraduate students. The state did not appeal the case (Greenberg 1994b, 46, 88, 89; Kluger 1975, 289, 290).

Young attorney Greenberg was almost immediately counted among the inner circle of LDF director Thurgood Marshall. At the same time, Greenberg declined an offer for a position in a major law firm because, unlike the law firm's cases and clientele, LDF clientele, civil rights issues, and their outcome were important to him. He also rejected an offer to teach at Rutgers University Law School because, as he later explained, he had engaged in "the action and thrill of actual combat in a cause I cared about" (Greenberg 1994b, 91, 92). His continued intense passion for civil rights is well documented (see Greenberg 1959a, 1959b, 1968, 1974b, 1975, 1979b, 1991, 1994a, 1997a).

The issues and Greenberg's pursuit of constitutional protections through the judicial system were so controversial that at times he was portrayed in the press as a "Boleshevik" and "the Jew Jack Greenberg" (Greenberg 1994b, 46). He was especially not welcomed by most whites when he worked on cases in the South, but he remained undeterred. Public school desegregation was among his top priorities. One of his first major cases, *Gebhart v. Belton* (1912), dealt with public school desegregation in Wilmington, Delaware. Greenberg and Redding were an effective team. Their clients included thirteen African-American and white students who traveled on five occasions to the Lafarque Clinic in New York, where experts performed research and presented evidence that illustrated the negative effects of segregation on children. The trial court decision was stunning because, for the first time in the United States, the court mandated desegregation of a white public school, which was required to enroll African-American students. Though it was not the perfect constitutional solution, it was a significant leap forward. During that period, Greenberg worked on several cases. LDF lawyers worked simultaneously on many school de jure segregation cases throughout the South. For instance, Greenberg and colleagues orchestrated the search for midwestern expert witnesses who would testify at the *Brown v. Topeka Board of Education* (1954) trial. The task was difficult. Prominent specialists turned down Greenberg's request. Dr. Karl Menninger of the renowned Menninger Clinic in Topeka, Kansas, ignored the request. Dr. Arnold Gunnar of the University of Minnesota eventually declined to participate as an expert witness. Within a few days of the trial, however, Greenberg finally found eight midwestern experts who agreed to testify (Kluger 1975, 274, 430, 442–449, 557; Greenberg 1994b, 134–138, 150).

Osmond Fraenkel

The American Civil Liberties Union (ACLU) has been one of the most influential advocacy groups in modern U.S. history. Founded in 1920 by social worker Roger Baldwin—who was an earlier cofounder of the American Union Against Militarism, which had a Civil Liberties Bureau—the ACLU continues as a nonprofit organization whose fifty state affiliates and three hundred local chapters often take cases on behalf of individuals whose rights are threatened. The ACLU has been especially prominent in its defense of First Amendment freedoms (including the rights of American Nazis to engage in peaceful demonstrations) and of the right to privacy, often filing amicus curiae (friend of the court) briefs in cases in which it is not directly representing a client. Osmond Fraenkel served as general counsel of the ACLU from 1954 to 1977.

Beginning with *DeJonge v. Oregon* (1937), a case involving the successful defense of a Communist organizer against charges of "criminal syndicalism," Fraenkel presented twenty-six oral arguments before the U.S. Supreme Court and helped draft 103 briefs filed before that body (Walker 1990, 106). His cases included his defense of Japanese-Americans for violations of curfews during World War II; his defense on appeal of two of the African-American Scottsboro Boys accused of the rape of two white women; cases involving challenges to the Smith Act and its suppression of freedom of speech and association; his defense of a birth control pamphlet and *Esquire* magazine against obscenity charges; and his defense of one's right to distribute pamphlets without a permit. Fraenkel said that he believed that "people should do whatever they wanted as long as they didn't hurt anyone else" (Margolick 1983). Fraenkel was a week away from his eighty-fifth birthday when he argued his last case before the U.S. Supreme Court (Walker 1990, photo insert, n.p.n.), and he continued his work as a lawyer until he was felled by a heart attack on his way to work at age ninety-four (Margolick 1983).

Born in New York City, Fraenkel (1888–1983) graduated from Harvard College and Columbia Law School. The author of an obituary noted that "the 'Osmond K. Fraenkel brief' became synonymous with clarity and conciseness" (Margolick 1983). Fraenkel authored more than one hundred articles and several books, including one about the historic *Sacco and Vanzetti* case, and he served from 1936 to 1951 as chair of the New York City Welfare Department Hearing Board.

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Greenberg was an especially effective attorney in dealing with diverse issues on the trial and appellate levels. The LDF agenda eventually included cases dealing with discrimination against African-Americans in the workplace, businesses and government agencies that either denied services or provided inadequate services, and the judicial system itself. Greenberg recognized the necessity for a lawyer to engage in thorough research, to develop effective writing skills, to select witnesses carefully, and to find and submit, when appropriate, sociological data, surveys, and unique remedies. He phrased arguments so that judicial biases did not interfere with convincing and original approaches in legal reasoning. Nevertheless, although the trial court's decision in *Gebhart,* the Delaware public school desegregation case, was a major step forward, it fell short of ensuring full constitutional protection for African-American students. School desegregation cases required significant time and concentration for the preparation of briefs. The Supreme Court justices were independent minded. Greenberg worked with colleagues as they carefully crafted legal strategies that, among other considerations, addressed Justice Felix Frankfurter's constitutional frame of reference and the technical questions that he would be likely to pose. Greenberg's first experience of oral argument before the Supreme Court was exciting for the twenty-eight-year-old attorney (Kluger 1975, 557).

School desegregation cases were a priority for Greenberg, but his determination to fight legal battles for other constitutional rights was equally important from the beginning of his career. Almost immediately after joining the LDF, Marshall worked with Greenberg on a capital-punishment rape case in Florida, *Shepherd v. Florida*. The defendants and the African-American community itself were subjected to an atmosphere of terrorism. After the African-American defendants were convicted, the LDF entered the case, and Marshall assigned Greenberg the task of writing the petition for the writ of certiorari on appeal to the U.S. Supreme Court and later the brief. During the trial, Greenberg, who had diligently read dusty volumes containing old English cases to impress Justice Frankfurter, experienced sneezing fits (Greenberg 1994b, 94–99). For the second trial, Marshall and Greenberg found new witnesses, relied on a detective's evaluation of evidence entered in the first trial, conducted a public opinion poll that showed the impossibility of a fair trial in Lake County, and conducted investigations that proved illegal conduct of the sheriff and his deputies. In the evening during the preliminary motions process, Greenberg watched white hecklers drive around his hotel while blowing horns, waving Confederate flags, and carrying torches. One demonstrator wore a Ku Klux Klan robe. The next morning, the local press reported that the sheriff had killed one of the defendants and severely injured the other defendant, Walter Irvin. Ter-

ror prevailed. The Florida NAACP state secretary and his wife were killed by a bomb detonated at their home. The governor offered the severely injured Irvin a sentence of life in prison if he confessed to raping the white woman, but Irvin refused to plead guilty to something that he did not do. The trial itself was a sham, and the judge's rulings were bizarre. Testimony by African-American witnesses for the state was inaccurate. An African-American newspaper labeled one African-American witness as "a turncoat." Testimony by witnesses for Irvin was described as "not terribly powerful." Despite an unfair trial, Irvin received the death sentence. Much later, the Florida governor commuted Irvin's sentence (Greenberg 1994b, 134, 135, 140–145; Greenberg 1994c, 590–594). The tragedy of the trial left its mark on Greenberg. Afterward, his mission was directed toward convincing the legal community that the capital-punishment system in reality does not accomplish the goal of our constitutional framers (see Greenberg 1986, 1992, 1994c).

Greenberg, armed with supporting data, has strongly maintained that the U.S. judicial system in practice unevenly applies the death sentence against white and African-American criminals and is especially biased against African-Americans. Recognizing that proponents of death sentences are motivated by moral principles and/or the idea that the prospect of a death sentence deters crime, he urges supporters of those laws to examine "the hard facts of the actual American system of capital punishment." Yet after all of the years in explaining statistics and other facts, Greenberg remains an optimist. He believes that eventually the Supreme Court will consider evidence of long-term erratic and uneven applications of capital punishment laws and decide that the system itself fosters cruel and unusual punishment in violation of the Eighth Amendment (Greenberg 1986, 1677, 1679; see also Greenberg 1977, 1982).

Greenberg's style as a lawyer handling difficult cases has attracted admirers and detractors. Assessments of Greenberg as a practicing attorney range from "a frostiness to his exterior," "a first-rate analytical mind," to a "substratum of deep emotional commitment." Walter Gelhorn has said that his former student's record shows that Greenberg "can stand controversy and developing animosity" and has lauded his intellectual approach, which Gelhorn felt was the most appropriate technique for arguing civil rights cases in the South. Attorney Robert Carter noted that Greenberg "was obviously a very bright lawyer, though perhaps with more of an intellectual than emotional commitment to his tasks." Professor Louis Pollak explained that Greenberg's abstract manner reminded him of a surgeon. His demeanor was a form of "self-protection from the drain of emotional energy that his work could so easily cause . . ." Attorney and former colleague

Louis Redding, based on his close association with Greenberg, said that his friend is a private individual. Redding never doubted his "genuineness about the Negro cause" (Kluger 1975, 274, 436, 438, 439).

Flexibility is a major strength of Greenberg as an attorney. For example, he changed legal strategies over a period of time in school desegregation cases. In the early Wilmington school desegregation case, he argued convincingly that African-American students should attend neighborhood white schools rather than travel on a school bus sometimes up to thirty-mile round trips to their assigned African-American schools (Kluger 1975, 442, 443). Several years later, Director Greenberg approved a new desegregation remedy in the celebrated and controversial busing-for-desegregation case of *Swann v. Charlotte-Mecklenburg School Board* (1971). In a 1978 interview, Greenberg justified his radical change in strategies. When questioned about his arguments against racial classification of students for school assignments in earlier cases and later his arguments that supported racial classification for student assignments, Greenberg responded,

> It became apparent that centuries of racial discrimination had so imbedded segregation into society, human habit, into a variety of educational practices, and that resistance to integration was so deeply imbedded, so severe, and that devious methods were being used, as well as all sorts of other types of resistance, that the only way that you could undo the segregation . . . and have some objective standard against which performance could be measured was by making racial classifications for the purpose of abolishing discrimination. (Mauney 1978, 169)

In contrast to earlier arguments in *Monroe v. Board of Education of Jackson* (1968) and other cases, the legal strategy changed to remedies focused on percentages of African-Americans and whites enrolled in individual schools. Director Greenberg reminisced,

> Well, I really don't know when people first began thinking about that, and I might say that we don't disparage the virtue of the neighborhood schools. There is something to be said for it, but there is something to be said about a great many other values. [You must] look at the total picture, take into account all of the various factors, and decide whether whatever benefit neighborhood schools have outweighs disadvantages that they might present in some circumstances. (Mauney 1978, 169)

Greenberg promoted freedom of choice in his 1959 book *Race Relations and American Law* (Greenberg 1959a, 239) and earlier cases. During the 1978 interview, Greenberg said that he was asked the same question during

oral argument in 1968. At that time he admitted to Justice William J. Brennan that if he had known when he proposed freedom of choice plans what he learned later, he would never have proposed freedom of choice (Greenberg 1994b, 383). He explained the change:

> I think people began to think of [freedom of choice] when they began to see that nothing was happening as a result of resistance, deviousness, settled habits, and things of that sort. So the only way that the pre-existing situation could change would be if some sort of benchmark was established. (Mauney 1978, 170)

Throughout his productive life as counsel and LDF director; as Columbia Law School professor and dean; in visiting professorships at Yale, Harvard, and Saint Louis University law schools; as consultant; as speaker; as recipient of honorary doctorates from Columbia University, Morgan State College, Central State College, and Lincoln University; and as author of articles and books, Greenberg has championed constitutional protections for African-American citizens (Greenberg 1991, 117n; Greenberg 1997, 129n; *Who's Who* 1998, 1671). Yet he balanced his unusually heavy schedule with responsibilities at home. As an attorney, his wife, Debby Greenberg, often was out of town, and husband and father Jack Greenberg "played a more than active role at home." Eventually, four of six children entered college, but they came home from time to time. Preparing dinners for his large family afforded an opportunity for chief cook Greenberg to develop expertise in the kitchen. Greenberg recalled that when "Debby called home from out of town, the kids, to her chagrin, usually seemed to be having a good time." She eventually returned to New York when she was appointed president of the Legal Action Center and later member of the Columbia Law School faculty (Greenberg 1994b, 428).

The U.S. Constitution is often described as a living and breathing document. Jack Greenberg has played key roles in challenging courts to adapt their constitutional interpretations to protect the rights of African-American citizens. At times he lamented how politicians in the legislative and executive branches sought to negate the accomplishments that guaranteed civil rights during his years as trial and appellate lawyer (see Greenberg 1983a, 1991, 1992, 1997a). He is a bold advocate for the elimination of grave injustices, both in the United States and in other countries. He was willing to find new legal approaches when old ones failed. His courage is well grounded in knowledge based on study, close observations, thoughtful analysis, and practice. Jack Greenberg remains a great American lawyer in every sense of the term.

—Connie Mauney

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GRISWOLD, ERWIN NATHANIEL

(1904–1994)

Erwin Nathaniel Griswold had a distinguished career as a professor and dean of Harvard Law School and as a practicing attorney, including a stint as solicitor general of the United States. He is one of the few individuals who has argued more than one hundred cases before the Supreme Court. During his lengthy and varied career, he made important contributions as an educator, scholar, and litigator in the areas of civil liberties and civil rights.

Griswold was born on July 14, 1904, in East Cleveland, Ohio, to James Harlen Griswold and Hope Erwin Griswold. The elder Griswold spent his career as an attorney in Cleveland, most of it as senior partner in the firm Griswold, Palmer & Hadden, so in a sense, Erwin Griswold was born to a career in the law. In May 1921, Erwin graduated from Shaw Public High School in East Cleveland as valedictorian of his class. By his own account, he received an "excellent preparatory education" grounded in a classical curriculum (Griswold 1992, 19). He followed in the footsteps of both of his parents by attending nearby Oberlin College

Erwin Nathaniel Griswold
Corbis/Bettmann-UPI

rather than following many of his friends to the Ivy League. He wrote in his autobiography that, although tempted by Yale, he suffered from shyness and found somewhat troubling the elitism associated with an East Coast education. "I never regarded myself as any sort of Brahmin, any sort of an elite. Most of the people who went from Cleveland to the big eastern universities had a superior attitude, which I did not feel" (Griswold 1992, 27).

Griswold graduated from Oberlin in May 1925. Although he toyed briefly with the idea of graduate studies in physics, he decided instead to follow his father into the law. Harlen Griswold had spent his entire career practicing law in Cleveland and was eager to provide Erwin with the Harvard Law School degree that his own parents had been unable to afford. Despite his earlier misgivings about elite eastern universities, Erwin entered Harvard Law School in September 1925.

In keeping with his previous academic record, Griswold excelled in law school. In 1927, his peers elected him president of the *Harvard Law Review*. He completed the LL.B. degree in 1928, fully expecting to return to Cleveland and join his father's firm. His mentor, Professor Austin Scott, instead persuaded Griswold to remain at Harvard for another year to pursue the higher law degree of S.J.D. Scott hired Griswold to assist him in his position as reporter on trusts for the American Law Institute. Griswold found his dissertation topic in that work, completing "Spendthrift Trusts" in time to graduate in the spring of 1929. His work for Scott and his dissertation research provided him with the foundation of a lifelong interest and expertise in tax law.

Griswold returned to Cleveland in September 1929 to work in his father's firm. That career was short lived, however. In October, at Scott's recommendation, U.S. Solicitor General Charles Evans Hughes Jr. offered Griswold a position on his staff. Griswold accepted, and on December 2 he became one of two junior attorneys on a staff of five in the solicitor general's Washington, D.C., office. The solicitor general's office was responsible for representing the government in Supreme Court cases. With virtually no practical experience, Griswold began assisting his seniors on important cases and soon began writing his own briefs. He also astutely carved a niche for himself. At the time, tax law was in its infancy as a specialty; Harvard Law School had not even offered a course on the subject. No one else in the solicitor general's office wanted to deal with tax law cases, so Griswold industriously took on the task. He soon gained a reputation as the resident expert on tax law in the Department of Justice and, before long, he began arguing tax cases before the Supreme Court.

Griswold continued on the solicitor general's staff until 1934. Besides laying the foundation for a lifelong interest and expertise in tax law, he made one other significant contribution to jurisprudence during that period. In

1934, the *Harvard Law Review* published an article by Griswold entitled "Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation." In one of the cases assigned to him by the solicitor general, he had discovered that it was virtually impossible to determine what federal regulations were operative in the case. This was during the early years of Franklin Roosevelt's New Deal. As the number of federal government agencies rapidly expanded, the regulations that those agencies issued multiplied exponentially. Such federal regulations, coming from the executive branch of government along with the president's own executive orders, carried the force of law. Unlike legislation emanating from Congress, however, no effective mechanism for publishing and cross-referencing federal regulations existed. Thus it was difficult to determine when one rule had superseded another, or even if a rule existed in the first place, since the basic mechanism for publishing federal regulations was through press releases. Griswold's article proposed congressional legislation to create a mechanism for systematically tracking and publishing orders and regulations issued by the executive branch of government. The end result of Griswold's effort was the law passed by Congress on July 26, 1935 (49 Stat. 501) creating the *Federal Register*. The first issue of the *Register* appeared on March 14, 1936. Although, as Griswold noted, it is probably the "dullest publication distributed widely in the United States," it allows any citizen to comment on proposed regulations and to read the exact wording of approved regulations and has doubtless "saved many mistakes by courts and enormous amounts of time for lawyers" (Griswold 1992, 118–119).

In 1934, Griswold left the solicitor general's office to join the faculty of Harvard Law School as an assistant professor, thus beginning a long and distinguished career in legal education. He began by teaching taxation, conflict of laws, and a seminar on legislation. His first major scholarly publication was a revision of his dissertation, *Spendthrift Trusts* (1936). In 1936, he was made full professor and also began developing a full-fledged curriculum on taxation. He produced a textbook, *Cases on Federal Taxation,* in 1940; it eventually appeared in six editions. He also collaborated with others on *Cases in Conflict of Laws* (1941).

In 1946, the Harvard Corporation, with the approval of the law school's board of overseers, named Griswold the Charles Stebbins Fairchild Professor of Law and simultaneously appointed him dean of the law school. In 1950, he was named Langdell Professor of Law, but he continued to hold the deanship until 1967. One of his first contributions to legal education as dean was his joint effort with the deans of the law schools at Yale and Columbia to persuade the Educational Testing Service to develop a standardized entrance examination for law schools (now the LSAT). He also immediately faced the challenge of rebuilding the law school faculty following

the lean war years, while simultaneously coping with enrollments burgeoning from the return of students whose legal education had been interrupted by wartime service and by new students coming under the auspices of the G.I. Bill.

Dean Griswold presided over a dramatic expansion of facilities and financial resources during his time at the helm of Harvard Law School. He took particular pride in having established the Harvard Law School Fund in 1950. The law school's first systematic annual giving program for alumni, it raised $80 million in its first forty years of existence.

During his career at Harvard, Griswold remained professionally active. He served as a consultant with private law firms in numerous tax cases and argued seven cases before the Supreme Court. Because of his interest in the complex issues surrounding the conflict between laws of different states, he was long involved in the American Law Institute. The institute, established in the 1920s, published *Restatements of the Law,* a reference tool that sought, in Griswold's words, "to organize and systematize our chaotic system of varying State laws" (Griswold 1964). Griswold served for thirty-seven years on the governing council of the institute. He was also a founding member of the section on taxation of the American Bar Association (ABA) and served on the section's council. On being elected as president of the Association of American Law Schools in December 1957, he automatically became a member of the ABA's house of delegates and continued to serve in that body for twenty-seven years. Griswold left Harvard in 1967 to assume the position of solicitor general of the United States during the tumultuous years 1967–1973. During that period, he argued before the Supreme Court the government's side in dozens of cases on a wide range of issues.

Apart from his sizable contributions to legal education, Griswold's career also had a significant impact in two broad areas of social and political life in mid-twentieth-century America: civil liberties and civil rights. Griswold's first foray into public commentary on the issue of civil liberties arose in the intensely anticommunist climate of the early 1950s. In 1951, the president of the Massachusetts Bar Association, Samuel P. Sears, demanded that Harvard Law School disband the Harvard Lawyers Guild, a student organization that Sears suspected of harboring Communist sympathizers. Griswold, then dean of the law school, refused on the grounds that such a step "would be an improper interference with the legitimate freedom of our students" ("Erwin Nathaniel Griswold" 1956, 239, citing *New York Times* article of 6 March 1951).

Griswold found further scope for his concerns about the suppression of civil liberties in Congress's anticommunism crusade of this period. In 1953 and 1954, at the height of Senator Joseph R. McCarthy's "investigations"

Great Trials in American History

It is difficult to think about great lawyers without also thinking about great trials. Just as great cities often grow beside great rivers, so too, great lawyers often emerge from, and are drawn to, great trials. In recent years, there have been a number of volumes that have been devoted to such trials.

One of the most popular descriptions of trials is located on a web site created by Douglas O. Linder entitled *Famous Trials*. The trials covered to date include the *Leopold and Loeb* trial (1924), the *Scopes* "monkey" trial (1925), the *Rosenbergs* trial (1951), the *Amistad* trials (1839–1840), the *Bill Haywood* trial (1907), the Salem witchcraft trials (1692), the My Lai courts-martial (1970), the *Scottsboro Boys* trials (1931–1937), the *Dakota Conflict* trials (1862), the *Mississippi Burning* trial (1967), the *Chicago Seven* conspiracy trial (1969–1970), the Andrew Johnson impeachment trial (1868), and the *O. J. Simpson* trial (1995). Linder plans to add a description of the *Sacco and Vanzetti* trial (1921) and the *Chicago Black Sox* trial (1921) early in 2001.

Of all American trials, Linder thinks that the *Scopes* trial was the most dramatic. Long after William Jennings Bryan, Clarence Darrow, and the other participants have died, conflicts about school curricula and science and religion continue to stir public debate.

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into alleged Communist infiltration of the United States, the senator brought many people to testify before his committee regarding their supposed Communist ties. A refusal to testify by claiming the Fifth Amendment privilege against self-incrimination was interpreted as an admission of guilt. The "guilty" parties, branded Communist sympathizers, often found careers destroyed and reputations shattered as a result of McCarthy's tactics.

Griswold was appalled by the abuse that the Fifth Amendment privilege suffered at McCarthy's hands. He gave a series of speeches in 1954 that were subsequently published in 1955 under the title *The Fifth Amendment Today: Three Speeches by Erwin Griswold*. Using several hypothetical examples, he demonstrated the reasons why a claim of Fifth Amendment privilege could not legally be construed as an admission of guilt. Griswold argued that the Fifth Amendment right not to testify against oneself was a key element of due process and a "right of fundamental importance in our legal and social system" (Griswold 1955, 53). The Fifth Amendment, in fact, stood as a symbol of "the great tradition of individual liberty" (Griswold 1955, 53). He further maintained that the McCarthy hearings violated due process because they lacked appropriate legal procedure and vio-

lated the rights of those called to testify. Griswold expressed the view that "a legislative investigation is improper when its sole or basic purpose is to 'expose' people or to develop evidence for use in criminal prosecutions"(Griswold 1955, 48). Questioning the legality of a congressional subcommittee conducting such investigations in the first place, Griswold held the entire Congress responsible for McCarthy's actions, because members had delegated to McCarthy the power that he was abusing and they failed to intervene when matters got out of hand. Griswold's most scathing commentary was summed up when he wrote, "In protecting ourselves from the threat of Communism, we should not adopt methods of oppression here which the Communists themselves would use" (Griswold 1955, 50).

Griswold's next major foray into the area of civil liberties found him in a rather different position. While serving as solicitor general from 1967 through 1973, he found himself intimately involved in one of the most notorious Supreme Court cases of the twentieth century: *New York Times Co. v. United States,* 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), popularly known as the *Pentagon Papers* case. At the height of public disillusionment over the Vietnam War, the *New York Times* and the *Washington Post* set out to publish excerpts from a top-secret history of U.S. involvement in Vietnam. Secretary of Defense Robert S. McNamara had ordered the preparation of the study in 1967. It covered the period from the end of World War II until 1968. One of the study's authors, Daniel Ellsberg, had by 1970 become radically opposed to the war and decided to leak a copy to *New York Times* reporter Neil Sheehan. Between June 12 and June 14, 1971, the *Times* published a series of articles based on the study; the *Washington Post* soon followed suit. The U.S. government sought injunctions for prior restraint of publication on the grounds that releasing information from the top-secret document could endanger the war effort and the lives of American prisoners of war. The papers fought in the courts on First Amendment grounds and on the grounds that all of the information contained in the report was more than three years old and therefore not likely to endanger national security. The complex legal maneuverings moved swiftly through the legal system, arriving before the Supreme Court on June 30, 1971. A divided Supreme Court ruled 6 to 3 in favor of the newspapers.

Erwin Griswold, as solicitor general of the United States, found himself arguing the government's side both before the Court of Appeals for the Second Circuit and before the Supreme Court. He later noted he was not even allowed to see the study before the Court of Appeals argument and had only a few hours to peruse the seven-thousand-page document before arguing the case before the Supreme Court. Although he thought the government's position was shaky at best, he proceeded with the government's argument on the grounds that a legitimate national security risk existed. He

was arguing from a difficult position because he had so little time to assess the papers himself. He lost the case and later declared that the whole situation was a "tempest in a teapot." He acknowledged that no harm had come from the publication of the papers, but he maintained that, had a real national security threat existed, the government would have been justified in its argument for prior restraint of publication and that he could imagine situations in which national security trumped First Amendment freedom of the press. The case, however, is usually cited as a major triumph for the First Amendment guarantee of a free press, and Griswold did not contest that interpretation.

In the area of civil rights, Griswold had a distinguished record. For example, in 1949, as dean of the Harvard Law School, Griswold petitioned the Harvard Corporation to allow the admission of women. The first class of women entered in 1950. But Griswold left his most important mark in the area of racial equality.

In 1928–1929, the year that Griswold spent as a graduate student in the Harvard Law School, an African-American second-year law student named William H. Hastie was elected to the board of editors for the *Harvard Law Review*. Hastie's attendance at the *Review*'s annual formal dinner became a point of controversy that year. Hastie himself stated that he would not attend because of the controversy. Griswold later wrote that "a considerable number of the members of the Board, with whom I joined as an alumnus member, let it be known that we would not attend the dinner unless Hastie was welcomed and did attend, and the matter was worked out on this basis" (Griswold 1992, 182).

During the 1930s and 1940s, Thurgood Marshall, then legal director of the National Association for the Advancement of Colored People, had developed a strategy of challenging segregation in public education by attacking the practice in graduate and professional schools. In 1950, Marshall approached Griswold and invited the dean to serve as an expert witness on cases involving legal education. Griswold first testified in North Carolina in a case challenging the legality of the refusal by the University of North Carolina at Chapel Hill to admit African-American students. A separate law school had been established in Durham at the North Carolina College for Negroes (now North Carolina Central University) but was clearly not "equal." Griswold recalled that he "testified, in short, that a segregated legal education *could not* be equal" (Griswold 1992, 184). He subsequently offered the same testimony in federal court in Oklahoma City in *McLaurin v. Oklahoma State Regents for Higher Education,* 339 U.S. 637 (1950). Griswold was also among the members of the Association of American Law Schools who filed an amicus brief in the landmark Supreme Court case *Sweatt v. Painter,* 339 U.S. 629 (1950). The *McLaurin* and *Sweatt* cases played an im-

portant role in establishing precedent for *Brown v. Board of Education* in 1954. Although Harvard Law School already admitted African-American students by the time Griswold became dean, he further promoted African-American legal education late in his career at Harvard by supporting a group of faculty members who received a grant to offer all-expense-paid summer prelaw institutes for African-American college students interested in the legal profession.

Griswold also served, under appointment by Presidents John F. Kennedy and Lyndon Baines Johnson, as a member of the U.S. Commission on Civil Rights from 1961 through 1966. In this capacity, he traveled throughout the United States presiding over hearings and gathering information that would then be used by the president and Congress to craft civil rights legislation.

Griswold's involvement in civil rights issues reached a climax during his term as solicitor general (1967–1973). In this role, he argued the government's side in Supreme Court cases involving school desegregation. Griswold viewed *United States v. Montgomery Board of Education,* 295 U.S. 225 (1969), as "one of the most important decisions in the desegregation struggle." In the Montgomery County, Alabama, schools, faculty and staff were segregated. A federal judge had declared that the school system thus violated the law and required that they achieve a consistent ratio of white and African-American faculty and staff in all of their schools. The school system appealed all the way to the Supreme Court, where Griswold argued the government's side, maintaining that the school board was violating both the spirit and the letter of the law. "If there is any one thing that makes a school a 'black school,'" he later wrote, "it is an all-black (or nearly all-black) faculty and vice versa" (Griswold 1992, 273).

One of the last major cases that Griswold argued before the Supreme Court was the landmark case *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). A judge had ordered the desegregation of North Carolina's Charlotte Mecklenburg County elementary schools and included a provision that encouraged busing students to schools outside their neighborhoods to achieve desegregation. Griswold represented the government's side, arguing that the judge's order was directed at rectifying past discrimination and was therefore valid and should be upheld by the Supreme Court. The Court ruled unanimously in favor of the government.

Erwin Griswold retired to private legal practice in 1973. He continued serving clients until not long before his death at age ninety in 1994. In a memorial that appeared in the *Harvard Law Review* shortly after Griswold's death, retired Supreme Court justice Harry A. Blackmun wrote,

> As the years passed, I watched with pride and enthusiasm the progress of this man—his contributive years at the Harvard Law School, his professional in-

tegrity and responsibility in representing the United States as Solicitor General under both Democrat and Republican Administrations, and his careful appearances for clients when he returned to the embrace of the Washington office of his old Cleveland law firm. All this demonstrated the personal integrity, the professional ability, and the steadfastness that anyone could expect of a lawyer. He brought grace and a distinct sense of righteousness to the profession. . . . His arguments to the Court, when I was there, were always thoroughly prepared, attacked the issues directly, contained an answer for every question any Justice asked, and ended within the allotted thirty minutes. For me, it was a delight to have him listed as an advocate on the day's calendar. ("In Memoriam" 1995, 980)

—Lisa Pruitt

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GUTHRIE, WILLIAM DAMERON

(1859–1935)

William Dameron Guthrie
Library of Congress

As a member of the Supreme Court bar, William Dameron Guthrie argued several critical constitutional cases before the justices. As an advocate of limited federal power and an opponent of economic regulation, Guthrie was instrumental in the striking down of the federal income tax and the development of the constitutional theory of dual federalism used by the Court. His arguments provided the legal and constitutional basis for Supreme Court decisions striking down the federal income tax and child labor and minimum-wage laws.

Born on February 3, 1859, in San Francisco, California, William Dameron Guthrie was the son of George and Emma Guthrie. As a child, William spent several years in France, where he developed a fondness for the country and its people. On his return to the United States, Guthrie began working as a messenger in the New York law offices of Blatchford, Seward, Griswold & DeCosta. After a few years he attended Columbia Law School and, although he did not earn a degree, he was admitted to the

bar in 1880 at age twenty-one. In 1883, at age twenty-four, Guthrie became a partner in the firm that became known as Seward, DeCosta & Guthrie.

As a partner in the firm, Guthrie was involved with much of the railroad litigation that sprang up during the 1880s. Guthrie spent much of his early career arranging for financing for railroads and defending them against financial claims. He developed a reputation as a tough negotiator and a hard worker. His dedication, though, had negative consequences. He became surly and difficult to work with when handling a case. His hectic schedule created tension within the law firm. He bickered with his partners over their legal work and over such minor irritants as their smoking habits. With the arrival of new partners, Guthrie saw his contribution and importance to the firm begin to decline.

Guthrie's partnership in the firm continued until 1906, and during that time he became one of the most prominent attorneys in the country. His departure from the firm was controversial. A New York State investigation of the firm's business practices caused Guthrie publicly to criticize his partners. Although Guthrie was cleared of any wrongdoing, his acrimonious relationship with his partners required his leaving the firm. In 1907, he served as a lecturer at the Yale Law School, then in 1909 he became a partner in the firm of Guthrie, Bangs & Van Sendren. Guthrie continued the partnership until 1921, when he joined the firm of Guthrie, Jerome, Rand & Kresel. In 1924, he left this firm and developed his own private practice. Throughout the period he was a constitutional law professor at Columbia, serving until 1931. He also served as mayor of Letlingtown, New Jersey, in the 1930s. While his litigation rate declined, Guthrie continued arguing important cases and providing legal advice and commentary on political issues. He attacked everyone from William Howard Taft to the Roosevelt administration. He remained tied to his views on economic regulation and the rule of law.

During his early years as a lawyer, Guthrie became attached to the belief that government regulation was a threat to private property. As his career progressed, he earned a reputation as a zealous opponent of economic legislation and a man who had principles rather than positions. Among those principles was an overriding belief in judicial activism and the courts acting as a check on the passions of the legislature in holding back the wave of economic regulation. Guthrie's efforts on behalf of these ideas took a two-track approach. His legal arguments before the Supreme Court provided the justices with a constitutional framework for striking down legislation. He supplemented those legal arguments with a series of public addresses. In those speeches he provided a systematic view of state and federal relations and the limits of governmental regulatory power.

But Guthrie was more than a litigator. He served as president of the New York State Bar Association from 1921 to 1923, then as president of the New

Delphin Michael Delmas

Delphin Michael Delmas (1844–1928) was known as the "Napoleon of the Western bar," partly because of his small size and imperial demeanor and partly because of his successes in the courtroom. Delmas was known for having won nineteen acquittals in nineteen murder cases (Langford 1962, 50).

Delmas's most famous case was his 1907 defense of Harry Thaw for the murder of architect Stanford White in Madison Square Garden, which White had designed. Thaw, a wealthy playboy heir married to Elizabeth Nisbit, openly shot White as he observed a theatre performance apparently to vindicate his wife, whom White had allegedly raped when she was a showgirl. Describing White as having "crushed the poor little thing—the sweet little flower that was struggling toward the light and toward God," Delmas argued that Thaw suffered from "*dementia Americana*," a type of insanity that persuades an American to believe "that whoever violates the sanctity of his home or the purity of his wife or daughter has forfeited the protection of the laws of this state or any other state" (Langford 1962, 203–204).

The prosecutor, William Travers Jerome, answered with his own powerful argument, pointing out that "justifiable homicide does not mean dementia Americana. Justifiable means self-defense, and when a man sits with his head in his hands, quietly looking at a play, and is shot down by an enemy with a revolver, held so close that his very features are so disfigured that his brother-in-law does not recognize him, even the wildest stretch of imagination will hardly picture that to a jury east of the Mississippi River as a case of self-defense" (Uelmen 1982, 50). These arguments led to a hung jury in the first trial and to exoneration in a second trial not argued by Delmas.

During Thaw's trial, a reporter described Delmas's almost hypnotic effect upon a jury:

> Juries like Delmas for the same reasons that women do; and he is the manner of man who women instantly like. . . . There is [in his manner] the flattering unction that causes a washerwoman to forget that she is not a queen. He bends over an ordinary feminine hand as though it were a lily leaf that had floated downward from the gardens of paradise. And there is in his attitude toward the jury a subtle hint of good fellowship and yet a deference which intimates, "You are the twelfth and I am merely the thirteenth. If you will permit this lesser being for a short time your gracious attention, I shall be most honored." (Langford 1962, 91)

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York City Bar Association from 1925 to 1927. He was also the chairman of a state constitutional revision committee. As chairman he oversaw changes to the judicial section of the New York constitution.

His role as chairman also gave him a platform on which to speak about the direction of the law and the type of legal education being offered. Guthrie was a proponent of the Legal Aid Society, which provided the avenue for those without money to challenge the economic regulations passed by the states and the federal government. He noted in a commentary that society maintained a respect for law and government institutions among most citizens.

Guthrie also confronted those who criticized the values he argued in the courts. He charged that law schools and professors were undermining students' belief in the courts. He considered some law professors to pose a danger to the stability of the law and disagreed with the Legal Realism movement that was sweeping through the profession. As chairman of the Committee on Character and Fitness for the New York Bar from 1927 to 1930, he fought to restrict entrance to the bar, warning against allowing radical lawyers to practice and threaten legal institutions. He took umbrage at being considered a mouthpiece for corporate interests. Instead he believed in the interests he represented, seeing himself as more than a legal advocate.

In addition to his work with the bar, Guthrie was involved with the Catholic Church. He received awards and recognition for his legal and other activities on behalf of the church. Guthrie provided legal counsel, including the church litigation *in Pierce v. Society of Sisters* (1925), which challenged an Oregon law prohibiting students from attending private or parochial schools. He also wrote a legal brief arguing that the new Mexican constitution violated religious rights and undermined the Catholic Church within the country.

That same year, he was considered for the Supreme Court vacancy created by Justice Joseph McKenna's retirement. But by that time Guthrie was approaching seventy and was considered by President Calvin Coolidge to be too old. Passed over for the prestigious office he always wanted, Guthrie spent his last years fighting a rearguard action against those who challenged his views of government and society.

During the first decade of his career at the Seward law firm, Guthrie dealt with routine cases involving corporate financing and rights. Although he was known within the legal community for his hard-bargaining stances and tendency to lose his temper, Guthrie was not nationally known. His rise to prominence occurred during the battle over the federal income tax.

Guthrie's role as a driving force behind the litigation in *Pollock v. Farmers Loan and Trust Co.* (1895) provides an interesting picture of the dedication

he felt toward his cause. The 1894 income tax focused on both corporate and individual incomes. Challenging the act, though, provided a special problem. It required that a litigant pay the tax, then challenge its constitutionality. Guthrie arranged for stockholders in the trust company to challenge the company's decision to pay the tax. That decision was prompted by Guthrie's suggestion that paying the tax provided the opportunity to challenge the law. Guthrie went even further. He worked with the federal government to expedite arguments for the case and took the additional step of suggesting a lawyer to oppose him. This collusion was not unusual during the era. The identical scenario prompted the challenge to the Louisiana segregation law in *Plessy v. Ferguson* (1896) and was not seen as a violation of ethics or the adversarial system.

The income tax cases attracted some of the best legal talent for oral arguments. Guthrie utilized the efforts of Senator George Edmunds of Vermont and Rufus Choate, one of the best-known attorneys of the era. Opposing him was Attorney General Richard Olney and James Carter, former president of the American Bar Association.

In oral arguments before the Court, Guthrie limited himself to a technical argument as to whether the income tax represented a direct or indirect tax and how the constitutional prohibition against direct taxes would apply. His co-counsel, Rufus Choate, offered a sweeping constitutional argument on behalf of overturning precedent and the Court's understanding of congressional taxing power.

A narrow 5–4 majority of the Court agreed with the Guthrie definition of direct taxes and struck down the income tax. Hence, at age thirty-five, Guthrie initiated a lawsuit challenging the keystone of the Progressive political agenda and constructed an argument that convinced five justices to sweep aside precedent and overturn a major piece of federal legislation. With *Pollock* under his belt, Guthrie moved on to challenging other forms of federal regulation on property rights.

As the twentieth century began, Guthrie was at the forefront of corporate lawyers using the judiciary to attack economic legislation. He served as lead counsel in two prominent cases defining federal commerce and taxing power. In *Champion v. Ames* (1903) and *McCray v. United States* (1904), Guthrie argued that the federal government had exceeded its power to regulate interstate commerce.

In *Champion,* Guthrie used a two-tiered argument that lottery tickets, which were banned as interstate commerce, were not commerce. In addition, he noted in his oral argument that the power to regulate commerce did not include prohibiting the use of that article of commerce. In his arguments Guthrie presented his own vision of state and federal relations. He denied the existence of a federal police power protecting the safety and wel-

fare of citizens. Instead, such power was delegated to the state governments under the Tenth Amendment. A closely divided Court rejected Guthrie's arguments in upholding the ban on interstate transport of lottery tickets.

In *McCray*, Guthrie represented margarine producers who were challenging a federal ten-cent-per-pound tax on their product. Guthrie's arguments on their behalf would be echoed in future challenges to federal taxing power. He also noted that the power to tax was to be used only for raising revenue, not restricting the use or manufacturing of a product. As with *Champion*, Guthrie's arguments convinced only a minority of the Court, as six justices voted to uphold the margarine tax.

During his many oral arguments in the Court, Guthrie served with several prominent attorneys and political figures. These included Elihu Root, with whom he argued the *National Prohibition Cases*, and Charles Evans Hughes. His close relationship with Rufus Choate during the *Income Tax Cases* solidified his position as a leading attorney during the era. He also represented several major clients, including the Illinois Central and Santa Fe railroads and the Vanderbilt family.

Guthrie also participated in one of the few challenges to the constitutionality of a constitutional amendment. In the *National Prohibition Cases* (1920), a group of brewers challenged congressional and state power to amend the constitution so as to restrict individual behavior. A second challenge arose to congressional power to regulate alcohol without state consent.

As a defender of state power, Guthrie offered evidence in support of the second argument. He noted that while Congress could regulate the interstate transport or sale of alcohol, it could not regulate intrastate alcohol production without state approval. To do so would be an invasion of state prerogatives under the Tenth Amendment. Guthrie's arguments were ignored by the Court, as a seven-member majority upheld the Eighteenth Amendment and the Volstead Act as proper uses of federal power. The justices dismissed Guthrie's contention that states controlled intrastate trade in alcohol.

In one of his last great constitutional cases, Guthrie represented the Catholic Church in its challenge to an Oregon state law prohibiting children from attending private school. In *Pierce v. Society of Sisters* (1925), Guthrie utilized the same arguments used against economic regulation to challenge the law. He stated that the law exceeded the police power in attempting to destroy a nonharmful institution. Guthrie returned to the proposition that the state could regulate only harmful activities to protect its citizens. Private parochial schools represented no such danger. In *Pierce*, Guthrie's arguments convinced each member of the Court, as they unanimously struck down the Oregon law.

Guthrie's career as a constitutional lawyer extended beyond the courtroom. He used his prominent position as an attorney and the leader of the New York bar to expound on his constitutional theories. Taking on the task as constitutional proselytizer, he gave a series of speeches that served as seminars on government power. In those speeches, Guthrie offered a systematic theory of the separation of powers, judicial activism, government economic regulation, and federalism. Guthrie proposed limitations on federal power and a strict division of duties between the federal and state governments.

Guthrie was even more adamant in his defense of the judiciary as a legal bulwark against progressive economic policies. He saw judges as the last defenders of economic rights and sought to expand judicial power at the expense of the legislature. One of the avenues for that was a reinterpretation of the Eleventh Amendment and state sovereign immunity as a check on federal judicial power. In a 1908 speech before the New York State Bar Association, Guthrie proposed a constricted view of state sovereign immunity, one that would allow federal judges to prevent state officials from enforcing economic regulations the Court believed to be unconstitutional. He commented on the case of *Ex parte Young* (1908), in which the Court did just as Guthrie advised and allowed federal judges to rule against state officials.

Guthrie died of a heart attack on December 8, 1935. During that time the Court and the country were poised on the edge of a constitutional revolution that would sweep away the arguments and philosophy offered by Guthrie. Although his beliefs would barely outlast him, William Dameron Guthrie was one of the most powerful members of the bar during his life and had a dramatic effect on the development and application of the law.

—Douglas Clouatre

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HAMILTON, ALEXANDER

(1757–1804)

Alexander Hamilton, usually remembered for his role as a political figure and a framer of the U.S. Constitution, also maintained a far-ranging law practice and laid the foundation for several legal doctrines that are integral to modern judicial thought. His legal theories gave rise to the doctrine of judicial review, helped to enlarge freedom of the press, and encouraged a muscular interpretation of the contract clause. By any standard, Hamilton was one of the most able and creative lawyers of the early republic.

Hamilton was born out of wedlock on January 11, 1757, on the island of Nevis in the British West Indies. Hamilton's mother died when he was eleven and his father played little role in his life. Raised in St. Croix, Hamilton was sent to America at age fifteen by friends. He studied at King's College in New York City from 1773 to 1776. Hamilton served in the Revolutionary War as General George Washington's aide from 1777 to 1781, and he married Elizabeth Schuyler, a member of a leading New York family, in 1780. Before the war ended, Hamilton briefly studied law in Albany and was admitted to practice in various New York courts in the period 1782–1783. He soon gained success at the

Alexander Hamilton
Library of Congress

bar and was in demand by prominent clients throughout his career. He often acted as co-counsel, appearing several times with Aaron Burr.

Hamilton authored the earliest known treatise on the practice of law in New York. Written while Hamilton was a law student, the book, entitled *Practical Proceedings in the Supreme Court of the State of New York,* discusses the procedures of the Supreme Court of New York as well as aspects of the state's substantive law. The treatise, an important early work on private law in the Revolutionary era, indicates that Hamilton was well versed in many areas of English law, as well as the laws of other countries, such as Spain, Italy, and France.

Among the first cases Hamilton argued were those known as the *War Cases*. These consisted of about sixty-five cases involving three New York anti-Loyalist statutes passed in the wake of the Revolutionary War. In the most noted of his war cases, *Rutgers v. Waddington* (1784), Hamilton fashioned legal arguments that became a building block for the modern doctrine of judicial review. The case concerned the occupation by Loyalist Benjamin Waddington & Company of property belonging to Elizabeth Rutgers, who had fled due to British military occupation. Under New York's Trespass Act of 1783, a plaintiff could bring a suit for trespass against anyone who had occupied or destroyed his or her property. Rutgers sued Waddington for eight thousand pounds in rent; Hamilton served as defense counsel along with Brockholst Livingston and Morgan Lewis, and the case was argued before James Duane in the Mayor's court.

The law of nations sanctioned the use of abandoned property, when authorized by the commanding military officer during wartime. By precluding the defense that one's trespassory actions were pursuant to a military order, the Trespass Act directly conflicted with the law of nations. Hamilton argued first that the Trespass Act violated the law of nations and was thus void. Because the New York Constitution had adopted the common law, which included the law of nations, violation of the law of nations was thus a violation of the laws of New York. Second, he argued that Congress had exclusive power to enter into peace treaties, including the implied power to prescribe reasonable conditions necessary to carry out the treaties. Lastly, he maintained that if the act was invalid on either ground the court was obligated to declare the statute void.

The court did not directly address Hamilton's argument. Instead, it held that the use by the defendant under immediate authority of the British commander was defensible under the law of nations. Regarding the issue of whether the court was bound by the statute even if it was in conflict with the law of nations, the court noted that it did not profess to have the power to find the statute void, acknowledging the supremacy of the legislature. However, the court held that because the legislature had not expressed the

intent to violate the law of nations, the court would read the statute so as to avoid this consequence. This necessitated the holding that the Trespass Act did not apply to the defendant's acts that were protected by the law of nations. Thereafter Hamilton represented Loyalists in a number of Trespass Act cases.

This early formulation of the concept of judicial review is one of Hamilton's most important contributions to the development of constitutional law. Hamilton further developed his thinking on judicial review in the famous essay No. 78 of the *Federalist Papers*. He endorsed the view that judges should strike down statutes that contradicted the Constitution, and he provided an intellectual foundation for judicial review.

In addition to his legal practice, Hamilton served in various political positions. He was a member of the New York legislature in 1787, served as a New York delegate to the Continental Congress from 1782 to 1783 and from 1787 to 1788, and was a New York delegate to the 1787 Philadelphia Constitutional Convention. Shortly after the Treasury Department was established in September 1789, Hamilton became the first secretary of the treasury, serving in this capacity from 1789 to 1795.

While secretary of the treasury, Hamilton proposed the creation of a national bank. In 1791, President Washington asked Hamilton for his views on the constitutionality of this measure. Hamilton responded with a classic formulation of the doctrine of implied congressional power derived from the "necessary and proper" clause of the Constitution. Hamilton's opinion was ultimately adopted by the U.S. Supreme Court in *McCulloch v. Maryland* (1819), a leading decision by Chief Justice John Marshall.

Except for the years in which he served as secretary of the treasury, Hamilton argued cases before the New York Chancery Court every year from 1784 until he died in 1804. A primary focus of his chancery practice was commercial transactions, and this aspect of his work increased markedly when he returned to law in 1795. He handled numerous cases dealing with such matters as debt, creditors' rights, sales contracts, and promissory notes. Other cases involved disputes between shippers and merchants over which party should bear the burden of the loss of goods while en route.

Hamilton also developed an extensive marine insurance practice. He handled cases dealing with the interpretation of insurance contracts, refusal to pay on a loss due to suspected fraud, the extent of the application of a contract when an insured lied on the application, and the ability of a creditor to insure a vessel in the owner's name without his permission. Hamilton did not appear predominantly on either side of these types of disputes, having represented insurance companies as well as many policyholders. Related cases concerned admiralty and maritime jurisdiction, with many of these

cases arising from violations of federal statutes. For example, the Slave Trade Acts prohibited American participation in the international slave trade. Hamilton participated in two cases in which his clients had allegedly violated these provisions. He was also retained in cases of civil salvage, in which the salvor of a distressed ship and/or its cargo received a fee for preventing a loss at sea.

Real property law was yet another of Hamilton's specialties. He represented both individuals and state governments in property boundary disputes, acting as counsel for New York in two boundary disputes with other states. The first, known as the *Massachusetts Dispute,* involved a portion of New York west of the Hudson River. Massachusetts claimed the land due to an overlapping colonial land grant. In 1785, New York retained Hamilton and Samuel Jones to represent the state in federal court. Massachusetts's argument was that discovery was the basis of title. Hamilton countered that occupancy and settlement were the appropriate elements by which to determine title, noting that the discovery doctrine would have entitled the Spanish to ownership of all of America due to prior discovery. This argument was never adjudicated, because the controversy was settled by the states in December 1786.

The second boundary dispute in which Hamilton represented New York was termed the Connecticut Gore controversy. This also encompassed British land grants that were vague about the exact location of boundaries. Connecticut claimed a small strip of land called "The Gore" along the New York–Pennsylvania border and had granted this land to two businessmen who owned the Gore Company. The men brought two ejectment actions in the U.S. Circuit Court for the District of Connecticut in 1796, against the grantees of the state of New York, for unlawful possession. Hamilton challenged the court's jurisdiction to try the case, suggesting that the U.S. Supreme Court should hear the case. Hamilton drafted a notice to the Gore Company, which had filed a petition to stay the ejectment action, while a bill in equity was filed in the Supreme Court. This notice appears to be the last action Hamilton took in the case. Both cases were eventually dismissed, and thus New York kept the land.

Similar to his role in the interstate boundary disputes, Hamilton represented individual property owners in boundary disputes arising from colonial land grants and also in disputes arising from land speculation deals. These cases were a substantial part of Hamilton's practice and predominantly consisted of ejectment and trespass actions. A major portion of the land in these disputes was that granted to three prominent families in the Hudson Valley, the Livingstons, the Schuylers, and the Van Rensselaers.

Criminal cases were not a large part of Hamilton's practice, but he represented a handful of criminal defendants, some of whom were court ap-

pointed. In *People v. Weeks* (1800), Hamilton, Aaron Burr, and Brockholst Livingston were defense counsel. Weeks was charged with murdering his fianceé and dumping her body in a well. The facts, as well as public opinion, were strongly against Weeks, but the defense put on a more organized case than the prosecution and convinced the jury that another man had committed the crime. Thus the jury found Weeks not guilty.

Hamilton also argued the significant case of *Hylton v. United States* (1796) before the U.S. Supreme Court. The immediate issue was the constitutionality of a carriage tax levied by Congress, but the larger question implicated the ability of the federal government to raise revenue. Arguing for the government at the request of the attorney general, Hamilton convinced the Court that the carriage tax was not a direct tax and was therefore a valid exercise of congressional power. Interestingly, the Court intimated that it would not enforce an act in violation of the Constitution, echoing Hamilton's views on judicial review.

One of Hamilton's noted contributions to the growth of constitutional law came in *People v. Croswell* (1804), the last important case of his career. On January 10, 1803, a grand jury indicted Harry Croswell, a Federalist newspaper editor, for seditious libel of President Thomas Jefferson. Croswell had published highly critical articles about Jefferson, accusing him of unconstitutional and partisan actions.

The defendant contended that his publication of this information was a public libel, in which truth should be a defense. This necessitated rejecting the English common law rule of libel, which did not allow truth as a defense.

The defendant also argued that the English law of libel was destructive of freedom of the press. Chief Justice Morgan Lewis, however, adhered to the common law doctrine, directing that a guilty verdict should be returned if the jury found that the defendant had in fact published the statements. He held that the issues of intent and falsity were matters of law for the court to decide.

Hamilton brilliantly argued Croswell's appeal to the Supreme Court of New York and helped to bring about a major change in the law. He insisted that freedom of the press required the defense of truth to charges of libel and that a jury, and not the court, should decide the question of guilt. Both of these, he said, were necessary to safeguard political discourse and to protect representative government. In his argument before the court, Hamilton declared, "I contend for the liberty of publishing truth, with good motives and for justifiable ends, even though it reflect on government, magistrates, or private persons" (Goebel 1964, 1:810). Although the court was equally divided and did not deliver an opinion, in 1805 the New York

legislature enacted a statute that revamped the law of seditious libel and adopted much of Hamilton's position. Furthermore, at the Constitutional Convention of 1821, the section of the New York constitution on freedom of speech and of the press was amended to require that the jury in a libel case, rather than the court, determine the law and the facts, and that truth could be given as evidence. Hamilton's argument in *Croswell,* then, was a milestone in the development of freedom of the press.

Another of Hamilton's signal contributions to constitutional law came to fruition in *Fletcher v. Peck* (1810). Hamilton's legal advice, as well as the resulting Supreme Court decision, are known for their effect on the interpretation of the U.S. Constitution. Georgia had claimed a large tract of land called the Yazoo tract, in the Old Southwest. The Georgia legislature sold this land in 1795 to a group of land companies. Because the public was upset that the legislature had accepted bribes in exchange for enacting the bill, a repeal act was passed in February 1796, nullifying the sale of the Yazoo lands.

Rather than obtain a refund, for which the repeal act provided, some of the land companies chose to fight for their rights to the land. Apparently at the behest of the land companies, Hamilton prepared an influential legal opinion in 1796 that maintained that the Constitution's contract clause prevented state interference with public as well as private contracts. Therefore, he concluded that the repeal act was void and the original contract of sale was still enforceable.

In 1803, the companies instituted a collusive suit to obtain a Supreme Court decision on whether the repeal act was valid or was a violation of the contract clause of the Constitution. Fletcher sued Peck for allegedly selling him land that Peck did not rightfully own, which tract was part of the original 1795 Yazoo sale. In 1810, Chief Justice John Marshall delivered the Supreme Court's opinion, holding as Hamilton had predicted in his opinion to the land companies. The Court ruled that the original sale was valid and that the repeal act violated the contract clause of the U.S. Constitution. Hamilton's legal opinion pointed toward a vigorous application of the contract clause and shaped much of the jurisprudence of the Marshall Court.

In 1804, Hamilton's life was cut short by a political enemy, Aaron Burr. Hamilton had thwarted several of Burr's political endeavors, specifically his quest for the governorship of New York. Because Hamilton had spoken out against Burr, Burr challenged him to a duel. Hamilton accepted the challenge, and in July 1804, he died from a gunshot wound inflicted by Burr during the New Jersey duel.

—James W. Ely Jr.

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HAMILTON, ANDREW

(1676–1741)

ANDREW HAMILTON
Archive Photos

THERE IS PROBABLY NO greater illustration of the principle that great cases identify great lawyers than the influence that the New York libel trial of John Peter Zenger has had on the reputation of Andrew Hamilton. Although Hamilton was a notable figure before this trial in his own right—indeed, one of the most notable colonial lawyers in America—his memory would have probably been largely lost along with other records of the cases of his period were it not for contemporary accounts of the *Zenger* case and its subsequent evocations by defenders of freedom of the press.

Little is known about Hamilton's background, although records indicate that he was born in 1676, probably in Scotland, that he may have graduated from St. Andrew's in Scotland (three men with this name graduated about the time he would have been there), and that about 1697 he moved to Virginia, where he may or may not for a time have assumed the name of Trent. The fact that he did not begin to practice law until three years after ar-

riving in Virginia further suggests that he may have studied in the law offices of an attorney there. Captain and Mrs. Isaac Foxcroft, who had no children of their own and who later made him executor, and heir, of their estate, are known to have befriended Hamilton in Virginia (Nix 1964, 393). Hamilton began his practice in the Accomac County court in 1702 or 1703 and in other courts on Virginia's Eastern Shore, where his practice seems to have grown. In Virginia he married Ann Brown Preeson, the daughter of prominent Quaker Thomas Brown and Susanna Denwood Brown, and the childless widow of Susanna Brown's nephew, Joseph Preeson. Andrew and Ann would have a daughter and two sons, one of whom, James, would later serve as a lieutenant governor of Pennsylvania.

Amid evidence (including a negative comment by William Byrd) that he had stirred at least some opposition in Virginia, Hamilton moved to Kent County, on Maryland's Eastern Shore at about 1708 or 1709 and practiced there as well as in Delaware as he phased out his Virginia practice. Hamilton was chosen by agents of William Penn—whose wife noted that he was "an Ingenious man, and, for a Lawyer, I believe, a very honest one, & of very considerable Practice in these parts" (Loyd 1907, 7)—to bring a suit in 1712. In 1715, after Hamilton had sailed to England, where he was admitted to Gray's Inn—allowing him to practice law there—and returned (he would visit England again on business between 1724 and 1726), Kent County, Maryland, chose him as a deputy to the state legislature. He showed up late to the legislature because of a case he was arguing in Pennsylvania, where he soon moved.

Hamilton held a number of offices in Philadelphia, including that of attorney general (1717–1724), member of the provincial council (1720), judge of the court of vice admiralty (1737), master of the rolls, recorder of Philadelphia and prothonotary of the supreme court (1727), and an assemblyman from Bucks County (1735–1739) (Loyd 1907, 13). Hamilton was speaker of the Pennsylvania house (once being elected unanimously) for all but one year from 1729 to 1739, when he retired, largely because of his failing health. He appears to have been speaker of the Delaware legislature as well. Perhaps in part because of his associations with both states, Hamilton was influential in resolving a boundary dispute between Pennsylvania and Maryland. His tenure in Pennsylvania was marked by the passage of a law designed to aid insolvent debtors and by his personal superintendence and design of one of America's best-known public buildings, the Pennsylvania State House, now known as Independence Hall (Loyd 1907, 18).

The record of Hamilton's closing speech to the Pennsylvania assembly is a beautiful example of the kind of rhetoric that he might be supposed to have employed with good effect in the courts. Giving special note to the freedoms that the people of Pennsylvania exercised, Hamilton noted that

> it is not to the fertility of our soil, and the commodiousness of our rivers, that we ought chiefly to attribute the great progress this province has made, within so small a compass of years, in improvements, wealth, trade and navigation, and the extraordinary increase of people, who have been drawn hither from almost every country in Europe . . . it is principally and almost wholly owing to the excellency of our Constitution, under which we enjoy a greater share both of civil and religious liberty than any of our neighbors. (Loyd 1907, 20)

Hamilton further cautioned "against all personal animosity in public consultations," which he likened to a rock, which "the Constitution will at some time or other infallibly split upon" (Loyd 1907, 22).

Hamilton lived for two more years after retiring and died at his mansion in Bush Hill, Philadelphia (a house occupied after his death by his son, the lieutenant governor, and later by John Adams when he served as vice-president), in 1741. Initially buried on his family estate, his remains were later moved to the cemetery at Christ Church.

In writing his obituary, Benjamin Franklin, whom Hamilton had befriended on a passage back from England, noted that "he was no friend to power, as he had observed an ill-use had been frequently made of it in the Colonies; and therefore was seldom on good terms with the Governors." Franklin also noted, however, that "when he saw they meant well, he was for supporting them honourably, and was indefatigable in endeavoring to remove the prejudice of others." Franklin observed that "he spent much more time in hearing and reconciling differences in private (to the loss of his fees) than he did in pleading cases at the bar." Most interesting is Franklin's comment, that "his free manner of treating religious subjects gave offence to many, who, if a man may judge from their actions, were not themselves much in earnest. He feared God, loved mercy, and did justice. If he could not subscribe to the Creed of any particular Church, it was not for want of considering them all, for he had read much on religious subjects" (Loyd 1907, 24).

As a political figure, Hamilton was not above controversy, and there are a number of contemporary pamphlets that criticized him. A biographer explains that

> his great success excited envy and stimulated calumny. The party leaders he opposed and frustrated, the rival lawyers whose ignorance and incompetence he exposed, the unfortunate litigants whom he disappointed, all were his enemies, or at least, ready to listen to his detractors. (Fisher 1892, 12)

Refuting most charges against him as baseless, a biographer further cites the *Zenger* case as one in which Hamilton, "with a professional reputation

already established, [and] a fortune already acquired," "appeared before a Court which had already prejudged his case and a provincial jury very likely to be intimidated by the frowns of authority, to assert the great right of Freedom of the Press, without which most other rights would be valueless" (Fisher 1892, 13).

Hamilton conducted the defense of John Peter Zenger in a New York City courtroom in 1735. This case grew out of New York governor William Cosby's prosecution of Zenger for seditious libel in connection with articles and mock advertisements criticizing and ridiculing the governor that had been placed in the *New York Weekly Journal*. Zenger—a German immigrant who had once been an apprentice under the colony's royal printer, William Bradford, who edited the *New York Gazette*—edited the *Weekly Journal,* for which he received support from the powerful family of Lewis Morris, whom the Governor had dismissed from the supreme court. The *Journal* was also supported by James Alexander, an attorney who had defended Rip Van Dam, the prior interim governor who had refused to turn over half his salary to Cosby, a controversy that had been the basis of party division within the colony and the source of much initial opposition to Governor Cosby.

After a grand jury refused to do so, the governor and Attorney General Richard Bradley indicted Zenger "by information," which did not require grand jury approval. Zenger was arrested, and he spent eight months in prison awaiting trial and continuing to dictate the *Weekly Journal* to his wife, who maintained its publication. Chief Justice James Delancey, whom Cosby had appointed to replace Lewis Morris, further disbarred Zenger's would-be attorneys, James Alexander and William Smith, although he did subsequently appoint one John Chambers to represent Zenger. Although Chambers succeeded in ensuring that a jury was chosen that was not packed by the governor's forces, he was more than willing to turn the defense over to the fifty-nine-year-old Hamilton, who dramatically announced from the audience that he would take the case after Chambers's opening arguments (Katz 1963, 22), and who apparently argued the case without being paid—although he was given a five-ounce gold box for his efforts.

Few causes could have appeared bleaker than the one that Hamilton assumed. Precedents in both Great Britain and America suggested that negative critiques of governing authorities were serious offenses. Truth was not, at the time, regarded as a defense; indeed, the more truthful the publications, the greater the libel was considered to be! The limited role of the jury was simply that of deciding whether the accused was guilty of uttering such negative statements, and, in this case, Zenger did not deny editing the *Weekly Journal*.

Cotton Mather's First Address to Lawyers

Puritan clergyman Cotton Mather is credited with giving the first address to American lawyers in 1710. The speech indicates that in the early eighteenth century, as today, lawyers were viewed as individuals with a great capacity to do both good and harm. Although Mather's language is antiquated, his sentiments point lawyers toward the highest ideals:

> GENTLEMEN: Your Opportunities to Do Good are such, and so Liberal and Gentlemanly is your Education . . . that Proposals of what you may do cannot but promise themselves as Obliging Reception with you. 'Tis not come to so sad a pass that an Honest Lawyer may, as of old the Honest Publican, require a Statue merely on the Score of Rarity. . . . A Lawyer should be a Scholar, but, Sirs, when you are called upon to be wise, the main Intention is that you may be wise to do Good. . . . A Lawyer that is a Knave deserves Death, more than a Band of Robbers; for he profanes the Sanctuary of the Distressed and Betrays the Liberties of the People. To ward off such a Censure, a Lawyer must shun all those Indirect Ways of making Hast to be Rich, in which a man cannot be Innocent; such ways as provoked the Father of Sir Matthew Hale to give over the Practice of the Law, because of the Extreme Difficulty to preserve a Good Conscience in it. Sirs, be prevailed withal to keep constantly a Court of Chancery in your Own Breast. . . . This Piety must Operate very particularly in the Pleading of Causes. You will abhor, Sir, to appear in a Dirty Cause. If you discern that your Client has an Unjust Cause, you will faithfully advise him of it. You will be sincerely desirous that Truth and Justice may take place. You will speak nothing which shall be to the Prejudice of Either. You will abominate the use of all unfair Arts to Confound Evidence, to Browbeat Testimonies, to Suppress what may give Light in the Case. . . . There has been an old Complaint, That a Good Lawyer seldom is a Good Neighbor. You know how to Confute it, Gentlemen, by making your skill in the Law, a Blessing to your Neighborhood. You may, Gentlemen, if you please, be a vast Accession to the Felicity of your Countreys. . . . Perhaps you may discover many things yet wanting in the Law; Mischiefs in the Execution and Application of the Laws, which ought to be better provided against; Mischiefs annoying of Mankind, against which no Laws are yet provided. The Reformation of the Law, and more Law for the Reformation of the World is what is mightily called for. (Warren 1966, ix–x)

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As one who was reputed to be the best attorney in America (Katz 1963, 21), Hamilton undoubtedly knew what the law was. He also recognized that he might be able to make an appeal to the law as it might and should be against the law as it actually was. In brilliant arguments before the jury, Hamilton connected existing English precedents on libel law to the hated Star Chamber and suggested that, especially in the case of officials such as

governors, who did not share actual sovereignty with the king, criticism was essential to the protection of liberty. Hamilton questioned the efficacy of English precedents in the New World setting. Denied by Justice Delancey the right to offer evidence to prove the truth of the accusations that had been printed, Hamilton in effect appealed to the jurors to recognize their truth anyway and to nullify existing law on behalf of a higher ideal. He succeeded in getting the jury to exonerate Zenger, to the huzzas of his audience, and he was subsequently feted before returning to Philadelphia. Heralded as this victory was in the colonies, it would be decades before the law to which Hamilton appealed would be recognized either in Great Britain or in America; curiously, it would be Alexander Hamilton who would later mention the Zenger precedent when defending a fellow Federalist, Henry Croswell, in 1804 against similar accusations raised by Democratic Republicans (Katz 1963, 32–33).

Andrew Hamilton clearly carried the day in the *Zenger* case by both the audaciousness of his arguments and the eloquence of his speaking. Hamilton's reasoning closely resembles that which would later find expression at the time of the American Revolution and the founding of the United States. At one point Hamilton argued that

> power may justly be compared to a great river; while kept within its due bounds, it is both beautiful and useful; but when it overflows it banks, it is then too impetuous to be stemmed; it bears down on all before it, and brings destruction and desolation whenever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which, in all ages, has sacrificed to its wild lust, and boundless ambition, the blood of the best men that ever lived. (Loyd 1907, 40)

Further pointing to his own advanced age, Hamilton said, "I should think it my duty, if required, to go to the utmost part of the land, where my service could be of any use, in assisting to quench the flame of prosecutions upon informations, set on foot by the government, to deprive a people of the right of remonstrating (and complaining too) of the arbitrary attempts of men in power" (Loyd 1907, 41). Much as Webster would later evoke the small size of Dartmouth College in arguing its case before the U.S. Supreme Court, Hamilton said that Zenger's case was "not of small nor private concern." Rather than the mere cause of "a poor printer," he said that "It may, in its consequence, affect every freeman that lives under a British government on the main of America" (Loyd 1907, 41).

Just as John Adams would later note that James Otis first fanned the flames of the American Revolution, Gouverneur Morris (a descendant of

the displaced judge in the *Zenger* case) would later say that the *Zenger* case was "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America" (McManus 1999, 914). Hamilton had the courage to see the law of freedom of speech not so much as it was as how it could be. Thus, a contemporary London correspondent of Benjamin Franklin's *Pennsylvania Gazette* noted that an English lawyer who heard about the case had said, "If it is not law, it is better than law, it ought to be law, and will always be law wherever justice prevails" (Konkle 1941, 109). Hamilton suggested that American liberty might be even wider than the liberty of Englishmen, and he arguably laid the foundation for freedom of the press that is as broad as that in any modern nation.

—John R. Vile

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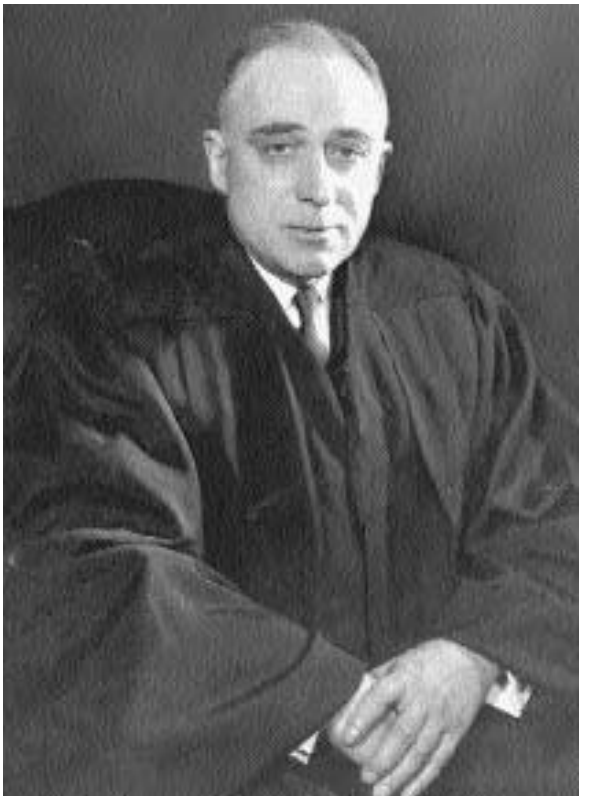
HARLAN, JOHN MARSHALL, II

(1899–1971)

Long before his years on the U.S. Supreme Court (1955–1971), John Marshall Harlan II was senior partner and chief litigator in one of Wall Street's most prestigious law firms. Grandson of the first Justice John Harlan (1833–1911), the complex Kentucky slaveholder and opponent of abolition who became a champion of civil rights on the Court, the younger Harlan was born in Chicago on May 20, 1899. His father, John Maynard Harlan, a colorful lawyer, was a Chicago alderman and unsuccessful mayoral candidate who railed against the city's traction (streetcar) interests and their grip on local officials, but ultimately made his peace with those same interests, becoming their counsel on a lucrative retainer. John Marshall's mother was the former Elizabeth Palmer Flagg of Yonkers, whom John Maynard met on one of his family's frequent summer holidays at Block Island, an exclusive resort off Long Island, and married in 1890.



John Marshall Harlan II
Collection of the Supreme Court of the United States

His parents' at times turbulent and often unhappy union produced John Marshall and three

daughters: Elizabeth, Janet, and Edith. The financial security John Maynard's traction clients provided, as well as the family's impeccable social connections, placed the Harlans at the center of Chicago society. But young John Marshall spent little of his life there. Packed off at an early age to a Canadian boarding school, where he excelled in academics and sports, he spent his summers with his family at their Quebec summer home. After a final year of preparatory education at the Lake Placid School in New York, he enrolled at Princeton in the class of 1920. After compiling an outstanding record at Princeton, where he was president of the student newspaper, he attended Oxford's Balliol College, the university's law school, finishing his three years of study there with a "First" in jurisprudence and placing seventh in a class of 120.

On his return from England, Roger A. Derby, the husband of Harlan's eldest sister Elizabeth, helped him to secure a position with Root, Clark, Buckner & Howland (now Dewey, Ballantine), one of New York's finest firms. Emory Buckner, Root, Clark's chief litigator, quickly became young Harlan's mentor and the greatest single influence on his professional development. Since Harlan's esoteric studies in jurisprudence at Oxford had hardly equipped him for an American law practice, Buckner insisted, over Harlan's initial objection, that his charge enroll at New York Law School, where he completed the two-year program in a year, winning admission to the bar in 1924. Under Buckner, Harlan also honed his litigator's skills, becoming a master of careful preparation and thorough attention to detail.

Soon, the young associate also got his first taste of public service. In 1925, Emory Buckner became U.S. attorney for the Southern District of New York. Harlan and other promising young lawyers—"Buckner's Boy Scouts," the press quickly dubbed them—joined his staff. With Harlan as his chief assistant in charge of the office's Prohibition division, Buckner launched a vigorous campaign to enforce the federal Prohibition law they—like most New Yorkers—personally detested. Given the office's limited budget, Buckner and Harlan decided to curtail the number of costly, time-consuming, and often fruitless criminal prosecutions, resorting instead to an approach that was proving successful in Chicago: the padlocking as public nuisances of nightclubs and other establishments found by the courts to be in violation of the Volstead Act. Not only were hundreds of clubs and restaurants closed, but thousands of criminal prosecutions were also processed. More than 70 defendants were acquitted after trial; the jury deadlocked in 10 cases; and nearly 700 cases were dismissed. But 3,880 guilty pleas were secured as well as 48 convictions after trial.

Among the criminal prosecutions, Harlan considered six major cases involving numerous defendants. In one, William V. ("Big Bill") Dwyer, one of the most notorious bootleggers of the period, received a two-year sentence

and a ten-thousand-dollar fine. In another case, the mayor of Edgewater, New Jersey, and twenty-two confederates drew prison terms on numerous charges. But the most celebrated of the Buckner-Harlan Prohibition prosecutions involved Earl Carroll, the theater owner and producer. At midnight, February 22, 1926, following his *Vanities* showgirls' last performance of the evening at his Manhattan theater, Carroll hosted what the *New York Times* later characterized as an "all-night bacchanalian orgy" for five hundred guests, complete with two jazz bands, two large tables of food and drink, three large tubs of "iced liquid," and a chorus girl bathing nude in a bathtub of what appeared to be an illicit beverage.

Called by Buckner and Harlan before two grand juries, Carroll denied under oath that liquor had been served at his party or that a woman had bathed on his stage, as well as other details furnished by witnesses to the event. While the first grand jury adjourned without making any findings in the case, the second charged the producer with six counts of perjury. Carroll's trial before a packed courtroom, with Harlan presenting the prosecution, produced no firm evidence that liquor had been served at the defendant's bash. In fact, a representative of the Canada Dry Company testified that his firm had paid the defendant for the privilege of serving free ginger ale to *Vanities* audiences and that sixty to seventy thousand pints of the product had been consumed at Carroll's theater in the past year. The showman's conviction appeared to hinge, therefore, on his denials regarding the bathtub incident. Harlan's star witness on that point was to be the "Bathtub Venus," as the press called Joyce Hawley, the showgirl who testified that she had indeed bathed nude on Carroll's stage—and complained that he had reneged on his promise to pay her seven hundred to a thousand dollars for her appearance. Harlan's effort to portray Miss Hawley as a much-abused innocent was difficult at best. Although only seventeen, she had been posing nude as an artist's model since age fourteen; however traumatic she may have found the bathtub incident, moreover, she was now doing the same act nightly at a Greenwich Village theater. Ultimately, though, Hawley must have been a credible witness. At one point, the trial judge had brought smiles to Buckner's and Harlan's faces when he asked incredulously, "And were these men all standing around that bathtub just to get a drink of ginger ale?" (Yarbrough 1992, 28). Even so, the jury acquitted Carroll of lying about the consumption of liquor at the party. Jurors convicted the showman, however, of lying about the bathtub incident. Given New Yorkers' distaste for Prohibition, Harlan considered a conviction on any count a triumph.

Despite his success in dealing with Prohibition violators, Emory Buckner's tenure as U.S. attorney was hardly free of criticism. Critics charged that he was enforcing the law with undue enthusiasm—or not vigorously

enough. Some thought he had his eye on the governor's mansion and that his Prohibition campaign was designed to bolster his popularity with voters, although the notion that Buckner's defense of the "dry" faith would endear him to most New Yorkers was questionable at best. Buckner was sensitive to such complaints, and charges of politics in his handling of the prosecution of two principals in the scandals of President Warren G. Harding's administration were the final straw; in 1926, Buckner resigned as U.S. attorney and returned with Harlan to Root, Clark. Two years later, however, Buckner and his protégé were back in public service. Buckner agreed to an appointment as a special assistant state attorney general in charge of an investigation and prosecution of Queens borough president Maurice E. Connolly on charges of municipal graft, with Harlan again serving as Buckner's chief assistant. Harlan's meticulously developed investigation, graphically depicted in a four-by-thirty-foot courtroom chart detailing the defendant's misdeeds, made Buckner's presentation at trial a relatively simple task. Connolly was convicted, and the appellate brief Harlan wrote effectively blocked the borough president's appeal efforts.

Harlan's successes as head of Buckner's Prohibition division in the U.S. attorney's office and his pivotal role in the Queens inquiry had enhanced his growing reputation in New York legal circles. On his return to Root, Clark after the Connolly case, he was clearly established as Emory Buckner's most valued assistant. That same year, Harlan also met and married Ethel Andrews, the strikingly attractive daughter of a Yale colonial history professor and sister of another Root, Clark associate. Ethel had been previously married to a New York architect twenty years her senior, from whom she had been divorced only a year. Divorce was rare in those days, and Harlan was nervous at the prospect of telling his mother that her only son was about to marry a divorcée. In appearance, personality, and disposition, however, the future justice had always been much closer to his refined, reserved mother than to his bombastic, temperamental father, who, continually pressed with financial problems in his later years, had become increasingly estranged from the family. When Elizabeth Harlan gave her blessing to the match, her son and Ethel were married on November 10, 1928, in Farmington, Connecticut. By all accounts, theirs was a generally happy marriage, producing a daughter and enduring until his death.

Soon, too, Harlan would become one of his firm's most important members. In 1931, he was made a junior partner. As Emory Buckner's health began to decline, Harlan also increasingly assumed leadership of Root, Clark's litigation team. His first major case in that capacity was also to be his most bizarre. In it, Harlan successfully defended heirs to the estate of the eccentric New York millionaire Ella Wendel from more than two thousand claimants. Miss Wendel's will left the bulk of the family's real estate fortune

Noah Walter Parden and Styles Hutchins

The first African-American lawyer ever to take the lead role in arguing a case before a justice of the U.S. Supreme Court was apparently Noah Walter Parden, who appeared before Justice John Marshall Harlan on March 17, 1906. Parden went before Justice Harlan on behalf of a twenty-three-year-old illiterate African-American named Ed Johnson, who had been accused and convicted of the assault and rape of a twenty-one-year-old white woman named Nevada Taylor in Chattanooga, Tennessee. The local sheriff, Joseph F. Shipp, and the judge, Sam McReynolds, were prepared to carry out Johnson's death sentence expeditiously after his court-appointed attorneys, Robert T. Cameron, W. G. M. Thomas, and Lewis Shepherd, agreed with the judge that an appeal of Johnson's conviction was likely to lead to mob violence like that which had first erupted when Johnson was arrested and incarcerated in the Chattanooga jail.

Unfortunately, Johnson's trial had been riddled with problems, and there is little evidence that he was guilty of the crime for which he was charged. African-Americans had been excluded from the jury, and Johnson's friends and family had not been able to attend. Judge McReynolds had met privately with attorneys and told them that he would not grant a change of venue. Although the victim believed Johnson to have been her attacker, she could not say for sure. The chief witness against Johnson, who had tried to link him to a leather strap that was found on the scene, had received a handsome monetary award. Numerous African-American witnesses who confirmed Johnson's alibi were apparently ignored, and one juror had threatened Johnson's life during the trial with no apparent response from the judge. Parden and his partner, Styles Hutchins, had entered the case after the three court-appointed attorneys decided that an appeal would be futile, and Johnson's father pleaded with them to take his son's case.

Although they were both African-Americans, Parden and Hutchins were quite different. Parden was a disciple of Booker T. Washington, who believed in trying to get along with white people. He was also deeply religious. Parden had studied law at Central Tennessee College in Nashville, Tennessee, and returned to Chattanooga, where he had attended high school. Unlike Parden, Hutchins was a follower of W. E. B. DuBois, who wanted more immediate equality for African-Americans. He had been one of the first African-American graduates of the University of South Carolina and had moved to Chattanooga after facing numerous obstacles to the practice of law in Georgia. Also very religious, Hutchins had convinced Parden to accept Johnson's appeal after noting that "much has been given to us by God and man. Now much is expected" (Curriden and Phillips 1999, 139).

When they appeared before the trial judge about the possibility of an appeal, the judge openly ridiculed them, asking,

> What can two Negro lawyers do that the defendant's previous three attorneys were unable to achieve? Do you know the law better than this court or the lawyers who represented the defendant? Are you aware of some legal principles that I have never heard of? What can a Negro lawyer know that a white lawyer does not? Do you think a Negro lawyer could possibly be smarter or know the law better than a white lawyer? (Curriden and Phillips 1999, 144)

Judge Reynolds further attempted to trick the lawyers by allowing them to be-

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lieve that he would not count Sunday in the calculation of days within which an appeal had to be filed. Despite these obstacles, Parden and Hutchins filed an appeal to the Tennessee Supreme Court in *Ed Johnson v. State of Tennessee*. After losing in this venue, Parden and Hutchins filed an appeal in federal court under the Habeas Corpus Act of 1867. The U.S. district court judge, Charles Dickens Clark, stayed Johnson's execution until an appeal could be made to the U.S. Supreme Court, but he seemed unsure about his authority to issue orders to state officials.

It was in this capacity that Noah Parden appeared with an African-American attorney from Washington, D.C., named Emmanuel D. Molyneaux Hewlett in an ex parte proceeding before Justice John Marshall Harlan, who supervised the federal circuit that included Tennessee. Ironically, although he admired the work of Parden and Hutchins, W. E. B. Du Bois had urged them to turn the work over to more experienced attorneys. Much to the surprise and chagrin of many Chattanooga residents, Harlan—the only dissenter in the case of *Plessy v. Ferguson* (1896) upholding the system of Jim Crow segregation laws—issued an order postponing Johnson's execution and accepting his appeal to the U.S. Supreme Court.

It was at this point that mob rule raised its ugly head. After threats of a mob circulated, Sheriff Shipp left his Chattanooga jail practically unguarded, and, predictably, a mob stormed the jail. After Johnson was extricated by force from his cell, he continued to maintain his composure and to proclaim his innocence, saying (in words later inscribed on his tombstone), "God bless you all. I am an innocent man." He was nonetheless dragged by the mob to a bridge, hanged, and riddled with bullets; one observer subsequently cut off one of his fingers for a souvenir. Sheriff Shipp, who had made no real attempt to quell the mob, subsequently issued a statement blaming the Supreme Court's decision for the turn to lawlessness.

In an extraordinary development, the Supreme Court charged Sheriff Shipp and leading ringleaders of the mob with contempt and ordered a trial to be held in Chattanooga before James D. Maher, a deputy clerk of the U.S. Supreme Court, acting as a commissioner. The U.S. Supreme Court subsequently upheld the conviction of Sheriff Shipp and five other defendants and sentenced them to jail.

By the time of Shipp's trial, Parden and Hutchins had both left Chattanooga. Although they had previously garnered numerous cases (often for little more than a free meal or two) from the African-American community, they had so antagonized Judge McReynolds and other local members of the bar that African-Americans no longer thought they could be effective in court. Lecturing for a time in the North, both apparently settled in the Oklahoma Territory, where Parden may have founded a small newspaper (Curriden and Phillips 1999, 349).

United States v. Shipp remains the only criminal trial that the U.S. Supreme Court has ever conducted. The case appears both to have helped reduce the number of lynchings and to have strengthened the resolve of sheriffs to intervene to stop such tragedies (Curriden and Phillips 1999, 339). Although they are not well known among American lawyers, Parden and Hutchins nonetheless demonstrated how lawyers with courage can make a difference.

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of about $75 million to a number of charitable institutions. But among phony heirs were several claimants who erected a tombstone bearing altered birth and death dates in a West Virginia cemetery, as well as Illinois claimants who produced letters from Wendel's father, dated 1836 and 1841, but written on paper purchased from Woolworth's and manufactured no earlier than 1930. The most audacious and, for those named in Wendel's will, potentially dangerous impostor was one Thomas Patrick Morris, a frail Scotsman who claimed to be the progeny of a secret marriage of Wendel's brother to an Edinburgh woman. With characteristic attention to detail, however, Harlan demolished the assertions of each fraudulent claimant. He established, for example, that the marriage certificate on which Morris largely based his claim to be the product of an 1876 marriage of Wendel's brother in Scotland was in fact torn from a book printed in 1913, thirty-seven years after the nuptials purportedly occurred!

Earlier, Harlan had assisted Emory Buckner in defending heavyweight boxer Gene Tunney in a suit for a piece of the champ's earnings from the 1926 Tunney-Dempsey match. And in 1940, he became involved briefly, but significantly, in a case that raised the sorts of fundamental civil liberties issues he would later confront on the Supreme Court. When the New York City Board of Higher Education offered noted British scholar Bertrand Russell a visiting professorship at City College, Russell's unorthodox life style and views on sex, morality, marriage, child-rearing, and education—especially his apparent support of sexual relations among college students and adultery as therapy for troubled marriages—provoked immediate controversy. In response to a taxpayer suit brought by a Brooklyn housewife challenging the board's action, a state judge who was a staunch Roman Catholic held the appointment invalid. Invoking a state law traditionally applied only to primary and secondary schoolteachers, the judge concluded that employment on City College's faculty was limited to U.S. citizens and those who had passed a qualifying examination. He also scorned Russell's "notorious immoral and salacious writings" and assumed authority to forbid creation of a "chair of indecency" at the college (Yarbrough 1992, 53). Volunteering his services without fee, Harlan filed a ninety-four-page appellate brief on the board's behalf. But two appeals courts upheld the trial judge. That defeat, a colleague later recalled, was the only time he ever saw Harlan truly angry.

As Harlan's battle over the Bertrand Russell appointment was reaching a frustrating conclusion, war erupted in Europe. By then in his early forties, Harlan was well past the usual age of military service, but he was anxious nonetheless to play a part in the great conflict. Enthusiastically accepting an opportunity to head the Army Air Corps' intelligence section in En-

gland, Harlan and his team of scientists and lawyers made numerous recommendations to military authorities, substantially improving the accuracy of air strikes. Toward the end of his tour of duty, he also served on a committee planning the postwar occupation of Germany.

After his separation from the service in December 1944, Harlan resumed his Wall Street law practice. As a senior partner in one of the city's leading firms, he was now at the top of his profession. He and Ethel had acquired a succession of increasingly commodious and comfortable Manhattan apartments and in 1937 had built a country home in Weston, Connecticut, on twenty acres of beautiful countryside. After the war as before, his principal clients were major corporate interests, including American Telephone and Telegraph and its subsidiary Western Electric, ITT, the American Optical Company, and the Gillette safety razor company. He also argued a number of important cases in the Supreme Court, including one in which he represented foreign diamond mining interests in an antitrust suit and another that produced a landmark decision in the fields of corporate law and civil procedure by erecting a substantial obstacle to suits by minor stockholders against companies in which they held stock.

Harlan's principal postwar clients, however, were members of the Du Pont family and a number of their corporate interests. In one antitrust suit, a district court rejected Harlan's arguments, holding that Du Pont and other companies were involved in an international conspiracy to eliminate competition in the trade of chemical products, arms, and ammunition. He successfully defended two of the Du Pont brothers, however, in another suit against their company, General Motors, and other businesses with large Du Pont holdings. For a Chicago phase of that litigation, a huge team of lawyers from several of the nation's leading corporate law firms descended on the city several months before the trial was to begin, taking over several floors of a local hotel and easily outgunning the government, which at one point was represented by a single lawyer. Perhaps discomfited by the stark contrast between the massive corporate and negligible government forces in the case, Harlan even offered the government's attorney—a "rabid New Dealer," the future justice's daughter later said—some of the space reserved for the defense team. After a nearly seven-month trial, the district judge accepted Harlan's central premise that the defendants' connections, however elaborate, established no conspiracy to violate the federal antitrust statutes. After Harlan's appointment to the Supreme Court, a majority, speaking through Justice William J. Brennan, overturned his trial victory in the Du Pont case. Given his earlier service as counsel in the case, Harlan had recused himself from participation in the Court's deliberations. As Brennan summarized the majority's opinion, however, Harlan penned a note to Jus-

tice Felix Frankfurter, one of two dissenters, decrying Brennan's "*superficial* understanding of a really impressive record. . . . I hardly recognize the case as I listen to him speak" (Yarbrough 1992, 135).

Even before the trial court's ruling in the Du Pont case, however, Harlan's career was taking a new and permanent direction. Although he was essentially uninterested in partisan politics, Harlan had participated over the years in a variety of Republican political campaigns as well as other political and civic activities. He enjoyed close relations with the moderate wing of the GOP and New York governor Thomas E. Dewey, the party's 1948 presidential candidate. When Dewey created a state crime commission to investigate ties between organized crime and government, the governor's selection of Harlan in March 1951 as the commission's chief counsel was thus hardly surprising. Harlan served without pay in the position until January of the following year, when the Du Pont suit began to require his exclusive attention. Augmenting his staff of lawyers were a number of full-time investigators, and local police were put at his disposal for temporary assignments. Investigating the influence of organized crime on the New York waterfront and in other areas, including the state judiciary, he and his staff conducted more than six thousand interviews and called more than two hundred witnesses before five public hearings. Their inquiry led to creation of the New York Waterfront Commission, among other reforms, made Harlan the target of death threats, and also generated charges, ultimately held to be unfounded, that he was using the commission and his staff for partisan political purposes.

By the time of Dwight D. Eisenhower's inauguration as president in January 1953, Harlan not only enjoyed a reputation as an outstanding corporate lawyer whose selection to the federal bench was likely to find favor with traditional Republican loyalists; he had also devoted a respectable share of his time and energy to party, bar, and public service causes. Of even greater significance to the future direction of his career were his ties to Governor Dewey, whose forces had supported Eisenhower at the 1952 GOP national convention; and Herbert Brownell, Eisenhower's attorney general and the key administration figure in the president's selection of federal judges, was a close Harlan friend of long standing. When a vacancy opened on the Court of Appeals for the Second Circuit, Brownell offered his friend the post, and Harlan accepted. His nomination went to the Senate for confirmation proceedings in mid-January 1954; on February 8, the Senate Judiciary Committee approved the nomination by a unanimous vote, and the next day the full Senate concurred.

On the Second Circuit, Harlan's caseload was confined largely to tax and other mundane issues. In *United States v. Flynn* (1954), the one notable exception to that pattern, Harlan spoke for a three-judge panel in upholding

the convictions of twelve Communists under the Smith Act. The narrow construction Harlan assigned freedom of speech and related civil liberties claims in *Flynn* reminded one critical commentator of the archaic English law of constructed treason.

Harlan's circuit tenure was also to be quite brief. When Herbert Brownell had first approached his friend about the court of appeals vacancy, he frankly indicated that the appointment would give Harlan the prior judicial experience, however brief, that the White House, following Earl Warren's 1953 nomination as chief justice, was insisting Supreme Court nominees possess. When Justice Robert H. Jackson, another New Yorker, died in October 1954, Harlan was Brownell's choice to fill the vacancy. Segregationist southern Democrats and conservative Republicans delayed Harlan's confirmation in the Senate for nearly five months, using the occasion for attacks on the Court's recent school desegregation ruling in the *Brown* case and on Harlan's nominal membership in the Atlantic Union Council, which critics considered a hotbed of "one-worlders" and a threat to U.S. sovereignty. Confirmation was never in doubt, but the Senate vote to approve the appointment was 71 to 11, with fourteen other senators abstaining.

On the supreme bench, Harlan quickly joined the restraintist voting bloc headed by Felix Frankfurter, whom the new justice had met years before through Harlan's mentor Emory Buckner, one of Frankfurter's closest friends. Like Frankfurter, Harlan developed his jurisprudence around a central premise that the political processes and principles of federalism and separation of powers ultimately were more effective safeguards of individual liberty than broad judicial interpretations of constitutional guarantees, as well as the corollary view that the policy preferences of elected public officials were entitled to substantial judicial deference in a free society. Consistent with such thinking, he generally supported governmental assertions of national security interests against First Amendment and related constitutional claims. In his last term, for example, he dissented when a 6–3 majority upheld free press claims in *New York Times v. United States* (1971), the *Pentagon Papers* case. He also opposed the Court's intervention in reapportionment cases, the *Miranda* restrictions on police interrogation of suspects, extension of the Fourth Amendment exclusionary rule to state cases, and the "incorporation" doctrine under which a majority applied most Bill of Rights safeguards to the states via the Fourteenth Amendment. After Justice Frankfurter's departure from the Court in 1962, at the beginning of the most "liberal-activist" period in the Warren Court's history, Harlan became the most significant critic of Warren Court constitutional trends.

His regard for the "passive virtues" did not mean, however, that Harlan invariably rejected civil liberties claims. His dissent in *Poe v. Ullman* (1961), for example, embraced a constitutional right of sexual privacy four

years before the Court adopted that position in *Griswold v. Connecticut* (1965). And when his colleague, friend, and jurisprudential opponent Justice Hugo L. Black dissented in *Griswold,* emphasizing that judges should stick to the words of the Constitution and charging Harlan and others of the majority with writing their own notions of "natural law" into the document's meaning, Harlan decried in a concurring opinion what he considered the futility of Black's efforts to confine the Constitution to its literal meaning. For Harlan, trained at Oxford in a common-law jurisprudence, the judge's role was inherently creative, but was to be tempered with due regard for majoritarian institutions and federal principles.

Although he was virtually blind during the last several years of his tenure, Harlan served with distinction on the Court until the fall of 1971, when spinal cancer and related medical difficulties forced his departure from the bench. On September 23, a respectable ten days after Justice Black's retirement, Harlan sent his own retirement letter to President Nixon and the other justices. On December 29, 1971, he died. After his cremation, his ashes were interred at Emmanuel Episcopal Cemetery near his beloved Weston, Connecticut, estate. Harlan's judicial record confirmed his place as a "judge's judge" in Supreme Court history. Long before he served on the high bench, however, his illustrious career as one of the nation's finest corporate litigators had also justified his admirers' praise of Harlan as a "lawyer's lawyer."

—Tinsley Yarbrough

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HASTIE, WILLIAM HENRY

(1904–1976)

William Henry Hastie
Bettmann/Corbis

William Henry Hastie was a legal educator, civil rights litigator and activist, one of the foremost African-American lawyers of the mid-twentieth century, and the first African-American appointed to the federal judiciary. Hastie was born into a middle-class family in Knoxville, Tennessee. His father was William Henry Hastie, a graduate of Howard University's College of Pharmacy who worked as a clerk in the U.S. Patent Office; his mother was Roberta Childs, a schoolteacher educated at Fisk University and Talladega College. In 1921, Hastie graduated with honors from Paul Laurence Dunbar High School in the District of Columbia. Four years later, he graduated from Amherst College a member of Phi Beta Kappa and the class valedictorian.

As a result of his sterling academic performance at Amherst, Hastie had the opportunity to study abroad, either at Oxford University or the University of Paris. Instead, he decided to accept a faculty appointment at the Bordentown Manual Training School in New Jersey, an institution for African-American students that gave Hastie the opportunity to earn money to attend graduate school. The position also fulfilled Hastie's strong sense of obligation to teach as a way of returning knowledge into the African-American commu-

nity. Hastie emerged as a gifted teacher and role model for his students, but after two years he decided to press forward with a career in the law. His decision to do so reflected Hastie's belief, shared with his cousin, the renowned African-American lawyer Charles Hamilton Houston, that law was a tool of social engineering that could be employed to advance the agenda of equality for African-Americans. Moreover, in the mind of Hastie, as was true of Houston, there was only one place to train for a life in the law: Harvard.

Hastie viewed Harvard as a means to the ends of social justice. When he entered law school in 1927 there were only about 1,230 African-American lawyers out of a total of about 160,000 attorneys in the nation. During this period, African-American lawyers were especially scarce in the South. Hastie believed that African-Americans had a particular duty to pursue social change through the law, since he concluded that white lawyers, no matter how well intentioned, could not be the most effective advocates in civil rights cases because, to some extent, they benefited from the exploitation that the civil rights movement sought to end. Hastie also learned a hard lesson about the assumptions behind even the most liberal members of the Harvard faculty. Hastie was one of only nine African-Americans on whom Harvard conferred LL.B. degrees between 1920 and 1930, the latter year that of Hastie's graduation. As previous law school dean and president of Harvard University Derek Bok has noted about the law school's provision of education to African-Americans, "If our tradition is long, it is also very thin" (Ware 1984, 30). Moreover, even as distinguished a figure as future Supreme Court Justice Felix Frankfurter embraced assumptions about African-Americans that upset Hastie. Obviously thinking that he was paying Hastie a compliment, Professor Frankfurter observed that the young African-American student was "not only the best colored man we have ever had but he is as good as all but three or four outstanding white men that have been here during the last twenty years" (Ware 1984, 30). Hastie observed in response that "this notion that Negroes have got to be better than other people is about as disgusting as the notion that Negroes are inferior. As a matter of fact, I very much fear that they are rationalizations of the same thing" (Ware 1984, 30).

Hastie had a brilliant career at Harvard. He was the second African-American man (Charles Hamilton Houston was the first) to become an editor of the *Harvard Law Review*, and he received his doctorate in juridical science in 1933. Hastie earned a reputation among his fellow students for brilliance, especially in response to the Socratic probing of Harvard's talented faculty.

When he graduated from Harvard, Hastie moved back to Washington, D.C. He joined the firm of Houston & Houston, where he worked with his

mentor, Charles H. Houston, and taught at the Howard University Law School. He also served from 1932 to 1937 as an assistant solicitor in the Department of the Interior and became part of President Franklin D. Roosevelt's "black cabinet."

His most important contributions as a lawyer came through his connection with the National Association for the Advancement of Colored People (NAACP). Houston and, to a lesser extent, Nathan R. Margold, a fellow editor with Houston on the *Harvard Law Review,* framed the civil rights organization's legal strategy. They urged the directors of the NAACP's Legal Defense Fund to mount an incremental and indirect attack on the doctrine of "separate but equal," first enunciated in *Plessy v. Ferguson* (1896) and subsequently reaffirmed by the Supreme Court. In its simplest terms, "separate but equal" meant that as long as a state provided facilities of equal quality it could legally separate the races in public places. Houston, Margold, and Hastie also understood that the powerful emotional commitment of southerners to legal segregation presented a formidable barrier to change. They also believed that the legal system, if asked to do too much too quickly, might actually strengthen segregation's hold. Thus, they attacked segregation through a targeted campaign designed to erode the precedent gradually.

Hastie emerged as one of the NAACP's chief litigation weapons during the 1930s and 1940s. He played a central role in *Hocutt v. Wilson* (North Carolina, 1933), which dealt with discrimination in graduate education; *New Negro Alliance v. Sanitary Grocery Co.* (U.S., 1938), which turned on the issue of discrimination in employment; *Smith v. Allwright* (U.S., 1944), which involved voting rights for African-Americans; and *Morgan v. Virginia* (U.S., 1946), which treated segregation in public transportation. Hastie also exercised influence in other cases. For example, between 1939 and 1949 Thurgood Marshall litigated nineteen cases before the U.S. Supreme Court, and of these Hastie served as a consultant or co-counsel in twelve. Through these efforts Hastie contributed to the NAACP's ultimate triumph in *Brown v. Board of Education* (1954), although by that time he was himself a member of the federal bench.

Hastie's first major civil rights case was *Hocutt,* and he lost. Margold and Houston believed that given the fears that white southerners had about mixing white and African-American children in elementary and high schools, the best strategy was to establish a beachhead in the area of higher education. Most southern states refused to admit African-Americans to graduate and professional education, but despite this practice they insisted that they were still complying with the dictates of "separate but equal." They did so by offering scholarships to African-Americans to attend universities in the North. In March 1933, Thomas R. Hocutt challenged this practice by attempting to enroll in the school of pharmacy at the Univer-

sity of North Carolina. The university refused on technical grounds to admit Hocutt, who failed to present a transcript of his college work.

At the time, Hastie was completing his studies at Harvard, but at Houston's urging he traveled to North Carolina to argue the case at trial. The North Carolina judge rejected Hastie's arguments and found for the state. Hastie, however, won broad respect on both sides of the issue for the clarity of his arguments and his poise before a hostile audience. Hastie also understood the importance of having argued the case, even in a losing cause. "It started something," Hastie recalled; "it was a first step toward eliminating the legal and moral contradiction of racism in the scheme of education for life in a democratic society" (Ware 1984, 53).

Hastie had greater success in two other major cases involving the rights of African-Americans, both of which became milestones in civil rights history. In *Smith v. Allwright,* the Supreme Court considered the constitutionality of the all-white primary. After Reconstruction, a Democratic primary victory assured success in the general election in Texas, where *Smith* arose, and throughout the rest of the one-party South. The Democratic party, however, which controlled southern politics, purposefully excluded African-Americans from participating in primary elections and thereby eliminated their voice in the general election. The Supreme Court accepted this practice in *Grovey v. Townsend* (1935) on the grounds that political parties were private organizations that could exclude anyone they wished, since "private discrimination" was beyond the reach of the Constitution.

Hastie decided that the best way to deal with the issue was to draw a distinction between state and federal elections. He understood that the high court itself had acknowledged such a distinction when it held in *United States v. Classic* (1941) that Congress could regulate primary elections that involved federal offices. In *Smith,* Marshall and Hastie expanded this opening by successfully arguing that the use of race to limit participation in primary elections violated the Fifteenth Amendment to the Constitution. The all-white primary was not a private practice, they insisted, because it was an integral part of the state's election procedures. The Democratic party of Texas, according to Hastie's view, was acting as a direct agent of the state and thereby unlawfully engaging in state-sanctioned, race-based discrimination. Justice Stanley Reed, who wrote for the majority in the case, agreed. He held that conducting primary elections was a state function that could not be shaped along racial lines by a private organization. Although the party was a private entity, it actually performed a public function, one subject to regulation as state action. The Court threw out the *Grovey* precedent and reduced the options available to keep African-Americans from voting to individual discrimination, such as the poll tax and literacy tests, rather than group discrimination.

Hastie's greatest success was *Morgan v. Virginia* (1946), another case that he argued with Marshall. In this instance, Irene Morgan, an African-American woman, boarded an interstate Greyhound bus in Gloucester County, Virginia, bound for Baltimore, Maryland. Virginia law required that African-Americans sit in the rear of the bus, but Morgan refused to obey the bus driver's order to do so. The Supreme Court of Virginia subsequently affirmed her conviction and fine, at which point the NAACP, Hastie, and Marshall stepped into the case, a somewhat unusual practice, since they had not handled it in the lower court.

Hastie emerged as the principal figure in *Morgan*. After Marshall presented the high court with the facts in the case, Hastie persuaded the justices of the need to change the law. He did so through a combination of legal skill and poise. Rather than focusing on the equal protection clause of the Fourteenth Amendment, Hastie rested his argument on the belief that a state could not impose a requirement to segregate passengers on a bus engaged in interstate travel because doing so violated the commerce clause of the Constitution. Hastie believed that if he rested his case on the equal protection concept, the justices would turn to *Plessy* for authority, with disastrous results. Justice Wiley E. Rutledge pressed Hastie on just this matter, but the lawyer refused to answer the question directly. "I pretended not to hear him," Hastie later explained. "I gave him fifteen minutes of irrelevancies" (Ware 1984, 189). Hastie, of course, believed that *Plessy* was wrong and that the Fourteenth Amendment should be applied to acts of discrimination in public transportation. He was also a pragmatic lawyer more interested in winning a small victory than losing a large battle, no matter its nobility. Still, in his brief, Hastie reminded the Court of the higher moral ground at issue, turning to the race-based discrimination practiced by Nazis. America, he warned, could not follow a similar path; interstate commerce should not be marked "by disruptive local practices bred of racial notions alien to our national ideals, and to the solemn undertakings of the community of civilized nations as well" (Ware 1984, 189).

The Supreme Court sided with Hastie by a vote of 7 to 1. As Hastie recognized, however, a legal victory did not immediately translate into practice. Throughout the South, buses continued to be segregated on an informal basis, even though it was clear that such practices on interstate vehicles would not survive legal challenge. Hastie also knew that he had nudged not only the Court but also the American people further along the path that led inexorably to *Brown* and the simple justice due all African-Americans.

Hastie's role in *Morgan* illustrated how indispensable he was to the NAACP's litigation strategy. Hastie was quick on his feet, gifted in debate, and a logician who exuded reasoned passion for the cause of African-American people. In short, he was the consummate appellate lawyer.

Hastie's career in the law extended beyond the courtroom. In 1937, President Franklin D. Roosevelt appointed him to the U.S. district court in the Virgin Islands, the first African-American elevated to the federal bench. He subsequently resigned that position in 1939 to become dean of the Howard University Law School, a post that he held for a year, when he took a leave of absence to become the civilian aide to Secretary of War Henry L. Stimson. The African-American community applauded Hastie's appointment, since he was given the responsibility of ensuring fair treatment for African-Americans in the military on the eve of World War II. In this and other positions, Hastie found himself confronted with a dilemma. As a leader in the African-American community, Hastie was one of the first African-Americans to enter white institutions, where he was typically given little power. He was often forced, as a result, to balance the need for African-Americans to maintain some foothold in the white institutions against the desire to avoid tokenism. In his role as adviser to Stimson, Hastie was given little actual power, but he nonetheless pressed for several reforms. He fought against the spread of segregation to integrated installations, advocated the protection of African-American soldiers from white civilian violence, and increased the number of African-Americans who received officer training.

In 1945, President Harry S Truman nominated Hastie to be governor of the Virgin Islands, the first African-American to hold that position. The nomination immediately ran into trouble from Senator James O. Eastland of Mississippi and several other southern senators. Hastie had during his career been involved with a number of left-wing political action groups. Eastland raised questions about these affiliations based on information supplied by the House Un-American Activities Committee. Eastland, for example, grilled Hastie about his possible Communist affiliations, notably his role in the National Lawyers Guild and the Washington Committee for Democratic Action. Hastie, however, maintained his poise while reminding the Senate Judiciary Committee that all Americans who had fought in the war deserved to be treated equally. The full Senate confirmed his nomination on May 1, 1946; Hastie served with distinction until 1949.

In 1945, President Truman had considered nominating Hastie to be judge of the U.S. Court of Appeals for the District of Columbia, but he decided not to do so in the face of strong opposition from the same southern Democratic senators who had opposed his appointment as governor. By 1949, however, Truman was grateful to Hastie for the support he had provided during the successful presidential campaign of a year earlier, one that Truman won surprisingly. The president decided to appoint Hastie judge of the Third U.S. Court of Appeals, which included Philadelphia. Opposition to the appointment came from several directions, some of them unexpected.

The African-American legal community in Philadelphia complained that Hastie had already been well rewarded; its members insisted that other African-American lawyers should benefit as well for their loyalty to the New Deal. White opponents charged that the governor of the Virgin Islands would be little more than a carpetbagger in the new position that most appropriately belonged to a Pennsylvanian. Hastie, as usual, remained above the fray, and the Senate ultimately confirmed his appointment. He became the first African-American to hold a federal appeals court judgeship.

Ironically, in his new office the great crusader for civil rights had few opportunities to advance the agenda he had pursued in the courtroom for more than two decades. Scarcely two dozen of his 486 opinions dealt with civil rights. Unlike Thurgood Marshall, who subsequently became a justice of the Supreme Court, Hastie was more restrained in his use of judicial power. For example, in *Lynch v. Torquato* (1965), he declined to expand the state-action concept that he had so actively advanced as a lawyer in *Smith v. Allwright*. He concluded that the equal protection and due process clauses of the Fourteenth Amendment did not embrace the management of the internal affairs of the Democratic party. Moreover, in his published writings he raised questions about the benefits of affirmative action programs that used race alone as a determinant of eligibility or qualification. Notably, a strong sense of Madisonian constitutionalism balanced his commitment to legal activism.

—Kermit L. Hall

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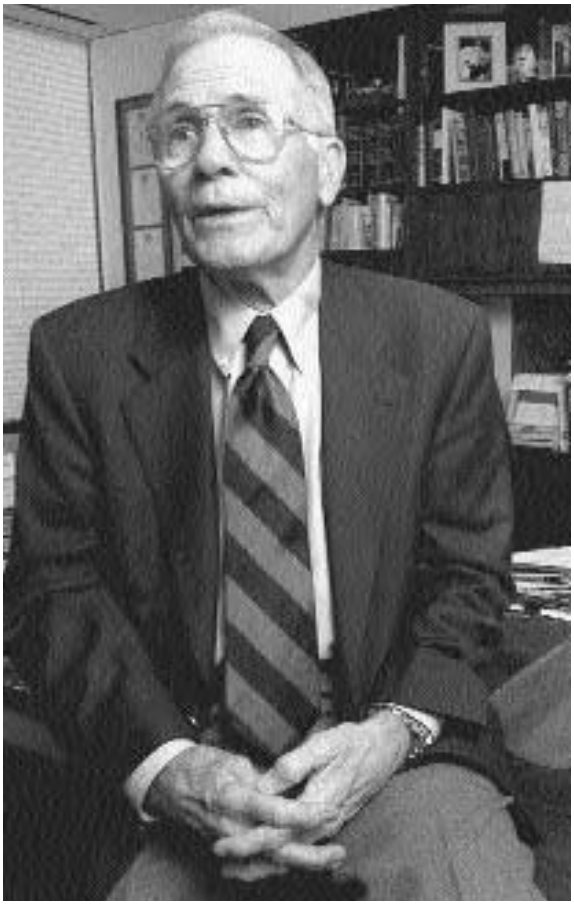
HAYNES, RICHARD "RACEHORSE"

(1927–)

Richard "Racehorse" Haynes is an archetypical representative of the lawyer as a champion fighter for his clients, and thus he is viewed either as a renowned folk hero or as an infamous villain, depending on the observer's perspective. Although this is a fairly normal situation for successful defense attorneys, "Racehorse" Haynes is particularly renowned for his dynamic courtroom style; he is a real crowd pleaser in the grand old tradition of the folksy, down-home lawyer. Perhaps the secrets of his success are his focused nature, his ability to pick a case thread and to weave it into a dramatic cloth, and the fact that his legal practice is conducted in the state of Texas, where such drama is appreciated. He is an artistic courtroom lawyer, and his artistic flair is manifested in both his professional life and his personal life. Past age seventy, he still enjoys flying his airplane, sailing his schooner, and motor racing around Texas.

Richard Haynes was born in Houston, Texas, on April 2, 1927. He was given the nickname "Racehorse" by a track coach dur-



Richard "Racehorse" Haynes

Famed defense attorney Richard "Racehorse" Haynes, former lawyer for John Hill, talks about the "Blood and Money" trial during an interview at his Houston office, 10 March 1999. Haynes said "It had everything in it: the doctor, the socialite, high society." (AP Photo/David J. Phillip)

ing high school. His physical vigor was also demonstrated when he served both as a Marine and an army paratrooper and was decorated for heroism during the assault and capture of the Japanese island Iwo Jima during World War II. His high energy levels were also manifested during his subsequent service with the United Nations, first as a paratrooper officer with the Eleventh Airborne Division during the Korean War, and more recently his work with the Houston Human Rights Committee. Haynes has always been a person of unusual strength and ability.

After his military service, Haynes attended the University of Houston, graduating with his B.A. in 1951. He was admitted to the university's law school, which had been founded in 1912 with a commitment to egalitarian opportunity; and in 1956 he completed the J.D. degree and was admitted to the Texas bar in the same year.

Unlike many of the older Ivy League institutions, the organizational culture of the University of Houston law school is not particularly geared to theoretical principles but rather focuses on turning out competent practical lawyers. In the criminal defense field, practicality means looking for the element of reasonable doubt, showing it to the jury, and hammering away at the theme for the entire course of the trial. It takes a high-powered attorney to excel in this type of career, and Haynes has the prerequisite abilities.

Like many successful attorneys, Haynes had a role model. According to author David Phillips, Haynes grew up in the shadow of Percy Foreman, a Texas criminal defense lawyer of legendary ability (Phillips 1979, 71). Foreman not only had the same dynamic ability as Haynes, he also had several trial techniques that were particularly well suited to Texas trial practice: first, he routinely put the police on trial; second, if that did not seem sufficient, he would argue that "the S.O.B. should have been shot." Perhaps law school faculty members should not advocate this technique, but in the steamy law library at the University of Houston, the students grasped every survival technique they could. Haynes would add a few frills to Foreman's style; he learned to attack the prosecution as well as the police and to subject witnesses to grueling cross-examinations until tempers flared and mistrials could be won.

Haynes first came to national attention due to his spirited defense of Dr. John Hill, a renowned plastic surgeon who in the early 1970s was accused of causing his wife's death by failing to render medical treatment. A best-selling book by Thomas Thompson described the case, which ended in a mistrial when the doctor's second wife testified that he had tried to kill her as well (Thompson 1976). The prosecution scheduled a second trial, but Dr. Hill was mysteriously murdered before that case went to court. Years later, Thompson was attending a school reunion and took pleasure in recounting the tale (and the courtroom adroitness of Haynes) to an admiring

crowd, members of an elite social stratum that delighted in messy scandals and divorces. Among his listeners was a man who was soon to have occasion to hire a defense attorney himself: T. Cullen Davis, the wealthy son of a Texas oil industry millionaire.

In 1979, Haynes was listed in *Who's Who in American Law,* undoubtedly because of his remarkable defense, in several proceedings, of T. Cullen Davis, perhaps the richest man ever accused of murder and subsequently of plotting the death of a trial judge. According to David Phillips, who wrote a spellbinding book about the affair, Haynes had successfully emulated his personal role model, Percy Foreman (Philips 1979, 71–72). As a result of this conscious career goal, Haynes may perhaps be portrayed as an anachronism: one of the last of the old-school populist lawyers, famous for his flamboyant trial tactics.

Haynes's style and success owe much to the fact that he bases his legal practice in Texas. The big, brash state represents the epitome of American entrepreneurial spirit and exalts the cowboy as the quintessence of rugged individualism. This cultural atmosphere sustains and rewards Haynes's trial technique of boiling down complex legal issues to the level of personal experience and gut reaction. This culture can be traced in part to the formation of the nation of Texas in 1836, when a group of Mexican citizens decided that they had had enough of dictatorial government and corrupt law enforcement. One of their number, Samuel Maverick, a graduate of Yale University, lent his name to what has become a focal point of Texas lore, the freewheeling radical lawyer who, in the name of common justice, challenges the high and mighty whenever necessary.

When his client Cullen Davis was tried for the attempted murder of his estranged wife and the murders of her daughter and boyfriend, Haynes's epic defense efforts made observers think of him as a combination hypnotist, psychologist, salesman, and legal sleuth. Steven Naifeh and Gregory Smith, in their popular work *Final Justice* (1994), compare Haynes to Rasputin, because of his gripping depiction of Davis's wife as a dissolute dweller in the slimy underbelly of Texas society. In *Law and American History* (1987), Steven B. Presser and Jamil Zainaldin describe how, in addition to following the precepts of defense practice generally and building on the lessons of Foreman, Haynes has refined his trial tactics by emphasizing changes of venue, voir dire, and publicity. After the original mistrial in Fort Worth, Haynes sought a more conservative venue and got the case removed to Amarillo, engaged in an elaborate (and expensive) process of juror research, and made sure that the community was deluged with news stories depicting Mrs. Davis's shortcomings and Mr. Davis's exceedingly generous contributions to local charities and worthy activities.

Another example of Haynes's technique, as noted by Phillips (1979, 80–81) during the Davis trial in Amarillo, is Haynes's use of a racy photograph of Mrs. Davis, enlarged on transparent film and held before a bright light during one of the Davis trials so that the jury could get a good view of the lady's indiscretion even if the exhibit might not be admitted into evidence. Instead of the cut-and-dried determination of whether an assault on the victim was committed, Haynes makes the jury experience an emotional reaction to the victim's own outrageous behavior, perhaps to justify the defendant's violent actions as righteous, or at least excusable behavior. According to Phillips (1979, 76), Haynes is perhaps the most famous living defense attorney in Texas.

In a subsequent trial, wherein Davis was accused of plotting the death of the judge hearing his wife's divorce case, venue was moved to Houston. Houston is a bigger and more sophisticated city than Amarillo, but it has a kindred culture. It is the same pioneering spirit that pushed the Apollo moon project to a successful conclusion and that drives the economic life of the state, and it is impatient with government rules and regulations. Among the compelling evidence submitted to the jury were FBI audiotapes of Davis apparently scheming; but after Haynes finished grilling the various FBI witnesses and informants and displayed the competing interests and factions within the FBI and other organizations, the Houston jury had no problem finding reasonable doubt whether Davis was a malefactor or the victim of overzealous police and prosecutors. Texas loves the underdog, and Haynes is an expert at uncovering the human motives of official investigators and witnesses in the courtroom—a surefire way to cast doubt over the objectivity of the criminal justice system.

Haynes has learned how to mine a rich field of public doubt over the fairness of the criminal justice system in Texas. That doubt is supported by pervasive official misconduct, such as was evident when the entire state prison system was placed under the supervision of the federal courts because of systematic constitutional violations. Of course, Texas was not the only state to be scrutinized in that regard. And some high-profile cases, particularly those involving Dallas prosecutor Henry Wade, have further undermined general confidence in criminal proceedings. Wade prosecuted Jack Ruby for the murder of Lee Harvey Oswald, fought to enforce abortion laws in *Roe v. Wade*, and prosecuted Lenell Geter, an African-American engineer, for armed robbery, despite the fact that he had clocked in at work and his coworkers swore he had an alibi. But after the police distributed so many photographs of him, labeled as a robbery suspect, that it became a mathematical probability that well-meaning citizens would come forth to testify against him, Henry Wade had little choice but to follow the police lead. Af-

ter Errol Morris's television documentary hit *The Thin Blue Line* aroused national indignation and Geter was set free, Wade was quoted by Brian W. Wice of the *Houston Post* as saying that it did not bother him that appellate courts found fault with his prosecutions. "We convict 'em on the front page—and they reverse 'em on the back page." Haynes knows that a certain percentage of the jury pool will be sympathetic to insinuations about official misconduct and is an expert in seating juries and winning their confidence.

Haynes has won national recognition for his legal defense skills. In 1997, the National Association of Criminal Defense Lawyers held its annual meeting and seminar series in New York City. Among the illustrious attorneys participating were Johnnie Cochran, speaking on closing argument, and Arthur Miller, speaking on assessing the strengths, flaws, and ethics of former colleagues. Haynes was also a key participant, offering a seminar entitled "Integrating the Theme into Voir Dire, Opening, Cross & Closing." Haynes is particularly good at hammering away at a given theme until it is accepted.

Because Haynes is recognized as one of the greatest living defense attorneys, among his clients have been other distinguished attorneys, judges, and powerful politicians. It is a telling tribute when one famous attorney turns to another for help. In 1998, a nationally known attorney, John O'Quinn, did so. O'Quinn, identified by the *Wall Street Journal* as "the King of Torts" for his record-setting victories against big tobacco companies and breast-implant manufacturers, can be expected to know a good attorney when he sees one. O'Quinn, who has incurred the wrath of large corporations, was threatened with disbarment for allegedly violating state bar rules on solicitation of clients involving an airline crash. The Texas State Bar Association has a monthly report listing attorneys who are disbarred for violating its rules against solicitation of clients, and O'Quinn wanted to be sure that Haynes's innovative and energetic style and mastery of the art of defense lawyering would shield him from such a fate. O'Quinn hired not only the dramatic Haynes but also the more laid-back Arthur Miller of Court TV fame (Templer 1998). Miller combines a polished persona with a scholarly, analytic style of argument. It may be a challenge even for these talented lawyers to prevent O'Quinn from losing his law license, particularly since he has already been disciplined for a similar incident in the past.

Two other recent cases reported in the media show that Haynes's powers of persuasion are still in demand. One of them involved a state judge. The *Abilene Reporter-News* describes the case of a former Texas state judge, William Bell, who was indicted on perjury charges stemming out of the Kennedy Heights (Houston) toxic chemical contamination case ("Former Judge Indicted" 1998). An attorney came forward with an audiotape recording of her conversation with the judge purporting to show his interest in a sweetheart arrangement with Chevron Corporation officials. Judge

Bell engaged Haynes, who confidently advised that the tape would actually exonerate his client. After all, isn't a judge supposed to be friendly?

Houston Chronicle reporter Thom Marshall (1999) reported another case in which Haynes was called in to save former city councilman John Peavy Jr., who was being retried on charges of bribery and conspiracy resulting from an FBI sting operation in 1995 and 1996. The FBI was pretty confident of victory, based on its rather damning evidence that tapes of the undercover agent's discussions recorded. However, Haynes pointed out that much of the transcript of the tape was marked "UI" for unintelligible, presenting the possibility that the agent had modulated his voice deliberately to elicit out-of-context remarks from Peavy. And Haynes noted that at one point on the tape the agent asked another if the recorder was turned off, and then said, "turn it off before —." The unknown operator should turn it off before what?—before they record some valuable truth for a jury to hear? This gaping black hole of government control of the truth is guaranteed to raise a reasonable doubt in every juror winnowed through Haynes's exhaustive jury research team.

Haynes was joining this defense late, and only in the capacity of co-counsel, because the sitting judge in the trial, federal judge David Hittner, refused to allow Peavy's former attorney to vacate the top spot on the defense team. Judge Hittner also instructed that he would put up with no theater in his courtroom; but, noted by reporter Marshall, many people wondered whether it is possible to keep theater out of a courtroom or to prevent Haynes from winning a case. Haynes's argument, put before a public audience, was reminiscent of his facility with debunking the supposed infallibility of official government surveillance tapes.

Haynes's biographical information on the Houston Human Rights Committee web site ("Richard 'Racehorse' Haynes" 2000) shows that the International Academy of Trial Lawyers, the International Society of Barristers, the American Bar Association, the Texas Bar Association, and the American Judicature Society are among the prestigious organizations of which he is a member. He is also the recipient of numerous awards and recognitions, including the Outstanding Alumni and Law Alumni awards from the University of Houston and the Golden Plate Award from the American Academy of Achievement. He is a member of the permanent teaching faculty of the National College for Criminal Defense and has served as an adjunct professor of law at the University of Houston. He also serves on the boards of directors of several community organizations and is an active member of the United Nations Houston Human Rights Committee, which is not the most popular organization in Texas.

Richard "Racehorse" Haynes is a throwback to the good old days of spellbinding defense lawyers energetically defending their clients according to

their oaths of office. Haynes does not hesitate to challenge the authority of law enforcement officers, prosecutors, and conservative judges. He looks for the shadow of a doubt in the case against his client, picks a defense theme, and vigorously hammers away at that theme in venue hearings, voir dire, and case argument. And Richard Haynes is a master of publicity and community culture. He and other attorneys like him are so good at getting criminal defendants released or acquitted that to many it may seem that the objectivity and functional effectiveness of the criminal justice system itself may be placed in jeopardy. And so it may, but perhaps their goals, and the American notion of justice through adversarial proceedings, can be asserted to justify their efforts.

—Lee Allen

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HENRY, PATRICK

(1736–1799)

Patrick Henry
Library of Congress

Failed shopkeeper, country lawyer, inflamer of revolutionary passions, wartime governor, opponent of the Constitution, and defender of popular and liberal rights, Patrick Henry lived the most political of lives. History knows Henry best for his fiery oratory, notably his charge at St. John's Church in March 1775, "Gentlemen may cry peace, peace—but there is no peace. The war is actually begun! . . . Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!" (Henry 1969, 1:266). Beneath the burning coals of his rhetoric, however, Henry was no demagogue. Though radical, his passions were shot through with the more ordered and lawlike sentiments of a backwoods barrister. To understand Henry, voice of popular revolution, one must also view his political life through the lens of the law, that career of forensic advocacy from which he emerged triumphant onto the political scene and into which he retreated honorably when his political career began to wane.

Henry's education in the law was, at best, cursory; his introduction to the bar, inauspicious. Although early biographers tended to mythologize and

exaggerate the rustic qualities of his upbringing, Henry was born into a respectable and educated Virginia family on May 29, 1736. His father, John Henry, gained a college education before becoming a landowner, vestryman, militia colonel, and chief justice in Hanover County; his mother, Sarah Winston Syme, came from a well-off farm family. His uncle, Patrick Henry, was a reverend in the Anglican church. Young Patrick received a good basic education, first in a common school and then from his father, learning history, mathematics, Latin, and Greek. At the time, however, there was no American law school; the boy went to work rather than attending college. His first endeavors, at keeping shop, farming, and tending bar, failed. Having married young at eighteen, he needed to find a trade quickly at which he could make a decent living. In 1760, he turned to law, for which he prepared only a matter of months—according to some reputable estimates, as little as six weeks.

Satisfied as to his own fitness to practice, Henry set out for Williamsburg to meet with the panel of bar examiners. The committee, which contained some of Virginia's most eminent men, seems to have been shocked by Henry's rough edges and his lack of particular knowledge. Although errant in many details of his recollection, Thomas Jefferson later recounted that Henry's approval had been in great doubt. John Randolph, Virginia's attorney general, and George Wythe, later to become America's first professor of law, signed off, but not without great hesitation. Peyton Randolph and Robert Nicholas remained unconvinced. After initially refusing a meeting, John Randolph subjected Henry to an extensive examination. Deficient in the specifics of the law, he nonetheless showed an acuity of mind and a sharp understanding of history and legal theory. In a debate over the common law, Randolph took Henry back to his office to check an authoritative tome, only to discover that the younger man had been correct. Marvelling at his "force of natural reason," Randolph went on to exclaim, "Mr. Henry, if your industry be only half equal to your genius, I augur that you will do well, and become an ornament and an honor to your profession" (Wirt 1832, 35).

Henry returned home to practice in Hanover and Goochland counties, and began to make a decent showing of himself. Most of his early cases were the routine stuff of a colonial country lawyer: debt actions, business transactions gone bad, wills and estates. In a slander case, *Winston v. Spencer,* one man called another a "hog stealer." Suing for Winston, Henry won £20, a sum considerably less than the £500 he had sought. Henry took cases where he could find them. One surgeon had not been paid by a woman for "many Chirurgical operations Amputations Incisions & Scarifyings" (Meade 1957, 107). Henry represented a plaintiff in a suit against Henry's cousin, John Payne Jr., who had hired the man to take his place in a military campaign,

only to later renege on the payment. That first year saw Henry as lawyer in 176 cases for around 70 clients. Collections always posed a problem—Henry even had his own suit against the reputed "hog stealer"—but overall Henry managed to break roughly even. His practice grew steadily over the next few years as Henry scrapped for cases in surrounding counties, particularly in rural areas where few other lawyers would travel. By 1763, he was handling almost 500 cases for the year, making £225 but leaving far more outstanding. These were mostly small cases, but they prepared Henry for the career-making case that was soon to come.

The *Parson's Cause* forged Henry's reputation as the great orator and lawyer of backwoods Virginia. The case involved a dispute between the Virginia legislature and the official Anglican ministers, who drew their pay from the state. By long practice, ministers had been paid in a set number of pounds of tobacco—a wage scale that fluctuated widely depending on the market value of tobacco. In an effort to save money, however, the assembly had set the price of tobacco for reimbursement purposes in the aptly named Two Penny Acts of 1755 and 1758, moves that greatly undervalued the crop and forced the ministers to take a drastic cut in pay. The clergy gained public sympathy but rapidly undermined this good will by taking their complaint directly to the Privy Council in England rather than to the assembly. They won, but Virginia authorities were not anxious to concede and compensate.

The ministers now sued for damages in local Virginia courts. Reverend James Maury, unable to gain redress from the local tax collectors, hired the King's attorney for Louisa County to pursue his case in neighboring Hanover and won the initial judgment; a hearing on specific damages would follow. At this point, the defense attorney quit and was replaced by Henry. The stakes remained high, so when the case was called in December 1763, the courtroom was packed with ministers (including Henry's uncle), their local opponents, and many onlookers. With little time to prepare and with the main judgment already lost, Henry adopted a radical strategy: He would attack not only the clergy, but also the legitimacy of the king's order as violating natural law and popular sovereignty. In this, he would appeal to popular resentment against royal meddling in local taxation and against the clergy as patrons of royal power. Henry's argument thus had its advantages despite being on the wrong side of the law. It also did not hurt that he would be making his appeal in front of a sympathetic jury, as well as his own father, who was the presiding judge.

Henry started slowly and initially seemed to be over his head. The crowd grumbled; his father shrank in embarrassment. But Henry's demeanor changed as he rose to the cause. Elevating himself into a fearsome oratorical presence, he challenged the legitimacy of an established church and argued that the Two Penny Act had served the common utility. He drew his

logic from John Locke's social contract theory, popularized locally by Richard Bland. Henry opined that "a king by annulling or disallowing laws of this salutary nature, from being the father of his people degenerates into a tyrant and forfeits all right to his subject's obedience" (Meade 1957, 5). Some of the crowd began to cry "Treason!"—a claim echoed by Peter Lyons, the opposing counsel. But Henry had made his impact on the assembled jurors and judges. His father and many others were reportedly reduced to tears. The jury took five minutes to return a token judgment of one penny for the plaintiff, as Henry had requested. Henry lost some clients afterward—and would later handle a similar case against his uncle—but his reputation had grown exponentially.

Soon after, Captain Nathaniel Dandridge retained Henry to challenge the seating of James Littlepage in Virginia's House of Burgesses. The charge: Littlepage had illegally influenced voters by plying them with free rum punch. Arguing before the Committee on Privileges and Elections, Henry again mustered a stirring speech, only to lose, largely because the legislators wanted to retain their election practices in the face of a prohibitive law. Significantly, the event signaled a shift in Henry's career—he would now turn his legal oratory increasingly toward a political forum.

The next year, 1765, Henry won election as burgess from Louisa County, an achievement that boosted his law practice. His confidence grew as well. He would often hunt on his way to court and appear before the bench unwashed and bloodsplattered, only to outshine his opponents with his rhetorical skill. His friend Spencer Roane described his style: "He was perfect master of the passions of his auditory, whether in the tragic or the comic line. The tones of his voice, to say nothing of his matter and gesture, were insinuated into the feeling of his hearers, in a manner that baffled all descriptions" (Henry 1969, 2:465). Even Peter Lyons remarked that Henry was the one attorney during whose speech he could not write, but only sit and listen. Despite his penchant for heated oratory, Henry's court manner was exceptionally deferential toward court and opposition, and he maintained good relations with other attorneys.

In 1769, Henry was accepted as a lawyer before the Virginia General Court, an honor that required him to terminate his county practice and forced him to adopt a more conservative court attire. Although he now worked fewer cases, his earnings greatly increased. Henry also broadened his legal interests. The late 1760s saw him defending the rights of dissenting Baptists against religious persecution. On the general court, Henry took to criminal defense, which became his expertise. By 1773, his reputation had grown to the point where Robert Nicholas, who had earlier refused to sign his bar application, now trusted Henry enough to bestow on him his law practice on retirement (Jefferson, Henry's rival, had first demurred). It

made little difference for Henry's legal career. Economic recession and the onset of the Revolution had more direct effects: Legal practice became less profitable, the general court was dissolved, and Henry found himself much more embroiled in political and military affairs. During this time, Henry would distinguish himself as a delegate to the Continental Congresses, as the first governor of an independent Virginia, and as a crusader for a national bill of rights.

After the war, with his health declining and debts for his large family mounting, Patrick Henry began a gradual retreat from political life. He completed his fifth and final one-year term as governor in November 1786, and declined to serve a sixth. Instead of attending the Constitutional Convention in Philadelphia, he chose to stay in Virginia and revive his law practice. Once again he built slowly. He handled mostly small civil cases in the first few years of his return. In 1789, he became an attorney for the Prince Edward District Court and took on cases of larger significance. One of his first big cases involved an intrafamily dispute over twelve thousand acres of land. Henry lost the case to Edmund Randolph, arguing for the plaintiff, but managed to secure an agreement by which his client, Robert Carter, could keep half the land on payment of £450. An ungrateful Carter refused to pay Henry's fee.

In another notable case, Henry defended John Venable, a commissary for the Continental Army. During English general Charles Cornwallis's invasion of Virginia, Venable had stolen two steers from John Hook, a wealthy Tory, in order to feed the troops. Hook now demanded compensation. Henry had little trouble painting Hook as a contemptible villain, coldly denying succor to starved and bloodied soldiers. Adopting his most mocking tone, Henry asked, "But hark! What notes of discord are these which disturb the general joy and silence the acclimations of victory? They are the notes of *John Hook,* hoarsely bawling through the American camp, *beef! beef! beef!*" (Meade 1969, 416). The county clerk had to run from the room to avoid bursting into a public fit of laughter. Hook narrowly escaped tarring and feathering.

Henry also resumed his criminal defense practice to great effect. He won several high-profile murder cases, sometimes playing off jury hostility toward Tory victims killed in ambiguous circumstances, and sometimes winning acquittals in the face of an anxious public. In one trial, Henry defended a constable before a tired and already convinced jury. Henry turned the tide by reminding the jury of the seriousness of the task: "I shall aim at brevity. But should I take up more of your time than you expect, I hope you will hear me with patience when you consider that *blood is concerned*" (Axelrad 1947, 242). According to one witness, Henry's very pronunciation of the word "blood" seemed to overwhelm and revive the court.

Sam Houston: The Lawyer as Frontiersman

Few American lawyers have packed as much excitement into their lives as did Sam Houston (1793–1863). Born in Virginia, Houston lived with the Cherokee Indians for a time after his family moved to Tennessee. Later rejoining white society, Houston fought under Andrew Jackson during the War of 1812 and was seriously wounded in a battle against the Creek Indians, but he managed to establish a lifelong friendship with the general and future president. Houston read law in Nashville under Judge James Trimble and subsequently set up practice in nearby Lebanon, Tennessee, serving for a time as an attorney general.

Elected to the U.S. House of Representatives and later chosen as governor of Tennessee, Houston had a tempestuous family life, being rejected by his first wife and falling in and out of love with a number of both Indian and white women. At one point, he shot a man in a duel. Houston later moved to Texas, where he ended up commanding the forces seeking independence from Mexico and defeating Mexican president and general Antonio de Santa Anna. Houston helped draft the constitution of Texas, which served as a model for other Western states, was twice selected as president of Texas, and became one of the state's first two U.S. senators. Opposed to the institution of slavery, Houston resigned from this post after Texas joined the Confederacy, but he was unsuccessful in taking the state out of the Union.

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Perhaps Henry's most famous criminal case involved a suspected infanticide. Richard Randolph, an idle gadabout from Virginia's prominent Randolph family, was accused of having fathered a child born to his wife's younger, prettier sister, and then having killed and buried it. No body was ever found, but persistent rumor forced the prosecutor to take action. The prime witnesses were slaves, who could not testify, and much of the other evidence was circumstantial speculation on the sister's uncertain state of pregnancy. Working with John Marshall, Henry successfully challenged the evidence as unreliable innuendo. Cross-examining the sister's aunt, who had claimed to have seen the naked girl's pregnant belly through a crack in the door, Henry queried, "Which eye did you peep with?" After the courtroom laughter had subsided, Henry proclaimed, "Great God, deliver us from eavesdroppers!" (Henry 1969, 2:492). Randolph was acquitted.

The most important case from this part of Henry's career was the *Great British Debts Case*, which later reached the Supreme Court as *Ware v. Hyl-*

ton. During the war, Virginia passed a law allowing its citizens to repay their British debts into the state treasury using inflationary currency, but the Treaty of Paris, which ended the war, demanded repayment in full. Although this could not be enforced in the Confederation, the Constitution gave added weight to federal treaties. Virginians resisted the deal, however, especially since it would force many to repay debts twice. Jefferson estimated the total burden at thirty times the money in current circulation. But with the debts unpaid, the British refused to leave the American frontier.

Henry joined John Marshall to defend one such debtor against his British creditors. Preparing extensively, Henry spent hours studying Vattel and Grotius on international law. Contracts between citizens of warring nations are invalid, Henry argued. Lampooning the petty hypocrisy of the creditors, he contrasted the sacrifice of life in a noble war to the preservation of commerce: "Though every other thing dear to humanity is forfeitable, yet *debts*, it seems, must be spared! Debts are too sacred to be touched? It is a mercantile ideal that worships Mammon instead of God" (Meade 1969, 410). Had the Americans lost the war, the British would have arbitrarily seized much of their property. Why now should the winners pay? Virginia had every right to sequester debts during the war. Henry won at both the federal district court and the circuit court level, although the ruling was overturned by the Supreme Court after Henry had left the legal team. Henry's arguments, however, had greatly impressed all involved, particularly Justice James Iredell, who had been predisposed to see Henry as a demagogue. The case also led to new political opportunities. Washington hoped to appoint Henry to the Supreme Court; crossing party lines, Marshall tried to recruit Henry as a vice-presidential candidate (largely to undermine Jefferson). Henry declined both offers. He died on June 6, 1799.

The career of Patrick Henry helps demonstrate the close interrelation of law and politics that is so central to American experience. Henry was no mere legal technician. Although he was capable of finely tuned argumentation, his legal brilliance emerged from his great political perception. He drew his moral voice, his ringing oratory, from the principles of natural law, popular sovereignty, and individual liberty that shaped the most democratic segments of the founding generation.

—Robb A. McDaniel

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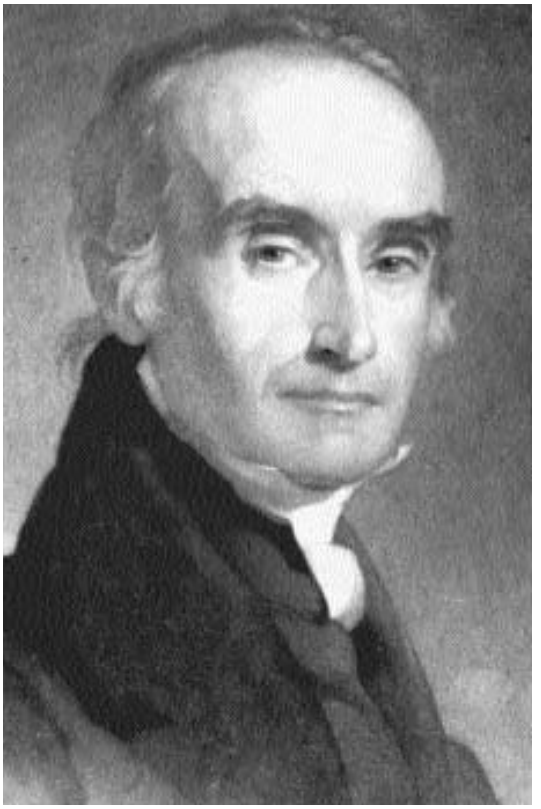
HOPKINSON, JOSEPH

(1770–1842)



Joseph Hopkinson
Archive Photos

Joseph Hopkinson was born in 1770 in Philadelphia. One of a long line of attorneys and jurists, Hopkinson's impact on the American legal system cannot be overstated. Best known for his service as a federal judge and congressman, Hopkinson participated as a litigator in several major constitutional cases that helped to define the U.S. Constitution and shape our legal system in its formative years. Looking back on the life and career of Joseph Hopkinson, one can clearly see his influences on bankruptcy, admiralty, and constitutional law. In addition, Hopkinson was a Shakespearean scholar and a composer, and, much like his father's friend Benjamin Franklin, can be considered a true Renaissance man, as his life's work can now be seen to have affected many different aspects of American society. Joseph Hopkinson was truly a great man, as well as a great lawyer, in American history.

A Rich Family Tradition

Born into an already distinguished family, Joseph Hopkinson had much to live up to merely because of his noble lineage. His grandfather, Thomas Hopkinson, Jr., was born in England in 1709. About 1730, he traveled to America, where he joined a group of young intellectuals called the "Junto" in Philadelphia. Subsequently, Thomas Hopkinson became judge of the

vice admiralty court and governor's council. Along the way, Thomas Hopkinson befriended Benjamin Franklin, with whom he conducted experiments involving electricity. Unfortunately, Thomas Hopkinson died at the young age of forty-two, leaving seven children, including a fourteen-year-old son named Francis. Young Francis was to follow in his father's footsteps and was fortunate enough to have Benjamin Franklin as a lifelong friend as well. Francis Hopkinson was admitted to the New Jersey state bar in 1775, and he later represented New Jersey in the Continental Congress, where he signed the Declaration of Independence in 1776. During the Revolutionary War, Francis Hopkinson continued to serve in the Continental Congress, and in 1779 he was commissioned as judge of the Pennsylvania admiralty court. After the creation of the federal judiciary, which took jurisdiction of all admiralty cases, Judge Hopkinson was commissioned by President Washington to the Eastern District Court of Pennsylvania, which also made him a judge of one of the three federal circuit courts, on which he served until his death in 1791. Francis Hopkinson was survived by his only son, Joseph, who was twenty-one years old at the time of his father's passing.

Renaissance Man

Joseph Hopkinson was admitted to the bar in Philadelphia in the spring of 1791 after having graduated from the University of Pennyslvania and reading law under Philadelphia attorneys William Rawle and James Wilson. Although his legal career was to be lengthy and distinguished, it is important to stress that Hopkinson was truly a multitalented and complex individual who came to represent the unquenchable American spirit of the times. He was, for example, a Shakespearean scholar and was a generous benefactor to the arts throughout his lifetime. In addition, Hopkinson was a talented composer. In 1798, a friend requested that he compose lyrics to accompany "The President's March" to stimulate public interest in the opening of a new theater in Philadelphia. The song with Hopkinson's lyrics came to be known as "Hail Columbia" and rapidly became the most popular national song of the day. Although the enormous popularity of "Hail Columbia" first thrust Hopkinson into the national spotlight, it was his successful, high-profile legal career that ensured his lasting legacy in the nation's history. A Federalist, Hopkinson married Emily Mifflin. Emily, the daughter of a Pennsylvania governor, bore him nine children.

In the National Spotlight

Four years after having been admitted to the bar, Hopkinson defended participants in the Whiskey Rebellion against charges of treason, and in 1799

he successfully pursued a libel suit by Benjamin Rush against William Cobbett. In 1804, Congress voted to impeach Supreme Court Justice Samuel P. Chase. Congress took this action because of its displeasure with the conduct of Justice Chase in several high-profile cases, including a treason trial in which Hopkinson had been involved as counsel. Accordingly, before the Senate trial, Justice Chase retained Hopkinson, among several other attorneys, to defend him. The Senate trial, presided over by Vice-President Aaron Burr, began on February 9, 1805, and lasted nearly one month. During the trial, the House managers attempted to prove that Justice Chase had, among other offenses, prejudged the law in the treason trial, making it impossible for the defense to win.

On February 22, 1805, Hopkinson opened for the defense. He warned the Senate to remember that posterity would judge their decision:

> Then, I trust, the high honor and integrity of this court will stand recorded in the pure language of deserved praise, and this day will be remembered in the annals of our land, as honorable to the respondent, to his judges and to the justice of our country. (Konkle 1931, 103)

Hopkinson then proceeded to argue that Justice Chase was not charged with treason or bribery, so he must be found guilty of high crimes and misdemeanors to be removed from office. Hopkinson also focused on the independence of the judiciary, stating that the people do not have the right to interfere with the regular operations of government, despite the fact that government exists at the pleasure of the people:

> Having delegated this power, having distributed it for various purposes into various channels and directed its course by certain limits, they have no right to impede it while it flows in its intended directions; otherwise we have no government. (Konkle 1931, 105)

After the lengthy trial, the Senate voted to acquit Justice Chase. According to Vice-President Burr, Hopkinson "acquitted himself greatly to his honor" and "displayed much ingenuity and knowledge of his subject" (Konkle 1931, 110). Justice Chase wrote to Hopkinson in March 1805, expressing his "thanks for [Hopkinson's] friendly and important services," and vowed that they would "live in my remembrance as long as memory remains" (Konkle 1931, 111).

Outstanding Causes and Cases

In 1809, Hopkinson, responding to an earlier pamphlet advocating the incorporation of common law precedents into a comprehensive system of

statutory law for Pennsylvania, wrote an influential essay entitled "Considerations on the Abolition of the Common Law in the United States," in which he opposed this plan. Hopkinson persuasively argued that the existing common law precedents were more stable, and would actually require the exercise of less judicial discretion, than would a new statutory scheme. Joseph Hopkinson is probably best known, however, for his role in several major U.S. Supreme Court cases, which have left such a lasting mark on our jurisprudence as to be taught in most law schools today.

In *Dartmouth College v. Woodward,* 17 U.S. 518 (1819), Hopkinson, along with Daniel Webster, represented the trustees of Dartmouth College, who had initially filed suit in New Hampshire state court, seeking to invalidate certain acts of the New Hampshire legislature that modified the charter issued in 1769 that had created the college. Specifically, the New Hampshire legislature passed three acts in 1816 amending the charter of the college, by, among other things, changing the name of the college, changing the number of trustees, and creating a new board of overseers, to be appointed by the governor of New Hampshire. William H. Woodward had served as secretary and treasurer, appointed by the original trustees, and was fired by that body in 1816, while still in possession of various goods and property belonging to the college. After the passage of the three acts by the legislature, the new trustees created by these acts reappointed Woodward as secretary and treasurer. The original trustees then filed suit against Woodward to recover the property of the college being held by him.

After a trial in the Superior Court of New Hampshire, then the highest state court, the jury rendered a special verdict providing that, if the acts of the New Hampshire legislature were valid in law, Woodward was not guilty of any wrongdoing. However, the jury provided that if the acts of the legislature were illegal, then Woodward would be required to pay damages to the original trustees. The superior court found the acts of the legislature to be legal and ruled accordingly on the jury verdict. After this decision, Hopkinson and Webster appealed to the U.S. Supreme Court.

In their presentation to the Supreme Court, Hopkinson and Webster argued that the New Hampshire legislature had only as much power over the charter as the King of England, under whose reign the charter was issued, and to whose rights New Hampshire succeeded after the American Revolution; under common law, the king could not modify such a corporation without its assent. Furthermore, anticipating the counterargument that the king (and, therefore, the legislature) could amend the charter of public corporations, Hopkinson and Webster argued that Dartmouth College was an eleemosynary corporation, and as such was necessarily a private corporation. According to Hopkinson and Webster, the New Hampshire acts vio-

lated both New Hampshire state law and Article 1, Section 10 of the U.S. Constitution, which provides that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

After the presentations by Hopkinson and Webster, along with the arguments of opposing counsel, the Court held that the acts by the New Hampshire state legislature violated the U.S. Constitution, and accordingly that the state court decision must be reversed. The opinion of the Court, written by Chief Justice MARSHALL, generally concurred with the points made in Hopkinson's and Webster's presentations. The Court found that the charter at issue was "plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties" and that the obligation of said contract could not be impaired without violating the U.S. Constitution. Furthermore, the Court found that the obligation of the contract had indeed been impaired by the acts of the New Hampshire legislature, because, among other things, "the whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire." On that basis, the Court held for the original trustees and against Woodward. After the great victory, the original trustees of Dartmouth College passed a resolution calling for Hopkinson, Webster, and their associate counsel to sit for their portraits to be taken and placed at the college, as an expression of the trustees' gratitude.

In *Sturges v. Crowninshield,* 17 U.S. 122 (1819), a significant step was taken toward the creation of a unified federal bankruptcy system. Hopkinson, who had long been an advocate of a national bankruptcy act, was retained to assist David Daggett in representing the plaintiff, Sturges, in a collection suit against Crowninshield. In the Massachusetts state courts, Crowninshield raised as a defense the discharge he had received under a New York bankruptcy statute. Thus, the central issue before the U.S. Supreme Court was the validity of the New York statute on which Crowninshield relied.

Daggett and Hopkinson initially argued that since the adoption of the U.S. Constitution, no state had the authority to enact a bankruptcy law, as the Constitution vested that power exclusively in Congress. Article 1, Section 8 of the Constitution provides that Congress has power "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." According to Daggett and Hopkinson, "every power given by the constitution, unless limited, is entire, exclusive and supreme." In addition, Daggett and Hopkinson maintained that the New York law impaired the obligation of contracts and therefore was unconstitutional.

Counsel for the defendant argued that the mere granting of power to Congress does not vest that power exclusively in Congress. The failure of Congress to legislate on the issue, according to the defendant, amounted to a declaration that Congress did not believe a uniform national system was necessary; thus, the states were justified in passing their own laws. Furthermore, the defendant argued that bankruptcy and insolvency laws historically were not regarded as impairing the obligation of a contract; since these laws were based on the inability of the debtor to pay, it was impossible for the debtor to perform the contract, and thus no impairment could actually occur by virtue of the statute at issue. In effect, the parties to such a contract entered into the contract with the knowledge that the bankruptcy statute was in place; thus, the bankruptcy law was effectively made a part of the contract. Hopkinson replied to this argument by stating that the "idea of a contract made with reference to a law which impairs the obligation of contracts, is absurd and incomprehensible."

The Court agreed with Hopkinson and Daggett and held that the New York law was unconstitutional. The Court first noted that until Congress exercises its power to enact uniform bankruptcy laws, the individual states are not forbidden to pass their own laws on the subject. However, the Court found the New York law to be unconstitutional due to its impairment of the obligation of contracts (by virtue of its discharge provisions). Thus, the groundwork for the passage of a uniform federal bankruptcy act was laid.

In *McCulloch v. Maryland,* 17 U.S. 316 (1819), Hopkinson again played an important role in a case with major constitutional implications. The main issue in this case was the constitutionality of a Maryland law that imposed a tax on "all banks or branches thereof, in the state of Maryland, not chartered by the [Maryland] legislature." Pursuant to this statute, the president, cashier, and directors of any bank violating the law were to be fined $500.00 per offense. When the Bank of the United States opened a branch in Baltimore, and no tax was paid to Maryland, the cashier of the branch (McCulloch) was fined accordingly; the state then sued McCulloch to collect the fines.

After a favorable decision for Maryland in the state courts, McCulloch appealed to the U.S. Supreme Court. His counsel argued primarily that Congress was authorized to raise a revenue and also to pass all laws necessary and proper to execute the powers conferred on it. Furthermore, since the Constitution was the supreme law of the land, the state overstepped its authority in attempting to tax the federal bank, for "an unlimited power to tax involves, necessarily, a power to destroy." Hopkinson was retained by the state of Maryland and argued as follows: (1) the Constitution did not expressly grant Congress the power to incorporate the bank; (2) even if the

incorporation of the bank was authorized, the bank had no authority to establish its own branches without the direction of Congress; and (3) the bank and its branches could not claim to be exempt from the "ordinary and equal taxation of property, as assessed in the states in which they are placed" (Konkle 1931, 330–337). This, according to Hopkinson, would be an "overwhelming invasion of state sovereignty."

Chief Justice Marshall, writing for the Court, held that the Maryland law was unconstitutional. After finding that the incorporation of the bank was constitutional, the Court held that "states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government."

Conclusion

After his lengthy and noteworthy litigational career, Hopkinson served as federal judge of the Eastern District of Pennsylvania, a post to which President John Quincy Adams appointed him in 1828. Hopkinson served as a federal judge until his death in 1842 and was a delegate to the Pennsylvania Constitutional Convention of 1837. Among the cases he decided was the precedent-setting *Wheaton v. Peters* (1837), which is credited with having "established the foundations of American copyright law" (Broomfield 1999, 193).

Why does Hopkinson stand out as such a unique contributor to our legal system? Is it simply because of the time period in which he lived? Granted, Hopkinson was alive during the formative early years of post-Revolutionary America, a time during which the fledgling Constitution was tested and galvanized by several major Supreme Court cases. However, many attorneys were alive during this period, and few can match the impact that Hopkinson had on our current legal system. Is it perhaps due to the fact that Hopkinson made his impact both as a lawyer, a legislator, and a judge? Or, is it due to Hopkinson's multifaceted life, in which he exhibited unique skills not only as a legal scholar, but also as a Shakespearean expert, composer, and benefactor of the arts? These are questions that have no certain answer. However, it is safe to assume that Hopkinson's lasting legacy is due at least in part to his ability to excel in many different areas. Like his family friend Benjamin Franklin, Hopkinson was a true Renaissance man, the type of man that Americans have always admired and remembered. Indeed, Joseph Hopkinson was a man that all lawyers, and all men, would do well to emulate.

—M. Keith Siskin

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HOUSTON, CHARLES HAMILTON

(1895–1950)

Charles Hamilton Houston
Library of Congress

Charles Hamilton Houston was a legal educator, civil rights litigator, and the foremost African-American lawyer before Thurgood Marshall. Houston was born in Washington, D.C., to William Houston, a lawyer, and Mary Hamilton. He graduated from Amherst College in 1914 as one of six valedictorians and a member of Phi Beta Kappa. After briefly teaching English in the District of Columbia, he entered the army as a second lieutenant in a segregated unit during World War I. Houston's military experience was crucial to his subsequent development as a lawyer and civil rights leader. "The hate and scorn showered on . . . Negro officers by our fellow Americans," Houston wrote, "convinced me that there was no sense in my dying for a world ruled by them." Based on that experience and the example of his father, Houston determined to "study law and use my time fighting for men who could not strike back" (McNeil 1983, 42).

Houston entered the Harvard Law School in 1919 and graduated three years later in the top

five percent of his class. He spent a fourth year and earned an S.J.D. degree, the first to be awarded to an African-American. Based on his strong academic performance, Houston won a coveted spot on the *Harvard Law Review* and subsequently became its editor, once again the first African-American to hold that position. During his time at Harvard, Houston became the protégé of Dean Roscoe Pound, one of the most influential legal academics of his day and a proponent of the concept of sociological jurisprudence. Pound played a pivotal role in the development of Houston's legal thinking and his subsequent career. Pound, for example, helped to arrange a Sheldon Fellowship for Houston that permitted the young lawyer to spend a year in Spain studying at the University of Madrid. The experience had a lasting impact because the new friends that he made there cared not at all about his color. He earned his doctorate in civil law and then returned to Washington in 1924 to join his father's law firm, renamed Houston and Houston.

William Houston, the father and founder, built a solid general practice that relied mostly, but not exclusively, on middle-class African-American clients. In subsequent years Charles's cousin, William Hastie, the first African-American to sit on a federal appeals court, joined the firm as well. Charles Houston brought to this practice a quick mind and impressive educational credentials.

Charles Houston learned much from his father. William Houston taught his son an important lesson about loyalty, since even as his firm's fortunes grew he continued to represent the maids, chauffeurs, and lower-echelon government workers and laborers that gave him his start. He also learned that an important part of a lawyer's work was to negotiate to avoid unnecessary, time-consuming litigation. William Houston also taught his son the value of thorough and accurate legal preparation, traits that characterized the younger Houston's subsequent legal career and a lesson that he carried to his students when he became a teacher at Howard University law school.

Houston's contributions to the education of African-Americans lawyers were among his most important achievements. Once again, Roscoe Pound played a critical role. Pound and Harvard law professor and future Supreme Court justice Felix Frankfurter wrote strong letters in support of Houston's successful application to join the Howard faculty. In 1924, the institution was trying to upgrade itself from a part-time, night law school to a full-time, accredited institution. At that time, Howard had trained more than three-fourths of the nation's nearly 950 African-American lawyers.

Thanks to his intelligence and determination, Charles Houston quickly became a faculty leader. He wanted Howard to become the training ground for a cadre of African-American civil rights lawyers. To accomplish that goal, Houston was a stern taskmaster who demanded that his students real-

ize that in the struggle for civil rights they had to be well equipped, not just legally but psychologically, to face the resistance that he knew would confront them. Houston also demanded that his students approach law in the same way that Pound had urged on him: from a sociological and psychological perspective. African-American lawyers, according to Houston, had to become social engineers who used the law as an instrument to change society. Throughout his life, Houston, who flirted with the ideas of communism but never joined the Communist party, also consistently taught that the law had a differential impact on people based on their race, wealth, and position in the social order. Thus, Houston's classroom mixed law and liberal arts and theory and practice in ways that asked students to grapple with the law's social consequences.

Houston had an abiding interest in the fate of all African-American lawyers. In 1927, Howard's board of trustees approved Houston's proposal, funded by a grant from the Rockefeller Foundation, to undertake a *Survey of the Status and Activities of Negro Lawyers in the United States*. Houston produced comprehensive studies of the status of African-American lawyers, of which the most influential was *The Negro and His Contact with the Administration of Justice*. It reported that not only were African-Americans treated as second-class citizens before the law, but they were also often accorded second-class representation through the legal profession. On the basis of these findings, Houston urged better training for African-American lawyers and a corresponding commitment to helping African-Americans realize full citizenship.

Houston invoked his experience as director of the *Survey* to press for substantial changes at Howard. In 1929, the board of trustees responded by appointing him vice dean in charge of the three-year day law school and its library. Houston strove relentlessly to make Howard an accredited law school. That objective met stiff resistance from many faculty members, some of them white, who condemned the project as elitist. Houston, however, recognized that accreditation from the American Bar Association and the American Association of Law Schools would give Howard law graduates a chance to gain real professional legitimacy. After considerable internal turmoil, Houston prevailed; in 1931, both organizations extended their imprimatur to Howard. Thereafter, the law school became a training ground for many of the most influential African-American civil rights lawyers, including Thurgood Marshall, William Bryant, and Oliver Hill.

In 1935, Houston became the first full-time paid counsel to the Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP). Even after he left the NAACP in 1940, Houston continued to have extraordinary influence. He helped to produce major change in education, labor, and housing.

Joseph Welch: A Folksy Attorney with a Sense of Decency

Courtroom skills are often transferable to other settings. One setting, which often fulfills a similar function to that of a courtroom, is the congressional hearing. Although such hearings can be an effective and powerful force for ferreting out incompetency and corruption (consider lawyer Sam Ervin's use of committee hearings in exposing the Watergate scandal), hearings can also sometimes be used to harass or embarrass individuals who, though they may have marched to a different drummer, have committed no crimes.

Few members have been as reckless in their use of the investigating committee mechanisms as Republican Senator Joseph McCarthy of Wisconsin, who was aided by Roy Cohn. At a time when tensions were heightened by the Cold War, McCarthy had charged that the State Department and other governmental agencies had hired scores of Communists, who were serving as foreign spies. In televised hearings, McCarthy widened his accusations to include the U.S. Army. The army hired Boston lawyer Joseph Welch (1890–1960) to defend it. A relatively obscure Boston attorney who had raised himself from poverty in Iowa and was known for his collection of more than 150 bow ties, Welch's folksy but straightforward manner ultimately proved to be Senator McCarthy's undoing.

After first getting McCarthy to show the same kind of evasiveness to questions that McCarthy had attributed to "Fifth Amendment Communists," Welch pressed McCarthy for keeping secret for months a document that purported to show Communist infiltration in the military. On June 9, 1954, Welch further responded to counter questions by McCarthy about the Communist affiliation of a person in Welch's own law firm by publicly asking, "Have you no sense of decency, sir, at long last? Have you no sense of decency?"

The committee room followed with applause, and the next day, newspapers throughout the country repeated Welch's question in bold headlines. By year's end, the Senate voted to censure McCarthy, and he died within three years. The folksy Welch continued to receive fan mail until his death in 1960.

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Although Houston did not invent the idea of a planned litigation campaign, during his time with the NAACP he raised it to a new level, especially in the areas of education and rights of the accused. As Gena Rae McNeil, Houston's biographer, notes, he developed a three-pronged litigation strategy. First, he was careful to select cases that presented clear legal issues and that had strong underlying records. Second, Houston knew that it was often best to attack some issues indirectly by building a chain of minor

precedents that, once linked together, could undermine a major precedent, such as the concept of "separate but equal" associated with *Plessy v. Ferguson* (1896). Third, Houston also understood that any successful litigation campaign required community support.

Houston's most important victory during his time with the NAACP was *Missouri ex rel. Gaines v. Canada* (1938). Lloyd Gaines was an African-American who sought admission to Missouri's all-white law school in the absence of a facility for African-Americans. The University of Missouri denied Gaines's application on racial grounds, and the state's highest appellate court upheld the denial. Houston, who had been representing Gaines, then appealed to the U.S. Supreme Court for a writ of mandamus ordering his admission. Houston insisted that the equal protection clause of the Fourteenth Amendment required Missouri to do more than merely pay the tuition for an African-American law student to attend an out-of-state school. State-sponsored out-of-state scholarships for African-Americans did not constitute equal protection of the laws. Chief Justice Charles Evans Hughes, writing for the Court, agreed with Houston's position and ordered Gaines admitted.

Houston's victory in *Gaines* was a pivotal moment in the NAACP's campaign to overturn the separate-but-equal doctrine. The Court did not repudiate segregation, but its decision was a vital step toward the subsequent legal destruction of the doctrine in *Brown v. Board of Education* (1954, 1955). Gaines, however, proved a personal disappointment for Houston. After winning the case, Lloyd Gaines disappeared, never entered law school, and was never heard from again.

During his service to the NAACP, Houston also rallied to the cause of African-American criminal defendants. For example, he succeeded in *Hollins v. Oklahoma* (1935) in having the Supreme Court overturn a death sentence imposed by a jury from which African-Americans had been excluded.

In 1940, mounting health problems prompted Houston to resign from the NAACP, although he remained a valued advisor to the organization and his successor and former student, Thurgood Marshall. In that year, Houston became general counsel of the International Association of Railway Employees and the Association of Colored Railway Trainmen and Locomotive Firemen. In this capacity, Houston tackled another important subject: the selection and recognition of bargaining agents for African-American railway employees.

The Railway Labor Act contained no provision prohibiting discrimination based on race either in the selection of a bargaining agent or in providing minorities adequate representation. Houston, however, believed that such a right could be implied from the language and spirit of the statute, a

position that he argued in two seminal cases: *Steele v. Louisville & Nashville Railroad Co.* and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen* (1944). These cases involved the denial on grounds of race of the right of African-American firemen to work and the abuse of the right of the railway unions to be the statutory exclusive bargaining agent for them.

Houston personally argued both cases before the Supreme Court on November 14 and 15, 1944. Justice William O. Douglas observed afterward that "he was a veritable dynamo of energy guided by a mind that had as sharp a cutting edge as any I have known" (McNeil 1983, 168). For Houston the cases boiled down to a simple matter: a union had to represent white and African-American employees equally.

In December 1944, the justices reversed lower courts' opinions and remanded the cases for further proceedings. Chief Justice Harland Fiske Stone, speaking for the Court, found that a union had a fiduciary duty to protect minority members. Justice Frank Murphy, in a concurring opinion, adopted part of Houston's oral argument to find that "racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation" (McNeil 1983, 169).

Both of these victories came during an especially complicated time for Houston. President Franklin D. Roosevelt in 1944 appointed him to the President's Fair Employment Practices Committee (FEPC), an advisory body designed to address issues of discrimination in employment. When in 1945 the new president, Harry S Truman, refused to follow an FEPC recommendation to ban discrimination by the District of Columbia's Transit Authority, Houston resigned. In a letter to Truman that he widely circulated, including to foreign ambassadors in Washington, Houston wrote that "the failure of the Government to enforce democratic practices and to protect minorities in its own capital makes its expressed concern for national minorities abroad somewhat specious, and its interference in the domestic affairs of other countries very premature" (McNeil 1983, 174).

Houston's last major legal victory dealt with housing. Many cities, including the District of Columbia, attempted to pin African-Americans in their traditional ghetto housing by enforcing private racial covenants on real property. So important had this line of legal work become to Houston's practice that he hired another African-American attorney and future civil rights litigator, Spottswood W. Robinson, to assist him. Houston, however, had little success with the courts of the District, whose judges routinely sustained such covenants.

The NAACP had been pressing similar cases in the states, and by 1948 the stage had been set for an appeal to the Supreme Court. In this instance, two cases, one from Missouri, *Sipes v. McGhee*, and the other from Michi-

gan, *Shelley v. Kraemer,* were waiting to be heard. Houston managed to convince the justices to add another case to their list, *Hurd v. Hodge*.

A District of Columbia court in 1947 had ordered James and Mary Hurd, African-Americans, to abandon their home and remove their personal property because the house that they occupied had been sold to them in violation of a restrictive racial covenant. The Court of Appeals for the District of Columbia subsequently sustained this verdict. Houston then moved for a rehearing, which was quickly denied. The denial, however, provided the basis to carry an appeal to the high court along with the *McGhee* and *Kraemer* cases.

Houston's brief for *Hurd,* which was prepared and argued along with white attorney Phineas Indritz, depended extensively on economists and sociologists to document the invidious consequences of promoting private discrimination through restrictive covenants. By all estimates, the brief prepared in *Hurd* represented Houston's most elaborate justification for the concept of the lawyer as social engineer, since it mixed constitutional, statutory, and common law concepts with public policy and social science. Houston urged the justices to understand that restrictive covenants violated public policy, federal law, and most notably the due process clause of the Fifth Amendment. Only six of the justices, however, heard the case; the three others absented themselves because of their personal connections to covenanted properties.

By a vote of 6 to 0 the high court in May 1948 ruled against judicial enforcement of racially restrictive covenants. In his opinion for the majority, Chief Justice Fred Vinson held that the courts could not be used to deny rights of occupancy or ownership on the grounds of race. Vinson and his colleagues found that in the case of the states such a practice violated the Fourteenth Amendment. However, in *Hurd,* which involved a federal rather than a state jurisdiction, the justices rejected Houston's constitutional position that the due process clause of the Fifth Amendment blocked such activity. Instead, the court adopted the position that the Civil Rights Act of 1866 prohibited judicial enforcement of discriminatory agreements. While failing to gain the broader constitutional position he argued, Houston nevertheless recognized that *Hurd* was a victory, since it afforded African-Americans an opportunity to claim another right due them.

Houston's health declined shortly after *Hurd,* and on April 22, 1950, he died of a coronary occlusion in Washington, D.C. Houston left behind a remarkable record of personal and professional success. Without his creative approach of "social engineering" through the law, his determination to prepare a new generation of African-American lawyers, his skills at mentoring those lawyers, his strategic sense of how to advance the African-American civil rights agenda, and his passion for justice, the victories achieved after

his death would not have come as they did. As Gena Rae McNeil has argued, Charles Hamilton Houston "turned the Constitution, the laws, and the legal process into weapons in the cause of his people." His legacy was that "there should be no end to struggling, no immobilizing weariness until full human rights were won" (McNeil 1983, 224).

—Kermit L. Hall

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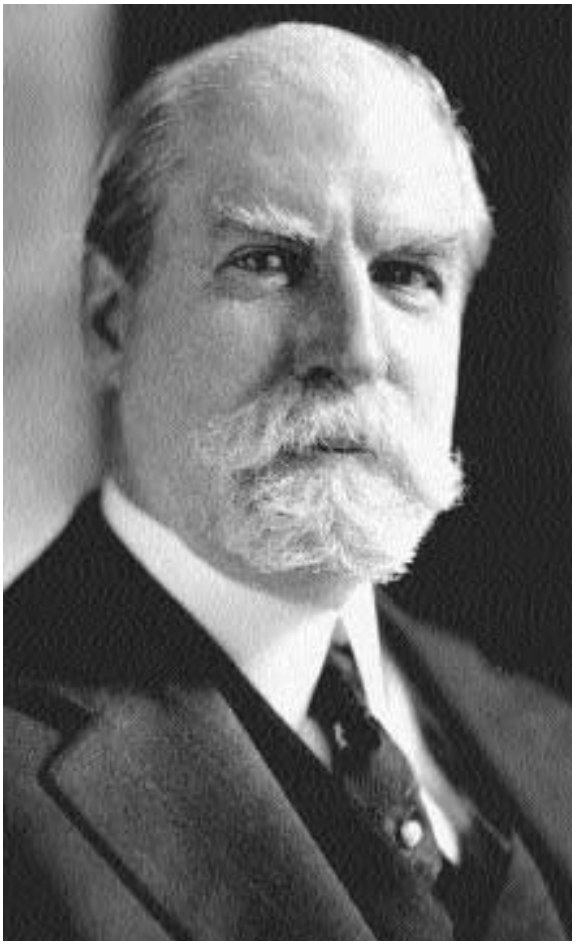
HUGHES, CHARLES EVANS

(1862–1948)



Charles Evans Hughes
Library of Congress

Charles Evans Hughes is regarded as one of the most outstanding Americans of the twentieth century. His list of achievements is extensive. He was a reformer, a politician, a diplomat, and a statesman, and he served twice on the U.S. Supreme Court. He was also the foremost and best-known lawyer of his day.

Hughes was born on April 11, 1862. His father, David Charles Hughes, was a Methodist minister who had come to New York City from Wales in 1855. In 1858, the elder Hughes met Mary Catherine Connelly, a schoolteacher, and soon decided to marry her. Converting to the Baptist faith to overcome the objections of her parents, the young preacher was assigned to the Glen Falls, New York, parish, where Charles Evans was born. The family subsequently moved to Sandy Hill, Oswego, Newark, and then New York City.

Clearly a precocious child, Hughes learned to read at age three. By age six he had studied German and French at home; by the time he was eight, he was studying Greek, science, and

Shakespeare. He possessed a photographic memory and was able to recite extensive passages from scripture. His mother forced him to work arithmetic sums in his head, without recourse to pencil and paper. His father had collected an extensive library, and there young Hughes read voraciously.

At age six, he was sent to a public school in Oswego. Hughes found the rigid routine of the school stifling and the subject matter—which he had long since mastered—extremely boring. Within four weeks he was petitioning his parents to be allowed to return to home schooling. To this end, the boy wrote out what he called "Charles E. Hughes' Plan of Study," specifying what subjects he planned to study and how much time each day he would give them. His father accepted the plan—which Hughes, as an adult, claimed was merely a device to give him more time to play after his studies (Pusey 1963, 1:7)—and Hughes left the public school for home studies. The boy did not return to public school until he was eleven; at age thirteen, he gained his diploma from Public School 35, one of the best secondary schools in New York City.

In September 1876, Hughes began his studies at what is now Colgate University; he remained there for two years, earning marks that ranged between "superior" and "the maximum." Desiring a larger college with more academic opportunity, he transferred to Brown University in 1878 and eventually graduated from that institution in 1881, at age nineteen. It was at Brown that Hughes developed his interest in poker, baseball, theater, and law. Both of his parents were deeply religious and had educated and trained their son with the hope that he would become a minister; at Brown, however, Hughes gradually realized that he did not "feel the call" to the ministry, and by his last semester there he found himself drawn toward the legal profession. After graduating from Brown, he spent a year teaching at an academy to raise money for law school. In 1882, he entered Columbia University Law School; he graduated in 1884 with highest honors. In the summer of 1884, he passed the New York bar examination with a score of 99.5.

As a student at Columbia, Hughes had been a summer intern at the New York law firm of Chamberlain, Carter, and Hornblower, and upon gaining admission to the bar, he joined that firm as a clerk. He rapidly advanced, and when the firm was reorganized in 1887, he became the lead lawyer in the new firm of Carter, Hughes & Cravath. The firm was successful and Hughes was very busy. (It was at this time that he grew his famous beard to eliminate trips to the barber shop.) In 1888, he married Antoinette Carter, the daughter of the firm's senior partner; the couple remained married until her death fifty-seven years later.

His obsession with perfection in every detail of his work brought Hughes great respect from his fellow lawyers and a substantial income, but it also contributed to a tremendous strain on his health. On the verge of a physical

collapse, he left private law in 1891 and accepted a teaching position at Cornell University law school. (More than once, Hughes worked himself to the verge of a breakdown.) The teaching duties were very agreeable to Hughes, and he soon recovered his full health. Unfortunately, the pay was not very good. Unable to support his growing family adequately on a professor's salary, he left the university in 1893 and rejoined his old firm.

Hughes entered public life for the first time in 1905. In 1904, amid charges of corruption, a controversy erupted over the rates the gas trusts were charging New York City for power. When the city government, influenced by the gas lobby, refused to investigate, the state legislature ordered its own investigation and sought a lead counsel. Although unknown to the public, Hughes was tapped for the job. His investigation of the industry revealed enormous price gouging—for example, the city was paying more than three times the rate of large private consumers—and a pattern of fraud, corruption, overvaluation of assets, and adulterated gas. The result of his work was the creation of the New York State Public Service Commission to regulate the activities of the power companies in the public interest.

Hardly had the gas inquiry been completed when Hughes was asked to lead another investigation, this time into malfeasance in the life insurance industry. Again the New York Senate summoned Hughes to be the chief counsel for the investigating committee. Under Hughes's relentless interrogation, leading figures in the insurance business admitted to overcharging on premiums and otherwise using fraudulent data and practices to provide exorbitant salaries for top executives. Hughes also discovered that the insurance industry had donated huge sums of money to political campaigns (including Theodore Roosevelt's 1904 presidential bid) and effectively "bought off" a number of legislators. The revelations forced a thorough reform of the insurance business and also led to New York's first regulations on lobbying and campaign donations.

His role in the investigations brought Hughes praise in the press and public fame, establishing his reputation as a brilliant—if somewhat aloof and austere—man of great integrity. In 1906, this reputation led to his nomination and election as governor of New York. During his two terms as governor, Hughes, a progressive Republican, "fought for campaign and election reform, strengthened child labor laws and wage and hour laws, and introduced the first workers compensation law in America . . . [and] introduced regulation to the telephone and telegraph industry" (McWhirter 1998, 135).

Despite these achievements, Hughes's first love remained the law. He had entered the rough and crude world of New York politics largely due to a sense of public service, and he soon tired of it. When President William Howard Taft offered him a seat on the U.S. Supreme Court in 1910,

Hughes readily accepted, much to the dismay of the Progressives in New York. Hughes served on the Court until 1916. During that time, he wrote 151 opinions, 32 of which were dissents; only nine times were there dissents from his opinions for the Court (Cushman 1995, 308).

By 1916, Hughes was one of the most respected and prominent Republicans in the country. He had been mentioned as a presidential candidate in 1912 but refused to run. In 1916, the Republican party convention drafted him as its candidate to challenge the incumbent, Woodrow Wilson. He immediately resigned from the Court and devoted his full energies to the campaign, but his bid ended in defeat when he lost California by 3,775 votes.

Upon his loss, Hughes retired from public life and resumed his career as a lawyer, becoming the senior partner in the firm of Hughes, Round, Schurman & Dwight. Well known and respected, he was a lawyer's lawyer, and clients flocked to his door, allowing him to take only the cases that held special interest for him. Even so, he was quite busy, arguing twenty-five cases before the Supreme Court in only twenty-eight months.

In 1920, Warren G. Harding was elected president of the United States. In one of his first appointments, he chose Hughes to be secretary of state. Hughes served in that office until 1925; during that time, he negotiated dozens of treaties, among them the disarmament treaty of 1922 and a security pact for Japan in the western Pacific. Hughes's accomplishments as secretary of state earned him the respect of the international community, but financial concerns led him to resign and return once more to private law practice.

Hughes remained in private life until 1929, when President Herbert Hoover named him to serve on the International Court of Justice in The Hague. His time there was short, however, for the health of U.S. Supreme Court Chief Justice Taft began to fail. In 1930, Taft resigned and Hughes was chosen to replace him. As chief justice, Hughes was a centrist "swing" vote bridging the clear liberal and conservative blocs on the Court; although most of his written opinions were conservative in tone, he often voted with the liberal bloc (Hughes 1973, xxv). Hughes himself denied any ideological bias, claiming to take each case on its objective merits (Hughes 1973, 300). Although he voted against a number of the New Deal laws, he also voted to uphold progressive labor legislation such as minimum-wage laws. Hughes also successfully guided the Court through the crisis created by Franklin Roosevelt's "court-packing" scheme.

In 1941, fearing a deterioration of his abilities as he neared eighty, Hughes resigned from the Court and left public life for the last time. He did not return to private law practice but spent his last years in quiet retirement in Washington, D.C. He died of congestive heart failure on August 27, 1948. More than 1,600 people attended his funeral in New York City.

Hughes's work as a lawyer is generally overshadowed by his achievements as a politician, jurist, and diplomat. In fact, he was an outstanding lawyer, highly regarded in his profession for his integrity and his ability to win difficult cases. He began his legal career in commercial law; as his reputation (and his income) grew with his success in that field, he found other lawyers bringing important cases to him. Eventually, Hughes was able to choose the cases he handled and would take only those that he deemed to involve sufficiently important issues.

Much of Hughes's success in law came from his meticulous preparation for his day in court. As a young student, he would rise early to spend the necessary hours mastering every detail of his assignments; this same trait served him well as a lawyer. No detail of the law was too small for him to know, if it might in some way affect his case. In drafting a will for John D. Rockefeller, Hughes had to deal with an obscure technical question and asked a junior partner to research all of the relevant precedents. The partner returned with every precedent in New York legal history, whereupon Hughes, wanting to eliminate any chance of surprise, sent him back for all of the precedents from every state. Hughes "made it his business to know everything that his opponent could say" about a case and to have a ready response for it (if not actually preempt it) (Pusey 1963, 1: 384–385).

Such diligence in preparation made him a formidable adversary in the courtroom. Yet apparently he was never comfortable before going into court; since he never thought anything important simply because he was saying it, he always feared that he had missed something that might harm his case. Early in his career, an older lawyer had advised him to always get a good night's sleep before a day in court, but he was rarely able to take advantage of the counsel. Instead, he would stay up until one or two in the morning preparing for his court appearances; as he aged, he began rising extremely early to prepare instead. Although he argued several times before the U.S. Supreme Court, Hughes rarely was able to sleep before his appearances there.

In the courtroom, Hughes was a spellbinding orator, arguing with great energy and intensity. The nervousness of the night before would be channeled into his speeches, which made them more effective. His photographic memory allowed him to argue at length without reference to the stacks of law books and papers on the table before him. He developed an ability to strip a case down to its essentials, presenting his argument so clearly and logically as to render counterargument almost pointless. A biographer of Hughes has noted that he devised a style and technique "designed to get his case so clearly, quickly, and cogently before the court as to forestall any objections . . . before such objections could arise in a judge's mind" (Pusey 1963, 1:385). Some of the judges before whom Hughes argued learned to

take special precautions against the power of his oratory. Justice Benjamin Cardozo once said that "he always reserved judgment for twenty-four hours in any case argued by Hughes to avoid being carried away by the force of his personality and intellect" (Pusey 1963, 1:385).

As a lawyer, Hughes was involved in a number of important cases that involved significant legal principles or social issues. He believed he had a duty to take "worthy" cases (Hughes 1973, xvi), and so represented both business and labor, defended individual rights of expression, promoted a limited but important increase in government's authority to enact programs benefiting social welfare, and supported key constitutional principles.

He argued before the Supreme Court against the government's seizures of transoceanic cable systems at the very end of World War I, calling them an unjustified overreach of government authority. (The cable lines were returned to private ownership and the case rendered moot before the Court could rule.) Similarly, the Supreme Court accepted his arguments that the Food Control Act of 1917, which banned price gouging but failed to set any specific standards, was unconstitutionally vague.

A strong defender of the right of free speech, Hughes took the lead in arguing the defense of the New York Socialists in 1920. Five members of the Socialist party had been elected to the New York Assembly, but in the wave of anti-Socialist hysteria that followed World War I, the assembly refused to seat them until they had proved their fitness to serve. Arguing before the assembly's judiciary committee, which was sitting as a court, Hughes denounced the assembly's demand that the five prove their worthiness to serve as a reversal of basic criminal due process. Moreover, he argued, the people had a right to elect whomever they chose, and "if a majority can exclude the whole or a part of the minority because it deems the political views entertained by them hurtful, then free government is at an end" (Pusey 1963, 1:392). Although the five were still denied their seats, Hughes's brief has been credited with helping to break the hysteria then raging in the United States.

Hughes also played a significant role in the *Prohibition Cases*. Opponents of the Eighteenth Amendment had filed suit arguing that its adoption was unconstitutional, and they asked Hughes to present their case. Ignoring the prospects of a huge fee from the liquor industry for his services, and despite his misgivings about prohibition as a policy, Hughes filed an amicus brief with the Supreme Court supporting the amendment. In it he argued that the Eighteenth Amendment was constitutional; not only did the people have the right to amend the Constitution as they saw fit, he declared, but such a right was vital to the continued viability of the Constitution. The Court accepted this argument and upheld the amendment.

Also noteworthy examples of his skills as a lawyer were the cases that made his reputation: the investigations into the power and the insurance industries in New York. These cases illustrated his ability to assimilate large quantities of information in a very short period of time: Beginning with no knowledge of either the power or insurance business, within a few weeks he knew both of them better than their own executives and was able to repeat the most minute facts as needed. His skills as a cross-examiner were displayed in the relentless interrogation that elicited damning confessions from officials of the businesses under investigation. And although he did not need his oratorical skills in these investigations, his ability to analyze, simplify, and logically present a problem is seen in his reports on the investigations and his recommendations, most of which were adopted into law.

The list of cases in which Hughes was involved is extensive and can only be hinted at here. His impact on twentieth-century America has been great. As a lawyer and a jurist, Hughes is generally regarded as a conservative, but a "progressive Republican" label would be more accurate. He was a staunch defender of civil liberties and supported policies that opened the door for government regulation of the economy in the public good. Particularly in the latter area, Charles Evans Hughes as lawyer and judge "moved the law forward as few others ever had" (McWhirter 1998, 136).

—Steve Robertson

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Great American Lawyers

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John R. Vile

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AN ENCYCLOPEDIA

JACKSON, ROBERT H.

(1892–1954)

Robert H. Jackson

Robert H. Jackson at the Nuremberg Trials. (Bettmann/Corbis)

Americans familiar with the history of the Supreme Court readily recognize Robert H. Jackson as the name of one of the most distinguished justices to have served on the nation's highest tribunal. Many are also aware of his service as chief prosecutor during the Nuremberg war crimes trials that followed World War II. People are far less aware of Jackson's accomplishments as an attorney, which are impressive in their own right. Indeed, Jackson was successful in every aspect of legal practice: as general practitioner, litigator, government lawyer, prosecutor, and judge. Without question, he ranks among the most important and successful lawyers in American history.

Robert Houghwout Jackson was born to William Eldred Jackson and Angelina Houghwout Jackson on their family farm in Spring Creek, Pennsylvania, on February 13, 1892. Jackson's great-grandfather, Elijah Jackson, was a Scotsman who founded the first English-speaking settlement in Spring Creek. His mother was descended from early Dutch settlers. Jackson's parents were tough-minded, practical, hardworking individualists who preached self-reliance and self-discipline, values that they successfully imparted to their son.

When Robert was about five years old, his family moved to Frewsburg, New York, a village near Jamestown. Jackson attended public schools in Jamestown. Although he was an excellent student and a voracious reader, Jackson never attended college. Rather, on graduation from Jamestown

High School in 1910, Jackson began a three-year apprenticeship in the law office of Frank H. Mott. He attended Albany Law School for one year but did not complete the program. Indeed, Jackson did not receive a law degree until 1941, when Albany Law School bestowed an honorary degree on him.

In 1913, at age twenty-one, Jackson embarked on his legal career as a solo practitioner. Although he was a general practitioner, Jackson soon developed a reputation as a highly effective trial lawyer. His clients included the Jamestown Telephone Corporation, the Jamestown Street Railway Company, and the Bank of Jamestown, as well as farmers, labor unions, and small businesses.

On April 24, 1916, Robert Jackson married Irene Alice Gerhardt. Their union produced two children, Mary and William Eldred.

In 1918, Jackson was appointed corporation counsel for the City of Jamestown. Thus began his career as a government lawyer. Jackson's appointment was particularly noteworthy because Jamestown's mayor and city council were Republican. Jackson was a Democrat. Nevertheless, Jackson's legal acumen and tremendous skill as a litigator more than offset any concerns about his political party identification.

As corporation counsel was a part-time position, Jackson continued his successful private practice. He practiced alone until 1919, when he formed the firm of Dean, Edison & Jackson. In 1923, he formed a new partnership, Jackson, Manley & Herrick. In 1924, Jackson was elected president of the Jamestown Bar Association. From 1928 to 1930, he served as chairman of the Federation of Bar Associations of Western New York. In 1930, Jackson was appointed to serve on a state commission investigating the administration of justice in New York.

As a prominent Democrat in a predominantly Republican community, Jackson attracted the attention of New York's Democratic governor, Franklin D. Roosevelt. The two became friends, which led to Jackson being invited to Washington in 1934 to serve in the Roosevelt administration. At first, Jackson was reluctant. He actually rejected an offer to become general counsel to the Works Progress Administration (WPA). By this time, Jackson's law practice was thriving, and working for the WPA would have been less lucrative. Moreover, Jackson had philosophical reservations about the New Deal, especially the National Industrial Recovery Act (NIRA), with its emphasis on centralized bureaucratic control of the economy. Of course, the NIRA would be declared unconstitutional by the Supreme Court in *A.L.A. Schechter Corporation v. United States* (1935).

Later in 1934, Secretary of the Treasury Henry Morgenthau approached Jackson about serving as assistant general counsel of the Bureau of Internal Revenue. Jackson was hesitant to accept a full-time position, but Morgen-

thau assured Jackson that he could work part time in Washington and still attend to his private law practice. Jackson accepted, but he soon found that he was spending all of his time in Washington. His most notable achievement with the Bureau of Internal Revenue was successfully prosecuting former treasury secretary Andrew Mellon for income tax evasion. In 1935, Jackson was transferred to the Department of Justice as assistant attorney general in charge of the Tax Division.

In January 1937, Jackson was asked to head the Anti-Trust Division of the Justice Department. During the winter of 1937, Jackson became an effective advocate of President Roosevelt's judicial reorganization, or "court-packing," plan. Although Jackson did not participate in the drafting of the proposal, he made a number of public speeches and testified before the Senate on its behalf. During this time he also developed an even closer relationship with President Roosevelt as an advisor. Yet Jackson never regarded himself as a "New Dealer." He was not part of the New Deal "brain trust," nor was he one of Felix Frankfurter's "young turks." His rural origin, his relative lack of formal education, and his thoroughgoing individualism set him apart from the New Deal elite. Nevertheless, his skills as an advocate were widely recognized.

Jackson was appointed solicitor general in 1938, when Roosevelt appointed Stanley Reed to the Supreme Court. In that capacity Jackson took on his most important legal work, arguing on behalf of New Deal legislation that was continuing to face judicial review. Of course, that task was rendered easier by the Supreme Court's sudden turnaround in the spring of 1937 in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*. There the Court upheld the Wagner Act, which recognized the right of employees to unionize and engage in collective bargaining. The Court's stunning action signaled the beginning of a new era in which the Court would accept government regulation of economic life. Nevertheless, Jackson's skills at appellate argumentation were quite evident, prompting Justice Louis Brandeis to remark that "Jackson should be Solicitor General for life." As solicitor general, Jackson's able advocacy facilitated the reoriented Court's decisions upholding important New Deal legislation such as the Agricultural Adjustment Act of 1938, which was sustained in *Mulford v. Smith* (1939). During Jackson's two-year tenure as solicitor general, he argued numerous cases before the Supreme Court and lost only one, *Perkins v. Elg* (1939), a deportation case of relatively minor importance.

In 1940, President Roosevelt appointed Jackson attorney general. By all accounts, Jackson did not relish his new position, which he compared to being "a maintaining clerk of a law office." Clearly, Jackson missed lawyering. Still, Jackson performed some very important work in this capacity, not least

of which was working out the legal aspects of the "lend-lease" arrangement through which the United States supported Great Britain in the early days of World War II despite the official neutrality of the United States at the time.

Jackson did not remain attorney general for long, because he was tapped to fill a vacancy on the Supreme Court created by the retirement of Chief Justice Charles Evans Hughes in July 1941. Roosevelt considered nominating Jackson to be chief justice, but decided instead to elevate Associate Justice Harlan Fiske Stone.

Jackson was thus nominated to fill the position vacated by Stone's promotion. His nomination sailed through the Senate, and on October 6, 1941, Jackson was sworn in as associate justice of the Supreme Court. Jackson was not altogether happy with his new role, as he was more accustomed to advocacy than to judging. After the Japanese attack on Pearl Harbor, Jackson regarded much of the Court's work as dull and irrelevant. He was much more interested in the global struggle between democracy and authoritarianism. Jackson was also uncomfortable with the conflict that was taking place within the Court, much of which struck him as petty. Jackson had a particularly difficult time in his relationship with Justice Hugo Black, for whom he had little respect.

Jackson's tenure on the Court coincided with the newfound emphasis on civil rights and liberties. Jackson was anything but doctrinaire in his jurisprudence. Best described as a pragmatist, Jackson advocated judicial restraint and the careful weighing of facts. He recoiled from the absolutism of Hugo Black and the dramatics of William O. Douglas. But Jackson could be moved to eloquence. Perhaps the best example of this came in *West Virginia State Board of Education v. Barnette* (1943), in which the Court struck down a state law requiring all public school students to participate in a daily flag salute ritual. In what has become one of the most widely quoted First Amendment dicta, Jackson opined, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." In an obvious reference to the nation's totalitarian enemies in World War II, Jackson observed that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

Justice Jackson's service on the Court was interrupted in 1945 when he agreed to serve as chief prosecutor in the Nazi war crimes trials in Nuremberg, Germany. This was the first time that individuals were held legally responsible for crimes against humanity committed during wartime. Unfortunately, there was no existing international law under which these crimes could be prosecuted, thus allowing the perpetrators to argue that they were

victims of ex post facto laws. In the end, this legal barrier was overcome by moral outrage over the monstrous offenses committed by the Nazis. Without question, Jackson's conduct of the Nuremberg prosecution brought legitimacy to a legally dubious undertaking. Of particular importance in this regard was Jackson's careful effort to assemble documentary evidence rather than rely solely on oral testimony. To rely on testimony would have been more dramatic, but documents provided more reliable evidence of guilt. The fact that three defendants were acquitted and released further enhanced the legitimacy of the tribunal. As Jackson remarked, "You must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty." In the end the Nuremberg trials proved to be a landmark in the development of international law and human rights.

Jackson was criticized in some quarters for not resigning from the Supreme Court when he accepted the Nuremberg assignment. Certainly his one-year absence impeded the Court's work and increased the opinion-writing burden on Jackson's colleagues. Jackson's departure for Nuremberg particularly irritated Chief Justice Stone, who had not been consulted in the matter and who learned of Jackson's appointment through the newspaper. Stone's irritation was compounded by the fact that he did not respect the legality of the Nuremberg trials. Stone believed that they constituted little more than political retribution "with a false facade of legality." Jackson, on the other hand, regarded his work at Nuremberg as "the most satisfying and gratifying experience" of his career and "infinitely more important" than his service on the Supreme Court.

Jackson resumed his work on the Court in October 1946. Many scholars believe that the Nuremberg experience had a significant impact on Jackson's jurisprudence. More wary of extremist groups, Jackson became more conservative in his interpretations of the Bill of Rights. Certainly Jackson's concurring opinion in *Dennis v. United States* (1951) is consistent with this interpretation. There Jackson supported the Court's decision to uphold convictions of members of the Communist party under the Smith Act. Jackson's position was that the Communist party was a criminal conspiracy and, as such, could not invoke the protections of the First Amendment. Jackson wrote: "The Communist Party realistically is a state within a state, an authoritarian dictatorship within a republic. It demands these [First Amendment] freedoms, not for its members, but for the organized party. It denies to its own members at the same time the freedom to dissent, to debate, to deviate from the party line. . . ."

Justice Jackson suffered a heart attack in March 1954, but he managed to continue his service on the Court for several months. One of his final appearances on the bench was on May 17, 1954, the day the Court handed

down its landmark decision in the "case of the century," *Brown v. Board of Education*. Although Jackson had reservations about the dramatic step the Court took on that day, he joined the unanimous bench in declaring racial segregation of public schools unconstitutional.

Robert Jackson died on the morning of October 9, 1954, while en route to the Court. His career is perhaps best summarized in the title of Eugene Gerhart's 1961 encomium: "Supreme Court Justice Jackson: Lawyer's Judge."

—John M. Scheb II

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JAWORSKI, LEON

(1905–1982)

LEON JAWORSKI

Special Watergate prosecutor Leon Jaworski speaks with reporters outside U.S. district court in Washington, 16 May 1974. (AP Photo)

LEON JAWORSKI HAD ONE OF the most distinguished and politically important legal careers in U.S. history. His half-century of service touched on many of the most important public issues of the day and culminated in the forced resignation of a president of the United States.

Jaworski was a life-long Christian and could write with compelling simplicity and sincerity about the influence of his religious convictions on his professional conduct (Jaworski and Schneider 1981). Throughout his long career two themes emerged: first, the duty of the individual to resist a corrupt moral environment; and second, the importance of the rule of law. Jaworski's unclouded convictions often steeled him for action in the face of strong social pressure, and he consistently fought for a government of laws, not of men. Many of those embroiled in the controversies that he addressed had succumbed to social pressure or subverted the rule of law.

Leonidas Jaworski was born September 19, 1905, in Waco, Texas, to Joseph Jaworski, a minister, and Marie Mira. His parents had immigrated to the United States from Germany in 1903. His father originally was from Poland, and his mother was from Vienna. In his youth, Jaworski saw Waco come under the influence of a resurgent Ku Klux Klan until Klansmen held

nearly every local political office. He was shocked to see prominent local citizens embracing bigotry and breaking the law, but he admired those few who opposed the Klan on grounds of conscience. He received his degree in law at Baylor University at nineteen, in 1925, and had to go to court to get permission to be admitted to the bar at his age. In 1926, he earned a master's degree in law from George Washington University and returned to Waco to practice.

Early in his career, Jaworski had to decide whether to act on his professional obligations in an unpopular cause. Jordan Scott, an African-American man, stood accused of the murder of a white farming couple. The court appointed Jaworski as defense counsel, along with another lawyer as assistant, both without pay. Local prejudice ran high, and a real danger arose that Scott might be lynched. Despite threats and abuse, Jaworski pursued the case with vigor, baffled and distressed that so many could lack respect for the right to counsel and to a fair trial, or to any trial at all. Scott had signed a confession (with an "X") and had led the police to the murder weapon, Scott's own gun, buried in a field. But he said the confession had been extracted by threats and that the crime was committed with his gun by an acquaintance, one Son "Rockbottom" Miller. Miller had returned the gun after the crime, and Scott had hidden it out of fear, he said.

Because of the danger of lynching, the judge set the trial date for just ten days after Jaworski's appointment as counsel. The jury convicted Scott, but the judge ordered a new trial because the prosecutor had referred to the defendant during closing argument as "This colored Negro, this brute, this assassin" (Jaworski and Herskowitz 1979, 34). With more time, Jaworski was able to do further investigation. He found that on the day before the murder, Rockbottom Miller had been released from jail in Waxahachie, Texas, and announced his intention to head for Waco, where the murders occurred. (Jaworski and Herskowitz 1979, 36.) This gave Jaworski new hope, but the drama was not to have a storybook ending. Miller turned out to have an ironclad alibi. When Jaworski confronted Scott with this fact, Scott confessed to Jaworski that he indeed had killed the two people. On retrial, a new jury convicted him again, and the state of Texas executed him.

In 1929, Jaworski moved to Houston, where he worked for a time with A. D. Dyess, and then moved to Fulbright, Crooker, Freeman & Bates. He remained with the latter firm for most of his life, taking leaves for other important work. In 1931, he married Jeannette Adam, and in the mid-1930s they had three children, Joan, Claire, and Joseph. Jaworski's law practice flourished along mostly conventional lines, with an emphasis on commercial litigation.

Jaworski was a resourceful and imaginative courtroom lawyer. In one case, his client, an oil-well wildcatter, was sued for allegedly polluting land

adjoining one of his wells, making the land unusable. Jaworski managed to get a continuance of the case until springtime. Shortly before trial he visited the site with a motion-picture cameraman and found grass growing. Not content simply to film the grass, he had some nearby cows moved onto the land and had them filmed eating the grass. When the plaintiff testified at trial that the land was utterly lifeless and barren, Jaworski submitted the film into evidence. The use of motion-picture film in court was so novel that its introduction provoked strong objection and extended argument. But the court admitted the film, and the sight of cows grazing on the land destroyed the plaintiff's credibility. The jury returned a verdict favoring the defense.

On another occasion, Jaworski was trying to save his client from the death penalty. In his closing argument, he announced to the jury that if they wished the man killed, they should do it themselves. He then tried to hand one of the jurors a knife. The juror recoiled, and Jaworski's dramatization of the harshness of the proposed penalty convinced the jury to spare his client.

As his style matured and his reputation grew, Jaworski was known for his toughness, his integrity, and his ability to absorb and understand large amounts of complex evidence. He would need these traits during World War II, when he was in the Army as a colonel, prosecuting German prisoners of war accused of murder, and Nazi war criminals.

Typical of the prisoner-of-war cases was that of the murder of a young German soldier named Heller, a prisoner of war held at Camp Chaffee, Arkansas. Heller's sin, in the eyes of his more fanatical German comrades, had been to do work for the Americans, beyond what he could be required to do under the Geneva Convention, in order to send money back home to his wife. For this, some of his fellow soldiers lured him from his barracks and beat him to death with clubs. One of the main suspects was a minister in civilian life, and Jaworski was disgusted to read his diary and see evidence that this man of God condoned the worst sort of barbarism. Jaworski was not able to produce enough hard evidence to convict the minister. However, by an appeal to conscience, he was able to persuade a German sergeant named Abar to testify against one of his fellow German soldiers. On this basis, Jaworski secured one conviction. Such convictions helped to quell violence in the camps.

Immediately after the war, and before the Nuremberg prosecutions, Jaworski tried two war-crime cases of note. In the first, citizens of the small German town of Russelsheim had fallen upon and viciously beaten eight American pilots whom the Germans had captured. With the men piled atop one another dead or unconscious, a local Nazi had then fired several shots into their bodies. Miraculously, two of the men lived and were able to

escape when an air raid drove their assailants to take cover. Jaworski secured convictions of ten of those involved; five were executed.

Another case left Jaworski appalled that seemingly normal human beings could perform the most barbaric acts because of ideology or simple social conformity. The Hadamar Institution in Hadamar, Germany, had been a mental hospital. The Nazis began putting the inmates of the institution to death. Then they began sending to Hadamar slave laborers who were too sick or starved to work, and finally simply those they wished to kill, sick or well. Members of the institution staff would lead the victim to a hospital bed, assure the victim of treatment, and then administer a lethal drug. The staff kept records, with falsified dates and causes of death—the records showed the victims in each group delivered to the institution as having died in alphabetical order, of natural causes. Jaworski secured seven convictions, of the chief administrator down to the gravedigger, with three death sentences. Watching one of the defendants in tears during her testimony, face-to-face with her own depravity, he reflected that "'there, but for the grace of God, go I' and other well-intentioned people if we let our moorings of morality slip" (Jaworski and Schneider 1981, 111).

After helping to gather evidence to be used in the prosecution of those involved in crimes against humanity at the Dachau concentration camp, Jaworski returned to private practice in Houston. He continued his involvement in important litigation. He successfully defended the right of Lyndon Johnson to appear on the ballot for senator in Texas in 1960, although he also was on the ballot as Democratic candidate for vice-president. After the election he successfully represented president-elect John F. Kennedy in a challenge to the vote count in Texas.

In 1962, Mississippi governor Ross Barnett defied court orders regarding the racial integration of the University of Mississippi. The Fifth Circuit Court of Appeals ordered the U.S. attorney general, Robert Kennedy, to pursue criminal contempt proceedings against Barnett. Jaworski took on the prosecution of the case at the request of Attorney General Kennedy. For this decision he faced criticism, much of it scathing, from friends and strangers alike. His secure belief in the importance of the rule of law gave him the strength to brave hostility even from those he knew and liked. Ultimately, the court in the Barnett case ruled that changed conditions, in particular the successful integration of the university, had "purged" the governor of his contempt.

In 1964, Jaworski was special counsel to the Warren Commission investigating the Kennedy assassination. Then and in later years, Jaworski fully supported the commission's conclusion that Lee Harvey Oswald acted alone in assassinating the president.

Elliot Richardson

In addition to special prosecutors Archibald Cox and Leon Jaworski, who made their stand for the rule of law during the Watergate investigations, then–attorney general Elliot Richardson (1920–1999) also demonstrated a willingness to elevate principle over expediency and thus helped elevate the status of the legal profession at a time when leading White House practitioners (including the president and his chief advisors) were engaged in illegal behavior.

Born in 1920 to a doctor who taught at Harvard Medical School, Richardson earned both his undergraduate and law degrees at Harvard, interrupting his study in law school to serve in the army as a first lieutenant. He was part of the D-Day invasion of Normandy and earned two Purple Hearts and a Bronze Star for his service in Europe. After returning to Harvard, Richardson was editor and president of the *Harvard Law Review* and went on to clerk for Learned Hand and Felix Frankfurter.

After working for Ropes & Gray in Boston, Richardson subsequently served as an aide to Senator Leverett Saltonstall (1953), as lieutenant governor of Massachusetts (1965), as attorney general of Massachusetts (1967), as U.S. attorney in Boston, as undersecretary of state (1969), as head of the Department of Health, Education, and Welfare (1970), as secretary of defense (1973), as U.S. attorney general (1973), as ambassador to Great Britain (1975), as secretary of commerce (1976), and as ambassador at large (1977).

The only American ever to hold four cabinet posts, Richardson was best known for his short stint as attorney general. He and his assistant secretary, William Ruckelshaus, resigned rather than carry out President Richard Nixon's order to fire special prosecutor Archibald Cox (who was pursuing his investigation against the president) in the so-called Saturday Night Massacre. Pressuring Richardson to remain at his post, Nixon told Richardson he was sorry "that you insist on putting your personal commitments ahead of the public interests." Richardson responded, "Mr. President, I can only say that I believe my resignation is in the public interest" ("Legends in the Law," 5). The resulting firestorm led in large part to the appointment of special prosecutor Leon Jaworski with renewed authority and independence.

In 1984, Richardson, who was known for his reserved Boston Brahmin personality, was unsuccessful in obtaining the Republican nomination for governor of Massachusetts. In 1990, Richardson helped monitor the Nicaraguan elections, and in 1998 he received the Presidential Medal of Freedom. Richardson died in Massachusetts on December 31, 1999.

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The culmination of Jaworski's career was yet to come, during the Watergate scandal. The scandal arose from the burglary of the Democratic National Committee office in the Watergate complex on June 17, 1972, by employees of the Committee to Re-Elect the President. Throughout 1972, the administration managed to keep the burglars quiet, largely by cash payments. The Watergate matter received relatively little attention during the 1972 election campaign, and Nixon was reelected in a landslide. But the scandal gained greater prominence early in 1973, when some of the burglars alleged that John Dean, counsel to the president, and Attorney General John Mitchell had instructed them to commit perjury. When Dean began talking to prosecutors, the White House tried to portray him as untrustworthy. Ultimately this attempt failed, because Nixon had made tape recordings of numerous White House conversations that corroborated Dean's allegations. Access to these tapes became a central issue in the scandal.

By May 1973, Nixon had to accede to demands that a special prosecutor be appointed. Jaworski was approached for the job, but he turned it down because he did not believe the position offered sufficient independence of action. The post went instead to Archibald Cox, a professor at Harvard Law School. The "Saturday Night Massacre" of October 20, 1973, when President Nixon fired Cox for his insistence that Nixon produce some of the tapes, tended to confirm Jaworski's fears. But the firestorm of protest following the Cox firing made it politically almost impossible for the White House to move against any successor. When Alexander Haig, Nixon's chief of staff, approached Jaworski with assurances of adequate independence, he reluctantly accepted the post.

No one could accuse Jaworski of being a Nixon-hater. He had voted for Nixon in 1968 and again in 1972. And when he took over as special prosecutor he thought that only Nixon's subordinates, and not the president himself, were guilty of substantial wrongdoing. This optimism disappeared when he first heard some of the tapes Nixon had produced before his appointment. They showed Nixon discussing perjury and the payment of hush money to defendants in the Watergate burglary. "Nixon," Jaworski later wrote, "had sat in the chief executive's massive, carved mahogany desk, flanked by the American and District of Columbia flags and conspired with [John] Dean and [H. R.] Haldeman to evade the law like criminals in a dingy saloon" (Jaworski and Schneider 1981, 178). At that moment Jaworski foresaw with blood-freezing clarity the way the Watergate matter likely would end.

Jaworski was to obtain convictions of Attorney General John Mitchell, presidential aides John Ehrlichman and H. R. Haldeman, and convictions of or guilty pleas from a number of others. He chose not to indict Nixon himself, instead having him named an "unindicted co-conspirator." A turn-

ing point was the struggle between the special prosecutor and the White House over the production of additional tapes in the course of these prosecutions. Without them, the full extent of White House wrongdoing might never come to light. On April 16, 1974, Jaworski issued a subpoena for these tapes, and on May 20 Judge John Sirica ordered Nixon to produce them. But Nixon appealed, and Jaworski feared that a lengthy appeal process could effectively thwart the investigation. He asked the Supreme Court immediately to review the matter, bypassing the intermediate court of appeals. Because of the gravity of the issues presented, the Supreme Court granted the request. Jaworski argued before the Court on July 8, 1974, and the Court rendered its decision just over two weeks later, on July 24. The two central legal issues were justiciability and executive privilege. The president argued that the dispute over the tapes was not justiciable—did not present a "case or controversy" over which the Constitution granted the Court jurisdiction—because it was a dispute within the executive branch between the president and one of his subordinates, namely Jaworski himself, and that therefore the doctrine of separation of powers precluded intervention by the Court. Essentially this claim amounted to a repudiation of assurances made to Jaworski that as special prosecutor he would have the power to take the president to court. Still more central to the case was the president's argument that the tapes were protected by executive privilege, the presidential discretion to withhold information.

As a practical matter, the Supreme Court opinion in *United States v. Nixon,* 418 U.S. 683 (1974), was a total victory for the special prosecutor. The Court ruled unanimously that Nixon had to produce the tapes. Legally speaking, the holding was narrow, with the Court merely concluding that the case was justiciable and that in the particular circumstances the interest of law enforcement—ironically, a perennial Nixon campaign theme—took precedence over the claim of executive privilege. The political result was decisive, however. The tapes Nixon produced in response to the ruling contained the famous "smoking gun," the conversation of June 23, 1972, just six days after the Watergate burglary, in which Nixon and Haldeman discussed using the Central Intelligence Agency to thwart the Watergate investigation. The House of Representatives' Judiciary Committee had already approved three articles of impeachment in votes taken between July 27 and 30, after the Court's ruling but before production of the new tapes. The clear evidence of obstruction of justice contained in those tapes made Nixon's impeachment and removal from office virtually certain. On August 9, 1974, President Nixon resigned.

Jaworski's last major public efforts related to the so-called "Koreagate" scandal, in which persons acting for the government of South Korea allegedly tried to bribe U.S. congressmen. In the late 1970s, Jaworski investi-

gated this matter on behalf of the House of Representatives. Though hobbled by the refusal of the South Koreans to produce a critical witness and by other difficulties, Jaworski was able to secure the conviction of one congressman and two private citizens. The House of Representatives reprimanded three of its other members.

In his last years, Jaworski gradually cut back his legal work. He died from a heart attack while cutting wood at the Circle J, his Texas ranch, on December 9, 1982. During his lifetime he had received numerous awards and honors, including the Legion of Merit and at least ten honorary degrees. Among other service to the profession, he was president of the State Bar of Texas (1962–1963) and of the American Bar Association (1971–1972).

In the end, Jaworski's career is testimony to the value of straightforward ethical principles steadfastly adhered to. When a more convoluted moral personality might have found reason to temporize, Jaworski followed his own uncluttered conscience.

—Tim Hurley

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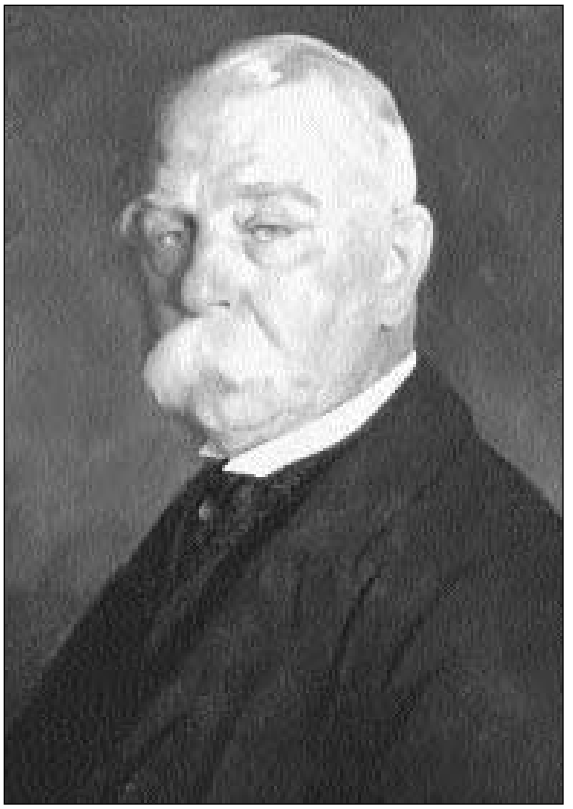
JOHNSON, JOHN GARNER

(1841–1917)



John Garner Johnson
The Corcoran Gallery of Art

John G. Johnson, noted corporate lawyer and art collector, was born in Chestnut Hill, Philadelphia, Pennsylvania, to John and Elizabeth Johnson. The son of a blacksmith and a milliner, he acquired his legal education from the law office of Benjamin and Murray Rush, graduating from the Law Department of the University of Pennsylvania in 1863. (He received an LL.D. from the University of Pennsylvania in 1915.) As part of his education, he participated in the Moot Courts of the Law Academy, becoming a member in 1862. This was also the year he joined the Union Army, a private in Battery A. He fought in the battle of Harrisburg and then returned to Chestnut Hill.

Starting as an office boy, he began by copying the legal papers of his employer, who, with his mother, encouraged him to study law. Murray Rush gave him odd jobs to be done for his relatives and friends. One of Rush's friends, Henry Williams, took Johnson under his wing. This was an important turning point in Johnson's career (Winkleman 1942, 21–23).

Williams was the counsel for the Pennsylvania Company, an insurance company that had turned to special corporation work. Williams employed William F. Judson, who would become Johnson's partner when Judson took over Henry Williams's affairs. This made two important contributions to

Johnson's career. First, it gave him an income while he was just starting out at a time when most beginning lawyers were struggling. Second, it lowered the class barriers that had prevented many able men from entering the profession (Winkleman 1942, 25, 27). Johnson was appointed general counsel of the Pennsylvania Company when Judson died in 1870.

Johnson chose to specialize in corporate law because he noticed that few people were selecting that specialty. It turned out to be a wise choice. He was widely recognized as "the King of the American Bar" (Twiss 1962, 208). So expert did he become that business leaders and corporate CEOs considered his advice the equivalent of a court opinion. For someone who wrote no judicial opinions nor published any books, Johnson had an enormous impact on American law. As counsel for the Pennsylvania Railroad Company, the New York Central Railroad Company, the U.S. Steel Corporation, the American Distilleries Company, and the National Hardware Association, he argued the corporations' position in a number of precedent-setting cases, including the *Oleomargarine Case* (1904), the *Northern Securities Case* (1904), and the *Standard Oil Cases* (1911).

The list of Johnson's cases is impressive. As the defender of the corporations' interests, he argued *U.S. v. E. C. Knight Co.* (1895), *U.S. v. Joint-Traffic Assn.* (1898), *Northern Securities Co. v. U.S.* (1904) and *Harriman v. Northern Securities Co.* (1905), *Standard Oil Co. of N.J. v. U.S.* (1911), *U.S. v. American Tobacco Co.* (1911), *U.S. v. Reading Co.* (1912), and *Wilson v. New* (1917). Two of these cases introduced key elements in the Social Darwinist interpretation of the Constitution during the "Robber Baron" era (1890–1929).

U.S. v. E. C. Knight Co., 156 U.S. 1 (1895), marks a turning point in constitutional interpretation of the commerce clause. Johnson's approach to that case is typical of his legal style. First, he chose a new point of law, which his opponent was not prepared to defend against. Second, he appealed not to principle or precedent, but to practical considerations of business. Finally, he tried to isolate in his briefs a single point that would command the attention of the justices, allowing them to do what they wanted to do (Twiss 1962, 210–211).

In *Knight*, Johnson developed the idea that manufacturing is not interstate commerce; only transportation is interstate commerce. While manufacturing may have an indirect affect on interstate commerce, Congress could only regulate when the objects of manufacture enter the stream of commerce. The Supreme Court turned to this argument as "an oasis in the shifting sands of contention" (Twiss 1962, 210).

Drawing on the belief that Congress had no authority to limit, under the commerce clause, a corporation's right to acquire, control, and dispose of its property in several states, he argued that it was immaterial that the property

might become future subjects of commerce. Until they entered the stream of commerce, they were to be regulated by state law only. Manufacturing occurred before commerce began. Congress regulates "contracts to buy and sell or exchange goods to be transported, the actual transportation and instrumentalities of transportation," not manufacturing.

Johnson's argument was based on dual federalism. He astonished his opponent by conceding that there was a monopoly in the refining of sugar. States had the authority to regulate within their borders and the federal government did not. If manufacturing was not commerce, it fell within the states' prerogatives.

This case was a turning point for Johnson's career as well. From this point on, he was the person to whom corporations turned for advice. Even if he did not argue the case in court, his advice was frequently followed. Such was his reputation that Presidents James Garfield and Grover Cleveland both offered him a seat on the Supreme Court. He turned them both down.

Northern Securities Company v. U.S., 193 U.S. 197 (1904), involved the proposed merger of the Northern Pacific Railroad and the Great Northern through a holding company. Johnson argued that the combination, rather than being in restraint of trade, was to further trade because it was created to defend the two companies from takeover by the Union Pacific Company. In addition, owning stock in both companies was not illegal under the Sherman Act. Speaking to a packed Supreme Court courtroom, Johnson said the ownership of the stock did not necessarily lead to a conspiracy. "Few of us have a desire to commit murder," he said, "but many of us use a razor, which gives us the power to murder" (Winkleman 1942, 217). Unless a conspiracy exists, trade is not restrained.

The decision in that case was five to four in favor of the government, with Justice David Brewer writing a separate concurrence. It was also the occasion for one of Justice Oliver Wendell Holmes's great dissents. The narrowness of the government's victory confused the business world and left the impression that Johnson's was only a technical loss. A representative from the Northern Securities Company announced, "The properties of the Northern Securities Company are still there. They are as good as ever" (Winkleman 1942, 221). The spirit of the times prevailed, and Johnson's positions reflected that spirit.

The panic of 1907 was one of the reasons the Department of Justice brought suit against the Standard Oil Company, leading to a dissolution order. *Standard Oil Company of New Jersey v. U.S.*, 221 U.S. 1 (1911), was another technical victory for the government. When the Supreme Court announced the decision, it adopted Johnson's argument that only "unreasonable" restraints of trade were forbidden by the Sherman Act. "Bigness" itself was not necessarily bad.

These three cases reflect Johnson's basic contributions to U.S. constitutional law. They also raise the question of whether Johnson merely reflected his times or shaped them. Certainly he provided the legal rationale for the corporations' expansion, a rationale that protected them even when he lost the case. Johnson himself never lost faith in those principles.

Nonetheless, Chief Justice Edward White is reported to have said,

> When I first became a member of the court, Johnson was constantly before us, and we all thought of him as by far the most powerful advocate of his day. But when later Johnson argued the great anti-trust cases, which in fact gave him his national reputation, all the justices felt that he was not at his best because he had lived into an economic era which he could not understand. (Winkleman 1942, 244)

The same, of course, could be said for the court itself.

His courtroom style has been described as "forceful." He was not flamboyant, but his presentation was compelling as he hit his points "like railroad spikes into a tie" (Carson 1917; quoted in Twiss 1962, 206). His speeches were brief, concentrating on a few points, which he emphasized with authority. He overwhelmed his opponent with his expertise.

Winkleman's description of Johnson's style suggests he would not have succeeded as well in the television age. Yet he owed nothing to grace of manner or tricks of voice. He was bulky and awkward, and his voice was so high in pitch as to be sometimes shrill. In pouring out his words he was like a high-pressure fire hose. To hear him the first time was to suffer disappointment. His reputation for getting verdicts stirred visions of a Choate or a Cochran, a Webster or a Brewster, a Culyer or a Sheppard. The actuality was simply force, overwhelming force: a huge man with an intense gaze, sweating at every pore, with both hands extended, one holding his eyeglasses, the other clutching his handkerchief, driving home a few points like railroad spikes into a tie. He jammed meaning into the words; his speeches were as rapid as they were brief. No one could tear the heart out of a situation with so swift and so powerful a hand, or spend so little time and effort on mere detail (Winkleman 1942, 200).

This did not mean that he would not use the intricacies of the law to win. A congressional investigation of the Sugar Trust is a case in point. The investigation concerned the contributions the officers of the American Sugar Refining Company had made to members of Congress in an attempt to influence the Wilson-Gorman Tariff of 1894. Indictments were issued, but the officers refused to give the information on the grounds that they had not been served a *subpoena duces tecum*, an excuse openly laughed at by journalists and members of the bar. On advice of counsel, they stated that

their contributions to state and local elections were none of Congress' concern. Since both parties had benefited from the contributions, there was political pressure to quash the indictments, and that was eventually done, leaving the public outraged.

While everyone castigated Congress, the Sugar Trust, the political parties, and the Justice Department, Johnson himself was not criticized. The public accepted him as a hired advocate who had served his clients well. Indeed, he was even more admired by the companies he served as someone who could protect their interests (Winkleman 1942, 180).

Johnson's sense of humor tempered his forceful personality along with his ability to establish a rapport with the jury. When an opposing lawyer based his arguments on Gilbert Bacon's *Digest of English Law,* Johnson, relying solely on American precedents, turned to the court and said, "Surely, you are not going to prefer a little bit of English bacon to the whole American hog" ("John G. Johnson, Lawyer" 1917, 1358).

Known for his eccentric billing practices as much as for his courtroom ability, lawyers told stories about his low fees. The most famous example deals with his bill to the Sugar Trust of three thousand dollars. The other lawyers on the case asked him to reconsider because they were then embarrassed to present their own much larger bills. Johnson refused, saying that he had charged the exact amount that his services were worth ("John G. Johnson, Lawyer" 1917, 1354). Another time he returned a check for $25,000, charging, instead, $5,000. The board of directors of the coal company had been prepared to pay him $50,000 (Winkleman 1942, 297). This eccentricity made him available to those who were not millionaires or trust officials. His dedicated defense of these clients was as legendary as his billing practices.

The majority of his cases involved the usual business of lawyers: wills, divorces, property disputes. He prepared as extensively for these as he did for the cases he argued before the U.S. Supreme Court. One of the keys to his success at the trial level was his sensitivity to the politics of the times, including court politics. He knew which judge held what opinion and argued accordingly, delaying his case when the appropriate judge was not present (Winkleman 1942, 308). This knowledge of his audience, combined with a phenomenal memory, made him a master trial lawyer.

Johnson married Ida Powell Morrell, a widow with three children, on July 15, 1875. All indications suggest it was a happy marriage, and Johnson treated the three children like his own. His wife served as his hostess until her death in 1908.

Although his wife was socially active, Johnson was not. He preferred to keep a low profile, even refusing to put his name in *Who's Who*. He was a modest man. In fact, his will instructed that no monument was to be

erected. Instead, "a plain low head and foot stone" with nothing but his name, date of birth and death were to be provided (Winkleman 1942, 286).

His will also provided that his house was to be turned into an art museum. He gave his extensive art collection to Philadelphia. As knowledgeable in art as he was in law, he served as a member of the Fairmont Park Commission, which built up the Wilstach Collection. His own impressive collection included works by Monet, Degas, Whistler, Sargent, and Homer. Today, he is remembered as much, if not more, for the art collection as he is for the great cases he argued.

—Jane Elza

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JOHNSON, REVERDY

(1796–1876)

Reverdy Johnson
Archive Photos

After the death of Daniel Webster in 1852, Reverdy Johnson was widely regarded for many years as the leader of the American bar. Also a prominent U.S. senator from 1845 to 1849 and again from 1863 to 1868, and briefly attorney general in the Zachary Taylor administration, he culminated his long career of public service as the U.S. minister to Great Britain in 1868 and 1869.

Born in Annapolis, Maryland, on May 21, 1796, to John Johnson—who served in both houses of the Maryland legislature, as state attorney general, as a judge of the court of appeals, and as chancellor—and Deborah Johnson, the daughter of Reverdy Ghieselen, Reverdy Johnson attended grammar schools and St. John's College in Annapolis until he was sixteen years old. He then began reading law, first with his father and later with a local judge. Serving briefly in the War of 1812 as a private in the Maryland militia, he was admitted to the bar in 1816 at age twenty (Steiner 1914, 1–2).

After one year in Upper Marlborough, Johnson moved his law practice to Baltimore, where it continued for almost sixty years. He soon won a reputation for thoroughness of preparation, skill in cross-examination, and deep-voiced, compelling argumentation. On November 16, 1819, Johnson married Mary Mackall Bowie, with whom he would have fifteen children. From December 1821 until March 1828, he was a senator in the state assembly, but he ultimately resigned because of the pressure of his professional responsibilities, which included coediting (with Thomas Harris) seven volumes of decisions of the Maryland Court of Appeals from 1800 to 1826 (Steiner 1914, 3–10).

By the 1830s, Johnson had an annual income of over ten thousand dollars from his law practice, mostly as an attorney for the Baltimore and Ohio Railroad, the Bank of Maryland, and other corporations. In 1842, however, he suffered a setback that might have ended the legal career of a less determined and resourceful attorney. While practicing shooting with a pistol, he received a ricochet that blinded his left eye, and the right eye soon became so severely strained that it also failed, which compelled Johnson thereafter to rely on others to do his reading for him and to rely on a tenacious memory. Rarely thenceforth did he cite specific authorities in his legal presentations, preferring instead to argue from fundamental principles (Steiner 1914, 11, 15–17).

Entering middle age, Johnson was described as sturdily built, of medium height, robust and strong featured, with a great shining dome of a head fringed with graying hair. He was an avid Whig, attending that party's national conventions in 1839 and 1844, and was selected by a Whig-dominated Maryland legislature to the U.S. Senate, beginning his service in that body on March 4, 1845. There he doggedly argued that Congress had no right to prohibit slavery in any of the western territories and persistently proposed that the issue be settled by the U.S. Supreme Court, then headed by Chief Justice Roger Taney, Johnson's close friend and fellow Marylander. On March 9, 1849, he resigned his Senate seat to accept appointment by President Zachary Taylor as U.S. attorney general, an office he held only until Taylor's death in July 1850, after which he resumed his private law practice in Baltimore. Perhaps his most significant act as attorney general was his refusal to allow the government of Prussia to fit out a warship in New York harbor in violation of U.S. neutrality laws (Steiner 1914, 18–21, 32–36).

While he was extremely busy trying patent and corporate law cases during the 1850s, Johnson also began to acquire a reputation as an authority on international law. In 1854, he was sent by the government to London to argue a claims case, and while there he became a popular figure among public men and prominent members of the English bar. Back home, his fees had

grown to be among the largest of any American attorney; yet in 1856 he argued pro bono for the defense before the U.S. Supreme Court in the *Dred Scott* case. According to George T. Curtis, one of the opposing attorneys, Johnson's "forcible presentation of the southern view of the Constitution, in respect to . . . slavery in the territories . . . contributed more than anything else to bring about the decision that was made in this case." Chief Justice Taney, who wrote the most important portion of the *Dred Scott* decision, was known to be greatly influenced by Johnson (Steiner 1914, 37–38).

Meanwhile, Johnson had abandoned the Whig party and announced his affiliation with the Democrats, his former opponents. He campaigned for James Buchanan for president in 1856 and supported Stephen Douglas for that office in 1860. He publicly spoke in favor of the so-called popular sovereignty solution to the slavery issue, of which Douglas was the principal proponent, and he urged the defeat of Abraham Lincoln, whom he accused of "reeking with the grossest heresies of political abolitionism." After Lincoln's election, however, he served as one of five Maryland delegates to the February 1861 Washington "Peace Congress," in which he was conspicuous for compromise and conciliation to stave off civil war. He deplored Southern secession but also opposed any effort of the federal government to force the seceding slave states back into the Union (Steiner 1914, 40–50).

Once the Civil War began at Fort Sumter, however, Johnson shifted sides and even publicly differed with his friend Taney in writing a defense of President Lincoln's constitutional authority to suspend the writ of habeas corpus in wartime, despite the chief justice's declaration to the contrary in *Ex parte Merryman* (1861). According to Johnson, the president had a constitutional duty to take care that the laws were faithfully executed, and that duty could frequently be performed in wartime or in cases of serious rebellion only by military means. Whereas the power to declare war was vested in Congress, the power to conduct that war, once declared, was exclusively bestowed by the Constitution on the president, who as commander in chief of the armed forces could therefore lawfully suspend the writ of habeas corpus and imprison people aiding or attempting to aid the Southern rebellion. This defense of presidential power foreshadowed the reasoning later used by Lincoln to justify his issuance in September 1862 of the Emancipation Proclamation, as well as to claim legitimacy for other controversial presidential acts during the Civil War (Steiner 1914, 51–52; Moore 1862, 2:185–193).

As the war progressed, Johnson denounced the "mad and wicked men" in Maryland who wanted that state to join the Confederate "armies of pestilence." Any person who favored secession was "in mind a fool, or in heart a traitor." Yet he also took fees from clients accused of disloyalty to win their freedom from federal confinement. Such efforts to stay in contact with both

pro-Union and anti-Union elements in his state paid off politically, first in his election to the state legislature in November 1861, and then in his selection by that body to the U.S. Senate, in which he began his second period of service in December 1863 (Steiner 1914, 53–57).

Meanwhile, Johnson's continued friendliness toward individual secessionists, while publicly deploring their cause, influenced Secretary of State William H. Seward to appoint him as a special agent to investigate and report on complaints lodged by European consuls at New Orleans against General Benjamin F. Butler, who had offended them as he tightened the federal military occupation of that city. As a result of Johnson's inquiries, Butler was relieved of his command. Soon afterward, however, Johnson ended his support of the Republican administration, and in 1864 he zealously backed George McClellan, the Democratic "peace" candidate for president against Lincoln, whom he accused of seeking reelection by employing the "most unscrupulous and unexampled abuse of patronage and power." After Lincoln's assassination, Johnson defended Mary Surratt, one of the accused conspirators, without fee, but she was convicted by a military tribunal and hanged (Steiner 1914, 58–60, 115–116).

Although Johnson's biographer, Bernard Steiner, asserted that his subject "appeared before the Supreme Court in *Ex parte Milligan* and there won his case," which, if true, would have involved Johnson in one of the most important decisions of the wartime Court, it appears that he actually played no part in that particular proceeding of 1866. He did, however, represent a Catholic priest and an attorney, both Missourians, before the Supreme Court in contesting the constitutionality of a provision of the Missouri Constitution of 1865 that required a retrospective oath of loyalty to the United States before certain citizens of that state could practice their professions. In January 1867, the Court ruled in the companion decisions of *Cummings v. Missouri* and *Ex parte Garland* that such test oaths were unconstitutional (King 1960, 251–255; Niven 1998, 108–112, 146–147; Kutler 1977, 170–174; Randall and Donald 1969, 646; Niven 1995, 406–407).

Later in 1867, Johnson's longtime political opponent, Senator Charles Sumner, conceded his "eminence at the bar of the Supreme Court. He has no superior," said the Massachusetts abolitionist. But Secretary Seward voiced a common criticism of Johnson when he called him "untruthful." Perhaps the most apt contemporary characterization of Johnson, however, came from George H. Williams of Oregon, who served with him in the Senate and was later U.S. attorney general under Ulysses S. Grant. "Mr. Johnson," he said, "was an exceedingly amiable and accomplished gentleman. . . . He was a great lawyer and had a remarkable and accurate knowledge of the decisions of the Courts at his command. He was a frequent speaker in the Senate and a ready debater upon almost all of the questions

that arose in that body. . . . He was not a man of very strong convictions and . . . could speak with equal readiness and facility upon one side of a question, as upon the other. . . . He was quite blind . . . and had to depend largely upon his memory, which was evidently a storehouse full of the learning of the law" (Steiner 1914, 118–119, 194).

During Andrew Johnson's 1868 impeachment trial, Reverdy Johnson, although by that time the oldest member of the Senate, was a dominant force among the minority of senators backing the president. At one point during the trial, he elicited important testimony from General William T. Sherman that greatly weakened the prosecution case. He also helped to arrange a private meeting in which President Johnson was induced to make certain pledges to several Republican senators that won him the votes needed for acquittal (Steiner 1914, 198–203; Trefousse 1989, 319–320, 323).

That same summer, the position of minister to Great Britain fell vacant and President Johnson offered it to Senator Johnson. Facing almost certain defeat for reelection because of having voted for key elements of the Republican Reconstruction program, Johnson gratefully accepted the appointment, which was unanimously confirmed by his Senate colleagues, who had long been impressed, as James G. Blaine put it, by Johnson's "talent for diplomacy and thorough knowledge of international law." Also, as Charles Sumner, the veteran chairman of the Foreign Relations Committee, declared, Johnson was "conservative and wise, . . . very amiable, and there was a general disposition to give him the compliment of the brief term of service which remained under the present administration" (Blaine 1884, 2:489; Pierce 1893, 383; Steiner 1914, 230–236).

Resigning his Senate seat on July 10, 1868, Johnson made his way to London carrying instructions from Secretary of State Seward to try to settle three Anglo-American controversies involving naturalized Irishmen, the location of the Canadian-American boundary line in Puget Sound, and the so-called *Alabama Claims* for damages allegedly incurred by citizens of both nations resulting from the American Civil War. Where hard bargaining was desirable, however, Johnson's legendary amiability and his hunger for popularity in England were liabilities. Although conventions that he negotiated with the British government covering all three of the above-mentioned issues were reluctantly approved by Seward and the president and submitted early in 1869 to Sumner's Foreign Relations Committee, they encountered almost immediate opposition from Republican Radicals reluctant to approve any measures submitted by the president they had recently impeached and his "evil genius," Secretary Seward. Anglophobic senators, of whom there were many, claimed to be furious about Reverdy Johnson's widely publicized "kowtowing" to the British aristocracy, and especially expressed indignation that he had been openly friendly to John A. Roebuck

Thomas Cooley: An Attorney as Scholar and Statesman

Although this book concentrates on lawyers who have distinguished themselves in trial or appellate advocacy, many others have distinguished themselves in other ways. Thomas Cooley (1824–1898) was acknowledged to be one of the greatest attorneys of the nineteenth century, and today the prestigious law school at the University of Michigan, where he once taught, is named after him.

Cooley's *Constitutional Limitations* (1883) was one of the most widely read American law books of the nineteenth century. In addition to writing this and other books and teaching at Michigan, Cooley served for many years on the Michigan State Supreme Court. He was also president of the American Bar Association.

Widely recognized for his fairness in assessing claims between rival parties, Cooley was appointed to, and was selected as chairman of, the Interstate Commerce Commission. This commission helped regulate railroads and was responsible for setting policies in regard to administrative law that were emulated by later federal agencies.

Cooley believed that "a public office is a public trust," and his example has served as an inspiration to many other attorneys who have followed in his footsteps. Professor Paul Carrington has described the work of Cooley and some of his outstanding successors in a recent book entitled *Stewards of Democracy* (1999).

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and John Laird, two notorious partisans of the Southern Confederacy in the British Parliament. Some senators, like Sumner, were displeased that they had not been consulted during the progress of Johnson's negotiations, and some were genuinely concerned, as was Seward, that the third convention incorporated not only the *Alabama Claims* but also every other claim on both sides since the previous settlement of such disputes in 1853, a distinct advantage to Great Britain. Moreover, in justifying his course of action in two long dispatches sent to Seward, Johnson appeared to argue from the British perspective rather than from that of his own country (Cook 1975, 63–67; Willson 1928, 336–342; Steiner 1914, 237–250).

The Johnson-Clarendon Convention of 1868 was unanimously rejected by the Foreign Relations Committee and received only a single vote in the full Senate. Still, its provisions were not appreciably less favorable to the United States than the Treaty of Washington of 1871, which dealt substantially with the same issues in almost the same way and led to the momentous Geneva arbitration awards of 1872. In speeches, pamphlets, and interviews, Johnson defended what he had done in England, but, as Hamilton

Fish, secretary of state in the Grant administration, declared, the politics of the period had been against him. The jury—the American people—had been unimpressed (Steiner 1914, 251–258).

At age seventy-three, Johnson resumed his Baltimore law practice. "Universally respected" and "an antagonist to be dreaded to the end," he was a "colossal and familiar figure," recognized by his fellow lawyers as the "head of the bar of the Supreme Court." Displaying to the very end his "profound grasp of constitutional subjects" and his "wonderful power" of persuasion, he also retained a capacity for intense labor that was "almost miraculous. It despised the weight of years and the loss of sight" (Steiner 1914, 259–260; Cook 1975, 68–71).

On February 10, 1876, Johnson was a house guest at the governor's mansion in Annapolis, when, probably because of his blindness, he fell on a paved area outside the building and suffered head injuries that ended his life. The Maryland General Assembly eulogized him as having "the consummate ability and commanding intellect, which exalted him as the foremost jurist of America," and the U.S. attorney general praised him during a special ceremony in the Supreme Court as "one of the most eminent lawyers of this country and one of the very foremost counsellors of this court." Yet, amid the approbation for Johnson that accompanied him to the grave, his critics muttered certain guarded reservations, resembling those earlier expressed by Gideon Welles. Suggesting that Johnson had at least inferentially promised to vote against impeaching the president in return for having his son-in-law appointed U.S. district attorney in Maryland, Welles wrote that although the senator had "a good deal of legal ability, he is not overburdened with political principles" (Steiner 1914, 263–269; Beale 1960, 3:56).

—Norman B. Ferris

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JONES, WALTER

(1776–1861)

Walter Jones
North Wind Picture Archives

Walter Jones was among the most scholarly and influential lawyers in the new Republic, leaving an indelible mark on American constitutional law during its most formative years. He argued not only some of the most important cases of the period before the U.S. Supreme Court, but he also argued the greatest number of cases before the Court. His record of 317 cases is unparalleled, standing at more than twice the number of cases any attorney argued before the Court in the twentieth century (Sullivan 1998).

Jones was born in "Hayfield," which is listed as being in either Lancaster or Northumberland County, Virginia, on October 7, 1776. He was born to Alice Flood and Dr. Walter Jones, a prominent physician. Dr. Jones served as a delegate to the Virginia Constitutional Convention of 1788 and as a member of Congress representing Virginia from 1797 to 1799 and again from 1803 to 1811. Thomas Jefferson considered Dr. Jones to be a political ally and a personal friend, a relationship that would later yield benefits for the son of the doctor.

Jones was educated at home, receiving a classical education from Scottish tutor Thomas Ogilvie. He read law in Richmond, studying under Bushrod Washington, a man of "rare moral and judicial qualities" whom President John Adams appointed an associate justice of the Supreme Court in 1799 (Warren 1926, 1:385). Jones proved to be an able student and was admitted to the Virginia bar in May 1796, before reaching the legal age of twenty-one.

He began his legal career practicing in Fairfax and Loudoun counties in Virginia. Jones quickly ascended the ranks of the Virginia legal establishment. Soon he relocated his practice to Washington, where the Supreme Court was moved from Philadelphia in 1801. In 1802, President Jefferson appointed Jones the U.S. attorney for the District of the Potomac; two years later Jefferson appointed him the U.S. attorney for the District of Columbia, an office Jones held until 1821. During his tenure in office Jones garnered considerable praise and built a solid reputation as a first-rate lawyer, one of a handful of attorneys that were considered the American equivalent of a British barrister.

In May 1808, Jones married Anne (or Ann) Lucinda Lee. Anne was the daughter of Charles Lee, the U.S. attorney general in the administrations of Presidents Washington and Adams, and the granddaughter of Richard Henry Lee, a signer of the Declaration of Independence. Anne bore fourteen children, eleven daughters and three sons. Twelve of the children lived to adulthood, but all three sons died unmarried and without progeny.

Jones possessed a deep and penetrating understanding of law, both in terms of legal theory and in practice. Though his contemporaries included such keen and nimble legal minds as Daniel Webster, William Pinkney, Luther Martin, Charles Pinkney, Henry Clay, Rufus Choate, William Wirt, and numerous others, Jones easily stood among them. Jones was described as being "fully their equal in legal ability" (Warren 1926, 2:69). A correspondent for the *New York Tribune* referred to Jones as "the rival of Pinkney and Wirt and Webster and other leading counsel," noting that "as a common law counsellor he excelled them all in depth and variety of learning" (Warren 1926, 2:70n). Charles Sumner, in watching the arguments in *Binney v. Chesapeake and Ohio Canal Company* (1835), wrote that Jones was "a man of acknowledged powers in the law, unsurpassed, if not unequalled, by any lawyer in the country. . . ." (Warren 1926, 1:787).

Propelling Jones into the forefront of the legal profession was his towering intellect. He was said to be endowed with a photographic memory that not only enabled him to remember virtually everything he read, saw, or heard, but also imparted the ability to recall with precision where he had read, seen, or heard it. Jones was also gifted in his ability to employ analo-

gies, allusions, and anecdotes to reify his complex, theoretical, and abstract arguments.

Jones was a man of small physical stature, but he possessed a powerful personal charisma. He was a modestly handsome man, with soulful eyes, which a fellow practitioner at the federal bar proclaimed "for piercing intelligence and shrewdness of expression I have never seen surpassed" (Warren 1926, 1:69). His appearance was made all the more intriguing by his eccentric dress. Regarding Jones's style of fashion, a correspondent to the *Boston Post* characterized him as being as "eccentric in his dress as John Randolph. The other day he appeared in Court in gray, and a stranger would sooner have taken him for a Georgia cracker than the eminently great lawyer" (Warren 1926, 1:70n).

He was not, however, a fiery, or even a rousing, orator as were some of his cohorts. Jones's general lack of an impassioned style and manner of speaking before the court adversely affected the public's perception of him. One reporter from the *New York Herald,* covering arguments in *Vidal v. Philadelphia* (1844), noted that the packed courtroom audience, eagerly awaiting Daniel Webster's presentation, grew somewhat restless awaiting the "transition from Gen. Jones soporifics" (Warren 1926, 1:127). The same *New York Tribune* correspondent who had lavished such praise on Jones's intellect and legal knowledge offered the following, much less flattering, narrative of Jones's courtroom performance:

> He speaks slowly and in a low tone, but with great purity of diction and clearness of thought. There is, however, a great want of force in his manner and few listen to him. Some years ago, a citizen of Ohio, after being in Court during an argument of General Jones, said to one of his acquaintances that he had witnessed that day the greatest curiosity which had ever met his observation; he had heard a man talk for two hours in his sleep! (Warren 1926, 1:70n).

Although the popular perceptions of Jones's presentations were anything but complimentary, Jones's fellow legal professionals praised his ability to communicate in the courtroom. His arguments before the court focused on the legal aspects of the case and were not made for the purpose of impressing a public audience or jury. His arguments were deft expositions on the law, making full use of the library of knowledge stored in his uniquely powerful memory, and thus frequently surpassed the ability of the average person, untrained in the law, to fully comprehend or appreciate. Hence, Jones was most effective in appellate tribunals arguing before judges who were educated at least to some degree in the law. Indeed, the difference in the perception of Jones's oral arguments between laypersons and members of the

bar is striking. Rufus Choate marveled at Jones's "silver voice" (Wright 1933, 203). Another colleague at the bar, having witnessed the oral arguments in *Groves v. Slaughter* (1841) wrote of Jones:

> His voice was a thin, high pitched one, and he was without any pretension to grace of manner. Few men who occupied prominent places in the profession were ever listened to with more interest than Mr. Jones. His fluency was only equalled by the choiceness of his language. He was so deliberate, so quiet, that perhaps fluency does not accurately describe his oratory. He was one of the closest reasoners. He never spoke at random. His style was simplicity itself. (Warren 1926, 2:69–70)

Despite indications to the contrary, Jones apparently did possess the ability, even if he did not often employ it, to offer stirring orations for public consumption, as evidenced by an impromptu speech he made to an angry mob in the riots that gripped Baltimore in 1842. His words to the infuriated gathering apparently were effective in soothing their frustrations. Based on such conflicting views of his oration, it is quite reasonable to surmise that he possessed a range of forensic and speaking talents, but that he tailored his style to speak to his intended audience and in a manner appropriate to the forum.

Jones served as counsel in some of the most important cases before the U.S. Supreme Court, particularly those involving federal supremacy and states' rights questions. One such important case was *McCulloch v. Maryland* (1819), in which Jones joined Luther Martin and Joseph Hopkinson (who both served as counsel in the successful defense of Justice Samuel Chase in his impeachment trial before the Senate), representing the state of Maryland in what would become a landmark decision. Daniel Webster, William Wirt, and William Pinkney represented the United States, arguing that the Constitution implicitly authorized Congress to charter corporations as federal agencies and that states may not interfere with them or with congressional control of them. Jones's argument, opposing Wirt, is little accounted, having been overshadowed by Pinkney's lengthy, passionate, and elegant argument before the Court. The famous opinion announced by Chief Justice Marshall for an unexpectedly unanimous Court upholding the constitutional existence of implied powers for the purpose of carrying out enumerated powers was a loss for Jones, but there is no indication that his reputation suffered from it; Jones was said to be as adept as Wirt at arguing either side of a case.

Another such case involving the authority of states vis-à-vis the federal government was *Ogden v. Saunders* (1827), in which Jones partnered with *McCulloch* adversary Wirt to argue for the validity of state bankruptcy laws

against supersession by federal bankruptcy laws. Here Jones enjoyed some measure of success before the Court, arguing against Webster, counsel for the federal government. The Court upheld the New York bankruptcy laws but found them to be of no force, and superseded by federal statutes, in instances involving diversity of citizenship between debtor and creditor.

Jones argued in favor of the right of a state to exercise its police powers, even if it impinged on Congress's powers to regulate foreign commerce. In *Mayor of the City of New York v. Miln* (1837), Jones argued that a New York law requiring ships' masters to provide passenger lists as a means of protecting the state's fiscal resources against the influx of foreign paupers was a constitutional exercise of New York's police powers and did not interfere with Congress's authority to regulate foreign commerce. The Court agreed with Jones's argument, holding that a minor incursion on the power of Congress exercised pursuant to legitimate and constitutional powers did not infringe on Congress's power and was thus constitutional.

Jones's arguments before the Court were by no means confined to matters of competing power between the states and the national government; indeed, he argued many different questions and matters before the Court. He dealt in matters of criminal law, unsuccessfully prosecuting two of Aaron Burr's alleged co-conspirators in 1807. He was counsel in *Bank of the United States v. Deveaux* (1810), a diversity case that was decided in favor of the state courts, a decision that delayed development of a body of federal corporate law for some forty years. Jones also argued portions of the original argument in 1831 of *Charles River Bridge Company v. Warren Bridge Company*, which was not decided until 1837 after reargument before the Court. In *Vidal v. Philadelphia* (1844), Jones argued (with co-counsel Daniel Webster) against the faithful following of Stephen Girard's will. Girard, who, coincidentally, had been a director of the Maryland branch of the Bank of the United States made famous in *McCulloch v. Maryland*, willed several million dollars to the city of Philadelphia to establish a college for poor white orphans, subject to the exclusion of ministers and ecclesiastical officials from holding any position in the college, or even visiting the college. Despite Webster's fervent and intensely passionate presentation, which reportedly was much more of a fiery sermon than legal exposition, the Court unanimously upheld the terms of Girard's will.

Jones also waded into that thorniest of nineteenth-century legal issues, slavery, in *Groves v. Slaughter* (1841). The constitution of Mississippi prohibited the "introduction of slaves into [the state] as merchandise or for sale" after April 30, 1833 (Warren 1926, 2:68). The Court thus considered the question of whether this provision of the Mississippi Constitution was valid inasmuch as it conflicted with Congress's power to regulate commerce among the states. Jones joined Henry Clay and Daniel Webster as counsel

for the United States. The volatile issue thus turned on whether the Court held that slaves were commodities or citizens. If the Court chose the former, it meant that the slave provision of the Mississippi Constitution violated the commerce clause of the federal Constitution. If the Court chose the latter proposition, that slaves were deemed to be persons, the Court would then be compelled to decide whether they were citizens of the United States. In short, *Groves* contained the elements of the *Dred Scott* case. Why that decision is memorable, and *Groves* is not, is that the Court handled the matter without reaching the constitutional question. The Court construed the provision in question as requiring a statutory enactment to set it into effect; since there was none, it indeed had not taken effect.

Despite Jones's close fraternity with many great political figures of the day, he never sought elected office. He, like his father, became a friend to Jefferson and was a strong supporter of the Jefferson Republicans. Though having no taste for political office, Jones nonetheless sought to influence policy in more subtle and behind-the-scenes ways. He frequently contributed editorials on issues of the day, most of which were published anonymously, to local papers and the *National Intelligencer*.

Jones was a founding member of the American Colonization Society, along with such notable persons as John Randolph, Bushrod Washington, and Henry Clay. He sat on the committee that drafted the constitution of the society, which was created "for the purpose of colonizing the free people of colour in the United States of America, in Africa, or elsewhere" (Wright 1933, 204). Jones was an ardent supporter of the Union, believing that supporters of secession committed treason against both the United States and Virginia.

Other than his positions as district attorney, the only other government offices that Jones held were military positions. In 1821, President James Monroe commissioned him a brigadier general in the militia. He later held the rank of major general in the militia of the District of Columbia. His military duties were mostly confined to leading forces in inaugural parades and other such displays of pageantry, as well as more somber ceremonies such as funerals. He oversaw the forcible quelling of riots in Washington in 1835. Jones's one wartime experience occurred in the War of 1812, in the 1814 battle of Bladensburg (Maryland). The militiamen were little match for the British forces, who fairly easily dispersed the American resistance and occupied Washington, burning the Capitol, White House, and other government buildings. For many years thereafter, Jones found himself, among several officers, on the defensive for his actions in the battle (Shepard 1999).

Financial problems ultimately caught up to Jones, who was a poor manager of money despite being a wise investor (Shepard 1999). He was gradu-

ally forced to sell his land holdings in Essex and Fairfax counties in Virginia, as well as his property in Washington and Alexandria, some of which had been received through his marriage, which also imparted numerous slaves to Jones. Walter and Anne, along with their unmarried daughters, eventually had to take residence in the home of their daughter Virginia, who was married to a physician. Jones remained there for nearly fifteen years, until the end of his life. He continued to practice law until he was beset by his final illness, which claimed his life after ten weeks in 1861.

—Paul Lawrence

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KAUFMAN, MARY METLAY

(1912–1995)

Mary Metlay Kaufman

Oliver Arsenault and Frank H. Fazekas flank their lawyer, Mary Kaufman, during the House Un-American Activities Committee hearing into Communist infiltration of Connecticut industry, 24 September 1956. (Bettmann/Corbis)

Mary Metlay Kaufman, labor and civil liberties attorney, was also a peace and human rights activist, an educator, an expert in international law, and a fierce advocate for the oppressed. Born November 9, 1912, in Atlanta, Georgia, Mary Metlay was the fourth of five children of Nathan and Etta (Kirschner) Metlay, who had emigrated from Russia three years earlier. The Metlays moved to Brooklyn, New York, when Mary was five. Her father was a sculptor, and both her parents supported the family through various occupations, including woodcarving and shopkeeping. Although poor, Mary grew up in an intellectual and socially conscious environment that instilled in her a strong sense of justice.

Kaufman attended James Madison High School and earned her bachelor's degree in political science from Brooklyn College in 1933. For the next four years she attended night classes at St. John's University Law School while working for the Remedial Reading Program of the Works Progress Administration (WPA). She was admitted to the New York bar in 1937. While continuing to work on WPA legal projects, she also took a job with labor lawyer Frank Scheiner, preparing cases to submit to the New York Labor Relations Board and the National Labor Relations Board on behalf of labor organizations and individuals fighting unfair labor practices. Kaufman was one of the original members of the progressive National Lawyers Guild, founded in 1937, although in those early years she devoted most of her organizing energy to the Lawyers' Security League, a union of WPA lawyers. Later, she would become quite active in the guild, serving on the national executive board as well as the New York City chapter for many years.

In 1940, Kaufman took a position with the National Labor Relations Board in Washington, D.C., as a review attorney, analyzing transcripts of hearings, reporting findings to the board, and writing decisions. In 1941, she married Frederick Kaufman and soon after left her job to return to New York, where she spent the next three years as a housewife and mother to their son Michael. In 1945, having separated from her husband, she returned with her son to Washington to work for the National War Labor Board, then as director of the Enforcement Appeals Program of the National Wage Stabilization Board. Mary and Frederick Kaufman were divorced in 1952.

When the Wage Stabilization Board closed in 1946, Kaufman was recruited to join the prosecution team of the U.S. Military War Crimes Tribunal in Nuremberg, Germany, in the case against the international chemical cartel, I. G. Farben (*United States v. Krauch*). A major financial backer of the Nazi regime, Farben also manufactured the gas used in the Nazi death camps, procured slave labor from the concentration camps, and pillaged the chemical industries of occupied Europe. Twenty-four members of the board of directors of Farben were charged with crimes against peace, war crimes, and crimes against humanity—the three categories of war crimes defined at Nuremberg. Kaufman arrived in Germany in February 1947. Her parents joined her to help care for her son. She went to Nuremberg assuming she would be a trial lawyer, but when she arrived the team had already been established and she found herself, as the only woman attorney on the team, in a battle against the sexist attitudes of her immediate superiors. However, with her characteristic persistence and excellent work, she soon won a position on the courtroom team.

Kaufman's primary responsibility was to collect and organize evidence and direct witness interrogations to establish proof of I. G. Farben's support

of Nazi aggression. But as the Cold War progressed, the U.S. government began to view the Germans as potential allies against the growing threat of the Soviet Union, and the U.S. State Department often impeded the prosecution's attempts to implicate the Farben executives as war criminals. By 1948, Kaufman observed a renewed confidence in the (mostly Nazi) defense lawyers, who "were arrogantly projecting the Nazi ideology and reaffirming the pretext for the whole Nazi invasion, namely the need to defeat the Communists" (Ginger 1972, 190). In a letter to an unidentified recipient, about 1948, a disillusioned Mary Kaufman wrote, "The trial is . . . dominated by a total absence of censure of the fascist methods, techniques, and aims that existed in 1945. Today those methods, techniques, and aims are considered the natural and normal aims of any government or group of people . . . with a little more finesse perhaps so that the gas chambers and crematoriums make way for the atomic bombs" (Kaufman Papers). In the end, the defendants received only light sentences, ranging from four to eight years.

Kaufman returned to New York in the fall of 1948 to a domestic cold war, which, she later said, created "an atmosphere I hadn't watched develop and was appalled by" (James 1973, 91). Shortly after establishing her private practice in New York City, Kaufman joined the defense team for *United States v. Eugene Dennis* (orig. *United States v. Foster*). It was the first in a series of trials of members of the Communist party of the United States (CPUSA) indicted under the Smith Act, which, passed by Congress in 1940, made it a crime to teach or advocate the overthrow of the government by force or violence. The twelve defendants in the first trial were the top national leaders of the CPUSA. The trial began in March 1949 at the Foley Square courthouse, the Southern District Court of New York, under Judge Harold R. Medina. With little experience in a U.S. courtroom, Kaufman served as staff counsel, not as a trial lawyer. The other attorneys for the defense were Harry Sacher, Richard Gladstein, Louis McCabe, George Crockett, and Abraham Isserman.

At the end of the trial, the five courtroom defense attorneys were found guilty of contempt by Judge Medina, who Mary Kaufman described as "one of the most sophisticated baiters of lawyers one could find" (James 1973, 91). In addition to damaging the careers of the five attorneys, all of whom were given prison sentences, Medina's action contributed to the antagonistic political climate, and the defense found it increasingly difficult to find adequate counsel for the succeeding trials. For *United States v. Flynn*, two hundred of the attorneys approached refused to offer their services. Several of the twenty-one defendants had to represent themselves, and Kaufman was left to prepare the appeal brief on her own. Many of the Smith Act attorneys, including the five found in contempt, were members of the Na-

tional Lawyers Guild, which the House Un-American Activities Committee (HUAC) had denounced as "the foremost legal Bulwark of the Communist Party" (Ginger and Tobin 1988, 115). They were paid little or no compensation, other than minimal travel and living expenses that could be raised by defense committees. This proved especially difficult for Kaufman, who was struggling to keep her private practice going and raise her son. In spite of the hardships, the Smith Act attorneys were extremely dedicated to defending the civil rights of their clients.

Kaufman represented mystery writer Dashiell Hammett, who was president of the New York State chapter of the Civil Rights Congress and a trustee of the Bail Fund of the Civil Rights Congress, which had posted bail for the Communists. The other three trustees were millionaire Frederick Vanderbilt Field, secretary of the Council on African Affairs W. Alphaeus Hunton, and Abner Green, executive secretary of the American Committee for the Protection of the Foreign Born. In July 1951, when the Supreme Court affirmed the *Dennis* conviction, four of the defendants fled New York, forfeiting $80,000 in bail. Anticipating the decision, the Communist party national leaders had selected the four to go underground to continue the work of the party. Judge Sylvester Ryan on the Second District Court called the Bail Fund trustees before him and demanded that they submit the names of the thousands of individuals who had donated bail money to the fund. When they refused, he charged them with contempt; Hammett and Hunton were each given a six-month prison sentence. Hammett was the first client Kaufman personally represented who was sentenced to prison. She fought to get her client out on bail, but when the donor of the $10,000 bail asked to remain anonymous, the district court refused to accept it. Kaufman also handled the contempt appeal of Robert Thompson, the New York Communist party chairman and one of the apprehended *Dennis* case fugitives, in 1952. Thompson, who had earned the Distinguished Service Cross from the army for heroism in the South Pacific, had his veteran's disability benefits revoked on the grounds of treason when he was convicted as a Communist. Kaufman assisted him in a series of appeals before the Veterans Administration board to retrieve his benefits.

After the *Dennis* case, Kaufman led the defense teams in four other Smith Act trials of second-tier and state-level CPUSA leaders across the country: *United States v. Elizabeth Gurley Flynn,* the second trial held at Foley Square, in 1952; *United States v. William Sentner,* in St. Louis, Missouri, from 1953 to 1954; *United States v. Bary* in Denver, 1955; and the third Foley Square trial, *United States v. Alexander Trachtenberg,* in 1956. The first Smith Act trial had been treated very much as a political stage by both the defense and the prosecution, who were more intent on attacking or defending the political stance of the Communist party than on focusing on the in-

dividuals on trial. The Communists took advantage of the public forum to give speeches in support of their cause, while the Smith Act Victims Defense Committee, chaired by Elizabeth Gurley Flynn, and the Civil Rights Congress of New York led a massive publicity campaign to rally public support for the defendants and organized regular demonstrations outside the courthouse. The following trials were less circus-like, in part due to Mary Kaufman's leadership. She focused the defense on the civil liberties and First Amendment rights of the individuals rather than on defending the ideology of the party (Belknap 1977). "Generally speaking," she said, "it is not productive to use the courtroom as a political forum. You can be much more effective organizing outside the courtroom" (Ginger 1972, 214–215).

Although they were less dramatic, the later Smith Act trials were no less political. In his opening statement for *Flynn,* defense attorney Frank Serri told the jury, "We are at grips here with fundamental matters that go to the roots of government and democracy and freedom, and in your hands is one of the great cases of our time" (CEDC 1952). All the trials followed the same general pattern as the *Dennis* case. The indictments were the same, as were many of the witnesses, the evidence, and attorneys. The prosecution read the same lengthy quotations from the classic Communist texts, dating back to 1919 and usually taken out of context. They also produced numerous informers (former Communist party members with dubious motives) to testify to the Communist party's intent to promote violent revolution. Kaufman noted, "The government's theory was that the defendants were responsible for anything said by anybody who had ever been a member of the Communist Party because it claimed the party was the conspiracy" (Ginger 1972, 205). The outcome was also always the same—the Communists were convicted and sent to prison. Cold War propaganda and the fear it generated were very effective. "It was a period," said Kaufman, "in which no juror in the country . . . would have dared acquit" (Ginger 1972, 208).

In reflecting on her work on the Smith Act trials, Kaufman said she learned to be a "political lawyer," educating "the jurors, your co-counsel, and people outside the courtroom" (Ginger 1972, 212). The prosecution of Communist party members slowed after the Supreme Court decided in *United States v. Yates* (1957) that the Smith Act did not apply to the teaching of abstract ideas, only to action incitements. From the mid-1950s through the early 1960s, Kaufman represented individuals and organizations brought before HUAC and the Subversive Activities Control Board (SACB) and handled immigration cases of Smith Act defendants and others threatened with deportation or who had difficulties obtaining passports because of their Communist affiliations.

Nineteen sixty-six was a turning point in Kaufman's career, when she took stock of her life: "I was terribly troubled by the racism in our society

and the war in Vietnam. I spent a long time researching and reviewing the Nuremberg war crimes trials. I was overwhelmed by the similarity of the patterns of the Nazis with our own. I knew we were as guilty of genocide at home and in Indochina as were the Nazis" (James 1973, 93). She began participating in antiwar activities and applying the Nuremberg Principles to the war in Vietnam. In 1966, she organized a conference of the New York City chapter of the National Lawyers Guild commemorating the twentieth anniversary of the Nuremberg Tribunal, and published "Judgment at Nuremberg—An Appraisal of Its Significance on Its Twentieth Anniversary" in the *National Lawyers Guild Practitioner.* During this time, Kaufman developed her strategy of interpreting international law and the Nuremberg Principles to defend those arrested in political actions against war crimes. One such principle, that of individual responsibility, stated that individuals have international duties that transcend the national obligations of obedience imposed by individual states. She traveled extensively through Europe from 1966 to 1967, visiting the Soviet Union, Czechoslovakia, and the German Democratic Republic to lecture and to study their legal systems and represented the National Lawyers Guild at the International War Crimes Tribunal in Paris sponsored by the Bertrand Russell Peace Foundation in 1967 to investigate U.S. war crimes in Vietnam. In 1970, she joined an international group of speakers who toured the Federal Republic of Germany in "Solidarity with Indochina."

In December 1967, hundreds of war protesters were arrested in New York City during "Stop the Draft Week," and the National Lawyers Guild set up the Mass Defense Committee, chaired by Kaufman, to defend them. It was the first time the organization undertook direct representation of people arrested in political actions. In April 1968, when more than a thousand people were arrested during the Columbia University strike, parents of students arrested helped to raise enough money to set up the Mass Defense Office (MDO). Mary Kaufman took on the job of director with a legal staff that included attorneys Elliot Wilk, Mitchell Horn, and Richard Greenberg. From 1968 to 1971, she supervised more than two hundred volunteer lawyers, law students, activists, and legal workers and directed the defense of thousands arrested in political protests. Their defendants included Black Panther party members, draft resisters and deserters, demonstrators against welfare cuts and for school desegregation, members of the Young Lords party (a Puerto Rican youth group organizing the barrios of East Harlem and the South Bronx), and prisoners in New York City jails and Attica prison, among others. By 1970, the MDO had an active docket of more than nine hundred cases, and in their first three years they had won over 78 percent of their cases ("The Mass Defense Office" 1970). The office in New York became a model for others, and Kaufman traveled around the country

speaking at lawyers' conferences and running workshops on civil disobedience and mass defense tactics. Kaufman encouraged the legal staff to work in a collective manner and take direction from clients in planning legal strategies. One "graduate" claimed that "the Mass Defense Office changed forever the traditional dynamic between lawyer and client" (Reichbach 1996, 6). Kaufman served as a dynamic mentor for young radical lawyers wanting to fight societal and political oppression and to change the elitism of the legal profession.

In 1971, Kaufman stepped down as director of the MDO, and, for a time, she returned to her roots, representing rank-and-file union members in various cases. In the fall of 1972, she accepted a position as visiting professor of law and director of the undergraduate legal studies program at Antioch College, an alternative liberal arts school in Ohio. She also taught at Hampshire College in Amherst, Massachusetts, from 1975 to 1976. Described by one former student as a "white-haired fireball" (Sobel 1995, 36), Professor Kaufman was especially admired for her conviction and passion. At Hampshire College, the student body overwhelmingly chose her to give the 1976 commencement address. Inspiring young activists and future lawyers was one of Mary Kaufman's greatest contributions to her profession and to the movements she embraced.

While teaching, Kaufman did some legal consulting and continued her political activism. In 1972, she served as legal advisor in *United States v. James Vincent Albertini, James Wilson Douglass, and Charles A. Giuli* of anti–Vietnam War protesters known as the Hickam Three. They were arrested for breaking into the Hickam Air Force Base in Honolulu and pouring blood on military documents in protest of the air war over Indochina. Kaufman testified on their behalf as an expert on international law and the Nuremberg defense. In the end, the government reduced the charges from felony to misdemeanor to avoid presenting the sensitive files that would have established the defense's claim that the military was committing war crimes (Jones 1972, 1, 6).

From the late 1970s into the 1980s, Kaufman spent most of her time traveling and lecturing on international law, attending conferences, and organizing for the antinuclear movement. In 1977, she went to Japan as a member of an international team of experts invited to investigate the full implications of the use of the atomic bomb over Hiroshima and Nagasaki. She consulted in a series of civil disobedience trials in support of activists arrested for protesting the Trident nuclear submarine at the U.S. naval base in Bangor, Washington, and testified as an expert witness in the 1979 and 1983 trials. Still active well into her seventies, Kaufman sat on an international tribunal in Brussels to investigate the Reagan administration's foreign policy sponsored by the International Progress Organization in 1984.

She barely slowed during the last decade of her life. When not traveling, she resided with her second husband, Paul Albert, on New York's Upper West Side, where she worked on organizing her papers in order to write her memoirs. She died on September 7, 1995.

Mary Kaufman's life spanned the major social movements and political events of the twentieth century, which greatly influenced and shaped her career as a political lawyer and activist, as well as providing a certain continuity. As she put it, "I went from one case to the next as a logical step in the struggles of the people of our country" (Ginger 1972, 203). In a 1971 interview, she explained her perseverance: "I'm naturally an optimistic person or else I wouldn't be participating in the struggle. I'm the sort of person who thinks each day you are alive and fighting is that much to the good. But that doesn't mean I am a Pollyanna. I have optimism that we can in time change the system, but I know it can't be done without hard and persistent organization" (James 1973, 96).

—Margaret Jessup

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KING, CAROL WEISS

(1895–1952)

Carol Weiss King
UPI/Corbis-Bettmann

"Carol King really believed the things so many of us only talk about. She really believed a democracy must be bold, dynamic, and advancing" (Ginger 1993, 544). These words, from the eulogy presented by friend and Yale law professor Tom Emerson at the funeral of human rights lawyer Carol Weiss King, accurately express the philosophy of the woman who placed advocacy for social change on a pedestal. King was at the center of the legal struggle over the defense of constitutional rights throughout her career. She began defending clients during the era of the Palmer raids brought by the U.S. attorney general against alleged subversives in the 1920s and continued until her death in 1952, when the United States was in the throes of McCarthyism. She made countless contributions to the legal profession and participated in several landmark cases of her era: defending the Scottsboro Boys against racially motivated rape charges and defending men accused of being Communists. She cultivated pro bono cases and developed expertise in cases relating to the foreign born, thereby deploying her skills in defense of civil liberties.

Although the majority of her cases involved working-class and immigrant defendants, King came from a completely different background: an upper-middle-class, intellectual New York Jewish family. Her father was a

corporate lawyer who represented companies such as Standard Oil, and her brother would follow suit. Considering her family background and the liberal views of her parents, it was obvious from an early age that Weiss would not follow the traditional path considered acceptable for women. In 1912, she entered Barnard College, where she excelled in athletics; she later claimed that her athletic ability helped her to be the first in line to file for cases (Berry 1996, 118–119). Immediately after graduating from Barnard, Weiss met Gordon King, a children's book author, at a party, and they were married several months later. Considering that Weiss rarely followed the traditionalist stance, it is surprising that she married so young, but she never allowed her married status to interfere with her work. She and Gordon were confidantes, and his death at age thirty-five from pneumonia would leave a void in her life, one that she attempted to fill with countless cases in support of the "underdog." Yet, her early marriage is just one of the contradictions of her enigmatic personality. She would often retain a male lawyer to argue a brief that she herself had written because she doubted her ability to argue effectively before the court. In addition, she would be a target of the Federal Bureau of Investigation (FBI), which kept a file on her presumed Communist activities (Ginger 1983, 257). Although she was undoubtedly leftist in her political leanings and established quite a reputation for defending accused members of the Communist party, she and her friends would vehemently deny any affiliation with the party.

Shortly after her marriage, King took the first steps on the path that would allow her to defend the underprivileged. She entered New York University Law School in 1917, and she proceeded as a student with relative ease, despite her frustration with the dearth of courses on civil rights or labor law (Berry 1996, 122). She joined the practice of Hales, Nelles & Shorr in 1920, yet she would continue to feel the tension between gender and professional identity that often intruded into the private life of female lawyers. King, however, represented a departure from the "typical" female American lawyer. She was part of the changing face of the law; where once the women who entered the legal profession had been primarily upper- or middle-class white Protestants, King was a Jew, and she was inordinately proud of her cultural background (Drachman 1998, 4–7).

King began her career in the midst of the Palmer raids against union members as well as both aliens and citizens, and this early experience provided her with a model that would allow her to challenge existing constitutional laws. She began to make frequent trips to Ellis Island to represent immigrants who had been detained and threatened with deportation. The combination of her shrewd intelligence and friendly demeanor allowed her to quickly obtain hearings for her clients despite the maze of bureaucracy. After her first jury case, she began to doubt her efficacy as a trial lawyer, and

she began to devote much of her time to nonlitigation work, primarily in constitutional cases. With the assistance of prominent lawyer Walter Pollack, she broke new ground by arguing that the portion of the Fourteenth Amendment that stipulated that no state should deprive any person of life, liberty, or property without due process of the law was intended to protect citizens from violation of their rights by individual states. She and Pollack lost this case in argument before the U.S. Supreme Court, but they had raised a valid point.

King's point regarding issues of constitutionality led to numerous victories in small civil cases. After the death of Gordon King in 1929, Carol King and other lawyers began the International Juridicial Association (IJA), which dealt specifically with human rights issues. As editor of the *IJA Bulletin,* she helped to compile the first systematic records of court decisions affecting constitutional rights. In 1931, she took her interest in human rights a step further with her involvement in the *Scottsboro Boys* case, in which a group of young African-American men in Alabama had been unjustly charged with rape. The case would drag on until 1933, when the Supreme Court reversed the convictions, finally ruling that African-Americans could not be excluded from juries or denied the right to due process and equal protection of the law (Berry 1996, 122–125).

King continually had numerous cases on which she was working, and, in addition to working on human rights violations, she devoted time to defending labor. In a plea to her clients, she wrote, "The government seldom has much information about a worker when a deportation proceeding starts, but usually obtains enough information when the worker talks freely with an inspector. In many instances the alien worker has lost his case by loose talking before his hearing" (Ginger 1983, 273). Yet, King did not work with only alien workers, as she proved by accepting the case of well-known labor leader Henry Bridges. This was the era of the New Deal legislation, in which big business attacked each of the measures to help the "little man." This case would mark a new era in her own litigation, as well as in the area of free speech law. The prevailing law in the 1930s denoted that any person suspected of affiliation with or membership in the Communist party could be deported. In the case of Bridges, the Immigration and Naturalization Service (INS) had arrested him on charges of a connection with the Communist party in his past. King would state at the time that the "principle [in the *Bridges* case] has been badly developed," particularly as the first round of administrative hearings for the *Bridges* case continued for weeks. Although King and her colleagues won this first round, gaining a cancellation of the warrant for Bridges's deportation, their victory was short-lived when Bridges was arrested again on new charges of affiliation with the Communists (Berry 1996, 125; Ginger 1993, 362).

Concurrent with the national attention garnered by the *Bridges* case, King accepted the case of an unknown, William Schneiderman. Schneiderman represented her typical pro bono case, for which King had become well known, but again, she attracted national attention by recruiting the services of former Republican presidential candidate Wendell Willkie. King had first heard about the *Schneiderman* case in 1939, and she was intrigued by the tale of the man who grew up poor in Los Angeles, after his family had immigrated to the United States from Russia in 1905 when he was three. He had applied for naturalization and became a U.S. citizen in 1927. In 1930, he became a member of the Communist party, in which he held several posts. His path even crossed with Bridges after 1930 when both had participated in demonstrations against unemployment, or other political rallies and strikes. In 1939, an attorney for the INS had filed for revocation of the citizenship granted to Schneiderman in 1927 on the grounds that it had been "fraudulently and illegally procured." The INS believed it had a strong case, since the law stated that no alien could be naturalized unless the person had been of "good moral character" for the five years preceding the naturalization, and Schneiderman had been a member of the Worker's party at the time of his naturalization. (The Worker's party joined with the Communist party in 1930.) The defense, however, argued that Schneiderman had not been asked at the time of his naturalization if he were a member of the Worker's party (Ginger 1993, 365).

Schneiderman testified in his own behalf, stating that he had been and was a Communist, but that he had never advocated overthrow of the government. After the district judge ruled against Schneiderman in 1941 and revoked his citizenship on the grounds that it had been "illegally obtained," Schneiderman retained the services of King. King raised numerous due process points, arguing that

> the oath may be held false because views were expressed of political beliefs which some displeased official has later concluded are inconsistent with a pledge to support the Constitution. Or, what is infinitely worse, . . . falsity may be attributed from association with a party and a selection of interpretations of party doctrines that do not represent the views of the affiant. (Ginger 1993, 367)

To increase Schneiderman's chances of victory, King needed the assistance of a lawyer with an inordinate commitment to the democratic process, and Wendell Willkie, the 1940 Republican presidential candidate, agreed to defend Schneiderman. In the publication of the proceedings of the *Schneiderman* case by the American Committee for the Protection of the Foreign Born in 1943, King praised Willkie. "Great credit is due Wen-

dell L. Willkie for his fearless and brilliant defense in the Supreme Court not only of the citizenship and political rights of William Schneiderman, but of the citizenship and political rights of all the American people" (Ginger 1993, 369–370; King 1943, 6). After the Supreme Court had reached a decision, King wrote that

> the decision . . . is a landmark in the development of American constitutional history. The issues at stake in this case transcend the status of any one political party or the rights of any one individual. . . . The rights upheld by this decision are not the rights of the Communists alone, but of all Americans of whatever political faith. . . . The opinion of the Supreme Court in the Schneiderman case helps to assure all Americans, naturalized no less than native born, "a political status as citizens in a free world." (King 1943, 5–6)

At the time of the *Bridges* and *Schneiderman* cases, the FBI had begun to compile a file on King. On October 28, 1941, J. Edgar Hoover, director of the FBI, recommended that "this individual be considered for custodial detention in the event of national emergency." In March 1942, FBI agents broke into King's office and photocopied various items, including the names of other legal contacts in King's address book (Ginger 1993, 368–371; FBI File).

Shortly after the announcement of the *Schneiderman* decision, King returned to the *Bridges* case, arguing it before the Supreme Court in 1945. She was victorious, and Bridges became a naturalized citizen in late 1945. She soon retained another client, Benjamin Saltzman, with a similar case. He had been born in Lithuania in 1895 and came to the United States in 1913. He did not apply for naturalization until 1942, but, during the application process, he admitted to a one-year membership in the Communist party in 1936. The INS summoned him in 1944 for a hearing, and he retained King as his lawyer. The case took four years to reach the courts, and this only occurred after INS officials had arrested Saltzman for deportation. Saltzman was not deported, but his case was typical of the cases King took on during the last years of her life (Ginger 1993, 475–479).

In 1951, she argued a similar case, that of John Zydoc, before the Supreme Court, her first opportunity to present her own oral arguments before the Supreme Court in thirty years of practice. At the time of her arguments, however, King was seriously ill with cancer. She would lose the *Zydoc* case in a 5–4 decision, but the dissents provided the basis for later civil rights cases. The Court ruled that the attorney general could arrest John Zydoc for deportation and hold him infinitely without bail (Berry 1996, 126–127; Ginger 1993, 537). *Zydoc* was her last case, but her memory would live on in other cases. She and her colleagues had thwarted the work of the INS and the FBI, as well as the Department of Justice. They had prevented

a Supreme Court decision that could have labeled the Communist party as illegal. Not only did King acquire a reputation for her pro bono and low-fee cases, but she also made a name for herself by defending such high-profile Communists as Harry Bridges. She risked the possibility of deportation by the FBI, since Hoover and other members of the FBI kept close tabs on her activities in 1,665 pages of files (Ginger 1993, 547).

The woman who frequently referred to herself as the "he-woman with a heart" had become a role model for activist attorneys devoted to civil rights. She and her colleagues had proved that the combination of well-known and lesser-known clients could equally set precedents. King chided the legal system for its imperfections, but she used each of her cases to point out the flaws in the system. Although she knew the impact of her gender, as her biographer Ann Fagan Ginger has pointed out, she did not fight openly for the rights of women. Rather, "she assumed and exercised them. Her victories commanded respect—sometimes open, often grudging—and frequent efforts of emulation"(Ginger 1993, 543). Her greatness, therefore, is not based on the number of clients she had, or on the fact that she made great waves, but essentially on the fact that she made the lives of many foreign-born Americans better simply for her tenacity in arguing cases such as *Schneiderman v. United States* and *Bridges v. California* before the Supreme Court. Both of these cases have become legal landmarks and represent the commitment of one woman to the judicial process.

—Jennifer Harrison

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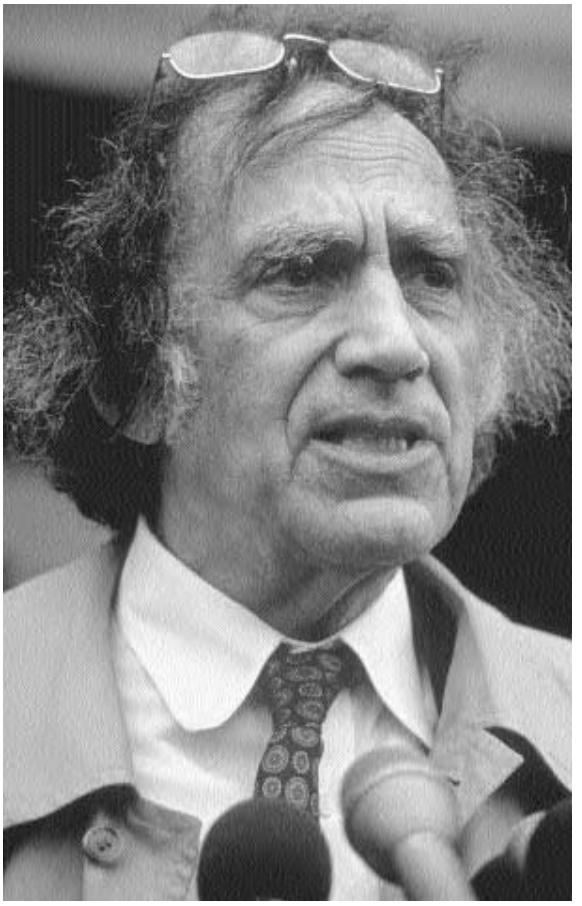
KUNSTLER, WILLIAM M.

(1919–1995)



William M. Kunstler
CNP/Archive Photos

William M. Kunstler—with his deep bass voice, his rumpled clothing, his glasses perched on top of his forehead, and his constant barrage of criticisms of government and racism—by the 1970s had become the personification of the "radical lawyer." He led the legal battles in most of the major court struggles of the 1960s and 1970s that pitted activist forces against the law-and-order establishment, as in the defense of H. Rap Brown and the Black Power advocates, the *Chicago Seven* trial, the Attica prison uprising, and the *Wounded Knee Leadership* trial.

A central paradox of Kunstler's personal life is that he craved admiration, love, and a sense of belonging. Yet he made such provocative public statements—for example, that President John Kennedy had deserved to die—that he must have known would result in extreme public disapprobation. Kunstler was a man who craved love and harvested hatred. Actually, he cared little for public opinion as such, but if he found himself in a room with conservatives Kunstler would earnestly attempt to persuade them to his progressive positions. On a personal level, almost all who met the man thought he was both self-centered and also extremely charming.

Fighting anti–African-American racism was the cutting edge of Kunstler's practice, but over time he extended his fight to include racism directed at other minorities—American Indians, Chicanos, and ultimately Arab-Americans. He developed great skill in publicizing the human side of his clients, and, from their perspective, the viciousness of the government oppression of them and their causes.

Kunstler was born on July 7, 1919, in Manhattan, of middle-class Jewish parents. Raised on the Upper West Side, he attended public schools and developed a strong sense of the injustice with which African-Americans were treated. He attended Yale University, where he majored in French literature and developed a strong self-centeredness. He spent the war years as a decorated army officer, and, paradoxically in light of his subsequent anti-government career, he enjoyed his army experience. In 1943, he married Lotte Rosenberger, a childhood acquaintance, with whom he would have two daughters.

After the war, Kunstler attended Columbia University Law School, becoming a lawyer in 1948. For more than a dozen years he and his brother had a rather mundane legal practice in New York City. The 1950s practice was not sufficient to contain Kunstler's restless intellect, and he simultaneously taught law at New York Law School and served as the host of numerous law-related radio interview and dramatization shows. At the same time, he also wrote extensively: book reviews for dozens of periodicals and newspapers, and full-length books on famous lawyers and legal cases. One of these books, *The Minister and the Choir Singer: The Hall-Mills Murder Case*, published in 1964, became a bestseller.

Kunstler held a local reputation in the New York suburb where he lived for being "radical" even in the 1950s, but his break into the public limelight came with the civil rights struggle of the early 1960s. Asked by the American Civil Liberties Union in 1961 to serve as an observer to the trials of the Mississippi Freedom Riders, he became a participant. Kunstler threw himself into the civil rights litigation, defending Freedom Riders, sit-in protesters, and all variants of civil rights protesters. He was one of the National Lawyers Guild attorneys active in the struggle, always taking a more militant stance than the lawyers from the Legal Defense and Educational Fund (commonly referred to as the "Inc. Fund") of the National Association for the Advancement of Colored People. Martin Luther King Jr. retained Kunstler on occasion to defend militants whom his official lawyers, the Inc. Fund conservatives, refused to defend.

Kunstler gained publicity and a small notoriety from his work, but his public persona became even more visible in the later 1960s when he ably defended the East Coast Black Panthers and especially black power advocate H. Rap Brown. Kunstler catapulted into fame with his representation

of the Chicago Seven, Vietnam War protesters charged with attempting to disrupt the 1968 Democratic National Convention in Chicago. The Richard Nixon administration put these defendants on trial in 1969, and virtually put protest itself on trial by selecting representative defendants from every stripe of the war protest movement.

Kunstler and the defendants were fortunate in the assignment of Julius Hoffman, an unintelligent martinet, as their trial judge. Through wit and zany behavior, Kunstler and his clients were able to provoke Hoffman into excessive reactions followed by courtroom disruptions that made most young Americans sympathetic to their cause. The nadir of the trial came when Hoffman ordered Bobby Seale, the token black defendant, gagged and tied to his chair for daring to represent himself. The *Chicago Seven* trial lasted many months and was widely followed by the American public. It pushed Kunstler into celebrity, and a favorable celebrity for young people and liberals. The trial itself has been the subject of several books; radio, television, and staged dramas; and an HBO movie. Leonard Weinglass, more subdued and perhaps more technically skilled, assisted Kunstler in the trial.

By the time of the Chicago trial, Kunstler had perfected his style of radical lawyering, using, however, techniques that were common currency to radical lawyers of the period. Those included deferring to the political aims of political activists by rejecting technical legal defenses in favor of defenses that would allow radical clients to use a trial as a forum for expressing political views. It meant putting the government itself on trial by making counterallegations of government wrongdoing and bringing affirmative lawsuits, a sort of legal counteroffensive against the very government agencies bringing the charges. Other key elements of radical lawyering involved the use of a trial as a means of educating the masses about the underlying oppressive nature of the government or economic system that truly was responsible for the particular prosecution. That meant using a prosecution as an opportunity for organizing defense committees and garnering publicity, in part to pay for defense costs but equally to utilize the prosecution's educational possibilities. Radical lawyers would actively participate in these activities and not adopt the position of a cool, removed professional.

Implicit in these views is a rejection of a criminal trial as a method of determining "truth." Rather, it is seen as a political struggle that should be utilized for advancing the defendants' political views. Law is likewise seen as merely a tool to be manipulated for these purposes. In turn, this meant that the radical lawyer must politically justify the representation of criminal defendants. This became hard to do in the 1980s when Kunstler occasionally represented mobsters, but he gamely insisted he was merely protecting their First Amendment rights and attacking the prejudice suffered by those of Italian extraction.

Sam Ervin, Country Lawyer

Few more unlikely heroes emerged from the Watergate crisis than North Carolina senator Sam Ervin (1896–1985), who was then in his seventies. Born in the horse-and-buggy era, Ervin—who had attended the University of North Carolina and (after service in World War I) Harvard Law School—had returned to his hometown of Morganton to practice law with his father. Ervin served for three terms in the state legislature and was later appointed to fill out the term of his brother, who had committed suicide while serving in the U.S. House of Representatives. In 1937, Sam Ervin was appointed to serve as a superior court judge. He resigned after seven years but was later appointed to the North Carolina Supreme Court. In 1954, Ervin was appointed by the state governor to fill out a term in the U.S. Senate; he served there until 1975.

Like most southerners of his day, Ervin strongly opposed the Supreme Court's decision in *Brown v. Board of Education* (1954) calling for school desegregation. Ervin was a strong force in opposing most civil rights legislation of his day. He would also strongly oppose the Supreme Court's *Miranda* decision and the proposed Equal Rights Amendment (which he thought ignored inescapable physiological differences between the sexes).

Ervin was, however, strongly committed to the freedoms embodied in the Bill of Rights. He fought for the rights of mental patients and Native Americans, strongly opposed governmental invasions of personal privacy, and opposed preventive detention of suspects not accused of capital offenses. Ervin also strongly opposed what he considered to be executive invasions of legislative powers.

Ervin gained his greatest fame as chair of the Senate committee responsible for investigating the scandals tied to the break-in at Democratic National Head-

(*continues*)

Again, these attitudes and techniques of radical lawyering are not unique to Kunstler. Kunstler perfected the methods of politicizing criminal defenses and of gaining wide publicity for his criminal clients and their claims of injustice. Beyond his theatricality, however, Kunstler won most of his trials by the old-fashioned lawyerly skills of cross-examination, close reading of documents, eloquent jury arguments, and knowledge of the rules of evidence. In most trials, he was the model of civility; the image of courtroom disruption, taken from the Chicago trial, is misleading.

Kunstler's most significant cases of the 1970s were his representation of the Attica inmates during their 1971 uprising and takeover of Attica prison and his defense of several militant American Indians. The 1971 Attica uprising, which ended in the tragic deaths of inmates and hostages alike at the hands of the New York State Police, spawned several books, the best of which is Tom Wicker's *A Time to Die* (1975). In 1973, the American Indian Movement seized the South Dakota hamlet of Wounded Knee to protest

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quarters at the Watergate and its subsequent cover-up. To television viewers of the hearings that ultimately uncovered the evidence that forced President Richard Nixon to resign, Ervin became known for his ability to make a point by citing Shakespeare, the Bible, and other works of literature as well as through his ability to tell stories from his own experiences practicing law in North Carolina. Accused on one occasion of harassing a witness, Ervin retorted that, "I'm an old country lawyer and I don't know the finer ways to do it. I just have to do it my way" (Clancy 1974, 273).

On another occasion when Ervin was holding hearings on presidential impoundments of legislative funds, Ervin acknowledged that the president had the right to advise Congress on the budget, but he could not resist telling one of his many stories:

> But I submit, the Congress should have the same power as the old lady who came to see me in my law office many, many years ago and asked my advice on a point of law. I took down the law book to enlighten myself as to what her legal rights were, and what she ought to do. She got up and started out of my office and I said, "Wait a minute, you owe me five dollars." She said, "What for?" I said, "For my advice." She said, "Well, I ain't going to take it." (Clancy 1974, 257–258)

Beneath Ervin's apparent rustic simplicity and southern prejudices was a firm commitment to principles of basic decency, respect for the U.S. Constitution, and commitment to the rule of law that did much to restore the faith of many Americans who had observed the unethical and illegal behavior of many other attorneys, from the president and the attorney general on down, who had betrayed their trust.

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the federal government's treatment of the Lakota Indians. After a seventy-one-day siege, the leaders of the movement went on trial in St. Paul. In an eight-month trial, Kunstler, assisted by Ken Tilsen, represented defendant Russell Means. Mark Lane, of Kennedy conspiracy theory fame, represented defendant Dennis Banks. Kunstler was tireless in bringing out prosecutorial misconduct during the course of the trial, and ultimately the federal trial judge, Fred Nichol, dismissed the case on basis of misconduct by the prosecutor and the Federal Bureau of Investigation (FBI). This trial also resulted in a book, John William Sayer's excellent *Ghost Dancing the Law: The Wounded Knee Trials* (1997).

In a separate 1975 incident, two FBI agents were shot and killed on the Lakota Pine Ridge Reservation. Three Native Americans were tried for murder: Darrelle Butler and Robert Robideau in one trial, and Leonard Peltier in another. Kunstler obtained an acquittal for Butler and Robideau but could not represent Peltier at trial because of a conflict in dates. After

Peltier's conviction, Kunstler handled the appeal for many years. The Peltier case has gone on to become a cause célèbre on the American left.

Kunstler's marriage foundered in the early 1970s, at least in part because of Kunstler's own flagrant, large-scale, and very public womanizing. He began living with a new inamorata, Margie Ratner, and within a few years he divorced his first wife and married Ratner. This union, which remained intact until Kunstler's death, resulted in two more daughters.

Kunstler had many radical clients in the 1980s, but they were much further from the national public eye than those in the 1960s and the 1970s. Although he still had some out-of-town trials, the focus of his practice shifted to New York City. One of his masterly defenses was that of Larry Davis, a young African-American man who shot his way out of a gun battle with more than a dozen New York police officers, escaping unscathed but leaving several officers wounded. Davis was ultimately arrested and brought to trial for attempted murder. In his defense, Kunstler took the audacious position that the police had cornered Davis, not to arrest him, but to kill him, and that Davis was simply acting in self-defense. With extreme skill, and with plausible but not overwhelming evidence, Kunstler fashioned the theory that Davis had been employed by corrupt police officers to sell narcotics for them. When Davis reneged on the arrangement, owing the crooked officers a great deal of money, the police threatened his life and then sought to kill him. Before trial, Kunstler beat the publicity drums masterfully, seizing on some very real evidence of mistreatment in jail. He and his colleagues spoke before numerous defense rallies and church groups in the Bronx, trying to radicalize people and also to influence the potential jury pool. Kunstler dramatized the story as an example of an African-American man fighting back against the "killer cops," as he called them. He ultimately sold the story to a Bronx jury that had years of experience with New York policemen killing young African-American men. He argued that the case was about "how the police treat young third-world people in the depressed communities of our city" (Langum 1999, 305), and Larry Davis was acquitted.

The Larry Davis case is a good example of the trial tactics that conservative lawyers criticized. A close examination of Kunstler's own statements on the case suggests strongly that the defense story was changed slightly over time and therefore was probably contrived. Kunstler made dramatic efforts to publicize the case before trial and turn the public perception against the police. Once in trial, Kunstler made overt racial appeals in favor of the African-American defendant before a jury that consisted of nine African-Americans and three Hispanics. Kunstler would say "so what?" to these sorts of charges. A trial is merely a political struggle of the oppressing class against the oppressed, not a search for truth. If he could manage events, manipulate facts, so that the oppressed could win a trial, all to the good.

Most of Kunstler's 1980s practice was less dramatic. In addition to a few mobsters and the countless number of nonpolitical defenses through which he made his living, a sampling of his clients in that decade includes "a state senator caught in an FBI sting involving money laundering; customers of Citibank who had their account erroneously credited with ninety-seven thousand dollars and then were accused of theft; a prostitute and a man who claimed he could not have normal sexual relations in a suit to declare the New York prostitution statute unconstitutional; a group of Syracuse cabdrivers in a beef with their city over access to the airport; a Bronx elementary school principal charged with crack possession; a man charged in a plot to illegally sell arms to Iran; a female entertainer who attacked a passport clerk; a fiery black Baptist minister jailed in contempt for refusing to give up the membership list to church dissidents; a homeless black man who murdered a Rockette; a black marine who became a Muslim and refused to go to Lebanon because he feared the wrath of Allah; and two graffiti artists who alleged that New York City had failed in its duty to provide a space for public art" (Langum 1999, 270–271). These cases provided a colorful practice. However, it was a far more diversified practice, and on the whole less seriously political, than Kunstler had enjoyed in the earlier two decades.

In 1982, a young man named Ronald Kuby began working for Kunstler, at first as a part-time student law clerk, and thereafter as an associate. For years Kunstler had managed many of his cases in collegial relationships with younger attorneys. The younger colleagues would do most of the routine legal work—the research, investigations, and depositions—and Kunstler would be the master strategist and lead attorney at trial. After Kuby's association in the firm, Kunstler had less need to bring in outside lawyers as colleagues, although he still did on occasion. Kuby became not only an associate and confidant, but also, as Kunstler described him, a partner and alter ego.

In the 1990s, Kunstler became once again much more in the national public's notice. In 1990, an Arab named El Sayyid Nosair was charged with the murder of the notorious radical rabbi Meir Kahane. Notwithstanding the constant picketing in front of his Greenwich Village home by the Jewish Defense Organization and death threats, Kunstler, a Jew, represented Nosair, an Arab and alleged rabbi-killer, and obtained an acquittal. This case more than any other single case resulted in Kunstler becoming a pariah in New York City. Kunstler came to see Arabs as the new racial outcasts of the United States. He represented several of the Arab defendants in the World Trade Center bombing, including Sheik Omar Abdel-Rahman, until federal prosecutors and judges forced him off the case through hypertechnical accusations of conflicts of interest.

Also in the 1990s, Kunstler successfully represented flag burners before the U.S. Supreme Court, establishing flag burning as symbolic speech protected by the First Amendment. He briefly represented a Jamaican immigrant named Colin Ferguson who killed six and wounded nineteen passengers on the Long Island Railroad. Ferguson's victims were mostly white, and there seemed little question that he acted out of racial motivation. Kunstler proposed a controversial "black rage" defense, in which an already insane person could be driven over the edge by racial discrimination encountered in the United States. Ferguson was so insane that he did not realize he was well represented, and he fired Kunstler just before trial. Kunstler's last important case was his defense of Qubilah Shabazz—daughter of militant Nation of Islam leader Malcolm X—who was charged with hiring someone to murder rival activist Louis Farrakhan. Kunstler negotiated a very favorable plea bargain after conducting a well-organized publicity campaign to discredit the government's chief witness. These cases once again brought Kunstler national attention.

Over the years, Kunstler faced great criticism from the conservative bar for his style of lawyering. He received fines for frivolous lawsuits, threats of disbarment for courtroom disruption arising from the *Chicago Seven* trial, and several threats or actual contempt-of-court citations. He referred to his censure by the New York Appellate Division in 1993 as a "badge of honor" (Langum 1999, 315).

Although Kunstler was a workaholic, he did have personal pleasures. In addition to his children, he enjoyed opera, poetry, Mets baseball games, and, above all, spirited conversation. He enjoyed writing poetry in perfect sonnet form. The poetry itself was lackluster, although his books on legal cases and famous lawyers written in the 1950s and early 1960s are first rate. Kunstler's motivation was ideological, and he accumulated very little wealth over the course of his years. Nonetheless, he lived a very happy life. All who knew him personally agree that he was utterly charming and utterly pleased with his life's work, which was, as he saw it, the defense of society's outcasts and oppressed. William M. Kunstler died of heart failure on September 4, 1995.

—David J. Langum

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LANGSTON, JOHN MERCER

(1829–1897)

John Mercer Langston
Perry-Castaneda Library

John Mercer Langston, an African-American educated at Oberlin College, was the first African-American elected to public office in the United States in the nineteenth century. In Langston's long, distinguished career, he practiced law in Ohio, served as inspector general of the Freedmen's Bureau, and was the first dean of the law school at Howard University in the 1870s. He also served as the attorney for the Board of Health for the District of Columbia and later was appointed U.S. minister and consul general to Haiti and chargé d'affaires to Santo Domingo. He was the first African-American elected to the U.S. House of Representatives from the Commonwealth of Virginia in 1888.

John Mercer Langston was born free in Louisa County, Virginia, on December 14, 1829, the son of Lucy Jane Langston, a part–Native American, African-American slave emancipated in 1806, and Ralph Quarles, a Revolutionary War captain and wealthy planter. Upon the death of Quarles in 1834, Langston received a portion of his father's estate and moved with Gideon and Charles, his two older brothers, to Chillicothe, Ohio, to live with William D. Gooch, a family friend. In 1845, at age fourteen, he enrolled in Oberlin College. Noted for its egalitarianism, the college recognized both racial and gender diversity. The faculty encouraged Langston to excel in rhetoric, and he graduated with honors in 1849 (Garraty 1999, 165). His failure to gain admission to

law schools and offices stifled his early efforts to study law. He returned to Oberlin to study theology in 1852 and was one of its first African-American graduates. Langston, however, disappointed with the failure of churches to oppose slavery, refused to enter the ministry. Throughout his life, Langston remained skeptical of organized religion. A year later, Judge Philemon Bliss, a Republican antislavery activist in Elyria, Ohio, accepted Langston as a law student. He was admitted to the Ohio bar on September 13, 1854, when a "judicial panel reluctantly ruled that Langston's light skin entitled him to the rights of a white man" and he became the first African-American to be admitted to the bar in the United States (Cheek and Cheek 1988, 110).

After his 1854 marriage to Caroline Matilda Wall, the daughter of a slave woman and a wealthy white North Carolina planter, the couple settled in Brownhelm, Ohio, an all-white area near Oberlin, and Langston established his first law practice. He involved himself in local politics and the Free Democratic (Free Soil) party and was elected town clerk in 1855, thus becoming the first African-American elected to public office in the United States. Langston also accepted and won his first law case in Brownhelm. A year later he returned to Oberlin and established a new law practice in the community known as a "biracial town." White bootleggers and livestock thieves provided the bulk of his clients early in his practice, but he gradually attracted clients with civil cases.

In 1862, he accepted one of his most important cases in the Oberlin area. The case involved Mary Edmonia Lewis, an Oberlin student accused of poisoning two of her classmates, who later recovered. Although Langston won an acquittal for Lewis, she left the college. She later became the first noted African-American sculptor. The significance of this case is not the acquittal but what it demonstrated about Langston—the person and the lawyer. First, it demonstrated his oratorical skills and his legal preparations. Second, and most important to Langston, it demonstrated that African-Americans "were capable of discharging society's obligations with efficiency and with profit to the community" (Cheek and Cheek 1989, 306). His biographers, William and Aimee Lee Cheek, noted that despite Langston's reputation as an "adroit attorney," he failed to attract many African-American clients, "a failure he attributed mainly to their fears of the prejudicial effects of his race in a hostile legal system" (Cheek and Cheek 1988, 110). Over time, African-Americans in and around Oberlin would seek out his services. Langston's private practice was enhanced by his public service. He was elected town clerk, served as secretary of the school board (1856), and was a member of the Oberlin city council (1857–1860).

Throughout Langston's career, he was an outspoken advocate for the rights of African-Americans and was a well-known figure and speaker at

Ohio's and other northern states' Negro Conventions during the 1850s. He organized the Ohio State Anti-Slavery Society to protest the Fugitive Slave Act (1858). The law allowed slave owners to recover runaway slaves and denied alleged fugitives the basic rights to protect themselves. The law also provided for U.S. commissioners to conduct hearings and to authorize the return of runaways, which in effect increased the enforcement of the law. For Langston and other free African-Americans living in the North, the new law threatened their safety because they could be legally kidnapped. Langston called on delegates to fight the unjust law with the law. The Fugitive Slave Act, he said, was a "hideous deformity in the garb of law. It kills alike, the true spirit of the Declaration of Independence, the Constitution, and the palladium of our liberties" (Nieman 1991, 31). Langston's well-tempered militancy caused him even to support John Brown's insurrection at Harpers Ferry when legal means seemed at an impasse (Cheek and Cheek 1989, 349–372).

During the Civil War, Langston recruited African-American soldiers for the Massachusetts Fifty-fourth and Fifty-fifth Regiments and for Ohio's Fifth Regiment. A long-time advocate for African-American suffrage, Langston traveled the South as a Republican party organizer for African-American voters and as school inspector general of the Freedmen's Bureau after the war.

After fifteen years of practicing law in Oberlin and the surrounding communities, Langston moved his family to Washington, D.C., in 1868 at the request of Colonel Oliver Otis Howard, director of the Freedmen's Bureau, to organize the law department at the recently established Howard University (1867), which offered the LL.B. degree following two years of training. Designed along the Oberlin model, Howard was envisioned by Langston as an egalitarian institution with high academic standards open to both races and sexes. The curriculum "emphasized classical as well as professional training, moral and social concerns, and a thorough grounding in oratory" (Cheek and Cheek 1988, 118). Langston opened the department with six students. Within a year, this number increased to twenty-two. The department graduated its first ten students on February 3, 1871. Of this group, eight were admitted to the bar in Washington, D.C., on the next day. Appointed dean in 1870, Langston stressed practical experience and used his influence to gain his students appointments in the offices of the Ulysses S. Grant administration.

In 1872, Charlotte E. Ray graduated as Howard's first African-American woman to earn a law degree. Although Ray is also recognized as the first woman to be admitted to practice law before the Supreme Court, she left the profession and became a schoolteacher in Brooklyn, New York, because of the discrimination she encountered as a woman. (Drachman 1998,

45–46). Also graduating with Ray was James C. Napier, who became registrar of the U.S. Treasury (1911–1913) and a member of Howard's board of trustees (1911–1940).

During Langston's six and a half years at Howard, he served as professor, dean, vice-president, and acting president. Troubled by his non-accommodationist racial progressive views, his strong advocacy for an expanded law school, as well as his well-known views on organized religion, the trustees rejected his bid for the presidency in 1875. In protest, the entire law department resigned their positions. Between 1877 and 1884, Langston served as minister and consul general to Haiti and chargé d'affaires to Santo Domingo. He assumed the presidency of Virginia Normal and Collegiate Institute in 1885 and served there for three years. After Virginia's Democrats forced Langston to resign his presidency at the institute, he ran as an independent for the U.S. House of Representatives in the primarily African-American Fourth District, of which Petersburg was the urban center. His opponents included a white Democrat and a white Republican (William Mahone). At the end of a long ten-month campaign, the Democratic candidate was declared the winner. Langston immediately challenged the election results. Congress voted in September 1890 to seat Langston, almost two years after the election. Langston served as a congressman for only three months (the first African-American elected to the U.S. House of Representatives from the Commonwealth of Virginia) before his official term ended. Nevertheless, Langston argued in Congress for popular suffrage and college and professional higher education for African-Americans. He lost his bid in the next election to retain his congressional seat from the Fourth District and returned to the practice of law. Langston retired in 1894 and published his autobiography, *From the Virginia Plantation to the National Capital*. He died in Washington, D.C., on November 15, 1897.

—Thaddeus M. Smith

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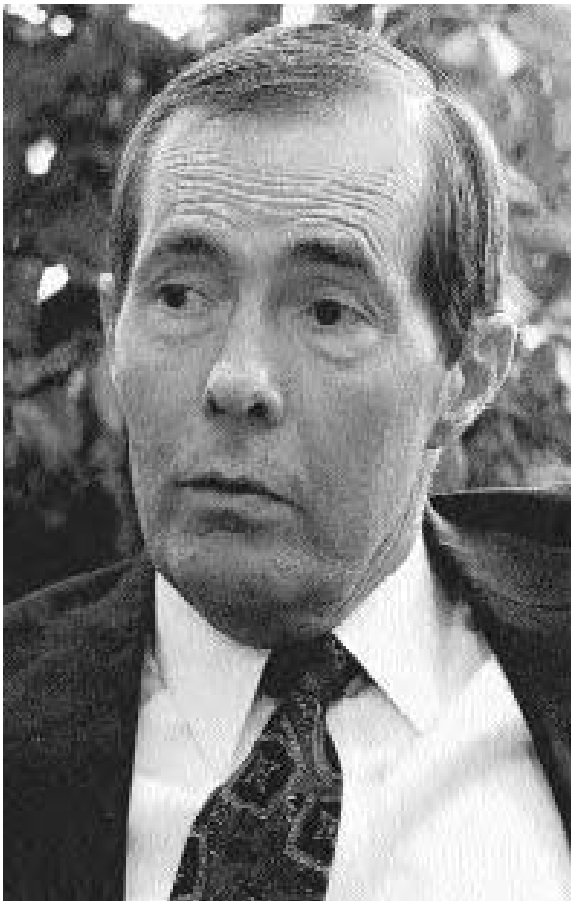
LEE, REX E.

(1935–1996)

Rex Edwin Lee was a conservative constitutional lawyer, law school founder, and university president who served as President Ronald Reagan's first solicitor general. Lee was born on February 27, 1935, in Los Angeles, the son of Rex and Mabel Lee. His father was killed in an accident before Lee was born; his mother then married Wilford Shumway. The Shumways moved to St. Johns, Arizona, where Lee was reared and graduated from high school. He attended Brigham Young University, graduating as valedictorian in 1960. Lee married Janet Griffin in 1959; they had seven children.

Lee attended the University of Chicago Law School from 1960 until 1963. After graduating first in his law school class, he moved to Washington, D.C., to clerk for Supreme Court Justice Byron R. White. In 1964, Lee returned to Arizona and joined the Phoenix law firm of Jennings, Strouss, Salmon & Trask. He was made a partner three years later. Lee was appointed the founding dean of the J. Reuben Clark Law School at Brigham Young University



Rex E. Lee
AP Photo/Deseret News, Stuart Johnson

(BYU) in 1972. U.S. Attorney General Edward H. Levi (dean of the University of Chicago Law School when Lee was a student) hired Lee in 1975 to serve as assistant attorney general in charge of the Civil Division of the Department of Justice. He remained in Washington, D.C., until the end of the Gerald Ford administration in January 1977.

Returning to the BYU law school, Lee continued as dean until 1981, when President Ronald Reagan nominated him to be solicitor general of the United States. Although he was astonished at being picked for the position, he recognized its importance. He called it "the creamiest lawyering job in the country" (Salokar 1992, 33). Since the solicitor general must be confirmed by the Senate, Lee appeared before the Senate Judiciary Committee on June 19, 1981. The Republican party was in the majority in the Senate after the 1980 election, and Republicans were in the majority on the panel. Despite this fact, Lee faced critical questioning from Democratic senator Edward Kennedy of Massachusetts, the leading liberal on the committee. Feminists also criticized the nominee. National Organization for Women president Eleanor Smeal testified that Lee was unacceptable for the position because of his membership on the board of litigation of the Mountain States Legal Foundation. The conservative foundation was known for its opposition to affirmative action and its conservative legal philosophy of limited government (Salokar 1992, 50). Smeal also pointed out the nominee's published opposition to the Equal Rights Amendment. Lee had written a book, *A Lawyer Looks at the Equal Rights Amendment* (Lee 1980), in which he questioned the propriety of amending the U.S. Constitution to provide sexual equality. In his testimony before the committee, he indicated his support of women's rights through statute. His book, while presenting a conservative ideology, was a review of U.S. case law regarding equal rights and was written to inform the lay reader. It hardly suggested Lee's future course of action as solicitor general.

Lee's second book, *A Lawyer Looks at the Constitution* (Lee 1981), had not yet been published at the time of the hearing, but it still briefly attracted the attention of Senator Kennedy. Critics attacked both books as having been written at the request of Mormon church leaders, a charge Lee refuted even though the books were published by Brigham Young University Press.

Lee's Mormon beliefs also were questioned at the confirmation hearing. Several opponents, including the group Mormons for the Equal Rights Amendment, were concerned about the role religious beliefs would have on the nominee's decisions as solicitor general. Their concerns centered on Lee's position on the role of women as stated in his books and in Mormon tradition. Despite the unusually strong opposition, the full Senate confirmed Lee in July 1981.

William Bentley Ball

Like Leo Pfeffer and William Mullen, William Bentley Ball, born in 1916, specialized in cases involving religious freedom. Arguing nine cases before the U.S. Supreme Court and assisting in twenty-five others, Ball was also active in state and in lower federal courts. A devoted Roman Catholic, Ball earned degrees from Western Reserve University and the University of Notre Dame. He taught for a time at Villanova University and founded the Harrisburg firm of Ball, Skelly, Murren & Connell, with which he remained associated until his death.

Ball was a member of the Christian Legal Society and the Catholic League for Civil and Religious Rights; he was also vice chair of the National Committee for Amish Religious Freedom. It was for this last group that Ball argued what may have been his most important case in *Wisconsin v. Yoder* (1972). In that case, Ball helped persuade the Supreme Court that the parents of Amish children should not be forced against their beliefs to send their children to public school beyond the eighth grade.

Ball died in January 1999 at age eighty-two.

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As solicitor general, Rex Lee labored in two roles. He was responsible for protecting the legal interests of the executive branch in the Supreme Court. He also advised the justices and served as a "gatekeeper" controlling the litigation brought to the Court, working as the so-called tenth justice (Caplan 1987). According to Lee (1991, 59), the solicitor general is "an officer of the Court and an advocate for a client." Although he identified a congruence in the roles, they did conflict from time to time. He often found himself pressured by colleagues in the Department of Justice when he refused to file amicus briefs in "agenda cases." According to Lee (1991), some members of the Reagan administration, particularly Assistant Attorney General for Civil Rights William Bradford Reynolds, wanted him to bring cases before the Court to enact the administration's conservative social agenda. Lee refused to file when he felt that taking action would endanger the solicitor general's credibility with the Court (Lee 1986). By not filing in these cases, Lee came in conflict with conservatives within and outside the Reagan administration.

Solicitor General Lee participated in a number of important cases during his four-year tenure. The government was on the winning side in about seventy-seven percent of the cases Lee brought before the Court either as a party or as an amicus. Critics point out that Lee won often because he refused to file cases presenting truly difficult questions. In *Immigration and*

Naturalization Service v. Chadha, 462 U.S. 919 (1983), the administration was on the winning side when the Court found the "legislative veto" to be an unconstitutional exercise of power by the Congress.

The government lost on abortion in cases such as *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 16 (1983). In this case, Lee felt that he had pushed too far too fast on abortion and that the Court had punished him for bringing the case. Social conservatives disagreed. The Court did side with the solicitor general on issues related to First Amendment exercises of religion. For example, the Court ruled in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that the city of Pawtucket, Rhode Island, could include a crèche in a Christmas display that also included a number of nonreligious Christmas figures. The ruling was not a clear victory for President Reagan's social agenda, however.

An important case in which Lee did not participate, raising the ire of social conservatives, was *Bob Jones University v. United States*, 461 U.S. 574 (1983). In 1970, the Internal Revenue Service (IRS) prohibited granting tax-exempt status to private schools that practiced racial discrimination. Although Bob Jones University did not discriminate in admissions, the school did not allow interracial dating among its students. The Reagan administration argued that the IRS did not have the authority to deny tax-exempt status; however, the government's brief was written by one of Lee's deputies, a holdover from the Jimmy Carter administration. The deputy, in his position as acting solicitor general, indicated that he did not believe in the government's position. The Supreme Court ruled in favor of the IRS.

The *crèche* and *Bob Jones* cases were important to the implementation of President Reagan's agenda (Caplan 1987, 96). The cases were part of a series of appeals known as the *Religion Cases* that became a key indicator of the strained relationship between the solicitor general and other officials in the Justice Department. Assistant Attorney General Reynolds regularly asked Lee to push harder to get the Court to change its interpretation of the First Amendment free exercise clause from strict separation to one involving the "accommodation of religion." The Reagan administration wanted government to be able to promote religion without endorsing a specific sect. James McClellan, founder of the conservative Center for Judicial Studies and its journal *Benchmark*, amplified the administration's arguments on the issue of church and state. He criticized Solicitor General Lee for having written a "weak" brief in the *crèche* case. McClellan argued that Lee should have raised questions about the Court's previous interpretations of the establishment clause and forced the justices to change or defend their position (McClellan 1984). McClellan called for Lee's removal from office because the solicitor general was not aggressively promoting the Reagan agenda.

Lee resigned as solicitor general in June 1985. His public explanation was that he could not continue to support his large family on the solicitor general's salary. He alluded to a second reason for resigning: he was tired of the pressure from conservatives (Caplan 1987, 106–107). In short, the man who some felt was too conservative to be solicitor general in 1981 was, by 1985, not conservative enough. Although Lincoln Caplan (1987) exaggerates the conflict between conservatives and Lee, one legacy of this internecine battle is Lee's clear statements of the proper role of the solicitor general in the U.S. legal system (e.g., Lee 1986; 1991). Harvard law professor Charles Fried succeeded Lee.

Lee joined the law firm of Sidley & Austin as partner focusing on appellate cases on July 1, 1985. He reached an arrangement with that firm and BYU that allowed him to split his time between teaching and private practice. In 1986, after spending a year establishing a relationship with Sidley & Austin in the firm's Washington office, the Lees moved back to Provo, Utah, where Lee became the George Sutherland Professor of Law in the Clark law school. Lee continued to split time with the firm even after being named president of BYU in 1989. He continued to argue cases before the Supreme Court until his death in 1996. In fact, he was preparing a case when he died.

Lee argued sixty cases before the U.S. Supreme Court during his relatively short career. In most of the cases, he appeared in his role as solicitor general. At Sidley & Austin, he was sought after as a "Supreme Court specialist." Lee faced other former solicitors general in a number of cases. In *R. J. Reynolds Tobacco v. Durham County,* 479 U.S. 130 (1986), Erwin Griswold represented R. J. Reynolds, while Lee was successful in representing Durham County, North Carolina. He represented Escondido, California, in *Yee v. City of Escondido,* 503 U.S. 519 (1991), a case involving the constitutionality of the city's rent control policies. Former federal judge and solicitor general Robert Bork represented the Yees.

One of the first cases Lee argued before the Supreme Court in private practice was particularly important to him. The case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos,* 483 U.S. 327 (1987), involved a custodian at a Mormon church–owned gymnasium who was fired after being unable to prove that he was a Mormon church member and eligible to enter its temples. The custodian sued the church alleging religious discrimination, although religious organizations are exempt from Title VII of the Civil Rights Act and allowed to discriminate based on religion. The federal district court in Utah found that the religious exemption to Title VII was an unconstitutional establishment of religion. The Supreme Court did not agree and upheld the constitutionality of the exemption. In another famous case from the October 1986 term of

the Supreme Court, Lee successfully argued the National Collegiate Athletic Association's case in its fight with University of Nevada at Las Vegas basketball coach Jerry Tarkanian, *NCAA v. Tarkanian*, 488 U.S. 179 (1987).

Lee's most significant fight was outside the courtroom. In 1987, he was diagnosed with lymphoma, a type of fast-spreading cancer. He underwent an experimental treatment at the National Institutes of Health in Bethesda, Maryland, and the cancer went into remission. While undergoing treatment, Lee briefly left the hospital to present oral arguments in *Karcher v. May*, 484 U.S. 72 (1987), the New Jersey moment-of-silence case. Wearing a wig to conceal baldness caused by the radical chemotherapy, he presented Karcher's case to the Court. He argued that the moment-of-silence law should be upheld as enacted by the New Jersey legislature in 1982. Lee lost the case on standing. Karcher had been the speaker of New Jersey's general assembly when that body approved the law. By the time the legal challenge reached the Supreme Court, Karcher was no longer speaker and the present legislature opposed any defense of the law. The Court ruled that Karcher did not have standing to bring the case, affirming the lower court's ruling of unconstitutionality.

In 1989, apparently cancer-free, Lee accepted an offer to serve as the president of BYU. He continued to practice law, dedicating one-sixth of his time to his practice. He was BYU's president until December 1995, when he resigned because of health problems. During his seven years as president, he still argued nine cases before the U.S. Supreme Court. In 1991, he represented natural gas producers in *Mobil Oil Exploration v. United Distribution Cos.*, 498 U.S. 211 (1991). According to Carter Phillips (1996, 6), this was the only argument of Lee's in which the justices asked no questions. The justices listened intently to Lee's defense of his clients' position. The Court ruled in favor of the natural gas producers. Another important case argued by Lee while he was BYU president was *Freeman v. Pitts*, 503 U.S. 467 (1992), a case involving the termination of a school desegregation decree in DeKalb County, Georgia. The school system, his client, was successful in the case.

The fight against cancer returned to Lee's life in 1990 when he was diagnosed with an incurable, but controllable, form of lymphoma. While his health slowly deteriorated, he continued practicing law and presiding over BYU. On December 31, 1995, Lee resigned as BYU president. He lost his fight with cancer on March 11, 1996, dying of respiratory failure at a hospital in Provo, Utah. The final case Lee argued before the Supreme Court was *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). Lee represented a law firm that had been sued by the government corporation for negligence in the advice the firm had given a failed savings and loan association. In

his presentation, he argued that if the Court ruled in favor of the Federal Deposit Insurance Corporation (FDIC), the Court would be creating law to supplement federal statute (Phillips 1996, 6). The justices agreed. Writing for the Court, Justice Antonin Scalia stated that if state law protects lawyers from being sued by a failed savings and loan, then the FDIC, acting as receiver of the savings and loan, is also prohibited from suing the lawyers. When he died, Lee was preparing for oral arguments scheduled for March 18, 1996, in the case of *Arizona v. Reno*, a case involving the application of amendments to the Voting Rights Act. Lee had represented the state of Arizona at every step in the process from the original complaint in the district court. Before the Court heard arguments, the federal government settled.

In a legal career that spanned thirty-three years before being ended by illness, Rex Lee made significant contributions to the U.S. legal system. These contributions include the building of a law school from scratch as well as other aspects of legal education. Working with Chief Justice Warren Burger, Lee created the American Inns of Court in 1980; these associations of judges, lawyers, and law students are designed to raise professional and ethical standards. He protected the solicitor general's office from being politicized by the Reagan administration and its supporters. Acting counter to the fears of his liberal detractors, he did not use his office to force a Mormon worldview on the jurisprudence of the United States. His entire legal career, in government service and in private practice, reflected his dedication to the words of the Constitution. He followed an ideology of judicial restraint, even when he angered his colleagues in the "Reagan Revolution."

—John David Rausch Jr.

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LEIBOWITZ, SAMUEL SIMON

(1893–1978)

Samuel S. Leibowitz, a leading criminal defense attorney of the 1920s and 1930s, was born in Iasi (Jassy), Romania, on August 13, 1893, the only son of Isaac and Bina Lebeau. The Lebeaus were orthodox Jews who immigrated to the United States in 1897 to escape second-class citizenship. Before moving to Brooklyn, they lived in Manhattan and took the advice of a friend—another recent immigrant—to "Americanize" the family name. In school, Leibowitz enjoyed theater and public speaking. In 1911, Leibowitz entered Cornell University and, deferring to his father's wish that he prepare to become a lawyer, excelled academically and in sports, debate, and drama. Torn between his father's wishes and his desire to pursue professional acting, Leibowitz spent much of his last college summer observing criminal trials. He imagined himself in various roles and found a solution for his dilemma: As a defense lawyer, he would dramatize real-life situations persuading flesh-and-blood audiences for high stakes on behalf of his clients.

Samuel Simon Leibowitz
(middle) Library of Congress

Graduating in 1915, Leibowitz passed the bar examinations at the top of his group and endured four years of low-profile legal apprenticeship in Brooklyn at several civil practice firms before volunteering for appointment to his first criminal defendant. Harry Patterson, a derelict lush, was in a

drunken stupor when police arrested him and charged him with breaking into a saloon to steal seven dollars and a bottle of whiskey. The police obtained Patterson's confession and a key Patterson took from his pocket saying he used it to enter the saloon. Patterson told Leibowitz he was innocent and confessed only because the police beat him. In the two weeks before defending Patterson, Leibowitz thought about nothing else. He constructed the prosecutor's case, then looked for a reasonable doubt, fastening on the key from Patterson's pocket as the key to the case. At trial, after the prosecution's case, Leibowitz called Patterson—limping—to the stand to testify that he confessed only because the police beat him. Then, Leibowitz demanded proof the key from Patterson's pocket would open the saloon door. Caught by surprise, the prosecution sniffed that the issue was irrelevant, and rested. The jury deliberated only four minutes before returning with a verdict of "not guilty." Afterward, Leibowitz asked the prosecution to try the key in a courthouse hall door. It opened them all.

Leibowitz immediately went into practice by himself. A defense lawyer who did not socialize with criminals, Leibowitz acquired clients as the press and jailhouse grapevine spread word of his successes. Leibowitz protested later that his success was due to preparation rather than courtroom legerdemain, but he would not present a defense he could not believe, and he knew exactly how to perform. He investigated the facts and the evidence—including the scene where relevant events had taken place—for himself. He constructed the case as if he were the prosecutor, identifying the elements of the case and the strengths and weaknesses of each. Only then did Leibowitz begin working on a defense. He learned everything available of the life history, personality, habits, and character of his client, potential witnesses, prosecuting attorney, presiding jurist, and potential jurors. Since high-profile criminal cases were usually tried in the newspapers first, he mastered handling the press. At trial, Leibowitz preferred "showing"—pictures, models, reenacting—to "telling" with mere verbal testimony. With witnesses he could be gentle or bruising, flamboyant or subtle, cool or emotive. His recall was immediate and accurate. He made expert witnesses understandable, and he engaged juries in thinking problems through to the solutions he wanted. Leibowitz had an exceptional ability to "read" the personality and character of others and to relate as an equal. Dramatics were carefully calculated and tailored to fit the needs of the case.

In only a decade—by 1929—Leibowitz was New York City's preeminent criminal defense attorney. He attained national recognition by his defense of Harry Hoffman. Hoffman was a Staten Island movie projectionist who had already been convicted of second-degree murder in the shooting of a young woman last seen entering a Model T sedan driven by a man with brown hair wearing a brown hat, brown overcoat, and glasses. The evidence

against Hoffman was entirely circumstantial. As the description of the probable murderer was publicized, Hoffman realized his car, pistol, clothing, and appearance matched. Worse, he could not account for his whereabouts. Hoffman cut his hair, arranged to repaint his car, mailed the pistol to his brother, burned the holster, and asked his brother and friends to lie to create alibis. In the original trial, two eyewitnesses placed Hoffman near the place and time of the murder, a ballistics expert identified Hoffman's gun as the murder weapon, and the history of Hoffman's attempted alibi fabrications was told. The jury convicted Hoffman of second-degree murder, which was, however, inconsistent with the indictment. When a new trial was ordered, Hoffman wrote to Leibowitz. Becoming convinced of Hoffman's innocence, Leibowitz believed he had to show that (1) the eyewitness identifications were unreliable, (2) Hoffman's pistol was not the murder weapon, and (3) Hoffman's reason for asking others to lie for him was innocent. Leibowitz asked each potential juror about possible connections with Horatio J. Sharrett—brother of Staten Island's political boss—and got as many jurors as possible with technical or mechanical knowledge. In his opening statement, Leibowitz boldly promised to show that the murderer was someone other than Hoffman. Never fingering anyone as guilty, Leibowitz named Sharrett as someone near the murder scene whose description matched that of the Model T's driver but who was not adequately investigated. Leibowitz got one of the prosecution's eyewitnesses to admit that she remembered little about anything except identifying Hoffman as the driver and not being able to do that until he was shown to her several times. Another prosecution eyewitness—a Staten Island policeman—claimed he saw Hoffman driving the Model T nearby at the time but admitted he spoke up only at the direction of the district attorney a month later when the reward money exceeded eight thousand dollars. Leibowitz also extracted a concession that the angle of the sun and its reflection off the windshield obscured the officer's vision of the driver. Leibowitz obtained testimony from the medical examiner that the bullets traveled from the left front to the right rear of the victim's body, making it likely the killer was right-handed. When the prosecution felt forced to put Sharrett on the stand, Leibowitz gently obtained testimony about Sharrett's twenty-year friendship with the district attorney, and that he was driving his Model T sedan nearby only minutes after the murder. The prosecution's ballistics expert asserted that Hoffman's pistol fired the killing bullet but would not reveal his "trade secrets" for determining that fact. Not only did Leibowitz's expert deny Hoffman's pistol fired the killing bullets, but Leibowitz set up a comparison microscope so the jurors, one by one, could compare for themselves a killing bullet and one from Hoffman's pistol. Leibowitz introduced testimony about ornaments and equipment making Hoffman's Model T

readily distinguishable from the killer's. To deal with Hoffman's attempts to change his appearance and create cover stories, Leibowitz had Hoffman testify of friends' jokes about his resemblance, his vain attempts to find someone who remembered seeing him elsewhere at the time of the murder, a friend's tale of being beaten by the police as a suspect, and his own exaggerated fears from watching movies about victims of mistaken identity. Leibowitz also introduced evidence—not previously mentioned—of Hoffman's left-handedness and inability to use his own right-handed revolver. In his summation, Leibowitz carefully analyzed the evidentiary defects of the case against Hoffman and made a frankly emotional appeal: If it did not acquit, the jury should give Hoffman the death penalty rather than send him back to jail. After three hours, the jury returned with a verdict of not guilty.

Leibowitz participated in events of lasting national importance when he defended the Scottsboro Boys—nine African-American youths sentenced to death (one to life imprisonment) for allegedly gang-raping two white prostitutes in broad daylight on a loaded freight train gondola between Chattanooga, Tennessee, and Huntsville, Alabama. Taken up initially by Communists, the case became a symbolic battlefield in which evidence was secondary to class warfare, organizational rivalries, sectionalism, and white supremacy. Finding that the defendants had been deprived of their constitutional right to counsel in a capital case, the Supreme Court overturned the original convictions (see *Powell v. Alabama,* 287 U.S. 45 [1932]). Now Leibowitz was retained. At his own expense, and with considerable personal bravery, Leibowitz shredded the prosecution's case and created the record for appeal—conviction by a jury regardless of the evidence being assured by the accusation. After the first jury voted to convict, the trial judge set aside the verdict. The conviction in the next retrial was appealed eventually to the Supreme Court, where Leibowitz successfully argued that the systematic exclusion of qualified African-Americans from lists of potential jurors denied the defendants the "due process" guaranteed by the Fourteenth Amendment (see *Norris v. Alabama,* 294 U.S. 587 [1935]). Thereafter, Leibowitz took a less prominent role as the cases ground down to conclusions unsatisfying to all.

Leibowitz was the impresario supreme in *People v. Vera Stretz.* Around 2 A.M. on November 25, 1935, police were called to help search the upper floors of the Beekman Towers apartments in Manhattan after tenants reported hearing gunshots. A woman (Stretz) encountered on the nineteenth floor said that a man in the apartment of a Dr. Fritz Gebhardt two floors up might need help. An assistant manager using a passkey found Gebhardt's lifeless body with four bullets in it. Meanwhile, a patrolman found a distraught Stretz—now on the stairs below the third floor—weeping and clutching a large handbag. It contained a revolver still warm from being

fired, two spent shell casings, a passport and stock certificates in Gebhardt's name, and a silk nightgown wet with blood stains. Asked if she shot the man upstairs, Stretz said, "Yes, I did. But please don't ask me why I did it." Stretz refused to explain and was charged with first-degree murder. The newspapers portrayed Stretz as an ice-cold femme fatale who murdered Gebhardt because he wanted to end their affair. Stretz's father retained Leibowitz. Stretz talked freely about her affair but not about the events of the fatal night. Finally, Leibowitz remarked he thought Stretz was unable to talk about it because she felt ashamed—and not because she felt guilty. Now Stretz poured out her story. Leibowitz promptly told the newspapers he would show in court that Gebhardt got what he deserved, but said no more. During jury selection, Leibowitz asked each venireman if he knew anything of Nietzsche's philosophy, and if deadly self-defense was justified for a woman to avoid being the victim of a felony. Leibowitz waived making an opening statement, leaving both prosecution and jury with only hints as to Stretz's defense. During the prosecution's case, Leibowitz obtained testimony that Stretz pointed the searchers to Gebhardt's apartment and disconsolately admitted shooting him, and that the physical evidence from Gebhardt's room could be interpreted in a manner different from that asserted by the prosecution. During the questioning of the prosecution's twenty-three witnesses, Stretz cried often and lost her composure entirely several times. By the time Leibowitz put her on the stand, Stretz had become a sympathetic figure. Leibowitz led Stretz through a calm recitation of why she had a handgun, and how she met Gebhardt. Then, Leibowitz asked, "By the way, you shot Dr. Gebhardt, didn't you?" Stretz closed her eyes and said softly, "Yes." Reminded of why they were there, those whose attention had begun to wander resumed listening again. Now Leibowitz had Stretz tell of her eleven-month fascination and affair with the brilliant and cultured older Gebhardt; his story of a wife back home in Germany to whom he was married in name only; Stretz's hopes for a life together; her adoring and passionate letters; Gebhardt's visit to Germany and letter apparently promising marriage; her disappointment when Gebhardt (who was well connected in high Nazi circles, and believed—in the Nazi way of appropriating Nietzsche—he was exempt from ordinary morality and that women should be used but not loved) returned and wanted them to go on as before; Stretz's decision to make a clean break; and Gebhardt's persistence in wooing her back. At last Leibowitz came to the shooting. Stretz testified calmly and in detail—at Leibowitz's increasing tempo—of Gebhardt's nocturnal telephone call asking her to bring a heating pad to ease his abdominal pains, her visit, and his rape of her. Getting Stretz to testify now became more difficult as she either sobbed or spoke into her handkerchief and chewed at it. Stretz writhed under Leibowitz's questions forcing

her to recall Gebhardt's words—"If you want to make it the last night, you will have to make it a good one"—as Gebhardt attempted to make her serve his pleasure further. Stretz told of Gebhardt's threat to kill her, his curses, their struggle, and her shots. But still Stretz had not said what Gebhardt wanted her to do. Finally, Leibowitz dragged from Stretz's lips Gebhardt's awful words ordering her to engage in sodomy (a felony in New York) and his attempt to force her. The judge ordered Stretz to repeat her testimony. Stretz repeated herself and collapsed. When she recovered, Stretz told of leaving Gebhardt's apartment, cleaning up and dressing in her own room, and encountering investigators who arrested her. The prosecution's four-hour cross-examination did not shake Stretz's story. In his summation, Leibowitz emphasized Gebhardt's campaign to dazzle and flatter, tracing the emotional trajectory of Stretz's infatuation, hopes for—and exaltation at the promise of—domestic bliss, crushing disappointment, and final humiliation by Gebhardt. Leibowitz concluded by emphasizing Stretz's right under state law to defend herself if she believed a felony was about to be committed against her. The prosecution said Stretz was acting. When the jury returned a verdict of not guilty, it was the 116th of 139 consecutive verdicts Leibowitz won to clear clients facing the death penalty.

In 1941, Leibowitz left the rigors of his practice to be a judge on the Kings County Court in Brooklyn. Judge Leibowitz was known for stiff sentences, his support of capital punishment, and leading a lengthy grand jury investigation into organized crime influence in the New York City Police Department. In 1953, Leibowitz ran for mayor but withdrew. In 1969, when no more extensions beyond retirement age could be granted, Leibowitz retired from the bench to teach, lecture, and practice law until his death in Brooklyn, on January 11, 1978.

—James A. Keim

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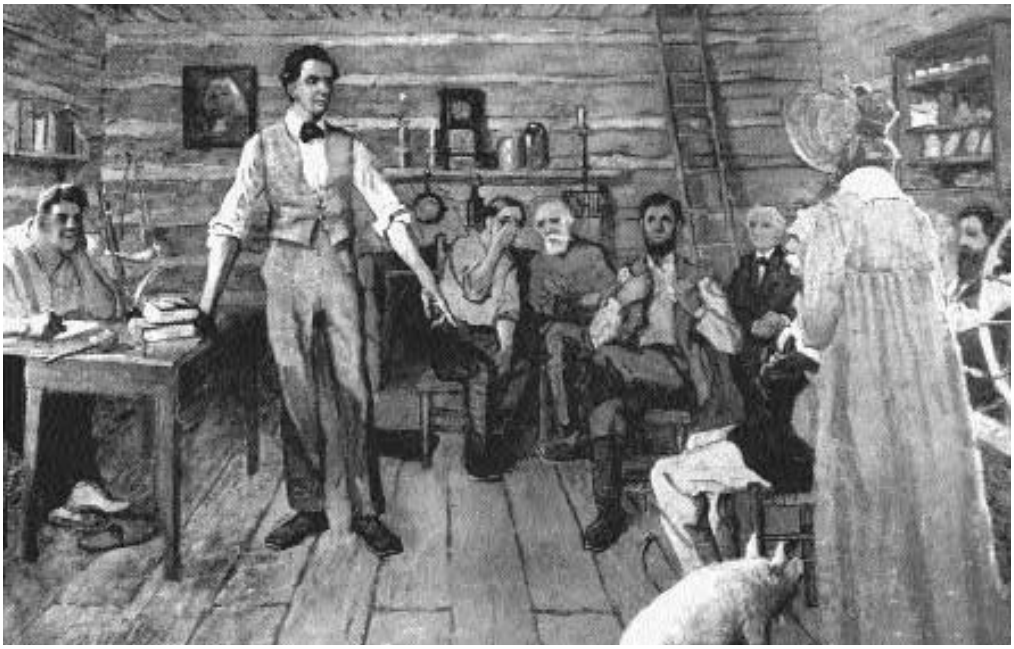
LINCOLN, ABRAHAM

(1809–1865)



Abraham Lincoln

A painting of Abraham Lincoln in the courtroom, created for the Chicago & Illinois Midland Calendar Series, by Fletcher Granson. (The Frank and Virginia Williams Collection of Lincolniana)

Historians have consistently ranked Abraham Lincoln, along with George Washington and Franklin Roosevelt, as one of the three greatest presidents of the United States. Unlike Washington and Roosevelt, Lincoln was also a highly respected lawyer who, during his career at the bar, helped to craft landmark decisions during more than two decades of an extensive law practice.

Almost entirely self-educated, this product of the Kentucky backwoods and Midwestern pioneer settlements nevertheless dealt effectively during the Civil War years with the most formidable aggregation of unprecedented legal and constitutional issues ever faced by an American president.

Lincoln was born in Hardin (later Larue) County, Kentucky, on February 12, 1809. His father, Thomas Lincoln, was an uneducated farmer and carpenter; his mother, Nancy Hanks Lincoln, was reputedly "intellectual," but she could not write her own name. From Knob Creek farm in Kentucky, where he lived as a small child, Lincoln and his sister Sarah were taken by their parents in 1816 to a small settlement near Pigeon Creek in Perry (later Spencer) County, Indiana, where they lost their mother to brucellosis when Abraham was only ten. A year later, Thomas Lincoln married Sarah Bush Johnston, a widow from Elizabethtown, Kentucky, and she and her three young children joined Abraham and his father and sister to make up a crowded but apparently happy household (Donald 1995, 1–228).

Once he learned to read, Lincoln was insatiable in his thirst for knowledge. As early as 1827, a warrant sworn out against him by two Kentucky ferrymen caused the youngster to borrow and study a copy of the *Revised Laws of Indiana*. In 1831, he left home and eventually settled in the village of New Salem on the Sangamon River in Illinois. There he was a farm laborer, boatman, surveyor, and store manager. He began to study English grammar and arithmetic and to read Shakespeare and the poetry of Robert Burns, and he joined a literary and debating club that met weekly at a local tavern. One day, at age twenty-three, he came into possession of a discarded copy of William Blackstone's *Commentaries*, from which he learned many of the basic principles of early-nineteenth-century jurisprudence. His early practical experience with the law came as an untaught litigant: he was sued at least four times during his New Salem years and, beginning in 1834, acted as a pettifogger, drawing up deeds, wills, mortgages, and other legal documents and pleading the cases of his neighbors in the permissive surroundings of the local justice of the peace court (Woldman 1994, 9–22).

Less than a year after his arrival in New Salem, Lincoln served in the militia in the so-called Black Hawk campaign but saw no combat. On his return from military service he ran for the legislature in the election of August 1832 but was badly beaten, the only time he ever lost an election by popular vote. Two years later, having in the meantime received appointments as village postmaster and assistant county surveyor, he easily won a legislative seat and followed with three additional successive terms.

On March 1, 1837, without undergoing any formal examination, Lincoln was granted a license to practice law in all the courts of Illinois. A month later, he left New Salem and moved to the new state capital at Springfield, where he became the law partner of John T. Stuart, with whom he had become friendly during the Black Hawk campaign. His principal duties were to conduct office business, including the preparation of pleadings and briefs in longhand, and to appear in trials involving rudimentary issues, while

Stuart ran for Congress against Stephen A. Douglas and then served two terms in Washington.

Fortunately for Lincoln, Illinois was still a young state, and there were few precedents or formidable authorities to research and cite. He was able to try most of his cases, such as his first one, *Hawthorne v. Wooldridge* (1837) (typically settled out of court), on principle rather than on precedent. Polishing his debating and public speaking skills by participating in a young men's lyceum, he began traveling the Eighth Judicial Circuit, joining a cavalcade of lawyers and Judge Samuel H. Treat, who rode in rickety buggies or on horseback over muddy trails, fording swollen streams, to hold court for several days in each of fourteen county seats, spread across an area comprising virtually one-fifth of the entire state of Illinois (Woldman 1994, 26–37, 85–86).

Although the practice of Stuart and Lincoln was more extensive than that of any other Springfield firm, it was not lucrative for its junior member. In 1841, the thirty-two-year-old Lincoln changed law partners, affiliating with former Judge Stephen T. Logan, who insisted that his junior associate be more thorough, methodical, and precise in the preparation of his cases. The firm of Logan & Lincoln, from April 1841 until it dissolved in the autumn of 1844, dominated the dockets of the state supreme court, participating in several landmark decisions, such as *Grable v. Margrave*, 4 Ill. 372 (1842), which became a standard for the assessment of damages in cases of sexual seduction (Woldman 1994, 38–42).

In December 1844, the firm of Lincoln & Herndon was formed. William Henry Herndon, nine years Lincoln's junior, came from New Salem and had been a law student in the office of Lincoln & Logan. Although Herndon was an impulsive radical abolitionist who did most of the menial work for the firm, and Lincoln was a cautious conservative Whig who tried practically all of its most important cases, the two split all of their income, mostly in the form of five- and ten-dollar fees, equally (Woldman 1994, 49–51, 56).

In 1842 (the year he married Mary Todd of Kentucky), and again in 1844, Lincoln had tried but failed to obtain the Whig nomination for Congress from the central Illinois district. In 1846, however, he was successful, and in August he won the election over his Democratic opponent, Peter Cartwright. Taking his seat in the House of Representatives in December 1847 as the only Whig member from Illinois, he immediately spoke out against the continuation of the Mexican-American War, which he viewed as an attempt to add more slave territory to the United States. He was also admitted to practice before the U.S. Supreme Court and argued his first case there in March 1849, just before returning home to Springfield to try to rebuild a disintegrated law practice, after accusations of lack of patrio-

tism had caused him not to be a candidate for reelection to Congress (Donald 1995, 94, 111–115, 119–125).

At age forty, Lincoln energetically set to work riding circuit with newly elected judge David Davis, being away from home for six months of the year, sleeping two to a bed in rustic inns or farmhouses with other lawyers, with no room in his saddle bags for law books, and relying largely on his wits and anecdotal abilities to win his cases with unsophisticated juries. Before the appearance in Illinois of railroads, telegraph lines, or daily newspapers, itinerant lawyers were the principal sources of news, political opinion, and witty repartee, at which Lincoln was the acknowledged master, and court days were local holidays for people, including members of juries, seeking both entertainment and enlightenment. Under these circumstances there was little incentive for the drawing up of elaborate briefs, even if there had been an opportunity to do so; hence, arguments comprised original reasoning based on broad constitutional principles, rather than per judicial precedents. It was during the years Lincoln traveled the Eighth Illinois Circuit that he developed the legal and political attitudes that characterized his peculiar presidency.

Although he was one of the most popular circuit-riding attorneys of his day, Lincoln's income from that portion of his practice was negligible. His clients tended to be poor and his travel expenses considerable. He was compelled to split fees with local lawyers who supplied clients, temporary office space, and local knowledge. But his gypsy-like meandering from one county courthouse to another during the 1840s and 1850s was invaluable to him politically, both because it enabled him to become closely acquainted with a coterie of fellow attorneys scattered across the region who became his avid supporters and organizers when he began once more to seek political office, and because it put him in touch with the opinions, aspirations, and mental processes of so many ordinary Americans, contributing immensely to the development of his famous "common touch" (Woldman 1994, 87–98).

For many years, Lincoln's cases were typical of a law practice in a region less than a generation removed from pioneering days. Civil litigation—involving quarrels between neighbors over land titles and boundaries or stray animals, and the enforcement of contracts, tried in local justice of the peace courts or on circuit—predominated. Less than one-tenth of his practice involved criminal cases. During the middle 1850s, however, Lincoln began to undertake much more complicated causes, involving vast property holdings and considerable technical knowledge. Banks, railroads, gas and insurance companies, and manufacturing concerns were examples of the large businesses that, along with municipal corporations, were increasingly among his clients. He began to participate in litigation dealing with patent rights

and infringements. Still confronting new and frequently unforeseen situations, he continued to argue fundamental constitutional principles, rather than search for precedents in the evolving law of his region. Indeed, some of the decisions resulting from his arguments became landmarks of Illinois jurisprudence affecting railroad construction, such as *Barrett v. Alton & Sangamon Railroad,* 13 Ill. 504 (1852); *Klein v. Alton & Sangamon Railroad,* 13 Ill. 514 (1852); *Alton & Sangamon Railroad v. Carpenter,* 14 III. 190 (1853); *Alton & Sangamon Railroad v. Baugh,* 14 Ill. 211 (1853); and *Chicago, Burlington & Quincy Railroad v. Wilson,* 17 Ill. 123 (1856) (Woldman 1994, 133–148, 171–174; Guelzo 1999, 167–170).

Perhaps the most important case that Lincoln won in the Illinois Supreme Court was that of the *St. Louis, Alton & Chicago Railroad v. Dalby,* 19 Ill. 353 (1857), in which the tribunal, by holding the railroad corporation responsible for the acts of its authorized agents, established the rule of law that was to govern all such questions thereafter. But Lincoln's most famous case, involving a contest for supremacy over the nation's transportation system between railroad and steamship corporations, was that of *Hurd v. Railroad Bridge Co.* (1857), which was ultimately settled by the U.S. Supreme Court in his client's favor (Basler 1953, 2:415–422; Woldman 1994, 175–176, 182–185; Guelzo 1999, 167–170).

From the time when he was able to command retainers of only two or three dollars to the time when he could successfully obtain a fee of five thousand dollars, Lincoln tried mostly common law and chancery cases, with criminal causes constituting less than 10 percent of his practice. Adapting himself to every imaginable kind of litigation, client, and court, he appeared as an appellate attorney in at least 290 cases in the Illinois Supreme Court and represented clients in state and federal courts in over 4,500 additional cases. One authority has estimated that he won favorable verdicts in approximately 70 percent of his cases (Long 1993, i–ii; Woldman 1994, 126–127, 148n).

Lincoln was universally thought by the most eminent jurists of his region to be a superb lawyer. David Davis, before whom most of his later circuit court practice took place, and who later served on the U.S. Supreme Court, testified that as an attorney Lincoln had few equals. Sidney Breese, the chief justice of the Illinois Supreme Court in Lincoln's day regarded him as "the finest lawyer I ever knew," and Judge Thomas Drummond, who presided over the U.S. District Court at Chicago during the same era, declared that Lincoln was "one of the ablest lawyers I have ever known." According to Representative Isaac N. Arnold, who traveled the eighth circuit with Lincoln for many years, his Springfield colleague was "the strongest jury lawyer we ever had in Illinois." No one objected when Lincoln substituted on the bench for Davis, as he did frequently when the judge was ab-

sent because of illness or personal business. The judicial temperament that Lincoln later exhibited as president in countless cases of military justice and in dealing with clashes within his cabinet was already evident in his calm, commonsense rulings as an irregular state "judge" (Woldman 1994, 149–160).

Lincoln's main weakness as an attorney was his lack of legal learning. His longtime partner declared that he had never observed Lincoln do more than glance at law books to find specific references, and that he knew little of the rules of evidence or of pleading and seemed to care little about them. He might cram for a specific case but otherwise read little law (Woldman 1994, 242–244).

Another weakness was a sometimes inconvenient fastidiousness that impeded his effectiveness whenever he became convinced that his cause was unjust. A contemporary recalled that "it was morally impossible for Lincoln to argue dishonestly. Lacking the willingness to employ subterfuges, sophistries, and appeals to prejudice, he was a poor advocate for a client who came into court with unclean hands" (Whitney 1940, 261).

But when he believed in the justness of his cause, he was unmatched in his ability to make the most intricate matters understandable to the farmers, laborers, and tradespeople who composed the juries in the courts of Illinois. His faculty for reducing issues to questions of basic principles, elucidated in plain language and illustrated with telling anecdotes, not only won him local fame and a host of clients in Illinois, but also suited him well for explaining to a distracted nation the essence of the complicated constitutional controversies that precipitated and arose during the American Civil War (Woldman 1994, 193–200).

In 1858, Lincoln was the nominee of the Illinois Republican party to unseat Senator Stephen A. Douglas. In a series of seven regional debates, the two lawyers argued the issues of the day, including the legitimacy of the recent *Dred Scott* decision, the validity of Douglas's doctrine of popular sovereignty, and the relationship of the Constitution to the question of the extension of slavery. Although more votes were cast for Republican candidates for the Illinois legislature in the ensuing election than for Democrats, the existing apportionment of legislative seats enabled the Democratic party to maintain control in Springfield and to reelect Douglas over Lincoln to the Senate. Lincoln, nevertheless, had become a national figure through the publicity given to his losing campaign; moreover, by forcing Douglas to take positions on slavery unpopular in the deep South, he had helped to create a division in the national Democratic party between a Northern Douglas faction and an extreme proslavery group that refused to accept the Illinois senator as their presidential candidate (Donald 1995, 211–224).

Famous Law Partners

Although their trial work is not as well known as that of their colleagues, the partners of at least two of the lawyers covered in this book—Abraham Lincoln and Clarence Darrow—have carved their own niche in history.

William H. Herndon, Lincoln's longtime partner, is perhaps best known for his portrait of Lincoln published in 1889. Edgar Lee Masters, author of the famed *Spoon River Anthology,* included a portrait of his neighbor Herndon contemplating in his declining years the life of a man [Lincoln] who had arisen "from the soil like a fabled giant/And thrown himself over a deathless destiny" (Masters 1992, 291).

Masters's own one-time partner was none other than Clarence Darrow. In *Songs and Satires* (1916), Masters penned a poem described as "the harshest assessment of the moral character of Clarence Darrow" (Uelmen 2000, 640). This assessment is in precarious balance with a much more favorable poem about Darrow that Masters later printed in *The New Republic* (also reprinted in Uelmen 2000, 641).

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In 1860, as a result of a lawyerlike indictment of slavery in a speech at Cooper Institute in New York City, and strenuous efforts on his behalf at the May Republican National Convention in Chicago, Lincoln became his party's candidate for president. When the Democratic party split and nominated two competing candidates, Lincoln was easily elected, thus ending his professional career as a practicing lawyer. When he left Springfield for Washington in February 1860, he told his law partner, Herndon, to let their shingle hang undisturbed, for if he lived he would return to resume practicing law "as if nothing had happened" (Weik 1922, 298).

The great questions that divided the United States and plunged it into four years of civil war that extended through most of Lincoln's presidency involved intricate issues of constitutionality, of legality, and of justice. The times demanded a national leader whose experience, intellect, disposition, and temperament permitted him to confront those issues forcefully and effectively. Was the secession of Southern slave states constitutional? Was the resulting conflict a war or an insurrection? Did the president have the right to order large-scale military movements without the approval of Congress? Did he have the right to suspend the writ of habeas corpus at his discretion, even where civilian courts were functioning, and to order the arrest and jailing of people without judicial warrants first being issued? Did he

have the right to increase the size of the nation's armed forces beyond previously authorized levels without prior congressional consent? Was it legal for him to levy taxes and spend money from the treasury without the previous approval of Congress? And could he confiscate the property of persons whom he had declared were engaged in rebellion against the United States, including, especially, their slaves?

Had Lincoln not been vastly experienced in the law, and particularly had he not been oriented to broad principles of constitutionality and justice rather than to hair-splitting technicalities, he would have lacked the tools adequately to meet the unprecedented legal and constitutional challenges with which he was continually confronted from his first day in office until the day he died. In his first inaugural address, a lawyerlike appeal for the maintenance of law and order and a plea to people in the North and the South to refrain from quarreling and stay "friends," Lincoln upheld the integrity of the Union as a solemn contract and refused to recognize the independence of the insurrectionary states in any way. Soon he established military courts, suspended the writ of habeas corpus, increased the armed forces, declared a naval blockade of the Southern coastline, and eventually issued proclamations emancipating the slaves of rebels because of "military necessity."

Lincoln's position in his notorious constitutional confrontation with Chief Justice Roger Taney in the *Ex parte Merryman* (1861) case, involving a Marylander's imprisonment by military authorities for alleged sedition when the civil tribunals were functioning, was upheld by Congress and by the Supreme Court in the so-called *Vallandigham* case, although it was partly overturned in a split decision by a postwar Supreme Court in the case of *Ex parte Milligan* (1866). Otherwise, both Congress and the courts generally endorsed Lincoln's position that his duty to preserve the Union and see that the laws were faithfully executed justified his acting in anticipation of congressional approval of certain military and financial decisions, and his temporary suspension of a single constitutional protection, namely habeas corpus, in order to protect the integrity of the Constitution as a whole (Neely 1991, 3–14, 51–74, 90–92, 164–184, 218–221; Silver 1998, 119–155, 217–232).

During slightly more than four years as president, Lincoln made five appointments to the U.S. Supreme Court. These men—Associate Justices Noah H. Swayne, Samuel F. Miller, David Davis, and Stephen J. Field, and Chief Justice Salmon P. Chase—ensured that the Court, for another generation, would tend to uphold national authority over states' rights, refuse to sanction any form of male social slavery, and validate the traditional Republican emphasis on the power of corporate wealth over governmental interference (Silver 1998).

But Lincoln's legal legacy most of all was that of incorporating the ideals of the Declaration of Independence into the U.S. Constitution. While working to preserve the Union, he temporarily assumed the role of a military dictator, but one whose veneration for legality and constitutionality permeated his every act. His state papers, models of legal argument, are a lawyer's briefs against disunion and state sovereignty. They illustrate his three greatest contributions to U.S. jurisprudence: (l) the annihilation of the previously popular doctrine of state supremacy over national authority, (2) the rededication of the nation to the idea of equal rights and equal justice for all, and (3) the enunciation of a national mission to provide for all humankind a model government "of the people, by the people, for the people."

—Norman B. Ferris

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LOCKWOOD, BELVA

(1830–1917)

Belva Lockwood
Library of Congress

"We pledge ourselves, if elected, with power so far as in us lies, to do justice to every class of citizens without distinction of color, sex, or nationality" (Fox 1975, 135). These words, from Belva Lockwood's acceptance speech as a candidate for the 1884 presidential election, exemplify her fight for equality during the nineteenth century. Belva Ann McNall Lockwood was the first female attorney to practice before the Supreme Court. Her active involvement in attempts to redress injustice against various underrepresented groups, such as Native Americans and women, made her a woman both reviled and respected. She was a "latecomer" to the field of law, but she was the first woman to graduate from a national law school, and she soon cemented her reputation by successfully representing the Eastern Cherokee Indians in an eight-million-dollar lawsuit before the Supreme Court. Not only did she test the waters of equality in the courtroom as the first woman to practice in federal courts, as well as before the Supreme Court, but

she was the first woman actually to run for president, not once, but twice, during the 1884 and 1888 presidential elections.

Born in upstate New York in 1830, Lockwood always had her own ideas about gender relations and equality. She would consistently argue with her father about things girls were not supposed to do, and early on, she recognized that there were very few things that women could not accomplish as well as men if they were given the chance (Fox 1975, 19). As a child, Belva was the top student in her class, and after graduation from her county school at age fourteen, she taught for one summer before heading to the Girls' Academy in Royalton, New York. Soon afterward, she married the son of her former headmaster, Uriah McNall, and moved with him to the milltown of Gasport, New York. Their daughter, Lura, was born a year later. After the loss of her husband in 1853 to poor health, she attempted to get a teaching job but turned down the offer after discovering that the salary was less than half what a male teacher would make. Disillusioned only for a short time, she sent Lura to live with her parents, who had since moved to Illinois, and moved to Lima, New York, to study at Genesee Wesleyan Seminary, known today as Syracuse University.

Genesee Wesleyan Seminary had just opened its doors in 1854, and the choice to pursue higher education was still an extraordinary one for a woman, particularly for a widow with a young child (Babcock 1997). Already a victim of prejudice, Lockwood found that she could easily express herself publicly on the issue of equal rights. After attending a lecture given by Susan B. Anthony, she gained an increased interest in changing the existing laws regarding property and voting rights for women. Soon after her arrival at Genesee Wesleyan Seminary, she had convinced the administration of Genesee College to admit her as a student, and she finished college in three years instead of the traditional four. Just before graduation in June 1857, the president of the college, Dr. Joseph Cummings, offered her the position of preceptress of the Lockport Union School District, in which she would be responsible for the education of approximately six hundred boys and girls between the ages of fourteen and eighteen (Dunnahoo 1974, 30–32).

Lockwood quickly distinguished herself by encouraging public speaking for both girls and boys, and every Saturday afternoon, each of the girls in her classes gave a short speech to an audience of parents and curious onlookers. There were many protests against her activities, but she refused to vacillate from her stance that boys and girls should receive the same education. As the Civil War began, Lockwood combined her efforts as president of a Ladies' Aid Society with teaching, soon opening her own female seminary, the McNall Seminary in Oswego, New York. After the end of the war in 1865, she decided that all the action was happening in Washington,

D.C., and after resigning her position as head of the McNall Female Seminary, headed to Washington with Lura. She wrote to a friend that she went to Washington, "this great political centre,—this seething pot,—to learn something of the practical workings of the machinery of government, and to see what the great men and women of the country felt and thought" (Winner 1958, 221).

Lockwood immediately became involved in the women's suffrage movement. She and Lura lived in the residence halls of the Union League Hall and opened their own private coeducational school, leasing the schoolrooms to religious, temperance, and political organizations in the evenings. She soon met Dr. Ezekial Lockwood, who became a staunch supporter. Their relationship quickly turned to romance, and on March 11, 1868, they were married. Considerably older than Belva, Dr. Lockwood was well established in Washington, but he closed his existing dentistry practice and opened a new office just down the hall from Belva in the Union League Hall. In January 1869, Belva gave birth to a daughter, whom the couple named Jessie Belva Lockwood (Fox 1975, 80–92).

Soon after the birth of Jessie, Lockwood accepted a position as vice-president of the newly formed Universal Franchise Association (also known as the Equal Rights Association), and it was not long before she had begun to petition Congress on suffrage matters. Her interest in law increased, and she applied for admission to Columbian Law School on October 23, 1869. Rejected, she received a letter from the president, George W. Sampson, which read, "Madam, The Faculty of Columbian College have considered your request to be admitted to the Law Department of this institution, and after due consultation, have considered that such admission would not be expedient, as it would be likely to distract the attention of the young men" (Dunnahoo 1974, 66). She was also refused by Georgetown University on the grounds that women had never been admitted, but her third attempt was a partial success. She applied in 1869 to the new National University Law School, whose vice-chancellor, William Wedgewood, had often spoken in favor of women's rights. The university refused her admission, but Wedgewood offered to teach private classes for her and other interested women. However, he made it clear that this would not entitle her to a diploma (Kerr 1947, 76–77).

As a law student, Lockwood continued her interest in the disadvantaged. In 1869, she took on a new project, fighting for equal pay for female Civil Service employees (Fox 1975, 100). She enlisted the support of Horace Greeley and proposed the Civil Service bill that reached Congress in 1870. The bill passed, and it read, "Hereafter all clerks and employees in Civil Service of the United States shall be paid irrespective of sex with reference to the character and amount of services performed by them" (Kerr 1947,

81). This was both a personal and a public victory, but this victory was dampened by the death of her daughter, Jessie. By May 1873, she had finished her course of study at the National University Law School, but she did not receive a diploma. Lockwood was unrelenting, however, in pursuit of the diploma she had rightfully earned, and she wrote to the current president of the United States, Ulysses S. Grant, also titular head of the National University Law School by virtue of his office. In her letter, she wrote, "Sir, You are, or you are not, President of the National University Law School. If you are its President, I desire to say to you that I have passed through the curriculum of study in this school, and am entitled to, and *demand,* my diploma" (Winner 1958, 224). Therefore, at age forty-three, Belva Lockwood prepared to embark on a new career as the first woman lawyer in the history of the United States. (Fox 1975, 107; Kerr 1947, 97).

Admitted to the bar of the Supreme Court of the District of Columbia on September 24, 1873, Lockwood quickly began arguing cases before the court. On behalf of her first client, Mary Ann Folker, she petitioned the court to grant a divorce in light of the ten years of cruel treatment Mrs. Folker had suffered at the hands of her husband. Lockwood won the case, obtaining the divorce for Mrs. Folker and a court judgment that Mr. Folker would pay for his ex-wife's expenses until she found means to support herself. When she was told that Mr. Folker would never pay, she reopened the case, and Frederick Folker went to prison until he promised to support his wife and children (Fox 1975, 105–108). Although this was her first case, it was a later case that brought her increased notoriety. Her defense of an accused murderer, a woman who was clearly guilty of shooting a constable, invoked the importance of common law. She argued,

> The laws must be enforced. My client is guilty. She has committed the double offense of resisting an officer of the law, then shooting the man. But gentlemen, the District of Columbia is under the common law. That law says a woman must obey her husband. She must obey him without question. Her husband told my client to load a gun and shoot the first man who tried to force his way into the house. As a good wife, she obeyed him. . . . Surely, gentlemen, you would not have a woman resist her husband. (Dunnahoo 1974, 114)

The jury returned a verdict of not guilty, and this strengthened her claim for seeking admission to the U.S. Court of Claims. Her appeal was denied, but for the first time, women had a sympathetic champion in the courtroom. She took on another case that a male lawyer would have refused to touch, that of the widow Charlotte VonCort, who had sued the U.S. government for the infringement of a patent for a torpedo boat invented by her

late husband. The case, won in a lower court, needed to go before the U.S. Court of Claims. Since Lockwood's claim to practice in this court of claims was denied, she herself appealed to the court. Her attorney, A. A. Hosmer, pleaded for her admittance, but Chief Justice Drake denied the plea, with the refusal, "Mistress Lockwood, you are a woman." Lockwood appealed, and the second verdict was even more harsh: "Mistress Lockwood, you are a *married* woman." This reasoning included the possible danger that a married female attorney would invite corruption, misapply funds, or commit fraud for which her husband would be liable under common law (*In re Mrs. Belva Lockwood, ex parte v. United States,* 9 Cl. Ct. 350–353 [1983]).

If Lockwood were to advance, she needed to supersede this barrier, so her immediate response was a petition to Congress, seeking a declaratory act or ;joint resolution that stated, "No woman otherwise qualified, shall be debarred from practice before any United States Court on account of sex." In 1876, Lockwood applied for admission to the U.S. Supreme Court bar, but her claim was denied since "none but men are admitted to practice before [the court] as attorneys and counselors . . . and the court does not feel called upon to make a change, until such change is required by statute, or a more extended practice in the highest courts of the States" (Babcock 1997, 6). Her dismay was heightened by the death of Ezekial Lockwood in the spring of 1877, but she forged ahead, and in the fall of 1877, H.R. 1077 was introduced by Representative John M. Glover. Although this bill had been presented before the House on numerous previous occasions, this time Senator Aaron Sargent spoke of Lockwood's acceptance by members of the legal profession. Many states, he argued, were admitting women to the bar, including his own state of California. "There is no reason why women should not be admitted to this profession or any other provided they have the learning to enable them to be successful in those professions. . . . Where is the propriety in opening our colleges . . . to shut them out?" (Dunnahoo 1974, 153). Despite Sargent's efforts, the bill's proponents were unable to obtain a vote of the full Senate. The bill was finally submitted to a vote on February 7, 1879, and Senator Sargent again made an impassioned plea. "No man has a right to put a limit to the exertions or the sphere of woman. . . . The enjoyment of liberty, the pursuit of happiness in her own way, is as much the birthright of woman as of man." The bill passed by a vote of 39 to 20, with 17 abstaining, on February 7, 1879, and was signed by the president on February 15. The story received full coverage in the national newspapers, and on March 3, 1879, Lockwood became the first woman admitted under the new law to practice before the Supreme Court. Three days later, she was admitted to the bar of the U.S. Court of Claims (Kerr 1947, 130). The claim cases became her favorite, and she broke another traditional prejudice when, on February 20, 1880, she approached the

U.S. Supreme Court with a motion to admit Samuel Lowry, an African-American lawyer, to the court. With her assistance, Lowry was admitted to the bar (Dunnahoo 1974, 164–165).

Her interest in the underrepresented made her a logical choice to represent the women of Washington at the Republican National Conventions in 1880 and 1884. Both times, she called for a sixteenth amendment to give women the right to vote. Disgusted at the lack of action, she sent a letter to Marietta Stow, the editor of the *Woman's Herald of Industry,* suggesting that suffrage might be obtained with the election of female candidates. She wrote,

> Why not nominate women for important places? Is not Victoria Empress of India? Is not history full of precedents of women rulers? The Republican party, claiming to be the party of progress, has little else but insult for women. . . . It is quite time we had our own party, our own platform, and our own nominees.

The result was the endorsement of Lockwood as a candidate for the presidency of the United States. Belva Lockwood became a much reviled character in the press, but she garnered more than four thousand of the popular votes, and when she ran again in 1888 on the same ticket of the Equal Rights party, the results were fairly similar.

These efforts were a direct result of her stance on equal rights issues and led to her advocacy of equal citizenship rights for Native Americans. A Cherokee, Jim Taylor, for whom Lockwood had already worked, enlisted her assistance in helping his people with their long-standing claim against the government. She represented the Eastern and Emigrant Cherokees in *Cherokee Nation v. United States,* a suit brought to the court of claims in 1903 and then appealed to the Supreme Court. This lawsuit addressed the claims of Cherokees who had been forced off their land in North Carolina, Georgia, and Tennessee by federal marshals. Her work on this case extended into the early twentieth century, and although the court of claims agreed the government owed her clients more money, Belva Lockwood was not satisfied and she took the case to the Supreme Court, where she won five million dollars for her clients (Dunnahoo 1974, 184–185). Not only was this a triumph for the law, but it set a precedent for female lawyers to fight against all injustice (Babcock 1997, 15). The Supreme Court justices who listened to Lockwood's arguments later said that she had made "the most eloquent argument of any of the attorneys before the Court" (Emert 1996, 78).

Lockwood lived to age eighty-six, and she worked actively on the claims cases that were so dear to her until three weeks before her death on May 19, 1917. She was a highly visible woman, and as an effective speaker, she tire-

lessly worked to pass legislation to fight injustice. Her record of litigation reflects her devotion to equal justice and civil rights.

—Jennifer Harrison

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MARSHALL, JOHN

(1755–1835)

Although John Marshall is best known as the fourth chief justice of the United States—from February 1801 until his death on July 6, 1835—he was also one of Virginia's finest litigators. Marshall's clientele ranged from the very rich and influential to the very poor and disenfranchised: his clients ranged from aristocratic British loyalists, to Revolutionary War veterans trying to recover back pay, to manumitted slaves forced into court to prove their freedom.

John Marshall
Library of Congress

Early Years

John Marshall was born September 2, 1755, in Prince William (later Fauquier) County, Virginia, near Germantown. John was the eldest of fourteen children born to Thomas and Mary Marshall. His father, Thomas Marshall, a Welsh immigrant, was a self-educated and self-made man, who got his start, like his friend George Washington, as a surveyor. His profession gave him knowledge of land, which in turn led to the land investments with which Thomas Marshall accumu-

lated wealth and prominence. At his death, in 1802, Thomas owned over 200,000 acres in Virginia and Kentucky (Smith 1996, 31). Thomas Marshall was known as a tolerant and intelligent man who helped found a nondenominational church in Fauquier County. He was also a clever inventor, responsible for creating the Marshall's Meridian Devise, a tool used to calculate true north based on magnetic north (Smith 1996, 32).

Thomas Marshall's wife, the former Mary Randolph, was descended from the most prominent family in all of Virginia. Through the Randolphs, John Marshall was related to both Richard Henry "Light Horse Harry" Lee, the father of Robert E. Lee, and to Thomas Jefferson. Some have speculated that Marshall's great respect for and devotion to women stemmed from his admiration for Mary Marshall. Growing up in the backwoods of Virginia, young John and his siblings were instilled by their parents with the virtues of education, duty, and hard work.

Soldier, Suitor, Student

Marshall was eighteen when the Revolutionary War began, and he served in the Continental Army from July 30, 1776, until resigning his commission as captain of light infantry in General Washington's army in February 1781. Marshall fought in engagements at Brandywine, Germantown, and Monmouth; he suffered the cold at Valley Forge; and he participated in the capture of Stony Point.

In 1779, Marshall joined his father, brothers, and cousins at Yorktown, where Thomas Marshall was commander of the Yorktown artillery. John's brother, Thomas Markham Marshall, and his cousin Humphrey served as officers under Thomas's command. The fortunes of war caused Thomas Marshall to be a welcomed and frequent guest in the home of Jacquelin and Rebecca Burwell Ambler. The senior Marshall had shared his son John's letters from the front with the Amblers and with one of their daughters, Mary Willis Ambler, known to all as Polly. When Marshall joined his family, the Amblers held a ball in honor of the heroic Captain John Marshall. There, John became infatuated with Polly and began courting his future wife; they were eventually married on January 3, 1783.

During Marshall's stay in Yorktown, a deadlock in the Virginia legislature made it impossible to muster troops for the war effort. While young Marshall awaited troops or orders, he entertained and educated Polly and her sister, Eliza Ambler. At the urging of his family and the Amblers, John began the study of law at the nearby College of William & Mary. Marshall later confessed, "From my infancy I was destined for the bar" (Smith 1996, 75). Thomas Marshall certainly did not discourage his son's choice of profession; in fact, he had been a charter subscriber to the first edition of

Blackstone's *Commentaries on the Laws of England* available in the colonies, when it was offered for purchase in 1772. Thereafter, father and son had studied the influential treatise together.

Marshall attended lectures on the common law at William & Mary, given by the then-preeminent American legal scholar, George Wythe. Among Marshall's classmates were Bushrod Washington, future associate justice of the Supreme Court and nephew of George Washington; and Spencer Roane, who would ultimately sit on the Virginia Court of Appeals—Virginia's highest court—and become Chief Justice Marshall's Virginia nemesis. Although Marshall was a diligent student, his law notebook shows evidence that his fancy occasionally turned to thoughts of the lovely Polly Ambler: Marshall frequently scribbled Polly's name on various pages of his notebook (Smith 1996, 80). Despite Marshall's brief course of study at William & Mary, he was called to the bar on August 28, 1780, in Fauquier County, Virginia.

On resigning his commission in 1781, Marshall was elected to serve in the Virginia Assembly. Marshall's experiences in the military and in the state assembly shaped his later nationalistic outlook. Years later, Marshall said that

> I partook largely of the sufferings and feelings of the army and brought with me into civil life an ardent devotion to its interests. My immediate entrance into the state legislature opened to my view the causes which had been chiefly instrumental in augmenting those sufferings, and the general tendency of state politics convinced me that no safe and permanent remedy could be found but in more efficient and better organized central government. (White 1988, 369)

Lawyer and Legislator

Initially, Marshall's somewhat careless appearance hampered his practice. Eventually, however, his brilliant legal ability shone through and his practice prospered, as an often-repeated story illustrates. A man came to Richmond to seek the services of a "city lawyer." When he asked an innkeeper who was the ablest lawyer in Richmond, the innkeeper informed the country gentleman that John Marshall was the finest lawyer in town. The gentleman sought out Marshall, but Marshall's appearance caused him second thoughts, and he retained a lawyer who wore a powdered wig. The gentleman then went to court and saw Marshall in action. Realizing that he had made a mistake, he asked Marshall to take his case, sheepishly explaining that he came to Richmond with $100, and that the first attorney had taken $95 as the fee. Nevertheless, Marshall agreed without hesitation to accept the case for $5 (Baker 1974, 77).

At first, like many young lawyers of the time, Marshall struggled financially. But his growing reputation, as well as his family connections, served him well in his political and legal career. Marshall was recognized as a rising star and attracted the kind of help given to promising young men. Marshall's seat in the Virginia Assembly provided him with a small salary. In 1782, Marshall was also selected for a position on the Virginia Council of State, largely due to the influence of his wealthy father-in-law, Jacquelin Ambler. Marshall's cousin, EDMUND RANDOLPH—the first U.S. attorney general and governor of Virginia—allowed Marshall to use his office until Marshall's practice picked up. It was through this gesture that Marshall indirectly inherited the law practice of his cousin and future political antagonist, Thomas Jefferson (Smith 1996, 90–91). In 1774, when Jefferson became governor of Virginia, he turned his practice over to Edmund Randolph; in 1786 when Randolph was elected governor, the entire practice then devolved to Marshall. John Amber, Polly's cousin, and by then patriarch of the Amber family, also retained Marshall in 1784 to serve as counsel for the family. With the richest man in Virginia as a client and friend, Marshall attracted even more new clients (Smith 1996, 101). James Monroe, himself a rising star in the Virginia political firmament, and a longtime friend of Marshall's, retained Marshall to handle his financial affairs on Monroe's election to the Continental Congress.

Marshall's military service also generated legal business. Revolutionary War veterans enlisted Marshall's services in getting their back pay and obtaining their pensions. Records indicate that Marshall's military service enabled him to secure many a soldier's pension (Baker 1974, 79).

But Marshall's community standing did not prevent him from following the dictates of his conscience. A free black woman named Angelica Barnet was sentenced to death for the killing of a white intruder. She was subsequently raped and impregnated by the jailer while awaiting execution. First Polly, then later John, signed a petition for Barnet's pardon, which was eventually granted (Baker 1974, 101).

The Fairfax Estate

By far the longest-running litigation in which Marshall was involved concerned the disposition of the estate of Lord Fairfax. When Lord Fairfax died in 1781, he owned some five million acres encompassing the equivalent of seven Virginia counties and six counties in what would become West Virginia. Thomas Marshall had surveyed much of the land and was the superintendent of Leeds Manor; both Marshall and George Washington counted Lord Fairfax among their friends. After Fairfax's death, the disposition of his land generated decades of litigation and had a tremendous impact on

John Marshall's reputation and practice. One contemporary lawyer stated that the Fairfax litigation ensured Marshall's position "at the head of the practice" (Smith 1996, 107). Not until Marshall was well into his tenure as chief justice would the matter of Lord Fairfax's estate finally be settled.

Marshall's initial involvement with the Fairfax lands came in the 1786 case of *Hite v. Fairfax*. It was Marshall's first major case and his first appearance before the Virginia Court of Appeals (Smith 1996, 105). At issue was who held title to the land in Virginia originally granted to Lord Fairfax. Marshall represented the Fairfax descendants as co-counsel, and was opposed by the considerable legal talents of Edmund Randolph and John Taylor of Caroline. The Court ruled in favor of the *Hite* claim, but in doing so it reaffirmed Fairfax's ability to convey title to the vast tract. Therefore, in effect it was a major step in quieting title of all those who had taken from Lord Fairfax or his descendants.

Marshall himself had a great desire to invest in the Fairfax property. Lord Fairfax's heir, Denny Martin Fairfax, lived in England and was anxious to sell the property before it escheated to Virginia. (During and after the Revolution, many states passed laws confiscating the estates of Loyalists and of British subjects residing abroad.) In 1794, the state had sold a 788-acre tract of the Fairfax land to David Hunter. In April 1795, Marshall represented Martin by filing suit to stop the sale to Hunter, claiming that Virginia did not have title to the land it was attempting to convey. The state court ruled in favor of Martin and Marshall—Judge St. George Tucker held that Hunter must initiate proceedings to clear title before the sale could be effected. Marshall, confident of his ability to defend the suit, immediately dispatched his brother James to England to negotiate a sale of 215,000 acres of the land. In doing so, Marshall thus created a direct conflict of interest, which by modern professional ethics standards would have rendered him unable to continue representing Martin, but such practices were not uncommon in Marshall's day.

Several county courts held that the state could proceed with the sale. To make matters worse, the Eleventh Amendment—which prohibited citizens of states and foreign countries from suing one of the United States in federal court—was pending. Quickly, Marshall filed suit against Hunter in federal court in April 1795; in June, a federal circuit court ruled in favor of Denny Martin Fairfax. Hunter appealed, and in 1816 the Marshall Supreme Court (minus the chief justice, who recused himself) finally settled the matter in *Martin v. Hunter's Lessee*. In the meantime, Marshall returned to the Virginia House of Delegates in 1796 and was able to effect a settlement in which Marshall and his brother received 50,000 acres of the estate (Smith 1996, 166–168).

Statesman and Lawyer

As soon as his position among the leaders of the Virginia state bar seemed all but assured, events compelled Marshall to resume a measure of public service. Daniel Shay's 1786 rebellion alerted Marshall to the immediate need for constitutional reforms to ensure a central government adequate to preserving the Union. Marshall wrote of the revolt, "[It] cast a deep shade over that bright prospect which the Revolution in America and the establishment of our free governments had opened to the votaries of liberty throughout the world" (Corwin 1933, 318). Though not a delegate to the Philadelphia Convention in 1787, Marshall was a member of the Virginia ratifying convention. His speeches defending the new federal court system are testament to Marshall's capable legal mind, as well as his skill as a persuasive advocate. Once Virginia ratified the Constitution, Marshall retired from the state legislature and returned to the full-time practice of law; he even rejected an appointment as U.S. attorney for Virginia in 1789.

That same year, Marshall's account book indicated that he served more than three hundred clients, most of whom he represented in some sort of litigation (Smith 1996, 145). Marshall was joined by Patrick Henry on two cases, thus constituting a veritable eighteenth-century "Dream Team": a case of infanticide and a case regarding the collection of debts owed the British. The first involved a flurry of rumor, innuendo, and insinuation that shocked Virginia society. Richard Randolph was called before a grand jury to answer for his alleged involvement with his sister-in-law Nancy Randolph and murder of the infant allegedly produced by their taboo affair. Henry's examination of the witnesses coupled with Marshall's ordered closing arguments resulted in no charges being brought against Richard Randolph (Smith 1996, 153). Some years later, in 1815, Nancy revealed that the baby, who had died shortly after being born, was that of her fiancé, Theordoric Randolph, who died shortly after conceiving the child with Nancy.

Henry and Marshall's other dual appearance concerned the disposition of Virginians' debts owed to British creditors. At the end of the American Revolution, American debtors owed some five million pounds sterling to British creditors—almost half of it owed by Virginians. These debts caused considerable friction in relations between the two countries after the war. Although the 1783 Treaty of Paris provided for the recovery of such debts, Virginia initially allowed debtors to pay sums to the state treasury. When the currency depreciated, many shrewd Virginians—including Washington and Jefferson, the Randolphs, and a number of other monied citizens—seized on this loophole. In addition, Virginia passed a law totally barring re-

covery by the British in Virginia state courts. Marshall served as counsel for nearly all of the defendants, who ended up being sued in federal courts. Marshall and Henry served as counsel all the way to the Supreme Court, but they lost the case of *Ware v. Hylton,* which held that the terms of the Treaty of Paris were controlling and Virginia's debt sequestration statute was null and void (Smith 1996, 158). Marshall's skill in prosecuting the litigation, however, overshadowed the fact that he lost the case. One observer stated that "the discussion was one of the most brilliant exhibitions ever witnessed at the Bar of Virginia." Another stated that "Marshall . . . excelled himself in sound sense and argument, which you know is saying an immensity" (Smith 1996, 157).

Prolegomenon to Greatness

After refusing several federal posts, Marshall finally accepted a post in 1797 as minister to France, where he became enmeshed in the notorious XYZ Affair. In 1800, he agreed to be John Adams's secretary of state, and eventually, in 1801, chief justice of the United States, a post he held until his death. Although Marshall's reputation was secured on the national stage, his legal skill and forensic powers were very much in evidence as he began his career in Virginia.

—Christian Biswell and Brannon P. Denning

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MARSHALL, THURGOOD

(1908–1993)

Thurgood Marshall

Attorneys who argued the case against segregation stand together smiling in front of the U.S. Supreme Court building after the high tribunal ruled that segregation in public schools is unconstitutional. Left to right are: George E. C. Hayes, Washington, D.C.; Thurgood Marshall, special counsel for the NAACP; and James Nabrit Jr., professor and attorney at law at Howard University in Washington, 17 May 1954. (Bettmann/Corbis)

Thurgood Marshall may well be the single most important lawyer of the twentieth century. During his years as legal counsel of the National Association for the Advancement of Colored People (NAACP), Marshall argued thirty-two cases before the Supreme Court and participated in eleven others. His life's work literally defined the movement of race relations in the United States throughout the twentieth century:

> It was Marshall who ended legal segregation in the United States. He won Supreme Court victories breaking the color line in housing, transportation, and voting, all of which overturned the "separate but equal" apartheid of American life in the first half of the [twentieth] century. It was Marshall who won the most important legal case of the century, *Brown v. Board of Education*, ending the legal separation of black and white children in public schools. The success of the *Brown* case sparked the 1960s civil rights movement, led to the increased number of black high school and college graduates and the incredible rise of the black middle class in both numbers and political power in the second half of the century. (Williams 1998, xv–xvi)

Thoroughgood Marshall was born in Baltimore, Maryland, on July 2, 1908, the second son of William Canfield Marshall, a sleeping car porter, and Norma Williams Marshall, a teacher. Thurgood (his name was changed officially in 1914) was raised in an activist African-American community in racially divided Baltimore. He received his diploma from the segregated Frederick Douglass High School in 1925. Five years later, he obtained the A.B. degree, graduating with honors from the all-male, all-black Lincoln University in Oxford, Pennsylvania. Statutorily barred from admittance to the University of Maryland law school because of the state's segregation policy, Marshall matriculated at the all-black Howard University School of Law in Washington, D.C., in 1930. There Marshall studied under Charles Hamilton Houston, the first African-American person to win a case before the Supreme Court. Houston consistently encouraged his students to use the law as a medium to eliminate the racist segregation system of Jim Crow. As Marshall later put it, Houston was "hell bent on establishing a cadre of Negro lawyers, dedicated to fighting for equal rights" (Tushnet 1994, 6). After three years, Marshall earned the LL.B. degree, finishing first in his class. That same year he was admitted to the Maryland bar and opened a private practice in Baltimore.

Marshall's practice developed slowly, in part due to his involvement with the NAACP. Marshall was recruited to assist the organization by his former law school professor, and head of the NAACP's legal office, Charles Hamilton Houston. To introduce Marshall to the enormity of the civil rights battle—and to bring him face to face with bitter segregationists—Houston took Marshall on a trip through the South. Houston wanted his protégé to understand that the lawyers' "toolbox" included more than the rules of the courts; "it also included an appreciation of the social setting in which the law operated. Lawyers therefore had to be able to explain to lawmakers how rules actually operated in society, and to do that they had to draw on the information that sociologists, historians, and other students of social life made available" (Tushnet 1994, 6). In 1934, inspired by Houston's commitment

and methodology, Marshall relinquished his private practice and became chief counsel for the Baltimore branch of the NAACP.

The following year, Marshall won his first major civil rights case, *Murray v. Pearson* (1935), in which a state court ordered that a qualified African-American man—who had applied to the University of Maryland law school and been rejected on account of his race—be admitted. (Marshall later said that he wanted to "get even" with Maryland for not letting him go to its law school.) Supervised closely by Houston, *Murray* was Marshall's "real introduction to the careful practice of law." For the next two years, Marshall and Houston—teacher and student—worked side by side. To give credit to Marshall as a great lawyer is to recognize Houston as a great teacher. From Houston, Marshall "learned that the events in the courtroom were only a small part of the trial lawyer's work. Far more important, he had to develop the facts through intensive investigation. Once the facts were in hand, Marshall learned, the trial lawyer had to be sure that they were admitted into evidence. Even if the trial judge ruled against him, as would frequently happen in civil rights cases, Marshall had to be sure that he developed a record that would allow an appellate court to reverse the trial judge. There was nothing flashy about this part of the job . . ." (Tushnet 1994, 11). This methodology served Marshall the lawyer well for the next three decades.

In 1936, Marshall joined the national staff of the NAACP, where he served in a number of positions: assistant special counsel (1936–1938), chief legal counsel (1938–1940), chief legal counsel, Legal Defense and Educational Fund, Inc. (1940–1950), and director–chief legal counsel, Legal Defense and Educational Fund, Inc. (1950–1961). During this twenty-five-year period, Marshall traveled throughout the country protecting the rights of African-Americans. He represented African-Americans who had been the victims of discrimination in employment, housing, and transportation. He spoke up for African-Americans accused of murder, theft, and rape. He counseled African-Americans in tenant-landlord disputes, labor disputes, and courts-martial. And he fought against coerced confessions, jury exclusion, and witness tampering. When clear racial overtones prejudiced a case, Marshall and the NAACP were prepared to provide assistance.

Marshall's courtroom style was persuasive but not forceful. One associate noted that Marshall did not "purport to be a legal scholar, but [was] an effective lawyer because he [had] common sense and a good instinct for facts." Marshall knew full well that the success of any case was more dependent on preparation than on courtroom theatrics. Accordingly, Marshall spent many hours conducting research, evaluating precedents, consulting with witnesses, and writing and rewriting briefs (Bland 1973, 8). At trial, the fruits of his labor, masterful in content, were delivered in his hallmark style: straightforward and plainspoken. "Marshall's trial work was

rarely the thrust-and-parry dramatized in film; much more often it was the patient compiling of facts to present to hostile juries and judges. His oral advocacy was commonsense and down to earth, capturing the heart of the moral cause for transforming civil rights law" (Tushnet 1994, vii). Marshall preferred the power of the argument to the power of the delivery.

Beginning in 1938, Marshall participated either by direct argument or by assisting in the preparation of the legal brief in forty-three cases brought before the U.S. Supreme Court by the NAACP. In thirty-two cases he participated by direct argument; he was victorious in twenty-nine. In eleven other cases Marshall assisted in the preparation of the legal brief. These cases constitute much of the significant civil rights litigation of the twentieth century. During Marshall's tenure at the NAACP, the Supreme Court decided a host of cases with great constitutional and societal significance. Perhaps the most important were those in which the Court struck down "whites only" primaries, restrictive property covenants, and segregated public educational facilities: *Smith v. Allwright* (1944), *Shelley v. Kramer* (1948), and *Brown v. Board of Education* (1954). In each, Marshall was the mastermind behind the litigation strategy.

In Texas (and many other southern states) the Democratic party prohibited African-Americans from voting in primary elections. (The Supreme Court had upheld this practice in 1935.) This exclusion was critical, for in the one-party South the victor in the Democratic primary was, with rare exception, the victor in the general election. In 1941, however, in a case unrelated to race, the Court ruled that primaries were "an integral part" of the political process. Marshall saw an opening: "[If] state law . . . made the primary an integral part of the procedure of choice [then] . . . in fact the primary effectively control[led] the choice of Senators and Representatives. . . . The legal consequence of this . . . [was] that the right to vote in Texas primary elections [was] secured by the [Fifteenth Amendment]." When a "whites only" primary was once again challenged before the Supreme Court, the justices accepted Marshall's argument. Thus, *Smith v. Allwright* (1944) overthrew the South's "white primary," permitting greater participation for African-Americans in the political process. William H. Hastie (who later became the first African-American judge on the U.S. Court of Appeals), Carter Wesley, and George M. Johnson assisted Marshall in this case.

A restrictive property covenant prohibited a certain class of persons from owning or occupying land. (In 1926, the Supreme Court had sustained the use of such covenants.) These covenants, often racially motivated, limited the supply of housing available to African-Americans. As such, Marshall committed the NAACP to a crusade against these agreements. Marshall opted to use sociological and economic material as the principal point of at-

Litigators as Judges

This book includes a number of lawyers who served as justices on the U.S. Supreme Court. They include John Marshall (who, although he was a leading member of the Richmond bar prior to his appointment to the U.S. Supreme Court, is partly included in this volume because of his dramatic impact on American law as chief justice of the Court), Louis Brandeis, Robert Jackson, John Marshall Harlan II, Thurgood Marshall, and Ruth Bader Ginsburg. A number of other justices—for example, Roger Taney, Hugo Black, and Lewis Powell—were also known as outstanding trial attorneys and might very well have been included had someone else drawn up the list or were it somewhat longer. Indeed, at the Constitutional Convention, Benjamin Franklin had suggested that judges should be selected, as in Scotland, by fellow lawyers "who always selected the ablest of the profession in order to get rid of him, and share his practice [among themselves]" (Farrand 1937, 1:120).

Although the U.S. Constitution outlines minimal qualifications for members of Congress and the president, it specifies no formal requirements for federal judges and justices other than appointment by the president and confirmation by the U.S. Senate (Vile and Perez-Reilly 1991, 198). In this century, a law degree has become an understood prerequisite (earlier, justices were sometimes self-educated, often "reading law" under another experienced attorney rather than attending law school). Although some appointees to the U.S. Supreme Court have distinguished themselves in trial work, others have engaged in other kinds of legal practice.

The central debate among scholars regarding appointments to the U.S. Supreme Court has centered not on the trial experience of appointees but rather on their prior judicial experience. One of the most famous articles on the subject was written by Supreme Court justice Felix Frankfurter, who had made his reputation before his appointment to the Court primarily as an advisor to President Franklin D. Roosevelt and as a Harvard law professor.

Frankfurter noted that many of the most outstanding justices—including John Marshall, Bushrod Washington, Joseph Story, Roger Taney, Louis Brandeis, and Charles Evans Hughes—had come to the Court without prior judicial experience. He concluded that "greatness in the law is not a standardized quality" and that "judicial experience is not a prerequisite for that Court" (Murphy and Pritchett 1986, 163).

Despite Frankfurter's judgment, presidents have increasingly looked to the bench in making their appointments to the U.S. Supreme Court.

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tack. When the case was argued before the Supreme Court, thirty-eight pages of data showing the disastrous sociological and economic effects of racially segregated housing were submitted to the justices (Bland 1973, 51). But Marshall did not rely solely on sociological data. He also focused on "state action": The equal protection clause of the Fourteenth Amendment prohibited a state from denying the right to own and occupy property to any person solely because of race. This civil right was protected from invasion by a state legislative body, of course, but should be protected from invasion by a judicial body, for "the acts of state courts are those of the state itself within the meaning of the limitations of the Fourteenth Amendment." Then, using an instrument from Houston's "toolbox," Marshall noted the wreckage caused by judicial enforcement of restrictive covenants: "[It] has created a uniform pattern of unprecedented overcrowding and congestion in the housing of Negroes and an appalling deterioration of their dwelling conditions. The extension and aggravation of slum conditions have in turn resulted in a serious rise in disease, crime, vice, racial tension, and mob violence." Although the Court ignored most of the social data, Marshall's "state action" argument was persuasive. Although the covenants themselves constituted private behavior—activity beyond the scope of the Constitution—judicial enforcement of those covenants violated the equal protection clause. Thus, *Shelley v. Kraemer* (1948) struck down racially restrictive covenants, increasing the supply of housing available to African-Americans.

Marshall's most lasting contribution, however, came in the area of desegregating public education. Beginning in the 1930s, the NAACP brought suits in state and federal courts challenging, as violative of the equal protection clause, state-imposed racial segregation in public education. The NAACP strategy was twofold. First, seek to ensure that states in fact provided *equal* educational facilities. Marshall thus instructed local chapters of the NAACP "to conduct research, collect, collate, acquire, compile and publish facts, information, and statistics concerning education facilities and educational opportunities and the inequality in the educational facilities and educational opportunities provided for Negroes out of public funds" (Brand 1973, 73). Second, persuade the justices that "separate but equal" educational facilities were inherently unequal. Accordingly, Marshall gathered extensive sociological and psychological materials evidencing the damaging effects of segregated public schools on children of all races.

Brown v. Board of Education of Topeka, Kansas (1954) was the magnum opus of Marshall's litigation career. The NAACP's finest legal talent—Jack Greenberg, Louis L. Redding, James Nabrit Jr., George E. C. Hayes, Robert Carter, and Spottswood Robinson—assisted him. Before the Supreme Court, and opposed by John W. Davis, former solicitor general of

the United States, Marshall forcefully advanced both constitutional and sociological arguments. First, segregated public schools denied to blacks the equality of educational opportunity required by the equal protection clause. Second, segregation of African-Americans imposed on them "a badge of inferiority." To support the second assertion, Marshall introduced an array of sociological data—supported by such leading sociologists as Gunnar Myrdal, E. Franklin Frazier, and Kenneth Clark—discussing the negative effects of segregation. An appendix to Marshall's brief—a position paper entitled "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement" and supported by thirty-two leading sociologists—attested to the psychological and social damage incurred as a result of segregation. Obviously Marshall had not forgotten the important extralegal strategies taught him by Charles Hamilton Houston.

The Court's opinion read like Marshall's brief: "Education . . . is a right which must be made available to all on equal terms." Relying heavily on the sociological evidence introduced, the Court noted, "To separate [Negro children] from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court then concluded, in perhaps its most famous edict, "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

Marshall's reliance on sociological data was later subjected to severe criticism. Nevertheless, it had been persuasive to the justices. And *Brown v. Board of Education* remains both Marshall's and the NAACP's greatest legal victory; moreover, it is perhaps the most important Supreme Court decision of the twentieth century. In 1975, Richard Kluger authored *Simple Justice*, a superb study of the desegregation efforts of Marshall and the NAACP. The book was later made into a movie.

Seven years after *Brown*, Marshall left the NAACP. In 1961, President John F. Kennedy nominated Marshall for a seat on the U.S. Court of Appeals for the Second Circuit. When a group of hostile conservative southern senators impeded his confirmation, Marshall served for a brief period under a recess appointment. The Senate eventually confirmed him on September 11, 1962, by a vote of 54 to 16. While serving on the court of appeals, Marshall authored 112 opinions, none of which was overturned.

Marshall resigned his judgeship in 1965, accepting the position of solicitor general of the United States. During his stint in the Department of Justice, Marshall argued nineteen cases for the government before the U.S. Supreme Court. In fourteen of those cases, the government prevailed, including *Harper v. Virginia Board of Education* (1966), in which the Court held that state taxes or fees that limit the right to vote were unconstitutional.

On June 13, 1967, President Lyndon B. Johnson nominated Marshall to succeed Associate Justice Tom Clark on the U.S. Supreme Court. In announcing his selection, Johnson said, "It is the right thing to do, the right time to do it, the right man and the right place." On August 30, 1967, by a vote of 69 to 11, the Senate confirmed Marshall. He thus became the first African-American to sit on the highest bench in the land. While there, Justice Marshall continued to seek remedies for the damage remaining from the nation's history of slavery and racial bias. "Justice Marshall gave a clear signal that while legal discrimination had ended, there was more to be done to advance educational opportunity for blacks and to bridge the wide canyon of economic inequity between blacks and whites" (Williams 1998, xvi). Marshall retired on June 27, 1991, at age eighty-two, having served on the high court for twenty-four years.

Marshall received numerous awards and honors, including the NAACP's highest honor—the Springarn Medal—in 1946; the Robert S. Abbott Memorial Award, for fighting to "secure basic human rights guaranteed every citizen," from the *Chicago Defender* in 1953; the Philadelphia Liberty Medal in 1992; and the American Bar Association's highest award—now appropriately named the Thurgood Marshall Award—also in 1992. He also received a number of honorary degrees from various universities.

During his lengthy civil rights career, Marshall wrote a number of articles that appeared in various publications, including *The Crisis*, the *Journal of Negro Education*, and the *Harvard Law Review*. A fair number of his speeches have also been published.

On January 24, 1993, Thurgood Marshall, at age eighty-four, died of heart failure in Bethesda, Maryland.

—Richard A. Glenn

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MARTIN, LUTHER

(1744–1826)

Luther Martin's distinguished legal career began in 1772, shortly before the beginning of the American Revolution, and extended to 1819 when, shortly after arguing *McCulloch v. Maryland,* Martin suffered a debilitating stroke at age seventy-one. Martin was a member of the Continental Congress and a member of the Federal Convention, and he served thirty years as Maryland's first attorney general. Luther Martin is best known for defending Aaron Burr in his famous treason trial and Supreme Court associate justice Samuel Chase in an 1805 impeachment trial. His legal acumen, vast memory, loquacity, and penchant for high-profile, difficult cases distinguish the redoubtable Martin as one of the finest lawyers in American history.

Luther Martin
Kean Collection/Archive Photos

Beginnings

Little is known about Luther Martin's youth, except that he was the third of nine children and was born near New Brunswick, New Jersey, in 1744. For his education, Martin was enrolled at the College of New Jersey (later Princeton

University). At the College of New Jersey—aptly described by Andrew Burnaby, a contemporary English traveler, as "a handsome school for the education of dissenters" (Clarkson and Jett 1970, 14)—Martin met future chief justice of the United States Oliver Ellsworth, before whom Martin would later argue many cases. Martin graduated from the College of New Jersey in 1766 and became a schoolmaster at Queen Anne's Country Free School in Queenstown, Maryland. In 1770, Luther embarked on the study of law as an apprentice, while maintaining a teaching position at an Accomack County, Virginia, grammar school, and was called to the bar in 1772.

Lawyer, Revolutionary, Framer, and Anti-Federalist

Aided by his good reputation and sound judgment, Martin's practice flourished. In recognition of his growing prominence, in 1774, Martin was elected to the Somerset County Committee of Observation and was later appointed as a delegate to the Annapolis Convention. Martin was among the first revolutionaries in predominantly Tory Somerset County, Virginia. An outspoken critic of the British government, he acquired and circulated Thomas Paine's essay *Common Sense* (Clarkson and Jett 1970, 35). Martin and British general Sir William Howe exchanged salvos in a propaganda battle waged in the *Maryland Gazette* and the *Maryland Journal*. To gain support for the revolution, Martin undertook a personal effort to distribute these exchanges in the isolated Eastern Shore counties (Clarkson and Jett 1970, 37). It was during this period that Martin formed a close relationship with another future Supreme Court associate justice, Samuel Chase. Chase, a leader of the Sons of Liberty and signer of the Declaration of Independence, recommended Martin for the position of first attorney general of Maryland. Years later, Martin would defend Chase in a politically motivated impeachment undertaken by the party of Thomas Jefferson to chasten the Federalist-controlled judiciary.

During his tenure as Maryland attorney general, Martin was a delegate to the 1787 Constitutional Convention (White 1988, 230). There, Martin earned the reputation as an "excessively voluble orator"—in one instance delivering a speech to the convention that lasted the whole of two days—and, as a consequence, he also earned the enmity of some of his fellow delegates. A persistent advocate for the small states and an opponent of a powerful central government, Martin played a part in rallying support for equal representation of small states in the Senate and argued for a single-term executive. Ironically, Martin, the opponent of a powerful central government, played a major role in drafting the supremacy clause, which makes the Constitution, laws, and treaties supreme over conflicting state laws. At the convention, Martin also exhibited a passion for human rights and civil liber-

ties. He was vehemently opposed, on moral and philosophical grounds, to the continuation of the slave trade (Clarkson and Jett 1970, 127–128). He also advocated a federal bill of rights guaranteeing specific individual liberties. Unable to convince his fellow delegates to adopt his suggestions, Martin, along with John Francis Mercer, took leave from Philadelphia without signing the document. Subsequently, Martin publicly opposed Maryland's ratification of the new constitution, enumerating his objections in a report to the Maryland legislature printed as *The Genuine Information* (1788). Again, there is an irony in Martin's activities on behalf of the anti-Federalist cause—years later, Jefferson excoriated Martin, who had become a critic of the president, as a "federal bulldog."

Attorney General of Maryland

Martin served as Maryland's first attorney general from 1778 until 1805, gaining prominence and notoriety for his diligent efforts during his long tenure. During the war years, Martin's duties took him from county to county—libeling vessels, prosecuting loyalists for arson and treason, and prosecuting criminals. Martin resigned his post in 1805, but he served again briefly from 1818 to 1819, until he was debilitated by a stroke. In between, Martin served as chief judge of a Baltimore city court from 1813 until 1816, when that court was abolished.

It was during his last, brief tenure as attorney general that Martin delivered a two-and-a-half-day closing argument before the Supreme Court in *McCulloch v. Maryland*. Martin, then seventy-one, was one of the few members of the Philadelphia Convention still living. During his argument, Martin shrewdly used his own historical import to garner prestige for Maryland's cause and to remind the other justices of their close association with the framers' generation (White 1988, 238). Despite Martin's efforts, Maryland did not prevail. The Supreme Court held that the Constitution's necessary and proper clause empowered Congress to charter a national bank and that a state could not subsequently tax a federal bank. Albert Beveridge considered Martin's arguments in *McCulloch* to be "the last worthy of remark which that great lawyer ever made" (White 1988, 240).

Practice and Personal Life

The nascent federal judiciary created by the Constitution that Martin opposed furthered Martin's reputation as a skilled practitioner. In time, Martin would also become one of a small number of lawyers who regularly made appearances before the U.S. Supreme Court—second only, some said, to Daniel Webster. In addition to his duties as attorney general, Martin ac-

quired a growing federal practice, which frequently took him to Boston, New York, and Philadelphia; and he remained his home state's most sought-after appellate attorney.

One span of less than ten months in 1801 and 1802 attests to Martin's reputation as a tireless litigator. During that time, Martin argued before the U.S. Supreme Court, the federal circuit court, two state general courts, the Maryland Court of Appeals, and Baltimore criminal court. Court reports indicate that between January 1 and February 5, 1802, alone, Martin argued daily in the general court, the court of appeals, and the chancery court (Clarkson and Jett 1970, 194).

Between 1808 and 1813, Martin argued more than two dozen cases before the U.S. Supreme Court (White 1988, 235). Most of these cases involved maritime law of prize, admiralty, and insurance; others touched on issues of evidence, sales, wills, property, and constitutional law (White 1988, 235). The seminal case of *Fletcher v. Peck* (1810) was among the latter (Clarkson and Jett 1970, 283). Members of the Georgia legislature had transferred millions of acres of Georgia's western lands, which include what are now Alabama and Mississippi, to several land companies. Outraged at this large-scale corruption, known as the Yazoo land scandal, voters turned out nearly the entire legislature at the polls. The new legislature repealed the sale and even publicly burned the original offending act. In the meantime, however, the land companies had sold parcels of the land to innocent third parties. Despite the self-dealing that accompanied the original sale, in which all but one legislator was said to have profited, the Supreme Court protected the contracts between the subsequent purchasers and the land companies.

Although he was an unqualified professional success, Martin's family life was tragic, a fact that might explain the alcoholism to which Martin's contemporaries made frequent reference. His wife, Maria Cresap, died young. Two of his daughters married young and against their father's will. One daughter, Maria, eventually separated from her husband, went insane, and died young. The other, Eleonora, eloped with one Richard R. Keene, precipitating a public feud between Martin and Keene, in which the father and his son-in-law traded barbs in pamphlets.

Martin's indulgences, and his penchant for unpopular causes, made him the target of jealous rivals and political opponents. One such rival, Benjamin Galloway—smarting over being bested in the courtroom by Martin, who had also disparaged Galloway's character in court—petitioned the Maryland General Assembly for the attorney general's impeachment based on Martin's many drunken court appearances (Clarkson and Jett 1970, 204). Despite the fact that the allegation was no doubt true, the house of delegates' treatment of the proposal, memorialized by the following entry in its journal, best expresses that body's esteem and affection for Martin: "On

motion, the question was put, that the said letter [from Galloway] be ordered to lie on the table? Determined in the negative. Ordered, that the said letter be thrown under the table" (Clarkson and Jett 1970, 205).

Another client, a Quaker, once extracted from Martin a promise to abstain from drink during the course of the representation. At trial, Martin apparently struggled during the court's morning session, torn between keeping his word and giving his client effective assistance of counsel. As the story goes, Martin soaked a loaf of bread in brandy and then proceeded to eat the potent loaf with a fork and knife. He then proceeded to win the case that afternoon (Clarkson and Jett 1970, 281).

Chief Justice Roger Taney observed that Martin "seemed to take pleasure in showing his utter disregard of good taste and refinement in his dress and language and his mode of argument" (White 1988, 237). Joseph Story described Martin as "a singular compound of strange qualities. With a professional income of ten thousand dollars a year, he is poor and needy; generous and humane, but negligent and profuse. . . . He never seems satisfied with a single grasp of a subject; but urges himself to successive efforts, until he models and fashions it to his purpose" (White 1988, 236). Yet, despite his excesses, Martin retained the respect and esteem of his contemporaries. The redoubtable Martin's legal shrewdness, vast memory, loquacity, and penchant for controversial cases distinguished him as one of the finest lawyers in American history. Martin was also loyal to friends, as shown by his willingness to represent, without charge, Aaron Burr and Samuel Chase in two of the most politically charged trials of the early nineteenth century—both of which set important precedents that today remain part of our constitutional fabric.

The Chase Impeachment Trial

In 1804, Luther Martin went to the aid of his longtime friend and political ally, Samuel Chase. Jeffersonians schemed to use the machinery of impeachment to remove Federalist judges appointed by John Adams and replace them with jurists more sympathetic to the Republicans. Chase, a rock-ribbed Federalist, was accused of partisan bias in the handling of several cases and was impeached.

Historians agree that Martin's arguments during Chase's Senate trial are among the finest ever delivered. (White 1988, 231; Clarkson and Jett 1970, 206). Henry Adams wrote of Martin's eloquence, "Nothing can be finer in its way than Martin's [argument]," noting "its rugged and sustained force; its strong humor, audacity, and dexterity; its even flow and simple choice of language; free from rhetoric and affections; its close and compulsive grasp of the law; [and] its good natured contempt for the obstacles put in its way"

(White 1988, 231). Martin's persuasiveness carried the day despite the determination of the prosecutors; Chase was acquitted. In a stroke, Martin deflated Republican efforts to bring the judiciary to heel, and he may have saved the independent judiciary, now regarded as an essential element of our constitutional order. The Chase trial also helped establish the principle that the machinery of impeachment should not be cranked up for purely partisan purposes. Disgusted at the failure to impeach the intemperate Chase, Jefferson later dismissed impeachment as a mere "scarecrow."

The Trial of Aaron Burr

Former vice-president Aaron Burr's treason trial, which lasted through the fall of 1807, stemmed from allegations that Burr intended to launch an attack on territory belonging to Spain, a nation with which the United States was at peace. Evidence implicating Burr came in a letter, which found its way into the hands of President Jefferson.

Martin's involvement with the Aaron Burr conspiracy began as co-counsel in the appeal of the denial of a habeas corpus motion of two of Burr's alleged coconspirators, Dr. Justus Bollman and Samuel Swartwout. Martin, with co-counsel Robert Goodloe Harper, persuaded the appellate court to discharge the two men because treason, defined in the Constitution as levying war on the United States, had not been committed in the District of Columbia.

At his trial, Burr's defense team consisted of John Wickham, Edmund Randolph, Benjamin Botts, Jack Baker, and Luther Martin. Martin, the consummate friend, provided his services free of charge and, along with four others, even gave surety for Burr's bond. Martin's trial work instilled fear in the prosecutor, George Hay, and earned Martin the everlasting enmity of President Jefferson. Martin argued the issue of whether Burr should be entitled to documents in the possession of Jefferson relating to the charge of treason. Hay so feared the unleashing of Martin's considerable talents that he wrote to Jefferson urging the immediate production of the documents (Smith 1996, 362). Hay's fears ripened when Martin forcefully argued that Jefferson must produce the documents. Chief Justice John Marshall, who presided at Burr's trial in his capacity as a circuit judge, agreed. Martin was successful in persuading Marshall to rule that Burr was entitled to the evidence prior to the grand jury indictment and that a subpoena may be issued to any party with material evidence, including the president. Martin's arguments, which contained remarks critical of Jefferson, and Marshall's subsequent decision enraged Jefferson. Jefferson, in a letter to Hay, referred to Martin as an "unprincipled and impudent federal bulldog" and suggested that Martin too be charged with treason (Smith 1996, 363).

Martin, though drinking heavily, delivered a fourteen-hour closing argument over the course of three days with tremendous vigor. The jury quickly returned a verdict of not guilty. However, the victory came at a price to the great litigator. Martin's association with Aaron Burr cost him his reputation and his personal finances. The defense of Burr was a contributing factor to his defeat in an 1811 Maryland House of Delegates bid; shortly after the trial, a Baltimore mob burned effigies of Martin, Marshall, Burr, and an alleged coconspirator (White 1988, 234). Baltimore police had to protect the former attorney general's residence from being looted. Adding private injury to public insult, Burr—a conspiracy charge still pending against him in Ohio—fled for Europe, leaving his friend Luther Martin personally responsible for approximately twenty thousand dollars of Burr's bail (White 1988, 235).

Last Years

Later in life, when most legal careers are winding down, Martin remained a tireless and vociferous advocate at the bar. Martin's age and alcoholism apparently did not diminish his activity. One volume of *Harris Johnson's Reports*, published around the time that the seventy-one-year-old Martin argued *McCulloch*, indicated that Martin had argued 27 of the 107 cases reported in the volume, winning 15 (Clarkson and Jett 1970, 294).

Martin was a colorful character in an intolerant and critical age. Throughout his life, Martin was known as a good friend, a chronic alcoholic, and a horrible manager of his personal finances. Although he courted public approbation with his defense of Chase and Burr, he eventually regained the affections of his fellow statesmen, and he never lost the admiration of members of the bar for his legal genius. After his stroke in 1819, Martin was insolvent; in 1822, the Maryland legislature passed a resolution assessing members of the state bar five dollars to the benefit of Luther Martin. Martin even reconciled with Aaron Burr. In his final days, Martin was invited to live out his days at the New York home of Aaron Burr, where he remained until his death in 1826.

—Christian Biswell and Brannon P. Denning

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MASON, JEREMIAH

(1768–1848)

Jeremiah Mason
Archive Photos

Although he is not nearly as well known, Jeremiah Mason was a contemporary of Daniel Webster, who counted him as one of the greatest lawyers of his day. Descended from Captain John Mason, who had led a successful campaign against the Pequot Indians in 1637, Jeremiah was born in Lebanon, Connecticut, the sixth of nine children of Jeremiah Mason, a farmer who acted as a local magistrate and a Revolutionary War militiaman, and Elizabeth Fitch. Jeremiah received little formal education, but at age fourteen he began two years of study under Master Tisdale in a public school in Lebanon about six miles away before going to Yale in 1784.

After completing his degree in four years and distinguishing himself in forensics (Mason argued against capital punishment as part of the forensic exercises connected with graduation), Mason headed for New York but was later persuaded by his father to remain in Connecticut. Mason read law with Simeon Baldwin of New Haven, who was married to a daughter of Roger Sherman,

and with Stephen Rowe Bradley of Westminster, Vermont, who allowed him to argue many of his cases in court even before his training was complete. Although noting that such practice detracted from his studies, Mason also observed that "it put me early in the habit of relying on my own resources, and I am inclined to think that it was on the whole advantageous to me" (Mason 1917, 20). Mason found the bar of New Hampshire to be more challenging and lucrative than that of Vermont, and he moved to Portsmouth in Rockingham County. There he married Mary Means, with whom he would have eight children. Mason spent most of his life in Portsmouth but moved to Boston in 1832.

Shortly after moving to New Hampshire, Mason served for three years as the state's attorney general. He resigned, apparently for financial reasons, and possibly because he had a preference for defense work. An ardent Federalist who appears to have enjoyed the practice of law more than holding political offices, Mason served in the U.S. Senate from 1813 to 1817 and argued against drafting state militia into federal service. He was also elected to a number of terms in the state legislature. Mason also served for a time as president of the Portsmouth branch of the U.S. National Bank. Mason turned down a number of judicial appointments, including the job of New Hampshire chief justice, apparently for financial reasons.

Although Mason represented many clients, most of the records of his arguments have been lost, and he never argued before the U.S. Supreme Court (Stites 1999, 653). In an early case involving an action of trover for two pigs, which brought him public notice, Mason made a solid argument for the unconstitutionality of a legislative action taken against his client (Gray 1907, 11).

The most famous case in which Mason was involved was the landmark *Dartmouth College Case* (1819), in which the heirs of the original trustees of the college questioned the state's attempt to alter the way the college was governed. Although Daniel Webster argued the college's case before the U.S. Supreme Court, Mason had been among those who had prepared the way in arguments before the Superior Court of New Hampshire. Mason helped advance the argument, which Webster developed further, that Dartmouth College was a private eleemosynary institution whose charter, or contract, New Hampshire had no right to alter (Stites 1972).

Another more factually dramatic case involving Mason was a Rhode Island case, *State v. Avery* (1833). Avery, a preacher who could not give an adequate account of his whereabouts at the time, had been accused of killing a young woman named Sarah Maria Cornell, who was found hanged near the town of Fall River in December of 1832 with a note in her box at the mill where she worked directing inquiries to Avery. Although circum-

stantial evidence pointed to Avery, it was also possible that Cornell, who was pregnant, had hanged herself and pointed to Avery in revenge for the fact that he had excommunicated her. In a seven-hour address to the jury, Mason questioned the adequacy of the evidence and won a victory on Avery's behalf. Apparently, Mason used the intense personal feelings of the community against Avery to suggest that this prejudice had unduly swayed the testimony against his client (Gray 1907, 23). During the trial, one of Avery's adherents reputedly ran into Mason's office to tell him that "An angel from Heaven appeared to me last night and declared that brother Avery is innocent!" Mason reputedly responded, "Have the angel summoned into court to testify" (Bell 1894, 504).

In another case, Mason appears to have played the part of a modern-day Johnnie Cochran in defending a will against allegations that its testator was mentally incompetent through repetitious use of a phrase that would stick in the jurors' minds. Mason repeatedly told the jury that whatever mental incapacities the testator might have had, "he had mind enough to know who he loved." The observer reported that Mason brought everything back to this point and won a verdict on behalf of his client (Gray 1907, 26).

Physically, Mason was an imposing man of considerable girth whose height was six feet six or seven inches tall and who was once likened to "the Ajax or Agamemnon" of the Rockingham bar (Plumer 1969, 179). Daniel Webster, fourteen years Mason's junior, is quoted as saying, "If you asked me who is the greatest lawyer I have known, I should say 'Chief-Justice Marshall,' but if you took me by the throat and pushed me to the wall, I should say, 'Jeremiah Mason'" (Gray 1907, 3). Similarly, another friend, Joseph Story, referred to Mason's status "in the first rank of the profession, and supported by an ability and depth and variety of learning, which have few equals, and to which no one can bear a more prompt and willing testimony than myself" (Gray 1907, 30).

A juryman who watched both Webster and Mason in action reported, "Oh, Mr. Webster is the greatest, yet Mr. Mason's clients won all the verdicts." His explanation, which might well cast light on Mason's persuasive powers was, "Oh, that was because Mr. Mason always happened to be on the right side" (Gray 1907, 25).

Most of the encomiums that Mason garnered centered on a number of characteristics. These included thorough preparation and mastery of the common law (Remini 1997, 90–91), solid reasoning, hard work, an ability to use simple unadorned speech, his powers of cross-examination, and his powers of sarcasm. Webster, who was known for his own florid rhetoric, apparently learned much from Mason's own less ornamental style. Webster seems to confirm another biographer, who noted that "he addressed the jury

in the plainest language and in conversational tones, sometimes standing with one foot on the floor and the other in a chair before him" (Bell 1894, 507). Webster reported that Mason

> had a habit of standing quite near to the jury, so near that he might have laid his finger on the foreman's nose; and then he talked to them in a plain conversational way, in short sentences, and using no word that was not level to the comprehension of the least educated man on the panel. (Remini 1997, 90)

Webster also observed that

> if there be in the country a stronger intellect; if there be a mind of more native resources; if there be a vision that sees quicker, or sees deeper into whatever is intricate, or whatsoever is profound, I must confess I have not known it. (Gray 1907, 29)

John F. Lord, one of Mason's students, referred to the court as "the field of his glory." He continued,

> He had great power with the Court; for he was respectful, lucid, and always panoplied with a well prepared legal argument. When he addressed the jury on trials, he was felicitous in presenting the strong points of his case, as it were, in a nut-shell, and in hiding out of sight, as much as possible, the strong points of his opponent's case, and commenting with severity upon his weak points. No matter what the case was, he was ready for trial, with his witnesses, his brief, and his authorities at hand. He seemed to have an intuitive knowledge of character, especially jurors, and when he addressed them, adapted his speech to their comprehension, their judgment, and their consciences. He aimed to be brief, clear, and argumentative, and not prosy, florid, and declamatory. (Mason 1917, 45)

Known for his powers of cross-examination, Mason could sniff out a witness falsely dressed in borrowed clothes to look like a Puritan or fondling a paper on which an attorney had written out testimony (Gray 1907, 28). After recounting the story in which Mason had successfully cross-examined and exposed an untruthful witness, a biographer notes that Mason apparently proceeded on the "theory that no story could be fabricated so ingeniously that when pursued into remote and unlooked-for details it would not disclose inconsistencies" (Bell 1894, 505).

Mason's power of sarcasm was legendary. After commenting on the lucidity of his arguments, one author noted that

> the only passion, indeed, which he ever seemed to feel, was that of contempt; contempt for his opponent, his client, and his witnesses; contempt, even, for the court and the jury which he was addressing; a feeling which those who were its objects in vain strove to resist, and which was, in fact, one of the strong agencies by which he wrought them to his purpose. Speaking of the terrible power of his sarcasm, Mr. Webster said it was "not frothy or petulant, but cool and vitriolic." (Plumer 1969, 213)

As another biographer has noted, Mason's "conversation was seasoned with salt and sometimes with pepper, for he could be sarcastic outside of the court as well as before a jury" (Gray 1907, 33). Once, listening to negative comments about a judge he despised, Mason noted,

> You should not be too hard on ———. He has twice as much to do as any other Judge. Other Judges have to consider "What ought I to do." But ——— has also to consider, "Shall I do it." (Gray 1907, 3)

Mason was known for working long hours. He appears to have served as counsel in two-thirds of the cases before the New Hampshire courts during his tenure there (Gray 1907, 16). Similarly, John F. Lord, who served as a student in Mason's office, noted in a letter that "the number of original entries he made at every session of court was usually more than of all the other attorneys of Portsmouth and more than three times as many as any other lawyer in the county; and he was employed in the defence of every important suit." Referring in this same letter to Mason as "a peace-maker," Lord, however, also noted that "Mr. Mason magnified his position by exerting all his influence to prevent litigation, or the commencement of suits upon mere quibbles, or for the purpose of procrastination, or to gratify personal vindictiveness, or retaliation" (Gray 1907, 28).

Mason died in Boston in 1848 of a stroke, approximately ten years after retiring from active practice. His wife, to whom he had been deeply devoted, lived until 1858.

—John R. Vile

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MOTLEY, CONSTANCE BAKER

(1921–)

Constance Baker Motley
Library of Congress

Constance Baker Motley, the United States' first African-American female federal judge, was born in New Haven, Connecticut, on September 14, 1921. Her parents, Willoughby Alva Baker and Rachel Huggins Baker, had recently immigrated to the United States from the island of Nevis in the West Indies, and her father became a chef for a Yale University fraternity. She married real estate and insurance broker Joel Wilson Motley Jr. in 1946, and they had one child, Joel Wilson Motley III.

Motley attended New Haven public schools as a child, but despite academic success, her parents lacked the money to send her to college. Thus, she began working for the National Youth Administration, and soon she became president of the New Haven Negro Youth Council. It was at this time that one of her public speeches was observed by a wealthy local businessman and contractor, Clarence Blakeslee. Blakeslee was so impressed that he subsequently paid for her higher education.

Beginning her undergraduate studies at Fisk University in Nashville, Motley ultimately received her bachelor's degree in economics from New York University in 1943. She then studied law at Columbia University Law School. Graduating near the top of her class, she received her law degree in 1946. Yet, it was while she was a student at Columbia that she began her

work for the National Association for the Advancement of Colored People's (NAACP's) Legal Defense and Educational Fund. On graduation, she declined an attractive offer from a Wall Street law firm and was hired instead as a full-time law clerk by Thurgood Marshall. This would prove to be the beginning of a career at the Legal Defense Fund that would span two very full and momentous decades, beginning in 1945. Stately in appearance, as well as brilliant and forceful in presentation, Constance Motley was the consummate litigator. And this consummate litigator had now found her niche.

Barely out of law school, she headed for Mississippi to begin her fight for civil rights. In Mississippi, she traveled much of the time with co-counsel Robert Carter. As the two litigated across the state, they were subjected to their full share of racial segregation. Unlike Connecticut, and more like her years at Fisk University in Tennessee, Motley came face-to-face with the degradation of Jim Crow restrictions on such decisions as where she could eat and where she could room.

Motley's very first civil rights trial involved assisting lead counsel Robert Carter in a locally unpopular 1949 challenge to racially unequal teacher and administrator pay in the nation's poorest state, Mississippi. Not choosing to challenge the Jim Crow education system per se at this point, the NAACP instead sued to make separate more equal. Using the Fourteenth Amendment's equal protection clause, they filed suit in Jackson federal court, arguing that African-American teachers and administrators teaching at all-black schools should be guaranteed the same pay as their white counterparts.

The case was filed as a class-action suit on behalf of all the state's African-American teachers and funded largely by the Negro Teachers Association. Their first challenge, however, was to locate individuals willing to be the named plaintiffs. No sooner had Jess Brown agreed, than he was fired from his teaching position. The trial itself took place beneath a large mural depicting life in the antebellum South. White women were dressed in frilly blouses and silk bonnets, while their white male counterparts wore high silk hats and cutaway coats. Meanwhile, black men and women stood next to bales of cotton, with the black men in farm work clothes and the black women dressed like Aunt Jemima. The case was ultimately thrown out on the basis of a jurisdictional technicality, and the U.S. Supreme Court refused to review the decision.

Before she was finished, however, Motley would participate in virtually every significant civil rights case from 1954 through 1965. Armed primarily with the equal rights and due process clauses of the Fourteenth Amendment, she and her fellow attorneys at the Legal Defense Fund challenged segregating Jim Crow laws and policies across the South. They defended ar-

rested Freedom Riders, for example, as well as many of those arrested in various sit-in demonstrations. In addition, she and Fund attorneys represented Martin Luther King Jr. and other civil rights leaders actively involved in the nonviolent struggle for equal rights. They also mounted a defense in federal court for hundreds of Birmingham students suspended from school for participating in local civil rights protests.

In the realm of school desegregation, Motley helped write the Legal Defense Fund's briefs in the two *Brown v. Board of Education* (1954) cases. It was the *Brown* decision that finally laid to rest the principle that "separate but equal" public facilities could actually be legally equal, although its enforcement was to be painstakingly slow. She then proceeded to help the NAACP press for what circuit court judge Harvey Johnsen referred to as totally "disestablishing" segregated school systems, as opposed to merely opening the doors of white schools to a few African-American students.

Motley's legal efforts also helped integrate the University of Texas Law School through her work in the *Sweatt v. Painter* case (1950); she was equally as successful in *Hawkins v. Board of Control,* integrating the law school at the University of Florida. In addition, she helped write the Legal Defense Fund's brief in *McLaurin v. Oklahoma* (1950), which ultimately barred intraschool segregation. Other school desegregation efforts included the often physically perilous attempts to enter Autherine Lucy and Polly Ann Hudson into the University of Alabama (*Lucy v. Adams* [1955]), James Meredith into the University of Mississippi (*Meredith v. Fair*), Harvey Gantt into Clemson College (*Clemson Agricultural School of South Carolina v. Gantt*), and both Charlayne Hunter Gault and Hamilton Holmes into the University of Georgia (*Holmes v. Danner* [1961]).

When Thurgood Marshall left the Legal Defense Fund in 1961, this opened the door for Motley to present arguments before the U.S. Supreme Court. Among her crowning achievements was winning nine of the ten cases she argued before the nation's highest judicial body.

In *Hamilton v. Alabama* (1961), an African-American man named Charles Clarence Hamilton was accused of breaking and entering at night with the intent to ravish, at that time a possible capital offense. Nevertheless, despite the high stakes, his right to counsel was denied at arraignment, a critical juncture in any trial, as that is the opportunity to make key motions, for example, to challenge the racial makeup of the grand jury that brought the indictment.

Justice William O. Douglas wrote for the Court's majority, overturning the conviction due to this denial of counsel. In his opinion, Douglas emphasized the Court's previous decision in *Powell v. Alabama* (1932), in which the court stated unequivocally in a unanimous decision that a defendant in a capital case "required the guiding hand of counsel at every step in

Clara Shortridge Foltz

Among the remarkable speeches collected in a recent book highlighting notable closing arguments is a speech by Clara Shortridge Foltz delivered in 1889 or 1890 in defense of an unknown Italian defendant accused of arson. Foltz, a mother of five whose husband had abandoned her, had studied under an attorney, drafted and successfully lobbied for a bill permitting women to practice law in California, and had in 1878, at age twenty-nine, passed an examination to become California's first woman attorney. She had subsequently become influential in the movement for public defenders.

Colonel Thetas Stonehill, a Confederate veteran, was serving as prosecutor of the Italian immigrant, but he apparently focused less on the defendant than on her attorney. During his closing, he said,

> SHE IS A WOMAN. She cannot be expected to reason; God Almighty decreed her limitations, but you can reason, and you must use your reasoning faculties against this young woman. (Lief, Caldwell, and Bycel 1998, 216)

Responding in kind, Foltz ridiculed the prosecutor's appeal to prejudice and responded proudly to the accusation by pointing to the fact that she had raised five children and by appealing to the jury "in the name of the mothers who nursed you, and of the wives and maidens who look love into your eyes." Noting that the prosecutor had called her a "lady lawyer," she noted,

> I am sorry I cannot return the compliment, but I cannot. I never heard anybody call him any kind of a lawyer at all. (Lief, Caldwell, and Bycel 1998, 220)

Asking that she be judged as a lawyer and not as a woman, Foltz said,

> I am neither to be bullied out or worn out. I ask no special privileges and expect no favors, but I think it only fair that those who have had better opportunities than I, who have had fewer obstacles to surmount and fewer difficulties to contend with should meet me on even ground, upon the merits of law and fact without this everlasting and incessant reference to sex—reference that in its very nature is uncalled for and which is as unprofessional as it is unmanly. (Lief, Caldwell, and Bycel 1998, 220)

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the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

In *Turner v. Memphis* (1962), Motley and the Legal Defense Fund challenged Tennessee's segregation law when Carl Rowan, then U.S. ambassador to Finland, was refused service at an airport restaurant on his way through Memphis. Jessie Turner, a local NAACP official, filed the suit. The

Supreme Court found that the law blatantly violated the Fourteenth Amendment's equal protection clause, and they ordered the district court to enjoin enforcement in this case.

Motley also appealed on behalf of five different individuals arrested for lunch counter sit-ins, and she succeeded in getting all five convictions overturned (*Gober v. Birmingham* [1963], *Shuttlesworth v. Birmingham* [1969], *Bouie v. Columbia* [1964], *Barr v. Columbia* [1964], and *Lupper v. Arkansas* [1965]). The *Lupper* case commenced just before passage of the hotly contested 1964 Civil Rights Act, and Motley referred to it as "the most difficult case I argued."

Lastly, she successfully argued *Watson v. Memphis* (1963), wherein the city of Memphis was ordered to accelerate the desegregation process for its city parks. Then, she was comparably successful in *Calhoun v. Latimer* (1963), this time succeeding in having Atlanta's school desegregation efforts sent back to the district court to be reviewed in light of the two *Brown* decisions, after the school district tried to get by through merely amending its student assignment policy to allow for free transfers.

The only case Motley lost before the nation's top court was *Swain v. Alabama* (1965). In its decision, the Court upheld the principle of preemptory challenges, whereby litigators can strike a set number of potential jurists without having to show cause. In this particular case, a prosecutor used his preemptory challenges to eliminate all African-Americans from the jury of an African-American man accused of raping a white woman. Such a use of preemptory challenges and the subsequent all-white juries for African-American defendants was a practice that had been going on for years in that particular county. Nevertheless, the Court ruled that there was still not enough evidence of discriminatory intent to warrant throwing out the subsequent conviction, let alone the practice of preemptory challenges itself, even though such challenges are fraught with the danger of being used for thinly veiled racist purposes. Twenty years later, however, in its *Batson v. Kentucky* (1986) decision, the Supreme Court vindicated Motley by significantly moderating its earlier ruling in *Swain*.

In a 1980 interview, U.S. Supreme Court justice William O. Douglas classified Constance Motley as one of the top ten appellate attorneys he heard argue in his long tenure on the federal bench. After U.S. attorney general Ramsey Clark heard her present one of her cases before the Supreme Court, he promptly recommended that President Lyndon Johnson appoint her to the federal bench. She was initially nominated for a position on the second circuit of the U.S. Court of Appeals, but the president was forced to withdraw the nomination when considerable opposition arose, apparently at least in part because she was a woman, and an African-American woman at that. Among other things, however, Senator James Eastland of Mississippi

branded her a Communist, based on individuals she had associated with in her student days.

Such discrimination plagued Motley for much of her legal career. For example, judges and opposing attorneys often refused to address her as "Mrs. Motley," instead referring to her as "Constance" or "Connie" if they called her anything at all. In addition, some federal judges actually refused to face her when she argued cases in their appellate courts. Even when she sat on the bench herself, she was still openly insulted by some of the other federal jurists.

In 1964, she left the Legal Defense Fund and won a seat in the New York Senate, the first African-American woman to sit in that body. A year later she was elected borough president in Manhattan, where she was the first woman borough president and the first woman to sit on the New York Board of Estimates, a governing body composed of the city's five borough presidents.

President Johnson finally made her the nation's first African-American female federal judge in 1966, successfully appointing her to the U.S. District Court in southern New York. She became the district's chief judge in 1982 and then a senior judge in 1986.

Constance Motley received numerous honorary recognitions in the course of her life. Among these were Hobart and William Smith College's Elizabeth Blackwell Award, the New York Women's Bar Association's Florence E. Allen Award, and her induction into the National Women's Hall of Fame. She also served on the board of trustees for New York University and received honorary doctorates from more than twenty colleges and universities, including Yale, Brown, Smith, Fordham, Howard, Spelman, and Morehouse.

—Marcus Pohlmann

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MULLEN, ARTHUR

(1873–1938)

Arthur Mullen
Nebraska State Historical Society

Although he argued only two cases before the Supreme Court, Arthur Mullen joins the ranks of the great litigators because of the lasting influence of his actions. Mullen gained recognition during his lifetime for his participation with the Democratic National Committee, his arguments before the U.S. Supreme Court in *Shallenberger v. First State Bank of Holstein* (1911) and *Meyer v. Nebraska* (1923), and for the continuing influence of the Court's decision in *Meyer.*

Born in Kingston, Ontario, Canada, in May 1873, Mullen was educated in Nebraska public schools before reading for the law at the University of Michigan. He served as the county attorney of Holt County, Nebraska, from 1901 to 1907, and as attorney general of Nebraska from 1910 to 1911 and considered himself a product of the American West. He also served as secretary of the Nebraska Tornado Committee in 1913. He became active in statewide politics in 1908 when he served as manager of the Nebraska campaign for William Jennings Bryan, the Democratic

presidential candidate (he later changed his views of Bryan, whom he believed had deserted the progressive movement) (Garraty and Carnes 1999, 72). Mullen served as a member of the Democratic National Committee from 1916 to 1920 and from 1924 to 1935 (Marquis 1938, 1823). From 1932 to 1934, he served as vice chairman of the National Democratic Campaign Committee, and he acted as the floor leader of the Roosevelt contingent of the committee's 1932 convention in Chicago. Mullen was a prominent Roman Catholic layman (Ross 1994, 4), whose most forceful advocacy was made on behalf of the rights of parents to send their children to parochial schools. In 1938, Loyola University of Chicago awarded Mullen an honorary doctor of laws degree, specifically mentioning his victory in *Meyer v. Nebraska* (Mullen 1940, vii).

As Roosevelt's floor manager, Mullen was charged with polling delegates to gauge support for Roosevelt among the convention participants and for the other strong candidates for the nomination, Speaker of the House John Nance Garner and Alfred E. Smith. After the first and second roll calls, the committee was deadlocked, unable to choose a nominee. A third roll call also resulted in a deadlock, after which Mullen held a press conference, stating:

> We have taken a new poll of our rockbound strength, and it convinces us that 650 of our delegates will stay here until Roosevelt is nominated or hell freezes over. If the emissaries of corrupt interests continue to halt the nomination of the man who is clearly the choice of the majority of the party, we shall speak out. We will denounce the damnable hypocrisy of the people who misrule New York City, Jersey City, and Chicago, coming here to stand behind Mr. Smith in an effort to seize the power in the nation or else throw the party on the rocks. (Arlahan 1971, 112)

Mullen's strategy at the convention was to arrange for one of the stronger candidates, John Nance Garner, to join with Roosevelt as the vice-presidential candidate, bringing with him the Texas delegates and winning the nomination. Mullen went on to serve as vice chairman of Roosevelt's campaign committee, helping to draw the votes of midwestern progressives. Mullen later became critical of Roosevelt's expansion of the presidential power, fearing, as did many progressives, that a stronger federal government threatened individual freedom (Garraty and Carnes 1999, 73).

Aside from his political involvement, Mullen was also an active litigator throughout the various stages of his career. He took particular satisfaction in a case involving Roy Youngblood and four other U.S. servicemen who had been given life sentences in a court-martial for the murder of an English citizen in Germany. Effectively establishing that Youngblood and his

friends were the victims of mistaken identification and a faulty system of military justice, Mullen was able to secure a pardon for them by President Warren G. Harding (Mullen 1940, 200). In another case, Mullen defended a potato seller against charges that he had bribed army officers to accept inferior products. In his speech to the jury, Mullen compared his client to Saint Peter and the army "spies" to Judas Iscariot; his client was exonerated (Mullen 1940, 240).

While serving as attorney general of Nebraska, Mullen argued *Shallenberger v. First State Bank of Holstein,* 219 U.S. 114 (1911), before the U.S. Supreme Court. The Court's decision in this case upheld a Nebraska act that forbade banking except by a corporation formed under the act and that provided for the public guaranty of bank deposits. However, it is Mullen's second case before the Supreme Court, decided in 1923, which is responsible for his lasting influence in U.S. jurisprudence.

In the wake of World War I, paranoia and fear of foreigners and foreign cultures gripped the United States, and Mullen's home state of Nebraska was no exception. In 1919, the Nebraska legislature passed three measures to stop the spreading influence of foreign languages in the state. The first, Senate File No. 15, ended a previous requirement that county board proceedings and land sales be published in German-, Swedish-, and Bohemian-language newspapers statewide (Tatolovich 1995, 34). Senate File No. 237 stated that all public meetings must be conducted in English. The third measure, Senate File No. 24, sponsored in part by Senator H. E. Siman, stated that

> no person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language. Languages other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides. (Tatolovich 1995, 34–35)

Violation of this restrictive legislation, which became known as the Siman Language Law, was a misdemeanor charge carrying the possibility of a fine of twenty-five to one hundred dollars or confinement in county jail not to exceed thirty days (Tatolovich 1995, 35).

The Siman Language Law was first challenged in *Nebraska District of Evangelical Lutheran Synod of Missouri v. McKelvie,* 187 N.W. 927 (1919). The Nebraska Supreme Court upheld the law as constitutional, taking judicial notice of several pieces of information regarding foreign-born Nebraskans:

> The operation of the selective draft law disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men born in this country of foreign language speaking parents and educated in schools taught in a foreign language were unable to read, write or speak the language of their country, or understand words of command given in English. It was also demonstrated that there were local foci of alien enemy sentiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language.

The court found that remedying this "very apparent need" was precisely the purpose of the Siman Law. Furthermore, the court discussed the right and duty of the state to educate its people to an end of building an "intelligent American citizenship, familiar with the principles and ideals upon which this government was founded." Finally, the court upheld the law on the basis that it fell within the power of the state to exercise its police powers to safeguard the public by insisting that the "fundamental basis of the education of its citizens shall be a knowledge of the language, history and nature of the government of the United States, and to prohibit anything which may interfere with such education."

This was the social environment prevailing when, in 1922, the Nebraska Supreme Court went even further to uphold criminal penalties against a schoolteacher in a Lutheran school charged with teaching the German language to a student who had not yet passed the eighth grade. In *Meyer v. State*, 187 N.W. 100 (1922), Robert T. Meyer, having been found guilty of violating the Siman Law, appealed to the Nebraska Supreme Court, claiming that because he had taught the child from a book of biblical stories written in German, the teaching constituted religious instruction with which the state should not interfere. The court ruled that the biblical nature of the material could not act as a shield to the defendant, who clearly violated the Siman Law by teaching the German language. The Court further ruled that the statute did not interfere with the right of religious freedom, stating that

> the legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents

> was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.

In addition, the court ruled that, although the instruction in the German language took place during a time of day when school attendance was not compulsory, this measure was taken solely to evade the law. It was recommended that the previous decision in *McKelvie* should be modified to remove the stipulation that the action must take place "during school hours" in order to be illegal (Tatolovich 1995, 59). The Siman Language Law was once again upheld in its entirety, causing Meyer, represented by Arthur Mullen and two of his associates, to appeal to the U.S. Supreme Court.

On February 23, 1923, Mullen, who had been influential in persuading Roman Catholic leaders to join in the challenge to this law (Ross 1994, 97), argued before the Supreme Court in *Meyer v. Nebraska,* 262 U. S. 390 (1923), that the liberty protected by the Fourteenth Amendment to the Constitution may not be interfered with by legislative action that is "arbitrary or without reasonable relation to some purpose within the competency of the state to effect"; that the Siman Language Law deprived teachers and parents of liberty without due process of law and without such "reasonable relation"; that the law could not be taken as an appropriate use of state police power as it could not be shown to legitimately protect the health of children by limiting mental activities; and that the police powers deemed appropriate by the state legislature are not conclusive, but are subject to supervision by the courts. The opinion of the Court, authored by Justice James McReynolds, concluded that the statute in question did in fact unreasonably infringe on the liberty guaranteed to the plaintiff by the Fourteenth Amendment. McReynolds stated that the term "liberty," as it is used in the Fourteenth Amendment, is not specifically defined but has been partially defined by case precedent to include freedom from bodily restraint, the right of the individual to contract, acquire useful knowledge, marry, establish a home, raise children, worship according to the dictates of conscience, and "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." The Court ruled that the state may compel attendance at a school, and it may require that instruction be given in English, but there was not sufficient reasonable relation to a state interest to allow for the prohibition set forth in the Nebraska law.

The *Meyer* decision in itself is sufficient to assure Arthur Mullen a place in history, especially as it came at such a time as to stem the tide of rising nativism after World War I. However, the influence of that decision as

cited in later cases is also quite remarkable. In the 1977 case *Maher v. Roe*, 423 U.S. 464 (1977), the Court ruled that the decision of *Roe v. Wade*, 410 U.S. 113 (1973), did not necessitate the funding of abortions by the state. In the majority opinion, Justice Lewis Powell compared the issue at hand to the decision in *Meyer v. Nebraska*, remarking that although *Meyer* required the state to cease prohibiting instruction in foreign languages, it could in no way be construed to require that the state fund public education in foreign languages. Such, argued Powell, was the case in *Maher v. Roe*. Although the state could not forbid a woman to undergo an abortion, it was not required to pay for the procedure. As the state of Nebraska was within its rights to prefer and to fund only instruction given in the English language, the state of Connecticut was within its rights to prefer and to fund only childbirth.

The *Meyer* decision is also cited in cases where the Court must point out the rights and roles of parents as the primary authority in decisions as to how their children will be raised, whether it be in reference to education, religious instruction, or medical decisions. The case of *H. L. v. Matheson*, 450 U.S. 398 (1981), is one such case in which the Court referenced *Meyer* in its decision to uphold a statute requiring doctors to notify the parents of minor women before performing an abortion.

Thus, Arthur Mullen's argument of *Meyer v. Nebraska* is one that continues to be significant to judicial deliberations today and one that still influences modern education and cultural relations, assuring Mullen a seat at the table of the great American litigators.

—Brandi Snow Bozarth

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NEAL, JAMES F.

(1929–)

James Neal
AP Photo/Mark Humphrey, File

James F. Neal was a federal prosecutor in many important cases of the 1960s and 1970s. Neal was born in rural Oak Grove in Sumner County, Tennessee, just north of Nashville, to Robert Gus and Emma Clendenning Neal. His parents had a hundred-acre farm where they raised strawberries, tobacco, and dairy cows and where James worked before and after school. Neal traces his own interest in law to his father, who often lingered around the county courthouse to listen to cases, which he shared with his family. After graduating from a public high school, the five-foot eight-inch Neal won a football scholarship to the University of Wyoming, where he played running back and was part of a team that had an undefeated season and beat Washington & Lee in the Gator Bowl in 1950.

Neal served in the U.S. Marine Corps from 1952 to 1954 and reached the rank of captain; he was a defense counsel in courts-martial and then regimental legal officer. He subsequently returned to Tennessee and attended Vanderbilt Law School, where he became a Founders Medalist by graduating first in his class. Shortly thereafter, he earned a master of law degree in taxation from Georgetown University, during which time he was associated with the Washington, D.C., firm Turney & Turney.

When President John F. Kennedy was elected in 1960, he appointed his brother Robert as attorney general. Robert Kennedy recruited Neal to serve as a special assistant to deal with labor corruption issues. The result was an early high-profile case in which Neal directed the prosecution of Teamster leader Jimmy Hoffa on charges that he had accepted kickbacks. Although this case ended in a mistrial, Neal subsequently succeeded in winning the first prosecution victory against the formidable Hoffa on charges of jury tampering. The trial made headlines, not only for Neal's victory but also for the time when a deranged man came in the courtroom and shot Hoffa with what turned out to be a relatively harmless gas pellet gun. Neal claims Hoffa's description of him—"The most vicious prosecutor who ever lived"—as a badge of honor (Gallese 1985, 109).

Neal continued his work as a prosecutor by serving as a U.S. district attorney for the Middle District of Tennessee from 1964 to 1966. One of the tasks that he successfully conducted during this time was to close down illegal gambling establishments in Nashville and the surrounding area. He subsequently became a partner in the firm of Cornelius, Collins, Neal & Higgins, from 1966 to 1970, and then joined a colleague to form Neal & Harwell in 1971.

Neal, who began lecturing at the Vanderbilt School of Law during this time, was called by Special Prosecutor Archibald Cox to be the chief trial counsel of the Watergate special prosecution force. He succeeded in getting convictions against such high-profile presidential counselors as H. R. Haldeman, Bob Ehrlichman, and Attorney General John Mitchell. When the defendants claimed that their contributions to the Watergate burglars had been for charitable purposes, Neal pointedly asked why they wore gloves when they passed the money along (Curriden 1990, 67). Neal would utilize similar skills when successfully pursuing the Senate Abscam investigations in the early 1980s.

After his service in the Watergate cover-up case, Neal returned to Nashville, where he continued his association with Aubrey B. Harwell Jr. Another Vanderbilt graduate, Harwell, who—like others in the firm—has a formidable trial reputation in his own right, is the firm's managing partner who facilitates Neal's strengths as a trial attorney through his efficient administration. As their firm has matured, it has increasingly taken on the defense of white-collar crimes and has specialized in corporate, bankruptcy, contract, and entertainment law.

The cases that Neal has taken as a defense attorney are as well known as the cases that he prosecuted. These have included the defense of Elvis Presley's doctor, George Nichopoulos, against charges that he illegally prescribed drugs to the rock singer; movie director John Landis, who was charged with criminal negligence in the deaths of actor Vic Morrow and

Barry Scheck and the Innocence Project

Stories of innocent people being wrongly convicted are among the most dramatic tales that the law has to offer. Recent advances in DNA testing on bodily fluids, first developed by Dr. Alec Jeffries in England, have allowed some individuals, especially those accused of sex crimes, to show that they were not guilty. As of August 1999, sixty-seven individuals, including many on death row, have been exonerated by this technique (Scheck et al. 2000, xiv).

Attorneys Barry Scheck and Peter Neufeld have created the Innocence Project at the Benjamin N. Cardozo School of Law at Yeshiva University, where they teach. This project seeks to use DNA evidence to exonerate individuals who have been wrongly convicted.

Scheck, a graduate of Yale (where he developed a reputation for radicalism) and the University of California at Los Angeles, started out in legal aid in the Bronx and subsequently went into private practice. In addition to working with the Innocence Project, Scheck has served in a number of high-profile cases. He was employed by the "Dream Team" defense as a DNA expert in the O. J. Simpson criminal defense case, in which he helped call laboratory procedures into question. Also recognized as an expert on spousal abuse, Scheck defended Hedda Nussbaum from prosecution after her husband killed their six-year-old daughter. Although Scheck lost his defense of Louise Woodward, a British au pair charged with murdering an eight-month-old in her care, the judge reduced her sentence to involuntary manslaughter (Bumiller 1998).

In a book devoted to their Innocence Project, Scheck and Neufeld, along with journalist Jim Dwyer, describe cases of innocent individuals who were convicted and seek to identify the factors that led to such convictions. These include mistaken identity, faulty laboratory work, police or prosecutorial misconduct, bad lawyering, testimony by false witnesses and jailhouse snitches, and false confessions (Scheck et al. 2000, 263). These findings reveal that, even in a system devoted to justice, mistakes can occur. They further highlight the need for the presumption of innocence and vigorous defense in criminal cases.

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two Vietnamese child actors who were killed during a helicopter crash in the filming of *Twilight Zone: The Movie;* the Ford Motor Company against homicide charges in connection with the explosion of gas tanks on the Ford Pinto that had resulted in fatalities; the Exxon Corporation against felony charges in connection with the grounding and subsequent massive oil spill in Alaskan waters by the oil tanker *Exxon Valdez;* the first individual

charged with air piracy; and Louisiana governor Edwin Edwards against racketeering charges.

Neal's defense of Nichopoulos grew out of charges that the doctor's overprescription of drugs had led to Presley's early demise. In the face of evidence that Nichopoulos had prescribed numerous medications to Presley over a long period, Neal succeeded in defending Nichopoulos by portraying him as a modern-day "Good Samaritan" who, rather than rejecting a patient who was already abusing drugs, accepted him and attempted to wean him from his habit by prescribing placebo pills and saline injections and squirting much of the contents of needles on the floor while Presley was not looking. Although pretrial surveys that Neal's firm commissioned showed that the citizens of Shelby County, where the case was being tried, had great affection for Presley, they also showed that most people held Presley himself responsible for his own addiction (Couric 1988, 202–203). When the jury returned its verdict, many hugged the doctor, believing that his actions had extended, rather than shortened, the life of the great singer.

In defending movie director John Landis, Neal acknowledged that Landis had illegally hired child actors but kept the focus of the trial on whether the helicopter crash was an act of homicide or simply a tragic accident. After demonstrating through testimony that Landis was exposed on the set to dangers similar to those of his actors, Neal succeeded in persuading the jury that the deaths of the actors were not the result of criminal negligence but simply a tragedy.

Neal pursued a similar strategy in the *Ford Pinto* case, in which three girls had been incinerated on their way to church after their car's gas tank exploded after being rear-ended by another car. Arguing that no car was completely safe, Neal showed that there was a necessary tradeoff in the building of any vehicle between safety and costs. He also produced a surprise, but credible, witness who indicated that the vehicle was stationary when it was hit at about 50 miles per hour, twice the speed that had been alleged. Under similar circumstances, Neal showed that gas tanks in other cars would also have exploded (Lusky 1991, 20). Neal, who says he fought a two-front war in this case, "in the courtroom and in the press," is also credited for holding daily meetings with the press in which he presented reporters with background material favorable to his side (Gallese 1985, 110).

Neal is a strong believer in attempting to derail prosecutions before charges are ever filed. Indeed, he has said that avoiding such indictments "is the most critical thing a white-collar criminal defense attorney can do" (Couric 1988, 195), and where possible he has someone from his firm interview individuals who testify for the prosecution as they leave the grand jury room. As a former prosecutor, Neal not only has contacts, but he has the advantage of being able to think like a district attorney. He also recognizes

that there are times when it is better to negotiate a plea than to take a case to court. In defending Jake Butcher, a Knoxville banker accused of making illegal loans that caused his bank to fail and faced with more than five hundred years in penalties, Neal reluctantly settled for a twenty-year sentence. Likewise, in the *Exxon Valdez* case, Neal agreed to settle for criminal fines of $100 million (the company had already paid $900 million in civil fees) rather than the $750 million for which the government had asked (Lusky 1991, 18).

Sometimes likened to a "bantam rooster," who struts as he fights (Lusky 1991, 24), Neal has not lost his southern accent or small-town charm. The prosecutor in the *Landis* case, Lea D'Agostino, has described Neal as "very cunning," and charged that "he plays the country boy who's just simple folk, when we all know he's anything but that" (Curriden 1990, 68). For his part, the cigar-puffing Neal has stayed close to his roots and has said that "people often underestimate the power of simply being yourself" (Lusky 1991, 22). Moreover, Neal has been described both as being able "to blur the lines between himself and the defendant" and to portray himself "as a champion of the truth, even when defending cases that run strongly against the tide of public opinion" (Lusky 1991, 20).

There are several keys to Neal's success. One is meticulous preparation. In the *Ford Pinto* case, Neal is reported to have spent six months on pretrial motions and depositions and another five months learning how to assemble an automobile (Curriden 1990, 67). Neal believes that a good attorney should never promise more in an opening statement than the attorney can deliver and believes that a good attorney should be able to describe 90 percent or more of his closing argument before cross-examining the first witness (Couric 1988, 208).

Neal likes to stipulate commonly accepted facts rather than chasing dead ends or running down tangents; he believes that a casual admission can often take the sting out of facts that would otherwise be worrisome. He thinks that, especially on the defense, an attorney needs to look for openings created when the other side makes a mistake. Neal's resolution "not to beat himself" has been described as his overriding motto, and he has cited the maxim that he learned in football that "the team that makes the fewest mistakes wins" (Couric 1988, 190). Drawing on the same football experience, Neal adds, "Unless you know everything about a case, you can't recognize a fumble when it occurs" (Curriden 1990, 68).

Neal can be relentless on a witness who so falters. In the Nichopoulos trial, Neal (who had checked on the witness's credentials beforehand) was able to expose the fact that a doctor called by the prosecution as an expert witness and who claimed to have numerous publications could not name a single one, even after an hour's recess (Couric 1988, 212). Neal believes in

meticulously preparing his own witnesses and requiring that they become familiar with all key papers in a case, even if that requires that he treat the witness brutally in pretrial mock trials that he conducts in his offices. Neal says,

> The defendant is the number one pivotal witness. There is nobody else who comes close in importance. A defendant who is a good witness can carry the day, even if most everything else has gone against you. (Couric 1988, 217)

Although he values charisma and can turn on the charm, Neal thinks that thorough preparation is more important. He also emphasizes explaining things clearly. Neal has noted that

> jurors will really understand 50 percent of what they hear—and remember 50 percent of what they understand. That gives you about 25 percent of everything that goes on. What you've got to do is make sure that the jury understands—and remembers—that 25 percent that you want them to understand and remember. (Couric 1988, 191)

Neal, who wishes he could have served as attorney general of the United States, has never held an elected public office. As one who has very much enjoyed his law practice, in 1978 Neal decided not to allow his name to be submitted as a possible director of the Federal Bureau of Investigation after he was told that the president was looking for a ten-year commitment. In 1982, he further decided against running for governor of Tennessee. When approached, after Watergate, about becoming commissioner of the National Basketball Association (NBA), Neal said he would not consider the position unless the NBA moved to Nashville (Curriden 1990, 67).

Neal, who has two children, acknowledges that trial work can be hard on families. He is now married to attorney Dianne Ferrell Neal, who served as former Tennessee governor Ned McWherter's legal counsel. A longtime Democrat, Neal serves as a personal attorney for former vice-president Al Gore. He also serves as a member of the Tennessee Racing Commission, of which he was chairman for two years.

—John R. Vile

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NIZER, LOUIS

(1902–1994)

Beginning with his introduction as a young attorney to the world of prominent people in 1928, Louis Nizer attracted a clientele that became what might constitute the quintessential "Blue Book" of glitterati. The list of clients he represented in trial and appellate courts all over the country from California to the U.S. Supreme Court in Washington, D.C., includes film, stage, and television performers Charles Chaplin, Mae West, Johnny Carson, and Elizabeth Taylor; artist Salvador Dalí; athletes Julius Erving, Muhammad Ali, and Joe Namath; writer Jacqueline Susann; astronauts Alan Shepard and Neil Armstrong; columnists Igor Cassini and Quentin Reynolds; and captains of industry Roy Fruehauf and Armand Hammer. He helped establish and successfully defend the Motion Picture Code and Rating Program, sued Captain Marvel on behalf of Superman, and prosecuted the song "Rum and Coca-Cola" representing its progenitor, "L'Année Passée." He wrote several bestselling books that portrayed his variegated legal career. Furthermore, enactments of his

Louis Nizer
Archive Photos

trial experiences have been performed on stage, screen, and television, with some notable actors—Van Heflin, George C. Scott, and Edward Asner—portraying him.

Although much has been written about Nizer's life in court—for the most part by Nizer himself—very little has been written about his personal life. In fact, the main source of information about Nizer outside his courtroom memoirs comes from his *Reflections without Mirrors: An Autobiography of the Mind* (1978), and very little of this book concerns his personal life. Indeed, *Reflections* barely contains a mention of his parents and does not even hint at his mother's name. Be that as it may, Louis Nizer was born February 6, 1902, at Whitechapel Road in London, England, to Joseph and Bella Bialestock Nizer. The elder Nizer immigrated to the United States in 1904, followed the year afterward by his wife and son. The Nizer family settled in over the family's dry-cleaning business on Sumner Avenue in the Williamsburg section of north Brooklyn, where Nizer spent most of his childhood.

Joseph Nizer's long hours at the cleaning establishment and Bella Nizer's night work at a nearby textile factory enabled their family to prosper. The young Nizer's graduation from Boy's High in Brooklyn, noted for other illustrious alumni, including the author Norman Mailer and the composer Aaron Copland, was followed by four years at Columbia University and the Columbia University Law School, one of New York's best and most expensive schools. Nizer sharpened his oratorical skills while at Columbia with his participation in forensic competition, twice winning one of Columbia's highest awards, the George William Curtis Prize, given for excellence in the public delivery of English orations. Governor Al Smith and Charles Evans Hughes, who was between his tenures as associate justice and chief justice of the U.S. Supreme Court, were present in the audience on the first occasion. The public-speaking skills that were to serve Nizer so well during a career spanning seven decades were actually manifested at a much younger age. When he was barely in high school, Nizer could be found standing on public podiums extolling the virtues of socialism alongside such notables as Morris Hillquit, himself an accomplished attorney who represented many socialists charged with espionage during World War I. A still youthful Nizer (age fifteen) also took to the rostrum at local cinemas and legitimate theaters on Broadway during World War I promoting Liberty Loans, for which he received a certificate of merit from the national government.

A position in his chosen profession initially eluded Nizer after he was graduated from law school in 1924 and had successfully completed the New York State bar examination. Yet, he was not to be denied. His first litigation opportunity, which turned out to be a major break, arrived while he was serving dispossess summonses for seven dollars a week on defaulting tenants in buildings owned by a lawyer named Emily Janoer. The case was notable

for several reasons, not the least of which were that he actually "beat city hall," and not only that, New York's highest court sustained his victory, with the already famous Benjamin N. Cardozo presiding. The case involved a dispute between some Ellery Street merchants who complained of the commissioner of market's decision denying them the privilege of having push carts loaded with merchandise parked on the sidewalk, a privilege that the commissioner had granted their across-the-street competitors. Apparently Nizer was the merchants' last hope, a long line of attorneys having turned down a seemingly hopeless case (among them Emmanuel Celler, who later served with distinction in the U.S. House of Representatives).

Undaunted, the plucky Nizer, "calling on my vast fund of political inexperience and naïveté," as he put it years later, told the merchants, "Certainly, you can fight City Hall." Nizer's clients prevailed largely due to his thorough preparation of facts that showed many gross inconsistencies in the commissioner's actions. Nizer gave the *Pushcart* case credit for instilling in him the truth that "preparation equates with proficiency." The law in the *Pushcart* case was straightforward and simple: The commissioner has discretionary leeway. Consequently, and obviously, he had nothing to rely on but factual application of that discretion. To be sure, as Nizer acknowledged, the fact that the trial judge was not a protégé of Tammany Hall—unlike the vicarious defendants on the other side of Ellery Street—and the ill-preparedness of the city counsel who exclusively relied on the law of administrative discretion, bolstered his clients' legal position (Nizer 1978, 82–93).

Nizer's break came when his success in the *Pushcart* case was reported in the newspapers, leading in turn to an employment offer from Louis Phillips, who had known Nizer's parents in London. More important to Nizer's budding career, Phillips was the executive secretary and general counsel to the New York Film Board of Trade, an association that would ultimately lead to Nizer's affiliation with the upper crust, not only of filmdom, but of politics, business, and society as well. Within two years, Nizer's performance produced an invitation from Phillips to become his full partner. This association was to last for a quarter of a century as the two built a law firm specializing in contract, copyright, libel, divorce, plagiarism, and antitrust litigation that continues to bear their names: Phillips, Nizer, Benjamin, Krim & Ballon. Nizer served as executive secretary and counsel of the New York Film Board of Trade and also represented the Motion Picture Association of America (MPAA), including most of its members' companies, most notably United Artists.

His association with the motion picture industry not only introduced him to elites. It led him to very select cases as well. For example, a major case came his way in the early 1960s when the vice-president elect of the American Federation of Television and Radio Artists, John Henry Faulk, took a

stand against the McCarthyite practice of blacklisting entertainers accused of having ties to the Communist party, or even considered to have seditious tendencies. Faulk quickly found himself on the blacklist. After being fired from his popular CBS radio show because of alleged subversive activities, Faulk retained Nizer to sue AWARE Inc., a group of self-appointed vigilantes paid by television networks to report on entertainers with purported Communist leanings. In 1962, Nizer won a record $3.5 million libel judgment against AWARE and two of its chief officers. Although Faulk's award was reduced on appeal to $550,000, it was still a record recovery. While Faulk experienced years of unfortunate decline and received only a portion of the award, his cause was credited with ending blacklisting in the broadcast industry, and no doubt enhanced an already flowering reputation for Nizer.

Not long after the *Faulk* case, Nizer was appointed general counsel for the MPAA. He immediately set to work, along with the also newly appointed association president, Jack Valenti, to protect the industry from censorship by an increasingly concerned public. In general terms, the impetus for this concern was the explosion of films containing material that was sexually explicit both in subject matter and photographic display, and specifically, the opportunity provided by Supreme Court decisions indicating that local jurisdictions could constitutionally enact legislation protecting minors from pornography. One decision was *Interstate Circuit, Inc. v. Dallas* (1968), in which Nizer had argued on behalf of United Artists, one of the parties. *Dallas* held that the city ordinance regulating the exhibition of "sexual promiscuity" to minors was unconstitutional because of vagueness, but the decision, considered with another case decided about the same time, *Ginsberg v. New York* (1968), suggested that a properly drawn ordinance might be found constitutional. The result of this effort by Nizer and Valenti was the Motion Picture Code and Rating Program adopted by MPAA later in the year. Although the ratings did not attempt to judge the aesthetic quality of a film, only its suitability for children, Tropic Film Corporation sued the association for restraint of trade because its film *Tropic of Cancer,* based on Henry Miller's novel, received an "X" rating. The district court refused to grant any relief, finding that the rating program did not eliminate competition but merely advised motion picture exhibitors and the public of the content of films. Subsequently, the case was voluntarily withdrawn.

With the Motion Picture Code and Rating Program, Nizer and Valenti had taken a leading role to protect freedom of expression by self-regulation in the private realm. Nizer was also a significant participant in the public realm. An instance of this was one of his many arguments before the U.S. Supreme Court, in *Jenkins v. Georgia* (1974). *Jenkins* followed the famous *Miller v. California* (1973) decision in which the Court set forth what the justices touted as the definitive definition of obscenity. Among other things,

the *Miller* opinion had indicated that the "prurient interest" and the "patently offensiveness" aspects of the obscenity test could be determined by local juries based on local standards. *Jenkins* was the first post-*Miller* case to reach the Supreme Court regarding this national-local dichotomy. A local superior court jury in Albany, Georgia, had determined the film *Carnal Knowledge* to be obscene and in violation of the Georgia anti-obscenity statute, and had therefore convicted a local theater manager, Billy Jenkins, of a crime. The Georgia Supreme Court upheld the jury verdict, relying on *Miller*'s apparent green light for local juries to apply local standards.

The MPAA arranged for Nizer to represent Jenkins in an appeal to the U.S. Supreme Court. Overcoming the insistence of many associates and amicus curiae colleagues to attack the *Miller* holding straight from the shoulder, much in the way that dissenting Justice William O. Douglas and others had done in *Miller,* and the Georgia dissenters had done in *Jenkins*, he opted—sticking to his standard practice—to leave existing law within the court's purview, emphasizing factual aspects instead. In short, Nizer argued for the distinction between ordinary and constitutional facts, granting jurors the last word in the former but subjecting the latter to judicial scrutiny. As Nizer stated during his argument, "When we are dealing with the precious rights of the First Amendment and a constitutional question is involved, this Court should not hesitate to express its parental care of the constitution that is exclusively vested in it." The opinion, written by Justice William Rehnquist, did just that, substituting its standard in place of the Georgia jury.

Not all of Nizer's Supreme Court appearances were as successful as *Jenkins*. One such case was *Fortnightly Corporation v. United Artists Television* (1968). This case involved the practice by which cable television systems captured transmission of copyrighted programs produced by movie producers and distributors and retransmitted them without paying the originators' royalty fees. Although the originators claimed copyright infringement, the cable operators compared their behavior with customers building taller antennae. United Artists Television, one of Nizer's clients, sued Fortnightly, a cable system in West Virginia. United Artists sought damages and injunctive relief. Despite having prevailed in the district and circuit courts without dissent, United Artists did not fare so well in the Supreme Court. Obviously, there could be any number of reasons that the Court ruled in a 5–1 decision that the copyright statute did not prohibit the cable operator's actions, but one commentator suggests that Nizer had become a bit too comfortable with the Court, if not overly vain. According to this source, when Nizer appeared before the Court to argue on behalf of the producers, he "adopted an attitude of disdain for the cable operators. His demeanor appeared to some of those in the courtroom to be a snub of the justices them-

selves who had agreed to hear the case, in which the outcome, Nizer implied, should have been obvious. He gave the impression to some who heard his arguments that the court was wasting his and everybody else's time by even hearing a case that was so clear cut" (Southwich 1998, 3).

Nizer's litigation forte—at trial, and on appeal—was to combine the discovery of all relevant facts with a thorough preparation of them for presentation. In fact, he conceptualized this custom in formulaic terms as ($IQ + WQ^2 = S$), which stands for "Intelligence Quotient plus Work Quotient squared equals Success"; or, as he put it more prosaically, "[Preparation] is the be-all of good trial work. Everything else—felicity of expression, improvisational brilliance—is a satellite around the sun. Thorough preparation is that sun" (Simpson, 1988). He also coined a little aphorism that captures this fetishism that goes like this: "Yes, there's such a thing as luck in trial law but it only comes at three o'clock in the morning. You'll still find me in the library looking for luck at three o'clock in the morning" (Simpson, 1988).

Louis Nizer was not only a consummate trial attorney; he was also something of a Renaissance man. He produced some prizewinning paintings that were exhibited at New York's Hammer Gallery, the Boston Museum, and the Galerie Heritage in Toronto. Composing musical pieces was another of his hobbies. Several of his songs were published, including two about places he visited, "Hawaii" and "Jamaica," along with several that he composed for his grandchildren, which were published by RCA under the title *Songs for You*. Nizer actually held a membership in the American Society of Composers, Authors, and Publishers. Nevertheless, when he represented the motion picture companies in a class-action lawsuit filed by seventy-one of his "fellow" musical composers, neither his clients nor the plaintiffs considered him to have a conflict of interest. Even so, he was nominated for a Grammy award for a song in which he analyzed several decisions written by Justice Oliver Wendell Holmes Jr. Nizer was at different times offered presidential appointments to be a federal judge and attorney general, to which he would respond "I enjoy the ardor, and also the freedom of a law office practice" ("Louis Nizer" 1994).

Nizer obviously had an indefatigable personality. In the midst of his kinetic law practice, he somehow managed to write ten books, alongside many articles and essays. He was for a time the chair of the Algonquin Hotel Round Table, which was a daily luncheon engagement for many of the city's literati. His books, spanning more than half a century, began with a legalistic work entitled *New Courts of Industry: Self-regulation under the Motion Picture Code, Including an Analysis of the Code* (1935) and ended with the 1992 publication of the story of Murray Gold, a man who withstood four trials for the double murder of a Connecticut attorney and his wife. In

Catspaw: The Famed Trial Attorney's Heroic Defense of a Man Unjustly Accused, Nizer recounts the four trials, two of which ended in mistrials, two in convictions. Nizer did not represent Gold at trial, but he did represent him in a successful appeal after the first conviction and in a successful habeas corpus petition after the second.

One of Nizer's best-known books is *My Life in Court* (1961), a didactic account of some of his more notable trials. It rose to the top of the *New York Times*'s bestseller list and remained there for a year and a half. One trial described in the book was the notorious libel suit Nizer filed for writer Quentin Reynolds against the Hearst newspaper columnist Westbrook Pegler. The *Reynolds-Pegler* trial became a popular drama, forming the foundation for playwright Henry Denker's stage play *A Case of Libel.* It was performed on Broadway and was later adapted for television in 1969 and for film in 1983. *My Life in Court,* like most of Nizer's books—particularly *The Jury Returns* (1967), and perhaps excepting parts of *Between You and Me* (1963), which covers many aspects of jury trials of interest to a would-be trial attorney—are popularized accounts of his courtroom experiences noted perhaps more for who the participants are than for any significant professional insight. Even so, they have surely added to the public's appreciation for the judicial process and its institutions.

Nizer's combination of hard experience and abundant wit not only equipped him to write so prodigiously. It made him a favored speaker and master of ceremonies. One of his books, *Thinking on Your Feet* (1940)—a Book-of-the-Month Club selection—is a compilation of many of his toastmaster speeches and introductions. Thus, it is not surprising that he is frequently quoted. Some of his quotations, especially as far as they render some insight into his approach to trying lawsuits, are worth repeating: "A speaker who does not strike oil in ten minutes should stop boring"; "I know of no higher fortitude than stubbornness in the face of overwhelming odds"; "Mud thrown is ground lost"; "The man who committed the crime is not the one you see now"; and "A fine artist is one who makes familiar things new and new things familiar." Such a man was he. His life and achievements could not be better summed than by the fact that two universities, Pepperdine University and Iowa Wesleyan College, bestowed on him honorary doctor of law degrees, and another, Tel Aviv School of Law, dedicated a new library wing bearing his name; except perhaps for the comments made by his friend and colleague, Jack Valenti, on the occasion of the first Louis Nizer Lecture on Public Policy at the Carnegie Council on Ethics and International Affairs:

> Louis Nizer is the only person I know or knew who could come close to matching Francis Bacon. Lawyer, courtroom genius, public speaker, best-

selling author, painter, composer, lyricist, historian, counselor to presidents and public officials: he was all these things and more. And in each he performed with exceeding intellect and ascending success.

—Clyde Willis

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OTIS, JAMES, JR.

(1725–1783)

As one of the best-known colonial-era lawyers, James Otis was not only an imposing precursor of several aspects of constitutional jurisprudence—including judicial review, search and seizure law, and full equality for African-Americans and women—he represents the finest tradition among common law lawyers, namely, community building based on reason and common sense rather than blindly following statutory and judicial precedent. Otis was a revolutionary, not because he resisted English rule, for he clearly did not, but because he revolted against blind adherence to English legal tradition, and he was an activist, not by taking up arms against the English, which he refused, but because he sought to uphold his revolutionary ideas in each and every lawsuit he undertook, from simple crimes to the famous 1761 *Writs of Assistance* case.

James Otis Jr.
Library of Congress

In 1635, Otis's grandfather four times removed, John Otis I (1581–1657), moved from Hingham in Norfolk, England, to become one of the initial residents of Hingham, Massachusetts, on the bay some fifteen miles southeast of

Boston. His grandson, John Otis III (1657–1727), moved to Barnstable, fifty-fives miles farther south, where he was judge of the common pleas and probates courts, as was his son James Otis Sr. (1702–1778), commonly called Colonel Otis, who was the father of James Otis Jr., who was destined to become a leading revolutionary-era patriot.

James Otis Jr. was born February 5, 1725, at the family home at Great Marshes, in what is now called West Barnstable, Massachusetts. It was his "upwardly mobile family" (Waters 1968, viii), endowed with opportunistic roots, that permitted the family of John Otis III to blossom during the Glorious Revolution in 1688 when William and Mary ascended to the British throne. The elder James Otis continued his family's achievements in the legal, commercial, and political community of Barnstable, a small provincial town on Cape Cod, steeped in Whig and Congregationalist conservatism, that was the last township in the colony to move for independence from England. Although Otis was infused with Whig conservatism, he did not formally affiliate with the church nor conduct family prayer (Waters 1968, 136). In fact, he appeared to be unaffected by such movements as the Great Awakening.

Otis entered Harvard College in June 1739 and took an A.B. degree in 1743, and the A.M. three years later. He forged a core natural law position while studying the classics that later informed his legal-political argument about the legitimacy of legislative enactments that violated fundamental natural laws. In fact, he used this argument early on in a rather brash defense of a Harvard Fellow who had been dismissed by the overseers. Otis claimed that the overseers had exceeded their authority, thereby constituting a "miserable, Despicable and arbitrary Government" (Waters 1968, 112). After graduating from Harvard, in addition to caring for family business matters, Otis engaged in an apprenticeship at law drawing up writs and reading "black letter" law under Jeremiah Gridley, a friend of the Otis family and one of Massachusetts's leading lawyers.

In 1748, yielding to his father's wishes, Otis established a law practice in Plymouth. With the Colonel's law practice including the same circuit, it was inevitable that father and son would meet as legal adversaries. They met early (September 1748), with Otis Jr. prevailing in a case in the court of common pleas that involved a disputed thirty-two-shilling debt. Otis Sr. unsuccessfully appealed the case to superior court. That same year they met once more in the case of *Veazie v. Duxbury,* a notable case in which Otis Jr., representing Duxbury, found himself again on the prevailing side. Duxbury, a small township some eight miles north of Plymouth abrogated the contract of its pastor, the Rev. Samuel Veazie, who retained the services of Otis Sr. to sue the town for nonsupport in violation of the contract. Otis Jr. used excerpts of Veazie's sermons to convince the jury that Veazie had not com-

plied with the contract by failing to be the "faithful, pious, and learned minister" he contracted to be, thereby releasing the town from its obligation. Although Otis Jr. won the battle, he lost the war, so to speak, for the result hardly impressed the church people in his district, who held Otis Jr. responsible (Waters 1968, 114–115). Whatever the reasons, Otis's law practice failed to prosper. For example, during May 1749, Otis obtained only one new case, while the average among leading practitioners was fifteen, and his father alone obtained more than thirty. Faced with this state of affairs, Otis Jr. left Plymouth for Boston in 1750.

In Boston, Otis achieved much success not only practicing law representing the city's leading commercial interests, but serving his family's business interest as well. He also became known outside Boston. One early case that gave him widespread notice was his successful defense of three men who were on trial for piracy in Halifax. His law practice—typical of lawyers throughout history—included liaison efforts between commercial interests and government officials, which inevitably led him to take a leading role in legal-political battles. Otis joined a faction of lawyers and merchants in opposing what they deemed to be excessive taxation. He also served as the spokesperson for commercial interests in their affairs with the colonial governor, Thomas Pownall, who sought Otis's association to bolster his opposition to the lieutenant governor, Thomas Hutchinson. Pownall appointed Otis to the prestigious post of deputy advocate general of the vice admiralty court.

After five years of success in Boston, Otis married Ruth Cunningham, daughter of a wealthy businessman. They had three children—two daughters and one son, James, who became a midshipman and died in 1777 as a British prisoner of war. The older daughter, Elizabeth, married an English officer from Lincolnshire and after the war lived in England, only returning for a short visit in 1792; the youngest, Mary, married a distinguished military officer who, being a distinguished Massachusetts lawyer after the war, died prematurely, as did Mary in 1806. Otis's sister, Mercy Otis Warren (1728–1814), was a notable American writer famous for her satirical plays, *The Adulateur* (1773) and *The Group* (1775), directed against the Tories. She married the well-known revolutionary James Warren of Plymouth.

Among the important and highly influential works of Otis that have survived are *The Rights of British Colonies Asserted and Proved* (1764) and *A Vindication of the British Colonies* (1765). Otis's writing contains some of the most radical egalitarianism of that period, far greater than is found in most Quaker works and those of Thomas Jefferson as well. For example, in *Rights of the British Colonies*, he insists on total equality for women, posing the rhetorical question, "Are women not born as free as men?" which he answers in the affirmative. He was equally adamant concerning the equality of

black slaves, asserting that "colonists are by the law of nature freeborn, as indeed all men are, white or black" (Bailyn 1965, 420, 439). At age thirty-five Otis published a work that typifies the broad liberal arts education of lawyers in that period and before—a characteristic that is becoming ever more rare among members of the modern bar. This was a linguistic analysis of style in Latin poetry and prose entitled *The Rudiments of Latin Prosody: A Dissertation on Letters and the Principles of Harmony in Poetic and Prosaic Composition* (1760). He wrote a companion book to illustrate the principles of Greek prosody (the study of the metrical structure of verse). John Adams, quite the classical scholar himself, praised Otis's linguistic publications as works of "profound learning and great labor" (Adams 1969, 10:263, 275).

James Otis was best known to his contemporaries—and to history alike, for that matter—as the lawyer who resigned as counsel to the admiralty court and argued against the Crown in the 1761 *Writs of Assistance* case. In fact, his appearance in this case led the loyalist governor, Francis Bernard, to say of him, "Troubles in this Country take their rise from, and owe their Continuance to one Man, [James Otis]." The patriot John Adams, then a young lawyer whose notes at the trial account for most of our knowledge of the trial, stated that the trial was "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there, the child of Independence was born" (Adams 1969, 2:124).

The appointment of Francis Bernard as governor and the deaths of Chief Justice Samuel Sewall and King George II as 1760 was drawing to a close laid the foundation for the *Writs of Assistance* case that is perhaps, along with the 1735 trial of John Peter Zenger in New York, one of the most well known and influential trials in colonial America. Near the successful conclusion of the French and Indian War, the Crown no longer had a need to curry favor with Boston's commercial interest, and thus it began to enforce taxes more stringently. Thomas Pownall had recently been replaced as governor by Bernard, who was much more inclined to enforce the tax and enjoy his one-third share of the revenue than Pownall had been (one-third of the tax revenue was supposed to go to the province, one-third to the governor, and another third to the Crown). Moreover, Bernard appointed Lieutenant Governor Thomas Hutchinson to replace the late Chief Justice Sewall, who had been quite reluctant to issue the writs of assistance. Finally, with the death of King George II, reissuance of the writs became mandatory because they expired six months after the death of a reigning monarch.

The 1733 Molasses Act levied a six-pence-per-gallon tax on molasses, which was used to make the rum that was so economically dear to many New England merchants. So much so that smuggling was almost a way of life for the affected commercial interests. Writs of assistance were an effec-

tive tool in ferreting out smuggled goods, which made them detestable to many local merchants. These writs, issued by superior courts—unlike ordinary search warrants that were based on sworn affidavits manifesting legitimate suspicion and limited to specific places and goods—permitted customs officers not only repeatedly to search any place at will, but to enlist assistance from anyone. Moreover, the authority granted by the writs did not expire until six months after the death of the reigning monarch. Writs of assistance were so named because they were orders ("writ" being Middle English for a written order issued by a court, commanding the party to whom it is addressed to perform or cease performing a specified act) that required others to assist officers in case of necessity while pursuing their duties, in this situation collecting taxes.

In November 1760, James Cockle, a deputy customs official at Salem, petitioned the superior court for a writ of assistance seeking authority to "break open ships, shops, cellars, houses, &c., to search for prohibited goods and merchandise, on which duties had not been paid" (Adams 1969, 2:124). Merchants of Salem and Boston filed a petition resisting the issuance of the writ and retained Oxenbridge Thacher and James Otis, who had recently resigned his admiralty position rather than advocate on behalf of the application for the writ. The customs officials retained Otis's former mentor, Jeremiah Gridley.

Actually, Otis had already become involved in the writs of assistance matter by petitioning the general court on December 17, 1760, claiming that Bernard's new trade policy was illegally administered by using the commonwealth's share of the forfeiture to pay for informers rather than for legitimate provincial matters. The petition called for the province to sue the customs collector, Charles Paxton, for £475, which it did successfully in the common law court of common pleas, only to have the decision overturned by the superior court with Thomas Hutchinson now sitting as chief justice. The reversal was based on an obscure jurisdictional dispute between actions in common law courts and prerogative courts that deprived the common law court of jursidiction.

By the time the *Writs of Assistance* trial began on February 24, 1761, public opinion, especially among the commercial interests, was running quite decidedly against Governor Bernard's general trade policy and these writs in particular. Gridley opened the trial with a review of the legal authority, pointing out that Parliament had authorized the writ by statute in the fourteenth year of Charles II, which by statutes 7th and 8th of William III's reign were later applied to the colonies. Furthermore, he argued that reasons of state demanded that individual liberties must stand aside in this case, claiming that while "it is true the common privileges of Englishmen

are taken away in this Case . . . 'Tis the necessity of the Case and the benefit of the Revenue that justifies the Writ . . . without which the Nation could neither be preserved from the Invasion of her foes, not the Tumults of her own Subjects" (Knappman 1994, 33).

On behalf of the commercial interests, Oxenbridge Thacher responded first by asserting that even if the (prerogative) Court of Exchequer in England had the authority to issue such writs, no similar authority resided with a colonial (common law) superior court. Otis then followed with his four-hour tour de force by first reciting his reasons for refusing to represent the admiralty court's application. He then requested "patience and attention to the whole range of an argument that may perhaps appear uncommon in many things, as well as to the points of learning that are more remote and unusual, that the whole tendency of my design may the more easily be perceived, the conclusions better descend, and the force of them be better felt." The latter point—seeing law suits as an integral means of constituting community—is a most exemplary component of legal advocacy, and Otis's legal practice takes a backseat to no one in this regard. Otis made a specific attack on Gridley's reliance on parliamentary enactments. Otis claimed that they authorized only those "special writs directed to special offices, to search certain houses etc. especially set forth in the writ," not the perpetual, open-ended, and general writs of assistance. However, his principal contention—the one requiring patience and attention—granted for the sake of argument that Parliament had authorized the writs. Otis opined, "An act against the Constitution is void; and if an act of Parliament should be made, in the very words of this petition, it would be void. The executive Courts must pass such acts into disuse" (Adams 1969, 2:524).

Otis readily conceded the propriety of one type of search warrant—as we would call it today—"that is special writs, directed to special officers, and to search certain houses, &c. specially set forth in the writ, granted by the Court of Exchequer at home, upon oath before the Lord Treasurer by the person who asks for it, that he suspects such goods to be concealed in those very places he desires to search." He also conceded that one can find general writs issued by justices of the peace in times past, but, anticipating Fourth Amendment jurisprudence, he went on to say that "in more modern books you will find only special warrants to search such and such houses specially named, in which the complainant has before sworn that he suspects that goods are concealed; and you will find that special warrants only are legal" (Adams 1969, 2:522–524).

Otis fortified this position with a four-point attack against the application. First, the "writ is universal, being directed to 'all and singular Justices, Sheriffs, Constables, and all other officers and subjects'"; second, it is "per-

petual, there is no return [date]"; third, the holder of this writ "may enter any and all houses, shops &c. at will, and command all to assist him"; and fourth, "by this writ not only deputies, &c., but even their menial servants are allowed to lord over us." Most important, however, Otis reiterated that these violations could not be sanctioned even by parliamentary action, since such would violate "one of the most essential branches of English liberty [namely] the freedom of one's house." As Otis employed what has become a habitual proverb in our culture, "A man's house is his castle," Gridley responded, yes, but "Everybody knows that the subject has the privilege of house only against his fellow subjects, not versus the King either in matters of crime or fine," citing acts of Parliament and the provincial law in Massachusetts (Adams 1969, 2:523).

Otis responded by invoking Lord Coke's dictum in *Bonhan Case* (1610), declaring, "when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed the common law [judges] will control it, and adjudge such act to be void." Many scholars have rightly pointed out that Otis misstated English constitutional history, failing perhaps to comprehend that the Glorious Revolution left Parliament supreme, meaning that whatever it enacted was, and is, unlike U.S. congressional enactments, not subject to constitutional attack (Bailyn 1965, 100–104, 412). Some scholars, like Bernard Bailyn, have even suggested that Otis misread Lord Coke as well. Even so, if Otis's position regarding judicial review does not comport with English constitutional history nor Lord Coke's position a half century earlier, it was most certainly a precursor of the U.S. doctrine of constitutional scrutiny and Chief Justice John Marshall's position a half century later in *Marbury v. Madison*.

Otis was not content to rely entirely on abstract principles of natural law. He recited several specific cases of abuse, such as the situation when a Mr. Pew who had one of these writs passed it over to his successor, Mr. Ware, who was totally unknown to the issuing magistrate. He cited another case in which a holder of the writ blatantly used it to harass his political enemies. Otis's vision did not prevail in this case. The court did not grant the application, but neither did it decide unfavorably, forwarding the matter to the colonial agent in England for clarification on the jurisdiction of superior courts. They ultimately upheld the legality of the writs and the superior court's jurisdiction, which issued the writs, although they were never enforced by local customs officials.

Otis's continuing legacy is not that he dwelled in some world of abstraction—for he clearly did not. Nor is it that he misrepresented the historical tradition of English law—which he may have done. Rather, it is that his aspiration elevated mundane and daily concerns to what have become some of our most cherished constitutional traditions in the areas of judicial

Lawyers as Scoundrels: William F. Howe and Abraham H. Hummel

Every profession has individuals who are professionally able but morally weak. Few lawyers have better fit this description than William F. Howe and Abraham H. Hummel (Howe & Hummel), who practiced law in New York City from 1869 to 1907. Their office featured a sign thirty to forty feet long and three to four feet wide, reading "Howe and Hummel's Law Offices."

Senior partner Howe is believed to have defended more than 650 individuals, most successfully, on murder and manslaughter charges (Rovere 1947, 5). Howe was especially adept at finding legal loopholes and on several occasions almost emptied the New York City jails. The firm also defended brothel owners, brokers, bankers, petty thieves, and various practitioners of organized crime, as well as major theatre performers and other entertainers of the day.

Howe was a large man who loved to wear ostentatious diamond jewelry to court; the more somber Hummel usually dressed in black and was often likened to a toothpick. Howe's background was obscure; he may or may not have been born and/or raised in England and/or previously practiced medicine. Best known for his criminal work, he handled some of the most notorious cases of his day. Howe was especially known for his emotional appeals to the jury, where he would often supply not only professional witnesses but also supportive wives and children for defendants. Howe could apparently command tears at will and once made an extended jury appeal on his knees. He also argued a number of insanity defenses, including some in which he directed his clients to enter court with their heads wrapped in bandages.

American-born Abraham Hummel, about twenty years Howe's junior, started as Howe's clerk and concentrated more on civil matters. Hummel was especially adept as a divorce lawyer and as a successful blackmailer of rich and famous men who had seduced young women who were willing to make charges and split fees with Hummel. Hummel was very interested in the theatre and developed this aspect of the firm's work.

In a book, *In Danger, or Life in New York. A True History of a Great City's Wiles and Temptations*, Howe and Hummel practically advertised New York City as a haven for criminals smart enough to seek the services of their law firm.

Howe tried his last case in 1897 and died in 1902. Hummel went to jail in 1907 when a plan to secure a divorce backfired after a witness he had bribed was finally located after months of dissipation (financed by Hummel) in faraway cities. The firm was shut down, and Hummel left the country, dying in London in 1926.

Although Howe and Hummel contributed to the great store of lawyer anecdotes that have added interest to the profession, they also left a legacy of lawyers as shysters that has done much to taint the reputations of more ethical practitioners.

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review, search and seizure law, and equality for African-Americans and women. In fact, Otis, in the best tradition of the bar—thinking globally and acting locally, as a contemporary bumper sticker puts it—continued to champion his vision of society even in the most run-of-the-mill cases. A case in point is his participation, not long before his death, as a self-appointed amicus curiae in a lawsuit begun by a Boston widower seeking to recover land. Defense counsel, having produced a deed executed by the plaintiff, duly acknowledged and recorded, the plaintiff offered evidence that he was insane at the time. Whereupon the defendant's counsel produced legal authorities that people are not permitted to "stultify" themselves (alleging or seeking to prove insanity so as not to be legally responsible). At this point, Otis, a spectator in the courtroom, stepped forward and offered his opinion that since we had become a new nation, we might base judicial decisions on "the dictates of reason and common sense," rather than on the books, however long and complete they may appear. Two of the judges voted to permit the evidence, and the jury found in favor of the plaintiff.

Otis had been afflicted with mental instability for some time when a blow to his head by a British officer almost rendered him completely disabled in 1769. From that time on, he eased in and out of periods of sanity—completely withdrawing in 1771 from his profession and public service. Between his lucid periods he could perform such acts as spending two entire days destroying most of his correspondence and other writings. James Otis died in 1783 after being struck by lightning in his home at Andover, where he resided the last two years of his life on the farm of an acquaintance, a Mr. Osgood.

—Clyde Willis

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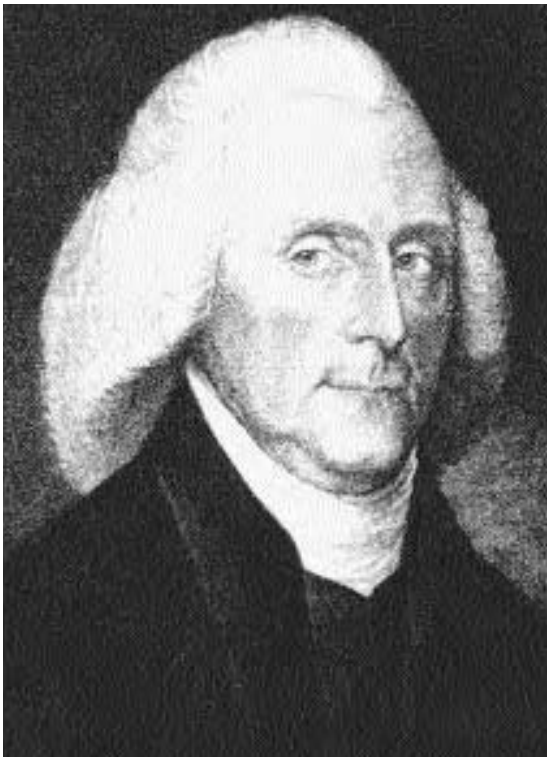
PENDLETON, EDMUND

(1721–1803)

Edmund Pendleton, notable early Virginia attorney and judge, was born in 1721, the seventh child of Mary Taylor Pendleton and Henry Pendleton, a farmer who had died four months previously. In 1723, Mary Pendleton was remarried to Edward Watkins. Edmund's schooling was fairly sparse, and he is believed to have had only two years of schooling before age fourteen, when he was apprenticed to Benjamin Robinson, the Caroline County, Virginia, court clerk. This very practical experience, along with three months of study in a Latin school, constituted Pendleton's legal education, but Pendleton had already served as a clerk to the vestry of St. Mary's Parish before being admitted to the bar in 1741 at age nineteen. That same year, he married Elizabeth "Betty" Roy, but seven months after she died in childbirth, he married Sarah Pollard. Although the couple had no children, they took in a three-year-old orphaned nephew (John Taylor of Caroline), who subsequently studied in Pendleton's law office and went on to achieve notoriety as a theorist of Republican principles. A number of other lawyers, including John Penn, who signed the Declaration of Independence as a delegate to the Continental Congress from North Carolina, also studied with Pendleton at his home.



Edmund Pendleton
Library of Congress

By 1744, Pendleton had been appointed a prosecutor, or "deputy attorney," and in 1751 he was made a justice of Caroline County. The next year

he was elected to represent his county in the state general assembly, and by his career's end, he had at one time or another headed each of the three branches of state government (Mays 1952, 1:22). In contrast to many other Virginia leaders of his day, Pendleton was not from a prominent family and had no great inheritance. As his main biographer notes, "Pendleton was entirely a self-made man. He had inherited nothing and he had been compelled to create Edmundsbury [his Caroline County home] from the proceeds of his profession" (Mays 1952, 1:107). Pendleton did succeed in amassing considerable lands in Caroline County, in North Carolina (later Tennessee), and elsewhere in Virginia. Like other planters of his day, Pendleton was a slaveholder, and many of the cases he handled as a judge dealt with punishing slaves who had violated the law, often quite severely.

Pendleton began to emerge as a colonial leader during the successive crises brought about by British attempts to tax colonial goods. Through most of this period, Pendleton was regarded as a moderate who strove for reconciliation. Pendleton disfavored closing the courts at the outset of the American Revolution, and, in a position very similar to the modern idea of judicial review, he declared that the Stamp Act was unconstitutional and therefore void (Mays 1952, 1:171).

When John Robinson—who had served both as the speaker of the House of Burgesses and as Virginia's treasurer—died, Pendleton was asked to handle his estate. Few tasks could have been more complicated, because Robinson had generously loaned not only his own money but also that of the state and was owed more than £130,000, most of which had been taken from the state treasury. Pendleton spent more than fifteen years on the tedious job of settling Robinson's estate, but the fact that he was entrusted with the job was undoubtedly a sign of the high esteem in which he was generally held.

Although he was both a justice in Caroline County and a Caroline County representative to the House of Burgesses, Pendleton continued his law practice. He was especially active in the court in Williamsburg, where he established himself as being among the best of a very able group of attorneys. Pendleton's talents have been most frequently compared to those of George Wythe, with whom he was often at loggerheads, although they sometimes took cases together. Pendleton was no match for Wythe's wide classical learning, but he was his equal, if not his superior, in the courtroom. With Pendleton's wide knowledge of people and public affairs, he was especially good at answering logical arguments that Wythe thought to be irrefutable. Henry Clay, who worked for a time transcribing for Wythe, has noted that

> Mr. Wythe's forte, as I have understood, lay in the opening of the argument of a case, in which for thorough preparation, clearness and force, no one could

> excel him. He was not so fortunate in reply. Mr. Pendleton, on the contrary, was always ready both in opening and concluding an argument, and was prompt to meet all the exigencies which would arise in the conduct of a cause in court. The consequence was that Mr. Pendleton was oftener successful than Mr. Wythe in their struggles at the bar. (Mays 1952, 1:229)

As an illustration of his generalizations, Clay went on to tell a story:

> On one occasion, when Mr. Wythe, being opposed to Mr. Pendleton, lost the cause, in a moment of vexation he declared, in the presence of a friend, that he would quit the bar, go home, take orders, and enter the pulpit. You had better not do that replied his friend; for if you do, Mr. Pendleton will go home, take orders, and enter the pulpit too, and beat you there. (Mays 1952, 1:229)

Clay further noted that "Mr. Pendleton was far less learned than Mr. Wythe, but he possessed more versatile talents, was an accomplished gentleman, and better adapted to success in general society and in the busy world" (Mays 1952, 1:229).

In analyzing Pendleton's skill as a legislative leader, Thomas Jefferson undoubtedly provided insight into Pendleton's skills in the courtroom as well. Jefferson noted,

> Taken in all, [Pendleton] was the ablest man in debate I have ever met with. He had not indeed the poetical fancy of Mr. [Patrick] Henry, his sublime imagination, his lofty and over-whelming diction; but he was cool, smooth and persuasive; his language flowing, chaste & embellished, his conceptions quick, acute and full of resource; never vanquished; for if he lost in the main battle, he returned upon you, and regained so much of it as to make it a drawn one, by dexterous maneuvers, skirmishes in detail, and the recovery of small advantages which little singly, were important altogether. You never knew when you were clear of him, but were harassed by his perseverance until the patience was worn down of all who had less of it than himself. (Mays 1952, 2:130)

Pendleton apparently attracted clients from throughout Virginia. On the eve of a battle, George Washington turned to Pendleton to write a will for him (Mays 1952, 2:234). Pendleton's biographer observed that "Pendleton attracted clients because he was what every client has always wanted—a winner" (Mays 1952, 1:234).

Pendleton was chosen as a member of the Virginia Committee of Correspondence and as a Virginia delegate to both continental congresses. In the second, he was one who helped draft yet another petition asking King George III for redress. When the hope of avoiding war was not realized,

Pendleton was selected as president of both of Virginia's revolutionary conventions in 1775 where, as president of the Committee of Safety, he was the de facto state executive (Konig 1999, 276). Pendleton's decision to deny chief military command of the Virginia forces to fellow attorney Patrick Henry (who had advocated independence long before the more conservative Pendleton) resulted in continuing ill will between the two lawyers that lasted through the rest of their lives.

Elected again to preside over the Virginia Convention of 1776, Pendleton was now ready for independence, and Virginia urged its representatives in Congress to make such a declaration. Pendleton was elected as speaker of the Virginia House of Delegates for a time but naturally gravitated toward the judiciary, which he hoped would be an anchor of stability. With Thomas Jefferson and George Wythe, Pendleton helped adjust the law to independence by revising the laws of Virginia.

In 1777, Pendleton injured his hip in a riding accident that left him in frequent pain and that forced a man once regarded as "one of the handsomest men in Virginia" (Mays 1952, 2:144) to use a crutch or a cane through most of the rest of his life.

Pendleton spent most of this time at the bench, gaining a reputation, after a distinguished English jurist, as "Virginia's Mansfield" (Konig 1999, 276). Pendleton was chief justice of Virginia's high court of chancery, created in 1777, where he served with George Wythe and Robert Carter Nicholas; he also presided over a new court of appeals, established in 1778 (Konig 1999, 276). When this was replaced by yet another court of appeals, Pendleton became chief justice, a position that (much to Wythe's chagrin) allowed him to review—and in many cases to reverse—decisions of George Wythe, who was now the lone chancellor of Virginia. Pendleton and his court are said to have reversed or modified a majority of the more than 150 cases that were appealed to them from Wythe's court (Mays 1952, 2:290).

When faced in *Commonwealth v. Caton* (1782) with the legitimacy of a pardon issued by the state legislature, Pendleton worked to avoid a direct confrontation by squaring the law with the state constitution, but he and other justices helped establish the groundwork for judicial review of unconstitutional legislation. Although he did not attend the Constitutional Convention in Philadelphia, Pendleton was chosen as chair of the Virginia Ratifying Convention. Despite their rivalry on other issues, Pendleton worked successfully with other Federalists, including George Wythe, who was selected to preside over the Committee of the Whole, thus enabling Pendleton to play a key role with James Madison and Edmund Randolph in debates, where Patrick Henry and George Mason led the fight against ratification. Pendleton was one of the main defenders of Article III of the new constitution providing for an independent judiciary, and he and other

Federalists successfully beat back proposals that would have made ratification of the new constitution contingent on the prior adoption of a series of proposed amendments, some of which were later incorporated into the Bill of Rights.

When George Washington became president, he offered Pendleton a position on a U.S. district court, but Pendleton declined in order to continue serving in Virginia. Although he gravitated toward the Democratic-Republican party and toward the philosophy of states' rights espoused by Thomas Jefferson and James Madison, Pendleton remained friends with Washington. After Jefferson's successful election as president in 1800, which Pendleton had supported, Pendleton authored a pamphlet entitled *The Danger Not Over* in which he proposed a series of amendments designed to curb what he regarded as encroachments by the national government.

As a jurist, Pendleton was known for his extreme practicality that appeared to mirror his approach as a lawyer. His chief biographer notes that "Again and again he would cut through involved arguments over the meaning of words used by men in their wills or contracts. What would a plain man take the words to mean? That was the test he applied" (Mays 1952, 2:281). Such an unadorned approach to law was undoubtedly one of the factors that led Wythe to bring his own conflict with Pendleton to the public attention, but Wythe's critiques were so complex that they had little impact on the reading public, and Pendleton decided not to reply in kind.

A longtime supporter of the once-established Anglican Church in Virginia, Pendleton was prepared to overturn a state law adopted in 1801–1802 allowing for the sale of church lands for the support of the poor. The case had been appealed from Wythe's court, which had upheld the law. Although Pendleton had written his decision, he died before he was able to give it, and the equally divided court on which he sat thus had the effect of affirming Wythe's judgment.

Pendleton's death was greeted with mourning both in the state and in national counsels. As a self-made lawyer and jurist, Pendleton epitomized many of the values that made the new nation such a great one.

—John R. Vile

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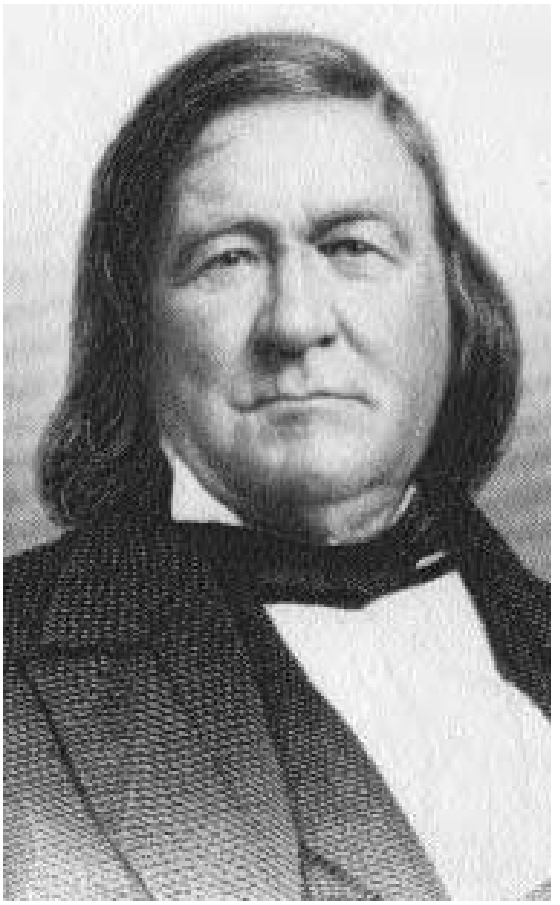
PETIGRU, JAMES LOUIS

(1789–1863)



James Louis Petigru
Library of Congress

James Louis Petigru—lawyer, antebellum South Carolina Whig, and Unionist politician and civic activist—never held a judicial office, yet is deemed "a great jurist"; never occupied high public office, yet is revered as a "statesman"; never established charitable institutions, yet is honored as a "great-hearted philanthropist"; never authored books or treatises, yet is regarded as a scholar of the law, a "lawyer's lawyer." Petigru's life is one of contradictions. His was at once a life of professional triumphs over a half century at the bar, high social status in a patrician society, personal tragedies, dramatic financial oscillations, and political marginality.

Petigru was born on May 10, 1789, near Abbeville in the Palmetto State's northwestern Ninety-Sixth District. He was the eldest child born to a struggling upcountry farmer, William Pettigrew, and Louise Guy Gibert, whose Huguenot ancestry and associated Calvinistic values led the upwardly mobile son to Huguenotize the spelling of his last name. Educated in a log academy, where he was taught by Moses Waddell, a graduate of Pres-

byterian divine John Witherspoon's College of New Jersey (later Princeton University), and at South Carolina College, from which he graduated in 1809, he subsequently read law with Beaufort attorney William Robertson. His legal career began, following admission to the bar in 1812, in Coosawhatchie, the rural court town of coastal Beaufort District. There he became district solicitor under the sponsorship of the politically powerful and nationalist local planter Daniel E. Huger. The daughter of another planter became Petigru's wife in 1816. Jane Amelia Postell, who bore him four children, suffered frequent illnesses that were symptomatically treated with addicting morphine.

A move to Charleston in 1819 brought him into partnership with future congressman and governor James Hamilton Jr. Petigru took over the practice in 1822, the same year that the legislature named him attorney general of South Carolina. He held that post until late 1830, when he won elective office on the Unionist ticket. The nullification storm that engulfed South Carolina in the wake of the 1828 protective tariff ("Tariff of Abominations") doomed Petigru's Whiggish political career in the state legislature, which had included advocating public financing of the state's economic infrastructure. Thereafter, only appointed offices lay open. The death of Charlestonian and U.S. Supreme Court associate justice William Johnson in 1834 found Petigru in the running as his successor. The aspirant doubted his chances, an insight verified by President Andrew Jackson's appointment of his loyal political ally Georgian James Moore Wayne. Even more abortive was the lofting of an aged Petigru's candidacy in 1862 to fill the Supreme Court seat vacated by John Archibald Campbell, who resigned on the secession of his native Alabama. Even the position of attorney general of the United States lay beyond his grasp. President Millard Fillmore, a fellow Whig, considered his nomination, but the solid opposition of the South Carolina delegation thwarted it. Instead, Fillmore named Petigru as U.S. attorney for the District of South Carolina. In the midst of a furor over the Compromise of 1850 supported only by the tiny Whig/Unionist constituency in South Carolina, the post was so unattractive that only Petigru would reluctantly accept the appointment. He held it from 1850 to 1853.

To the end of his life, Petigru remained a political maverick who embraced conservative principles in an order-shattering Jacksonian age that fostered a sea change in the political culture of South Carolina. He, however, glorified the founders' handiwork and praised the Constitution and the frame of government it created as bulwarks of liberty, unity, and progress. In Petigru's view, the Constitution rested not on a national compact among sovereign states, as John Calhoun argued, but rather on the sovereign people, as Chief Justice John Marshall maintained. At the great chief justice's death in 1835, Petigru authored the Charleston bar's

memorial resolutions incorporated in the published proceedings of the U.S. Supreme Court. In it he alluded to Marshall's conception of the Constitution, the protection it accorded to vested property rights, and to judicial independence. For South Carolinians, however, dwelling in a state roiled by the nullificationist response to the tariff and surging toward secession, as Petigru perceived in 1833, Madisonian democracy and Marshallian constitutionalism faded as anchoring forces.

Notwithstanding pervasive tensions between fidelity to Federalist-Whig principles and loyalty to hearth and home, the political never became personal. Petigru's cheery temper, warm, hearty, and courtly manners rendered him a veritable "punctilio of etiquette" and enabled him to win and retain friendships with even his fiercest political opponents. Fate did not spare him the premature deaths of children, afflictions of siblings, a disabled and extravagant wife, or the collapse of his quest for the acknowledged cachet of social status—a landed estate. His six-hundred-acre Savannah River rice plantation became a casualty in the 1837 panic of risky speculative investments with ex-partner Hamilton. Financial recovery by the mid-1850s reflected the fruits of a flourishing law practice. Whether as state's attorney or as private counsel, Petigru's practice carried him from his Charleston home to every judicial district in South Carolina, to trial and appellate courts in that state, and often into neighboring states. His was an unpredictable, peripatetic life, made so by the relatively few state judges who, having completed the docket in one district, immediately moved on and opened the next court. Petigru's modern biographer has calculated that, although he eschewed criminal business in the 1840s, his firm appeared in 20 to 25 percent of all civil cases heard in Charleston's equity court. And during the 1840s and 1850s, his successful practice averaged ten reported appeals court cases per year.

From 1830 to the early 1850s, hardly a term of the U.S. Sixth Circuit Court—held alternately in Charleston and Columbia—passed without civil cases involving Petigru's clients on that court's usually uncrowded trial docket. Petigru and senior partner Hamilton appeared before circuit-riding Supreme Court justice William Johnson and district judge Thomas Lee in 1821, two years after Petigru's arrival in Charleston. Court cases carried to judgment by Petigru and partner Lewis Cruger occasionally appeared on that court's docket during the 1820s and early 1830s. They increased in number in the late 1830s and the 1840s, when ex–U.S. attorney Robert Budd Gilchrist replaced Lee and Georgian Wayne succeeded Johnson as the sixth circuit justice. By then, Petigru, in his fifties, was in partnership with a young Henry Lesesne, who resigned in 1850, succeeded by Henry King.

In an era of legendary courtroom combat, Petigru pursued mediation and legislative strategies on his clients' behalf. The former aimed to achieve

court-approved compromise solutions. The latter sought monetary settlement unavailable through the judicial process. His citation of arbitration awards and his compromise offers in marine salvage cases met rebuff in published decisions handed down by the federal district court in Charleston. Yet his renown as an arbitrator took him to New York to settle a dispute involving telegraph inventor Samuel F. B. Morse. Lobbying the Georgia legislature nearly fifty-five years after the Supreme Court's nationalistic decision in *Chisholm v. Georgia* (1793), Petigru won for his claimants-clients authorization of a bond issue to pay the principal owed for supplies purchased by Georgia during the Revolutionary War.

Petigru's courtroom demeanor differed substantially from the nineteenth-century oratorical model. A contemporary described him as a person of "elastic step and erect carriage" that suggested a height greater than his five feet ten inches (Pope, 1908, 58). His "great muscular power" made him seem larger than he was. A "rather low but broad brow, . . . strong massive chin, . . . magnificent dark gray eyes, gave dignity, character and intellectual vivacity" to an otherwise plain face that hid a V-shaped vein, "which in moments of high physical or intellectual excitement flamed out like a veritable scarlet letter" (Pope, 1908, 58). Noteworthy too were his hands as elements in his courtroom theatrics. They grasped a professional green bag and the gold head of his walking stick. During arguments they brushed back from his forehead his long, never-graying hair, toyed with spectacles and pinched the sneeze-inducing contents of his gold snuff box. Thus did he punctuate what another contemporary described as a "quaint, original, magnetic eloquence" (Pope, 1908, 35). His oral presentations were founded on careful preparation, a parsimonious style that made for logical and lucid induction from his premises that, as a contemporary recalled, "*turnpiked* the legal pathway out of the most complicated labyrinth of law and fact" (Henry A. DeSaussure in *Memorial* 1866, 11). Precision rather than more common redundancy of language marked his courtroom performances. Oratorical pauses signaled his search for "the right word in the right place" (Pope, 1908, 57). Mood changes, wit, flashes of humor, sarcasm, and the unleashing of "wondrous powers of ridicule" trapped witnesses and won over juries (Isaac W. Hayne in *Memorial* 1866, 13). His professional reputation brought students to his office. His biographer estimates that 10 percent of all lawyers admitted to practice before the South Carolina Court of Appeals between 1825 and 1860 read law under Petigru's mentorship. Attesting to his national eminence was his election by Harvard law students in 1852 as president of their association named after Marshall's close Supreme Court associate, Joseph Story.

Petigru's law practice reflected the legal business spawned by an agricultural slave state; it was largely devoid of issues that influenced enduring

changes in the law's development. Only glacial legal change affected probate, trust, and real property law, which constituted much of Petgru's practice, in cases brought by planter clients. Unusual for the region were his other clients: banks, railroads, and corporations. These carried Petigru close to the cutting edge of legal change. Whether as a private attorney or as a public prosecutor, even run-of-the-mill cases pitted him against the dominant culture and its norms. As a courageous prosecutor, he contested appeals by slave owners who had murdered their slaves and he sided with ejected tenant farmers who were about to harvest their crops. Illegitimate children, battered women, and imprisoned debtors all found in him a stout courtroom defender. So too did clients discriminatorily branded as products of miscegenation. Although he was a slave owner who, as a devout Episcopalian, doubted the morality of slavery, Petigru worked, not always successfully, in a hostile legislative climate, to make manumission a reality for slaves on the brink of freedom.

Such "against-the-tide" cases made little societal impact other than on his clients. Some, however, raised important public policy issues involving federalism, civil liberties, corporations, and private property rights. As attorney general of South Carolina, in the early 1820s he had eluded participation in the state's enforcement of the infamous Negro Seamen's Act and the associated Denmark Vesey slave insurrection conspiracy. Years later, while simultaneously serving as attorney for the British consul in Charleston and as U.S. attorney, he invoked in *Roberts v. Yates* (1853) Supreme Court justice William Johnson's circuit court decision in *Elkison v. Deleisseline* (1823) to assert the supremacy of a British-American treaty over South Carolina's internal security measures aimed at quarantining the example and messages carried by free black mariners. And, in the midst of the nullification crisis, he successfully challenged in Judge Gilchrist's district court a test of the constitutionality of the federal tariff act brought by the Nullifiers, among whose leaders was former law partner Hamilton.

The relationship between the Constitution and corporate citizenship figured in a landmark Taney Court case, *Louisville, Cincinnati, and Charleston R.R. v. Letson* (1844), one of two reported Supreme Court cases in which Petigru served as counsel. He represented Yankee contractor Letson, who sought damages against a railroad originally promoted by ardent states' righters to compete with northern roads linking the Midwest to eastern markets, but which failed in the wake of the 1837 panic. With stockholders residing in the contractor's home state, the railroad invoked hoary Marshallian jurisprudence relating to corporations to assert the absence of diverse citizenship, hence its unsuability in the federal forum. Justice Wayne, before whom Petigru successfully argued Letson's case in the U.S. circuit court, affirmed that decision and praised "the really distinguished ability of

the arguments of counsel." Wayne, however, did not embrace Petigru's central argument that corporations were "a state in miniature" and that the residency of corporate officers, not just of stockholders, fixed corporate citizenship. Instead, he followed the argument proffered by Petigru's fellow South Carolina Whig and President Tyler's attorney general, Hugh S. Legaré, to hold that the place of incorporation and place of doing business determined corporate citizenship in a developing national market economy.

Curbing overreaching by government, whether power excesses arose from rampant majoritarianism or from elite manipulation, was a hallmark of Petigru's legal practice. Repeal of South Carolina's Nullification Ordinance was followed by a Nullifier stratagem of imposing on all state officers a test oath of allegiance to the state. The oath, aimed squarely at dissident Unionists, was challenged by Petigru, who argued before the state appeals court in *McCready v. Hunt* (1834) that the oath evoked memories of religious and political oppression in Europe and conflicted with state and federal constitutions. The duty of the court was plain, he stated. "The free and generous principles of the law which the court is sworn to administer favor liberty." The oath deprived "the humblest citizen of his liberty." Therefore, the judges, he continued, "must take the law as they find it, and if it does not conform to the Constitution declare it null and void." Success capped his effort. Successful as well was his invocation in federal district court of the fair trial and due process rights of Yankee woodcutter and fraternizer with slaves Reuben Smalle, whose nonconformist ways had been subjected to harsh public and private suppression. Later, in the Confederate district court, before ex–U.S. district judge Andrew Gordon Magrath, then robed in gray, to whom he had taught law, Petigru fearlessly came to the defense of private property owned by enemy aliens residing in the North that the Confederate Congress sought to confiscate and sequester. Petigru argued fervently against the writ of garnishment and attached interrogatories respecting such property held by him as trustee while decrying the government's demand that he betray his clients. Privately doubting the very legitimacy of the Confederate Constitution, he assailed in Magrath's courtroom the power of the Confederate Congress to interfere with the moral obligations of debtors to creditors and, as a government of limited constitutional powers, to usurp the sequestration powers implicitly reserved to the states. Soaring rhetoric marked his conclusion. Should, he asked, such legislative powers be inferred from a constitutional text that restricted laws to effect only powers expressly granted? "Forbid it, Heaven!" he declaimed, "for if it is, mankind have been deluded by a vain hope, and paper Constitutions are no more than a cheat practiced on the credulity of poor suffering human nature."

Suffering defeat in Magrath's courtroom, failing health, war-induced evaporation of his law practice, destruction by fire of his Charleston home, and loss of kin in war, Petigru nevertheless labored on in his twilight years as a law reformer. Legal reform had occupied his attention since the 1820s, when he sought reform in the state's equity system to promote, in the Federalist-Whig tradition, enterprise and commerce. The legislature in 1859 named Petigru to codify, unify, and harmonize the common and statutory laws of South Carolina by producing a modern civil code. Posthumously rejected by the legislature that had commissioned it, his efforts provided a foundation for the Reconstruction legislature's codification of the state's laws in 1872.

An anomaly in life, Petigru had stood with an old and conservative political order against fire-eating revolutionary forces of Southern glorification and nationalism. The vanguard of these forces assembled in Columbia in December 1860. Petigru then allegedly directed an inquiring stranger seeking the "Lunatic Asylum" to the secession convention filled, at that moment, he said, with "one hundred and sixty-four maniacs." Three years later, federal troops hovered at Charleston's doorstep. On March 9, 1863, the pillar of the South Carolina bar, persevering defender of the Constitution, advocate for rich as well as disadvantaged clients, untiring law reformer, promoter of civic causes, and courageous political iconoclast died. He died in virtual political exile among those who ironically eulogized their noble native son as one who stood "at the head of the profession . . . in this State; and . . . both in the old Union and in the new Southern Confederacy" (Richard Yeadon, in *Memorial* 1866, 15). And chiseled into the marble monument marking his grave in Charleston's St. Michael's churchyard was an epitaph reminding visitors that

> In the great Civil War/He withstood his People for his Country/But his People did homage to the Man/Who held his conscience higher than their praise/And his Country/Heaped her honors on the grave of the Patriot,/To whom living,/His own righteous self-respect sufficed/Alike for Motive and Reward.

—Peter G. Fish

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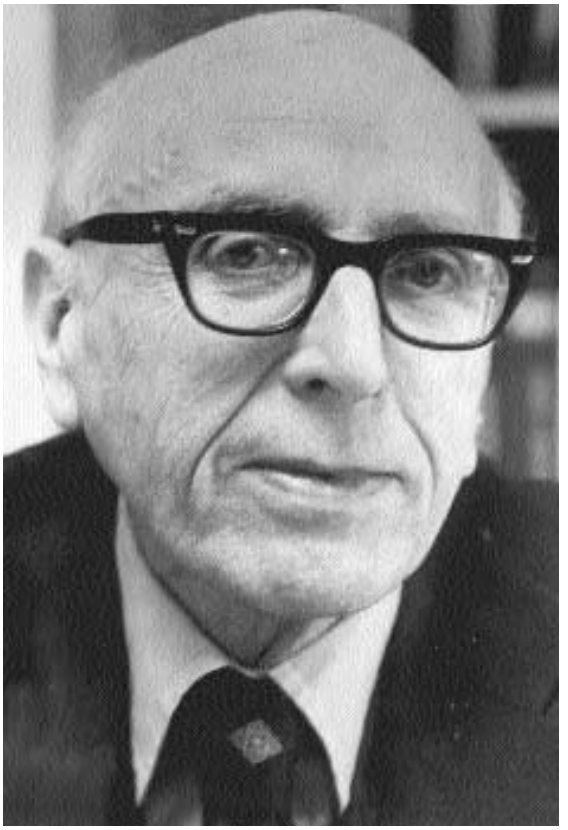
PFEFFER, LEO

(1909–1993)



Leo Pfeffer
American Jewish Congress

Leo Pfeffer, eminent lawyer, scholar, author, and advocate for religious and civil liberties, was perhaps best known as an ardent defender of the separation of church and state. His frequent and compelling oral arguments before the U.S. Supreme Court significantly shaped American church-state law under the U.S. Constitution. Pfeffer, whether as lead attorney, filer of amicus curiae brief, or litigation consultant, was personally involved in more than 50 percent of establishment clause cases that were heard by the Supreme Court during his career. Samuel Krislov, a noted scholar of the U.S. judicial system, described Pfeffer in this way: "Leo Pfeffer is probably sui generis. . . . No one comes to mind . . . to rival Pfeffer's intellectual dominance over so vital an area of constitutional law for so extensive a period" (Wood, 1985, 421). In a tribute to Pfeffer, James E. Wood Jr., former director of the J. M. Dawson Institute of Church-State Studies at Baylor University, said, "In Leo Pfeffer were combined the scholar and the jurist, the thinker and the participant, the theoretician and the practitioner. . . . Deeply involved in his concern for a broad range of human rights and civil liberties, he was a passionate advocate of religious liberty and an eloquent defender of the institutional separation of church and state which he always saw as a

corollary to the constitutional guarantee of the free exercise of religion" (Wood, 1985, preface).

Leo Pfeffer entered the arena of church-state litigation in the post–World War II era, just as the Supreme Court, by making the establishment and free exercise clauses binding on the states, opened the doors to an increasing docket of church-state cases. Two basic interpretations of the religion clauses emerged in this period. The first held that the constitutional framers intended to separate church and state, creating a secular state that was to be neutral with regard to religious matters. The second interpretation held that the framers never intended to create a secular state. Rather, government could assist religion provided it was done in an evenhanded, nonpreferential manner. It was the first position, the separationist framework, which found in Leo Pfeffer its most articulate legal advocate. He therefore argued that "complete separation of church and state is best for the church, and best for the state, and secures freedom for both" (Pfeffer 1967).

Background

Leo Pfeffer, the youngest of five children, was born in 1909 to Hungarian Orthodox Jewish parents. His father was a rabbi. Two years after his birth, his family immigrated to the United States and settled in the Lower East Side of New York City. When Leo was six, his parents enrolled him in a nearby public school, but when the school considered introducing released-time religious instruction into the school his parents withdrew him and enrolled him in a yeshiva school. He subsequently attended the Rabbi Isaac Elchonon Talmudical Academy for his secondary education, which later became Yeshiva University. Pfeffer received his college education at the City College of New York and, at age twenty-three, his law degree from New York University in 1933. In 1937, he married his lifetime mate, Freda Plotkin. They had two children, Alan and Susan.

Among the events that formed the context for Pfeffer's career was his religious upbringing. As the son of an Orthodox rabbi, he grew up with a sense of respect for his religious tradition and for the traditions of others. His Talmudic education in Jewish philosophy and his love for the prophetic tradition informed his argument and concern for social justice. Moreover, the Holocaust and the anti-Semitic resurgence in the United States during and after World War II made him critical of majoritarianism and aroused his concern for the rights of minorities. Often excoriated as an atheist due to his commitment to church-state separation, his genuine devotion to his Jewish faith was never questioned by those who knew him.

Leo Pfeffer joined the staff of the Commission on Law and Social Action of the American Jewish Congress (AJC) in 1945. As counsel, special coun-

sel, and director, he served the commission for much of the remainder of his career, becoming a church-state expert in the process. During his career, he also served as counsel for the New York Committee for Public Education and Religious Liberty (PEARL), and the National Coalition for PEARL. In addition, he held several academic positions: lecturer, New School of Social Research, 1954–1960, and Mt. Holyoke College, 1958–1960; David W. Petergorsky professor of constitutional law, Yeshiva University, 1962–1963; and professor and chair of political science, Long Island University, 1964–1979. He died on June 4, 1993.

Pfeffer received many awards, including an honorary doctor of laws degree from Hebrew Union College; the Trustee Award for Scholarly Achievement from Long Island University; the Thomas Jefferson Religious Freedom Award from the Unitarian Universalist Church; the Rabbi Maurice N. Eisendrath Memorial Award from the Union of American Hebrew Congregations; the Citation for Contribution to Public Education from the Horace Mann League; the distinguished American Jewish Council Award; and the Certificate of Merit from the Council of Jewish Federation. In 1985, the J. M. Dawson Institute of Church-State Studies, Baylor University, in recognition of Pfeffer's twenty-four years of service as a member of the editorial council of the institute's *Journal of Church and State*, published a 596-page festschrift in his honor.

Leo Pfeffer's scholarly writings reflect his devotion to religious liberty and church-state separation. They include *Church, State and Freedom* (1953), described by one authority as "the most authoritative constitutional history of America's experience with the double faceted principle of religious liberty and separation of government and religion"; *The Liberties of an American: The Supreme Court Speaks* (1956); *Creeds in Competition: A Creative Force in American Culture* (1958); *Church and State in the United States* (1964); *This Honorable Court: A History of the United States Supreme Court* (1965); *God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (1974); *Religious Freedom* (1976); and *Religion, State, and the Burger Court* (1985). He published many pamphlets, and his more than 240 articles and numerous book reviews appeared in diverse religious and secular publications. He left many unpublished materials, most of which are part of an extensive collection of Pfeffer's papers maintained at Baylor's Dawson Institute. Syracuse University also houses an extensive collection of Pfeffer materials.

Litigation Activities

Pfeffer's first legal assignment with the AJC was to prepare a memorandum on the merits of "released time" for religious instruction. Released time is a

Ellis Rubin

Miami defense attorney Ellis Rubin (b. 1925) has the relatively rare distinction of having been sent to jail rather than calling a witness who he believed was planning to perjure himself. Raised in Binghamton, New York, Rubin went to school with Rod Serling, who went on to create the acclaimed television series *The Twilight Zone*. Rubin encountered massive problems with stuttering throughout his childhood, but he was later able to overcome these in the courtroom. Rubin joined the navy, which sent him to Holy Cross College and he later graduated from the University of Miami Law School.

When Russell Sanborn told Rubin he was going to use a fabricated story to exonerate himself from the brutal killing of his wealthy girlfriend, Rubin asked the judge for permission to withdraw from the case, and was denied. Rubin subsequently spent thirty days in jail rather than commit what he regarded as an ethical violation (his client, defended by another appointed attorney who allowed him to testify, was convicted).

Rubin has had many sensational cases, most of which he has won. Rubin received great media attention when he unsuccessfully tried to argue that fifteen-year-old Ronny Zamora, who had robbed and shot an elderly neighbor, had done so because his addiction to television had caused him to be unable to distinguish between reality and fiction.

Rubin was more successful in defending Prentice Rasheed, a Miami businessman who, faced with numerous break-ins to his store, devised an electrical contraption that had the effect of electrocuting and killing, rather than simply shocking and deterring, an intruder. Rubin's defense before the grand jury is sometimes called the "Tutti-Frutti" defense because he used the example of his ferret named Tutti-Frutti, who chewed through an electrical cord with 115 volts and did not die to show that there was no way that his client could have anticipated the effects of his own contraption.

In another extraordinary case, Rubin used the "battered-woman syndrome defense" to exonerate Lisa Keller for the bludgeoning death of her father outside their condominium. Rubin showed that the petite Lisa (age twenty-nine) had suffered years of physical and sexual abuse at the hands of her father from age thirteen and that she had finally snapped on a night when her father had insisted that she, her mother, and he must all drink from the same glass at the dinner table.

In yet another case, Rubin was able to exonerate Charles Reynolds of Delaware for the strangulation death of his live-in girlfriend, Linda Palachios. Rubin had been recruited into the case by Reynolds's sister, Doris, who had come to him after an initial trial had resulted in a hung jury. After meticulous examination of photographs from the crime scene, Rubin was able to demonstrate that Palachios's death was not murder but was the result of autoerotic behavior, possibly compounded by an overdose of Advil.

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system of religious education in public schools under which children desiring to participate in religious instruction are excused from their secular studies for a specified period weekly, while those children not participating in religious instruction remain under the jurisdiction and supervision of the public school for the usual period of secular instruction. The actual practice of released time began in 1913 in Gary, Indiana, and was a staple in the curriculum of the majority of American public schools by the 1940s. Pfeffer was intrigued by the assignment, since the released-time concept had led his parents to remove him from the New York City public schools as a youngster. The memorandum he prepared not only revealed his opposition to the idea of released time but also formed the basis of the AJC's Commission on Law and Social Action brief of amicus curiae in the U.S. Supreme Court case of *McCollum v. Board of Education* (1948).

The brief listed four reasons why the released-time scheme is unconstitutional. It argued that the program (1) preferred one religion over another while at the same time aiding all religions, (2) influenced and compelled children to attend instruction against their will and that of their parents, (3) rendered financial aid to sectarian instruction, and (4) constituted government participation in religious instruction. In delivering the opinion of the Court, Justice Hugo Black held that the state's practice of using public school buildings for the dissemination of religious doctrines "aided the sectarian groups through the use of state's compulsory public school machinery. This is not separation of church and state." According to Pfeffer, the significance of the Court's decision was its application of the "wall of separation" principle. In his concurring opinion, Justice Felix Frankfurter observed that the divergent amicus curiae briefs filed by different religious organizations showed that the program had been a divisive one. The Court sided with Pfeffer's position, ruling that released-time instruction, when it takes place on school premises, is unconstitutional. Pfeffer's important career as an advocate for religious freedom and church-state separation was off and running.

Pfeffer's involvement in church-state litigation proved to be prolific. His arguments in a range of cases were significant influences in shaping the Supreme Court's mostly "separationist" interpretations of the religion clauses. Although it was Thomas Jefferson's "wall of separation" metaphor that provided the vision for the American principle of separation of church and state, it was Leo Pfeffer who convinced the Court of the brilliance of that vision. In case after case, the high court sided with Leo Pfeffer. The issues in those cases involved primarily religious education in public schools and controversies over public aid to religious schools, both of which he argued under the establishment clause. In addition, there were the cases he called "clash of conflicting interests" involving the defense of new religions

and the protection of Sabbatarians and conscientious objectors, which he argued under the free exercise clause. Generally speaking, Pfeffer did not see a clear-cut conflict between the two religious clauses. He maintained that when there is a government-created coercion to participate in religious conduct, both religion clauses are violated, but where there is a coercion to participate in secular conduct only, only the free exercise clause is abridged.

In 1952, four years after the *McCollum* case, Pfeffer represented before the Supreme Court a number of parents whose children attended the New York City public schools. The city had a released-time program, but it differed from the one in *McCollum* in that it released the students to off-campus sites for religious instruction rather than permitting the instruction to take place on school grounds. Pfeffer argued that the program was substantively no different from the one in *McCollum*. "The weight and influence of the school is put behind a program in religious instruction, which remains a violation of the Establishment Clause," he argued. But to no avail; much to Pfeffer's chagrin, the Court ruled in favor of the New York City school system.

Pfeffer filed an amicus curiae brief in the 1962 landmark case of *Engel v. Vitale*. The arguments of Pfeffer and his colleagues prevailed this time, convincing the Court that a twenty-two-word, nondenominational prayer written by the New York State Board of Regents for official use in the public schools was unconstitutional. The following year he filed an amicus brief in *Abington School District v. Schempp*, a case that considered the merits of daily recitations of the Lord's Prayer and Bible passages in public school settings. His side prevailed, convincing the Court that such practices violate the Constitution's requirement of neutrality toward religion. He also filed an amicus brief in *Stone v. Graham* (1980), asserting the unconstitutionality of a Kentucky law authorizing the display of the Ten Commandments on the walls of public school classrooms. The Court ruled the law unconstitutional.

During the civil rights era of the 1960s, many of the state governments initiated programs to fund private schools, which were in fact sectarian schools. Pfeffer participated in many of these cases, seeking to end public funding of religious schools (from the elementary to the college level). It was the incessant nature of the cases that led him to describe the situation as "a chess game with the Constitution." He elaborated on the strategy behind these cases:

> A game plan emerged. Pass a law providing aid to parochial schools and start paying immediately or as quickly as possible. Continue paying until the Supreme Court finally declares the law unconstitutional. It may take a year or more before a suit is started to challenge the law, and perhaps another two years until the case gets to the Supreme Court. In the meantime, keep paying.

> When the law is finally struck down by the Supreme Court, rush some variation through the legislature and start over again. (Pfeffer, 1974, 282)

Among the recurrent cases in which he participated were *Board of Education v. Allen* (1968), *Flast v. Gardner* (1968), *Lemon v. Kurtzman* (1971), *Tilton v. Richardson* (1971), *PEARL v. Levitt I* (1973), *PEARL v. Nyquist* (1973), *Sloan v. Lemon* (1973), *Meek v. Pittenger* (1975), *Roemer v. Board of Public Works of Maryland* (1976), *PEARL v. Levitt II* (1977), *Wolman v. Walter* (1977), and *PEARL v. Regan* (1980). In the *Allen, Roemer,* and *Wolman* cases, Pfeffer, as special counsel for the AJC, filed briefs arguing that all aid to sectarian schools is a violation of the establishment clause. In his brief in the *Allen* case he challenged the "child benefit theory," which was first applied in the case of *Everson v. Board of Education* (1968). He sought to affirm the "no-aid" principle and show the unconstitutionality of a statute that allowed the loaning of public school textbooks to sectarian schools. He argued that the statute was fraudulent on the grounds that child benefit is the goal of *all* education and so would warrant state funding for all education, public or private. Although the case was decided for the (New York) Board of Education, it prepared Pfeffer to show in future cases that religion permeates all activities of religious schools.

In 1971, the Supreme Court simultaneously heard arguments in two similar cases, *Lemon v. Kurtzman* and *Earley v. DiCenso*. Both cases dealt with salaries or salary supplements paid to teachers of private religious schools from state funds. As counsel for plaintiffs/appellants in both cases, Pfeffer sought to show the extent of religious pervasiveness in church schools as well as the excessive entanglement of the state in the affairs of church schools. In addition to challenging the unconstitutionality of the legislative funding efforts, Pfeffer objected to the inclusion of private-school personnel on the committee that oversaw the administration of the funding statute. Pfeffer argued on the basis of *Schempp*'s two-prong test (legislation must have a secular purpose and cannot advance or inhibit religion), and the excessive entanglement principle announced in *Walz v. Tax Commission* (1970). The Court found in favor of the appellants and based its decision on these three principles which became known as the "*Lemon* three-prong test."

In that same year (1971), Pfeffer served as lead counsel for the plaintiff in *Tilton v. Richardson*. He challenged a law that provided state aid to church colleges to construct facilities to be used for secular purposes only. The law permitted the state to recover the funds if the facilities were used for religious purposes within twenty years. After twenty years, however, the restriction ceased and the property could be used for any purpose, secular or religious. The Court held that the twenty-year provision was unconstitu-

tional but that the law did not otherwise violate the establishment clause. In arguing that the Court must consider the level of religiosity of colleges and universities in ascertaining whether or not facilities could actually be constructed for "secular" purposes, Pfeffer recommended considering six criteria: (1) the stated purpose of the college, (2) the college personnel, which included the governing board, the administrative officers, the faculty, and the student body, (3) the college's relationship with religious organizations and groups, (4) the place of religion in the college's program, (5) the result or "outcome" of the college program, and (6) the work and image of the college in the community. He argued that all of these criteria were present in *Tilton,* but the Court disagreed, holding that the college was not "pervasively sectarian" and that the state funding statute was therefore constitutional. A year later, however, in *PEARL v. Levitt I,* the Court, in striking down a New York statute that compensated church schools for expenses incurred in keeping records and conducting tests, used Pfeffer's six-category profile to find the church schools "pervasively sectarian" and thus incapable of receiving state funds. The "pervasively sectarian" rule remains in place today as the standard by which the constitutionality of government programs to aid religiously affiliated education is measured.

Finally, Pfeffer litigated numerous cases involving Sunday laws, Sabbatarian interests, new religious movements, and conscientious objectors. As noted earlier, these cases are what he termed "clash of conflicting interests." Among them were *Gallagher v. Crown Kosher Supermarket* (1961), a case that upheld Sunday closing laws; *Sherbert v. Verner* (1963), a Sabbatarian case that produced the all important "compelling state interest" test to measure violations of the free exercise clause; *U.S. v. Seeger* (1965), which recognized the right of conscientious objection to war; and *Torcaso v. Watkins* (1961), which struck down religious tests for holding civil office. Pfeffer filed briefs of amicus curiae in the *Crown Kosher, Sherbert,* and *Seeger* cases and argued as counsel in *Torcaso.* In these cases, Pfeffer based his argument on freedom of conscience, which the First Amendment guarantees. In his argument challenging the Sunday law, Pfeffer contended that the law imposes a "religious test for the right to receive unemployment benefit" and that "the grant of a privilege may not be conditioned upon the forfeiture of a right secured by the First Amendment." Although Pfeffer did not win his Sunday law cases, he did prevail in *Torcaso* and *Sherbert.*

Conclusion

Leo Pfeffer was indeed one of the premier advocates of church-state separation and religious liberty in U.S. history. Although many have praised Pfeffer for his enormous influence on the development of U.S. church-state law,

Gregg Ivers, in his book *To Build a Wall: American Jews and the Separation of Church and State*, delivered perhaps the highest accolade of all. He concluded that Pfeffer "was beyond doubt the most dominant and influential advocate of his generation (and quite possibly of all time) in the field of church-state law."

—Derek H. Davis

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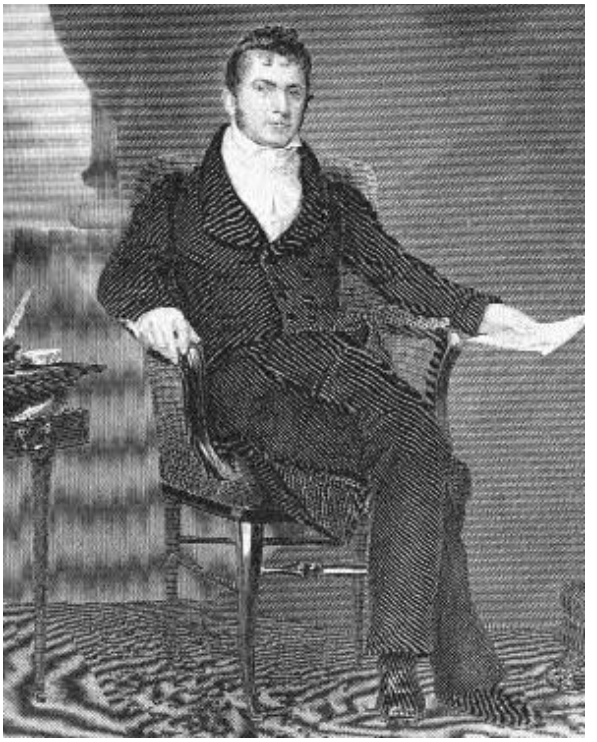
PINKNEY, WILLIAM

(1764–1822)

William Pinkney was a distinguished lawyer, diplomat, and statesman. Born in Annapolis, Maryland, to Jonathan Pinkney and Ann Rind Pinkney, William Pinkney had his education at King William School interrupted when his parents' property was confiscated during the Revolutionary War due to their Tory sympathies. Pinkney, who had joined the patriot cause, subsequently took up the study of medicine under a Doctor Goodwin before turning to law with the aid of Samuel Chase, who later became a justice of the U.S. Supreme Court.



William Pinkney
Library of Congress

Pinkney was admitted to the bar in 1786, first practicing outside Baltimore and later moving to Annapolis. Pinkney's deep knowledge of real property and special pleadings were quickly recognized, and he quickly rose to the top of his profession. In 1789, he married Ann Maria Rodgers, with whom he was to have ten children.

Pinkney held a variety of offices during his life. He was elected in 1790 to the U.S. House of Representatives, although he did not subsequently serve. He was elected as mayor of Annapolis and delegate to the Maryland legislature in 1785. From 1796 to 1804, he served as a diplomat to England, where he served on a commission that helped resolve prize cases between Great Britain and the United States under the Jay Treaty. He was the attorney general of Maryland from 1805 to 1806. From 1807 to 1811, he was a minis-

ter to England. He served as U.S. attorney general from 1811 to 1814, during which time he was a Maryland militiaman and was wounded at the battle of Bladensburg (he resigned as attorney general when he was told that he needed to reside full time in the nation's capital, which would have limited his outside legal work). Pinkney served as ambassador to Russia and Naples in 1816; and he served as U.S. senator from 1819 until his death in 1822 (Sterling 1999, 548).

Pinkney was admitted to the bar of the U.S. Supreme Court in 1806, and, despite interruptions of his practice occasioned by his diplomatic assignments, he argued eighty-four cases before that body (Sterling 1999, 548). Many of the encomiums Pinkney received came from U.S. Supreme Court justices. Chief Justice John Marshall is reported to have referred to Pinkney as "the greatest man he had ever seen in a Court of Justice" (Niles 1907, 177). Justice Joseph Story noted that "his accurate and discriminating Law knowledge, which he pours out with wonderful precision, gives him in my opinion, a great superiority over every man whom I have known" (Niles 1907, 177–178). Noting that "it was worth a journey from Salem to hear it," Story said of Pinkney's arguments in *McCulloch v. Maryland* (1819) that "All the cobwebs of sophistry and metaphysics about States' Rights and State Sovereignty, he brushed away with a mighty besom" (Niles 1907, 211). Similarly, Chief Justice Roger Taney claimed that he had never seen another attorney before the Supreme Court who "was equal to him" (Niles 1907, 177).

When he was state attorney general, Pinkney argued the case of *Luther Martin v. The State*, in which he established that, as attorney general, Martin had received a fee to which he was not entitled (Niles 1907, 193). Much later, Pinkney delivered a three-day speech in the case of *McCulloch v. Maryland* (1819), in which he argued, in language from which Chief Justice John Marshall seems to have borrowed heavily (see White 1991, 248–250), for the constitutionality of the U.S. bank. *McCulloch* has been described as "the most important case of William Pinkney's legal career" and is possibly "his greatest speech before a court of law," and there is some evidence that the court might actually have been leaning against the bank prior to Pinkney's presentation (Ireland 1986, 181–186). Pinkney's arguments in this case displayed his usual use of analogies and allusion to classical learning:

> These miserable *State Jealousies*, which the learned counsel seems, in the language of Milton, to consider as "hovering angels, girt with golden wings"—but which, in my estimate of their character, attended like *Malignant Influences* at the birth of the Constitution, and have ever since dogged the footsteps of its youth—may be said to have been summoned by him to testify in this cause, to give this Court their hysterical apprehensions and delirious warnings, to affect

> our understanding with the palsy of fear, to scream us, as it were, into a surrender of the last, the only fortress of the common felicity and safety, by capitulating with these petty views and local feelings which once assailed us, in the very cradle of our independence, as the serpents of Juno assailed the cradle of Hercules, and were then upon the point of consigning us to everlasting perdition. (Niles 1907, 209)

Although he died before he could argue either, Pinkney also developed the argument in *Cohens v. Virginia* (1821) that the U.S. Supreme Court had jurisdiction to hear the case, and he was initially retained in the historic *Gibbons v. Ogden* case (1824), dealing with navigation and interstate commerce. Pinkney was also involved in the *Nereid Case* (1816), in which he unsuccessfully argued that Argentine goods were subject to capture by American privateers. Pinkney frequently appeared in prize cases, arguing in more than one-third of ninety-three such cases argued before the U.S. Supreme Court from 1812 to 1822, "the golden age of prize law" (Ireland 1986, 95).

Pinkney was a powerful orator who could adorn his speeches with striking figures of speech. Renowned by contemporaries for his word painting, an acquaintance once remembered Pinkney's description of St. Paul's Cathedral to him as lingering in his memory "like a strand of the grandest music" (Ireland 1986, 230). Pinkney was also known for his prodigious preparation.

A more controversial quality, for which Pinkney was also known, was his practice of ruthlessly focusing on his opponent's weakest points and giving no quarter. After distinguishing "soft and persuasive" rhetoric from that which is "impetuous and overpowering," a nephew, in an otherwise rather fawning biography, notes that

> Mr. Pinkney's oratory was impetuous and overpowering. He could touch the tender chords with the hand of a master, and call forth, when he willed, the softest tones to melt and subdue the listener; but most commonly he spoke to command and bear down, and such was the might and majesty of his eloquence that it took captive every hearer at its will. It was masterful and victorious. (Pinkney 1969, 82)

So too, another biographer has noted that "One characteristic, however, of his arguments throughout his whole career, was the unmerciful way in which he would pounce down upon some weak point or careless argument of his adversary, and remorselessly hold it up as a target, while he riddled it with his logic" (Niles 1907, 188).

Perhaps because of the interruption of his earliest schooling, while serving abroad as a U.S. diplomat Pinkney became cognizant of his own educa-

Littleton Waller Tazewell

Few of the advocates before the John Marshall Supreme Court could have been less ambitious than Virginia's Littleton Tazewell (1774–1860). Born in Williamsburg to Henry Tazewell, an attorney, and Dorothea Waller, who died when Littleton was only three, Tazewell was largely raised by his maternal grandfather, Judge Benjamin Waller. The young Tazewell also attracted the attention of George Wythe, who helped in his education before he graduated from the College of William & Mary and read law under John Wickham in Richmond, after his father unsuccessfully pressured him to consider diplomatic service.

Tazewell began practice in Williamsburg and was elected to the Virginia House of Delegates, during which service his father, then a U.S. senator, died. Tazewell would later serve as a member of the U.S. House of Representatives, a member of the Virginia General Assembly, a U.S. senator, a delegate to the Virginia Convention of 1829–1830, and as governor of Virginia, but he rarely sought office, and he resigned from a number of them. A Tazewell biographer notes that he did not consider public office as "a prize to be won" but "a duty to be borne" (Peterson 1983, 239). Tazewell once remarked, "If I know myself, there is no situation within the power of the government to bestow which I covet or desire, nor is there one which I would not accept, if the discharges of its duties by me was deemed necessary or useful to my country. I have no ambition to gratify, although I have duties to fulfill" (Peterson 1983, 94).

Drawing from his contemporaries, a modern scholar has identified Tazewell's key characteristics as a courtroom attorney. They were "a striking physical appearance [Tazewell was six feet tall and had striking blue eyes], a remarkable capacity to cut to the heart of an argument, a remorseless logic, and a competitiveness, and a seemingly greater interest in the mechanics of an argument than in the intrinsic rightness of the proposition he was arguing" (White 1991, 215).

Tazewell spent much of his life practicing law in Norfolk, where he developed interests in commerce and banking that sometimes distinguished him from other Virginia Republicans and where he developed commercial law as a specialty. He argued a number of prize cases before the U.S. Supreme Court, but his anticipated confrontation with William Pinkney in the *Santissima Trinidad Case* (1822) was forestalled when Pinkney died. Tazewell objected to a line in Justice Joseph Story's opinion in this case that Tazewell thought was intended to give credibility to charges by Tazewell's political opponents, that he used subtlety to undermine his opponents' arguments; in what must surely be a relatively rare occurrence, Tazewell succeeded in having the language changed (White 1991, 223–224).

Although he lived until 1860, after resigning from the Virginia governorship in 1835, Tazewell ceased practicing before the U.S. Supreme Court and largely retired to private life, where he cultivated the life of a country gentleman. When others strove for glory, Tazewell pronounced himself content to "spend the balance of his days under the shade of his own fig tree" (Peterson 1983, 100).

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tional deficiencies and made serious, and apparently successful, efforts to attain a more powerful mastery both of classical literature and of the English language. Thereafter, Pinkney apparently made it a point to let fellow lawyers know how bothered he was by the grammatical infelicities of others. One memoir indicates that Pinkney was reported to be "writh[ing] as if in pain when listening to [Luther] Martin speaking in his slovenly way in broken sentences, using the most indefensible vulgarisms and sometimes mispronouncing his words" (White 1991, 241).

Pinkney enhanced his own reputation for verbal fastidiousness by dressing in a fashion that elicited the comments of his peers. Justice Story noted that Pinkney's personal appearance "was as polished as if he had been taken right from the drawer; his coat of the finest blue, was nicely brushed; his boots shone with the highest polish; his waistcoat, of perfect whiteness, glittered with gold buttons; he played in his hand with a light cane; in short, he seemed perfectly satisfied with himself" (White 1991, 241). Chief Justice Roger Taney indicated that Pinkney's dress "approached to dandyism" (White 1991, 241), and other contemporaries noted what they considered to be his excessive use of corsets and makeup.

Contemporaries often connected Pinkney's dress and his apparent claims to mastery of the facts in so many different areas—a friend is quoted as saying, "I never heard him allow that any man was his superior in anything; in field sports, in music, in drawing, and especially in oratory, in which his great ambition rested" (Niles 1907, 215)—to vanity. While they appreciated his ability to argue logically and to point out weaknesses in opponents' cases, colleagues often appeared to have less admiration for Pinkney's personal character, which many considered to be artificial and somewhat affected. Chief Justice Roger Taney observed that

> when replying to [opposing arguments] he took particular pleasure in assailing the weaker points, and dwelling upon them in a tone and manner that sometimes made the adversary ashamed of them, and sometimes provoked his resentment. . . . His voice and manner and intonations did not appear to be natural, but artificial and studied. . . . This want of naturalness in tone and manner was unpleasant to those who heard him for the first time. . . . But a man who, at the age of fifty, spoke in amber-colored doeskin gloves, could hardly be expected to have a taste for simple or natural elocution. (White 1991, 251)

Analyzing these and other comments by his contemporaries, a modern commentator has observed that "Pinkney was an especially formidable and annoying presence" (White 1991, 251). Pinkney once insulted Thomas Addis Emmet by making a negative reference to his native country. An analyst of Pinkney's legal career also notes a "narrow escape" from a duel with

William Wirt and a "private altercation with Daniel Webster" (Ireland 1986, 130).

In 1789, Pinkney delivered a speech (later reprinted by abolitionists) in the Maryland legislature in which he attributed the downtrodden position of blacks to their station in life rather than to their inequality. In rhetoric typical of that he would later use in court, Pinkney observed,

> As well might you expect to see the bubbling fountain gush from the burning sands of Arabia, as that the inspiration of genius or the enthusiastic glow of sentiment should rouse the mind which has yielded its elasticity to habitual subjection. Thus the ignorance and vices of these wretches [the slaves] are solely the result of situation, and therefore no evidence of their inferiority. Like the flower whose culture has been neglected and perishes amidst permitted weeds ere it opens its blossoms to the spring, they only prove the imbecility of human nature unassisted and oppressed. (Niles 1907, 182)

Ironically, in the U.S. Senate, Pinkney, continuing to concede that slavery was "unchristian and abominable," argued that the Union had no authority to prohibit a state—in this case, Missouri—from preserving or instituting such an institution at its pleasure (Niles 1907, 212–213). His speech was one factor that led to the Missouri Compromise by which Missouri was admitted to the Union as a slave state and Maine as a free one.

Pinkney, who was scheduled to serve as counsel in twenty-two cases during the 1822 term of the Court (Ireland 1986, 222), died in February 1822. One week earlier, he had fainted after having apparently overexerted himself during a case and stayed up late during an illness. The U.S. Supreme Court adjourned in his honor, the first time in its history that it did such a thing, and about two hundred carriages accompanied his body to the grave (Ireland 1986, 224).

Pinkney, however, left a mixed legacy that enabled an early biographer, Henry Wheaton, to tell Chancellor Kent that Pinkney was one of the "brightest and meanest of men" (Ireland 1986, 226). A contemporary law professor, who says that Pinkney was "acknowledged to be the greatest advocate of his age," has identified Pinkney's central strengths as an attorney as "preparation, rigor, logic, competitiveness, presence, determination, [and] intimidation." Noting that these strengths were also "weaknesses," he went on to speculate that they were "part of a mask he fashioned to wear in the public gaze of a world he may well have feared and even hated" (White 1991, 254). Another sympathetic biographer, while noting Pinkney's "desire for applause," also observed that he was "perhaps, the most eloquent man of his age" (Niles 1907, 214).

—John R. Vile

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RANDOLPH, EDMUND

(1753–1813)

EDMUND RANDOLPH
Library of Congress

BORN NEAR WILLIAMSBURG, Virginia, to John Randolph and Ariana Jennings in 1753, Edmund Randolph, delegate to the U.S. Constitutional Convention and the first U.S. attorney general, was a member of one of the state's most prominent families. Both his father and grandfather served as king's attorneys in Virginia, and his mother's father, Edmund Jennings, served in this post in Maryland. Edmund's uncle, Peyton Randolph, served as president of the First Continental Congress. Like his forbears, Edmund would play a significant role in the history of his state and his nation, but when he died in 1813 he faced serious financial difficulties, and leaders of both political parties questioned his loyalty and his principles.

Randolph was educated at the College of William & Mary and subsequently studied in his father's law office before beginning practice at age twenty-one. As the American Revolution approached, Randolph's father and his family left for En-

gland, while Randolph found himself joining with his uncle Peyton, who took the patriot side. Edmund's own loyalty does not appear to be questioned; he took a job as an aide-de-camp to General George Washington, but he had to leave shortly thereafter to help his aunt cope with the unexpected death of his uncle.

Randolph was selected to serve in the Virginia State Convention in 1776. Although he was the youngest member, he helped write the influential Virginia Declaration of Rights. That same year, Virginia selected Randolph as the state's first attorney general (a position in which he would serve for about ten years), and Randolph married Elizabeth Nicholas, with whom he was to have six children (one of whom died in childhood and another of whom was stillborn).

Randolph's appointment as attorney general did not prevent him either from taking on private clients or from accepting other positions. In November 1776, he was elected mayor of Williamsburg; in 1777, he was chosen rector of William & Mary; in 1778, he was named clerk of the Virginia House of Delegates; and in 1779, the Virginia Assembly appointed Randolph as a delegate to the Continental Congress, a position from which he resigned due to pressing legal duties.

Randolph's private practice probably occupied more of his time than his work as state attorney general. Randolph's biographer believes that his practice was the state's largest and his income second only to that of Henry Tazewell (Reardon 1974, 70). As attorney general, Randolph argued the case of *Commonwealth v. Caton et al.* (1782), in which he successfully defended a pardon granted by the House of Delegates, even though it was arguably in conflict with the state constitution. President of the Court Edmund Pendleton observed that Randolph argued the state's case "fully and learnedly" (Reardon 1974, 62). In another case, *Hite v. Fairfax* (1786), which Randolph argued as a private attorney, Randolph and John Taylor of Caroline (attorney John Marshall was on the other side) succeeded in defending Hite's claims to property in Virginia's Northern Neck against claims of Lord Fairfax. Randolph argued from principles of equity, and his outline in the case has been said to show an "impressive style and subtle coloring" (Reardon 1974, 72).

In 1786, the same year that he attended the Annapolis Convention—the body that issued the call for the Constitutional Convention—Randolph was selected as governor of Virginia. Randolph apparently believed that his new position was to be an end his career in law, and he did not seem disappointed in the prospect. Randolph, who on an earlier occasion had taken on some of Thomas Jefferson's clients, now turned over his own to John Marshall (Reardon 1974, 88). Writing to Washington, Randolph noted that he was leaving a profession "which from the earliest moment of my life

I abominated, and from which I was determined to escape, as soon as I was possessed of a competence" (Reardon 1974, 88). In his capacity as governor, Randolph became head of the Virginia delegation to the Philadelphia Convention, and he appears to have played a key role in persuading George Washington to join the delegation.

As titular head of the Virginia delegation, Randolph was responsible for introducing the Virginia Plan, which appears to have been mostly written by James Madison, with whom Randolph had established a friendship in the Continental Congress. As a "moderate nationalist" (Bradford 1981, 168), Randolph was a defender of a stronger national government but grew increasingly concerned with the direction the convention took, favoring a plural executive and expressing concern over the powers that the smaller states had achieved. Ultimately hoping for another convention to propose amendments before the new document was ratified, Randolph (along with fellow Virginian George Mason and Elbridge Gerry of Massachusetts) was one of three remaining delegates who refused to sign the Constitution.

Back in Virginia, Randolph eventually supported the Constitution at the state ratifying convention when he was convinced that the only alternative was disunion—Randolph said that he would rather lose a limb than "assent to the dissolution of the Union" (Reardon 1974, 139). Not surprisingly, partisans on both sides attacked Randolph for what they perceived to be indecisiveness or an attempt to curry popular favor. In this and in future conflicts, Randolph would often find himself to be a man in the middle. After resigning as governor, Randolph was elected to the Virginia House of Delegates.

Nowhere was Randolph's role as a moderate more evident than in his service as the United States' first attorney general, an office that paid only half that of other offices, perhaps in part because it was expected that Randolph could continue private practice. Randolph appears to have been the first person sworn to practice before the U.S. Supreme Court (Reardon 1974, 192), but he initially had few cases to argue and served primarily to advise both the president and the Congress. In his first year of service, Randolph described himself as "a sort of mongrel between the State and the U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former,—perhaps in a petty mayor's or county court" (Baker 1992, 51). President Washington, who accepted the opinion of Treasury Secretary Alexander Hamilton, rejected Randolph's (and Secretary of State Jefferson's) advice on the unconstitutionality of the national bank, but Washington agreed with Randolph (and Jefferson) that a congressional reapportionment statute was unconstitutional and made this his first veto.

Randolph established the practice as attorney general of writing out formal opinions and of attending cabinet meetings. Perhaps more important

than any legal opinion that he rendered, however, was Randolph's role as a presidential advisor. Caught between the partisan proclivities of Federalist Hamilton and Democratic-Republican Jefferson, Washington—who had long before received free personal legal advice from Randolph—increasingly turned to Randolph for advice, and Randolph complied with nonpartisan counsel that often carried the day but that endeared him to neither member. Jefferson, a former friend with whom Randolph most often still sided, would call Randolph "the poorest cameleon I ever saw, having no color of his own, and reflecting that nearest him" (Baker 1992, 53). Randolph took an increasing role in advising the president on political and diplomatic matters (including the treatment of the French diplomat Citizen Genêt) that did not necessarily flow from his office, and Jefferson's criticism was more directed to this extralegal advice than to his legal advice (Baker 1992, 54).

As attorney general, Randolph did argue two important cases. In *Hayburn's Case* (1792), he attempted to get circuit judges to perform an administrative task assigned by Congress, but Congress later revised this authorization after the judges questioned this authority on separation of powers grounds. Randolph also argued on behalf of the plaintiff in *Chisholm v. Georgia* (1793). Randolph engaged in a two-and-a-half-hour presentation designed to convince the Court that Georgia (which refused even to send a representative to Court) could be sued by an out-of-state citizen without its consent. Although Randolph won a divided opinion, the decision was extremely unpopular and was shortly thereafter modified by adoption of the Eleventh Amendment to the U.S. Constitution.

When Jefferson resigned from Washington's cabinet, Randolph was appointed secretary of state, but, despite some successes, this became a period of declining influence for him. After Federalists (aided by the release of communiqués that the British had captured) called Randolph's impartiality into question and he lost Washington's confidence, Randolph angrily resigned from the cabinet. He returned to Virginia, where he published two attempts to vindicate himself (one of which, in judgments Randolph later modified, was highly critical of George Washington) and resumed the practice of law. Randolph, who had previously resided in Williamsburg, now lived in Richmond so that he could argue cases before the Virginia Court of Appeals (state law prevented the lawyer who had argued a case in lower courts to handle appellate decisions).

Randolph appears to have had a successful practice, participating by 1800 in as many as half of the cases that appeared before this court (Reardon 1974, 348). Randolph's chief biographer believes that few of these cases held great interest for Randolph during the time in which he became "what

he vowed he never would be—a professional lawyer" (Reardon 1974, 358). Randolph did take part in the case of *Turpin v. Lochet* (1804), in which the court evenly split over whether county overseers could sell property of the once-established Episcopalian church for the relief of the poor (the decision, which would have gone in Randolph's favor had Edmund Pendleton not died before he was able to give his opinion, left in place the lower court opinion permitting the sale and arguably striking a blow for disestablishment). Randolph, who at one time owned 101 slaves and who freed his own house slaves (Daniels 1972, 165), appears to have represented both slaves seeking their freedom and slaveholders. Randolph does not appear to have argued any cases before the federal courts during the latter part of his life, although he was one of six attorneys who defended Aaron Burr in his treason trial before the U.S. Circuit Court in Richmond in 1807 (Shepard 1999, 123). In a speech praised as "a masterpiece of invective," Randolph reportedly condemned Jefferson for commenting on Burr's guilt and noted that "if you cannot exorcise the demon of prejudice, you can chain him down to law and reason, and then we shall have nothing to fear" (Eckenrode 1946, 139).

In his latter years, Randolph was hounded by creditors, including the U.S. government, which accused him of improper disbursements of State Department funds. Although no one appears to think Randolph was guilty of embezzlement, his sloppy bookkeeping eventually led to a judgment of more then fifty thousand dollars against him, most of which was assumed by his brother-in-law Wilson Cary Nicholas. Randolph's wife died in 1810, and his own health declined. Randolph undertook to write his *History of Virginia,* which was not, however, published until many years after his death at the house of a friend near Millwood, Virginia, in 1813. An obituary in the *Richmond Enquirer* noted that "his history is blended with that of his country" (Reardon 1974, 365).

Randolph's contemporaries, who sometimes branded his moderation as a form of "trimming," did not always judge him positively, but he seems to have been motivated by nonpartisan ideals of citizenship. Never entirely at ease with his chosen profession, Randolph appears to have been good at it. A contemporary, Hugh Blair Grigsby, referred to "Randolph's reputation" for "exactness in statement, lucidity of language, and an impressive simplicity which allayed distrust" (Eckenrode 1946, 115). Similarly, after describing Randolph's physical features, William Wirt noted that "his attitudes [were] dignified and commanding; his gesture easy and graceful; his voice perfect harmony; and his whole manner that of an accomplished and engaging gentleman" (Eckenrode 1946, 115–116). Randolph did much to shape the office of the nation's highest attorney, and, although it did not

save him from financial worries and political misfortunes, the strength of his practice was tribute to the esteem with which his contemporaries viewed his legal talents.

—John R. Vile

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REEVE, TAPPING

(1744–1823)

TAPPING REEVE
Litchfield Historical Society

THE GREATEST LEGACY PROVIDED to the American legal profession by noted Connecticut lawyer, judge, and jurist Tapping Reeve was the "law school" that he established in Litchfield, Connecticut. Judge Reeve's Litchfield Law School was the first of its kind in the United States and can fairly be said to have inaugurated professional legal education in the United States. Reeve's Blackstone-based curriculum—lectures copied by students, and reinforced with occasional moot court exercises—would be a widely copied model for legal education until Christopher Columbus Langdell introduced the case method at Harvard in the 1870s.

Early Career

Tapping Reeve was born on Long Island, New York, in 1744, the son of a Protestant minister. He graduated in 1763 from the College of New Jersey (later Princeton University) and stayed on after graduation as a tutor until 1770. In 1771, Reeve moved to Connecticut and began the study

of law in Hartford. About two years later, in late 1772 or early 1773, Reeve moved his practice to Litchfield, then an important seat for law and commerce in northwest Connecticut. Reeve spent the rest of his life there. Reeve brought with him his first wife, the sister of Aaron Burr. Burr himself was one of Reeve's first apprentices (McKenna 1986, 41).

Lyman Beecher, a prominent local clergyman, recalled in his *Autobiography* his sister's physical description of Judge Reeve. Reeve, she had written,

> had a pair of soft dark eyes of rare beauty, a beaming expression of intelligence and benevolence, while his soft gray hair fell in silver tresses to his shoulders in a style peculiar to himself. His figure was large and portly, and his manners gentle and dignified. His voice was singular, having failed from some unknown cause, so that he always spoke in a whisper, and yet so distinctly that a hundred students at once could take notes as he delivered his law lectures. (Cross 1961, 162)

Another admirer also emphasized his calm demeanor, his somewhat unruly hairstyle, and his weakened voice: "I seem, even now, to see his calm and placid countenance shining through his abundant locks as he sat, pouring [*sic*] over his notes in the lecture room, and to hear his shrill whisper, as he stood when giving his charge to the jury" (Kilbourn 1909, 27).

Reverend Beecher remembered Reeve as "distinguished for his piety, and interest in all benevolent operations, as much as for his learning" (Cross 1961, 151). Another admirer wrote that Reeve

> loved the law as a science, and studied it philosophically. He considered it as the practical application of religious principle to the business affairs of life. He wished to reduce it to a certain, symmetrical system of moral truth. He did not trust to the inspiration of genius for eminence, but to the results of profound and constant study, and was never allured by political ambition. (Kilbourn 1909, 27)

Others also remembered Reeve as an ardent opponent of slavery, who worked to end the practice in New England and thereafter put his legal services to the defense of fugitive slaves (Kilbourn 1909, 44, 329). Beecher's sister, in a letter to him that Beecher reprinted in his autobiography, recalled that "the judge was known for his chivalrous devotion to women both in and out of the domestic circle. . . . He was a great admirer of female beauty and also of female talent, and various anecdotes were current of his chivalrous sayings" (Cross 1961, 162). Indeed, Reeve's devotion to women was reflected in his treatise on domestic relations, *The Law of Baron and Femme* (1816), which was notable for its advanced views on sexual equality

and calls for reform of legal disabilities imposed on women (Siegel 1998, 2017–2018).

Reeve the Advocate

By all accounts, Reeve quickly established a reputation as an effective (if a somewhat eccentric and absent-minded) courtroom advocate. In a speech recalling the greatness of the Litchfield bar at that time, Reeve was remembered as having "engaged in almost every case of importance tried in Superior Court at Litchfield, and never failed to argue every one in which he was engaged, if argued at all" (Kilbourn 1909, 42). During the American Revolution, Reeve's eloquence was employed in the service of the patriot cause. Reeve was dispatched by the Connecticut Assembly as part of a committee whose charge was "to rouse and animate the people" of the state, encouraging them to volunteer for General Washington's army (McKenna 1986, 43). Reeve's biographer wrote that "his deportment at the bar, his treatment of judge, jury, and witnesses . . . furnished an example worthy of imitation, and had an elevating influence on other practitioners" (McKenna 1986, 36). Reeve was known equally for his eloquent extemporaneous speeches in court, as well as his occasional lapses in grammar and syntax, when the ardor of his cause got the better of him. Nevertheless, his performances seem never to have failed to make an impression on those who heard them.

One witness, a Litchfield attorney named David Boardman, to Reeve's eloquence at the bar recalled:

> I saw him . . . during nine sessions of the Superior Court, and never failed to listen to him, if I could avoid it, with unqualified love and admiration through every speech he made, to its conclusion. . . . As a reasoner, he had no superior within the compass of my observation of forensic performances. I mean true, forcible and honest reasoning. In sophistry, he was too honest to indulge, and too discerning to suffer it to escape detection in the argument of an adversary. (Kilbourn, 1909, 42–43)

Reeve was remembered as ordinarily being "exceedingly ardent, and the ardor he displayed appeared to be prompted by a conviction of the justice of the cause he was advocating." Occasionally, Reeve himself was evidently swept away by the moral force of his argument:

> His ideas seemed often, and indeed, usually, to flow in upon him faster than he could give utterance to them, and sometimes seemed to force him to leave a sentence unfinished, to begin another,—and in his huddle of ideas . . . he was

> careless of grammatical accuracy, and though a thorough scholar, often made bad grammar in public speaking. Careless as he was of his diction and thoughtless as he was of ornament in ordinary cases, yet some elegant expressions and fine sentences would seem, as if by accident, to escape him in almost every speech. But in such cases as afforded the proper field for the display of eloquence, such as actions of slander, malicious prosecution, etc., and in that part of such cases as usually prompt to exertions of the kind, his hurried enunciation and grammatical inaccuracies, all forsook him, and then he never failed to electrify and astonish his audience. (Kilbourn 1909, 43)

This same observer once heard Reeve "burst forth into such a strain of dignified and soul-searching eloquence, as neither before nor since, has ever met my ear. . . . I was perfectly entranced during its delivery, and for an hour afterwards I trembled so that I could not speak plain. His manner was as much changed as his language, and to me he looked a foot taller than before." The young admirer later approached Reeve for a copy of his closing argument. "He said he would try, but he did not know whether he could recall it to memory, for there was not a word of it written before hand. A day or two after he saw me in Court, behind his seat, and beckoned me to him and said he had tried to comply with my request, but it was so gone from him that he could make nothing of it" (Kilbourn 1909, 43). Though Reeve would largely give up private practice when he began to educate future lawyers in earnest, his powerful forensic talents seem undisputed.

The Litchfield Law School

Although Reeve's skills at the bar won him praise from contemporaries and secured for him pride of place in remembrances at annual Connecticut bar association dinners, his contributions to legal education have earned him a place in the history of American legal education. Until Reeve established his school, legal education was largely undertaken by the apprenticeship method. A member of the bar often took in one or two students, who would perform administrative tasks, such as copying documents; would observe the elder lawyer in court; and, in quiet times, would study the canonical texts—usually Blackstone's *Commentaries* and perhaps Coke's edition of the *Institutes*. After some period, often prescribed by law, the apprentice would be eligible to sit for an examination, on successful completion of which he would be "called to the bar." Although through the apprenticeship method future lawyers obtained an appreciation of legal practice in fact, it meant that an attorney was usually able to take only a small number of aspiring lawyers at any one time. Judge Reeve revolutionized this system by instituting a series of lectures that large numbers of students could attend.

Reeve's first student, whom he took in 1774, was his brother-in-law, Aaron Burr. "By 1782, Reeve had organized his legal material and was delivering detailed lectures to the young men congregating around his office" (Siegel 1998, 2003). Two years later, to provide respite to his ailing first wife, Reeve built a freestanding schoolhouse beside his residence; as a result, many date the official establishment of the "Litchfield Law School" to 1784 (Siegel 1998, 2003). Thereafter, the school grew from ten to fifteen students a year in the 1780s and 1790s, to forty or fifty at its peak in the first quarter of the nineteenth century. In 1797, after the death of his first wife, Reeve was appointed to Connecticut's highest court. To help with the school, he enlisted the services of a former student, James Gould, who would operate the school with Reeve until Reeve's retirement in 1820, and afterwards until 1834, when the school closed.

Students at Reeve's school saw their education gradually become more regimented, marked by a routine schedule and a prescribed curriculum. Five or six mornings a week, Reeve or Gould would lecture to the students for ninety minutes on a predetermined area of law. In addition to the "black-letter" rules, both teachers would often illustrate with applications or hypotheticals (Siegel 1998, 2006). A complete set of lectures was delivered over the course of fourteen to eighteen months, but students wandered in during different times of the year. After the morning lecture, students would retire to the impressive law library that Judge Reeve had accumulated and read treatises and cases cited in the morning's lectures. Having supplemented the morning's lectures, students would then spend the afternoons copying their lecture notes into the handsome leather volumes that would be their primary reference works once in practice (Siegel 1998, 2007). Although there were no formal grades, since Litchfield conferred no diplomas, it became standard practice for either Reeve or Gould to "examine" students on Saturday, by asking them questions on the week's lessons (McKenna 1986, 85; Siegel 1998, 2007). "Students received a further opportunity to impress their teachers during moot court exercises, held once a week" (Siegel 1998, 2008).

In addition to the legal education that students received, there was an ideological component, as well, that was believed to be just as important. Litchfield was a Federalist stronghold in Connecticut; after the French Revolution and the election of Thomas Jefferson in 1800, Federalists sought to create a redoubt of sorts in the legal profession and the judiciary from which to combat the swelling tide of Francophilia and "mobocracy" that threatened to wash away the old order. "It was through law that the Federalists hoped to inculcate and protect their core social values: order, hierarchy, and benevolence" (Siegel 1998, 2012–2013). This social vision naturally influenced the form and the substance of Reeve's and Gould's lectures.

In the end, Litchfield, lacking as it did an affiliation with a major college or university, was destined to go the way of many other proprietary law schools. Although Gould was able to keep the school going after the retirement of Reeve in 1820, the numbers of students steadily dwindled as Harvard, Yale, and Columbia began to offer law degrees. But this is not to say that Litchfield did not leave a substantial mark. One of the founders of the law school that eventually became the Yale Law School was probably one of Judge Reeve's students. In addition, "at least 101 Litchfield graduates sat in the United States House of Representatives, while at least twenty-eight [including John C. Calhoun] sat in the Senate. . . . Fourteen state governors and six members of the national cabinet owed their legal training to Reeve and Gould. Thirty-four sat on state supreme courts, three earned places on the U.S. Supreme Court, and dozens more served as . . . court reporters, lower court judges, and law professors" (Siegel 1998, 2020–2021).

Last Years

Although he would see his school continue after his retirement, Judge Reeve's last years were not happy ones. There was a bitter split with Gould in 1820. Some say Reeve was pushed from the school; Gould's partisans maintained that Reeve's mental and teaching capacities had been much diminished. Reeve was then beset with financial difficulties. Some of his former students tried to alleviate Reeve's difficulties by sending out a letter asking Litchfield alumni to contribute to a fund to support Reeve in his old age. Illness also plagued Reeve, and he died on December 13, 1823, at age seventy-nine. His old friend Lyman Beecher delivered a twenty-two-page oration at Reeve's funeral, and he was buried beside his first wife and his son, Aaron Burr Reeve, who was also one of his students (McKenna 1986, 164–165).

—Brannon P. Denning

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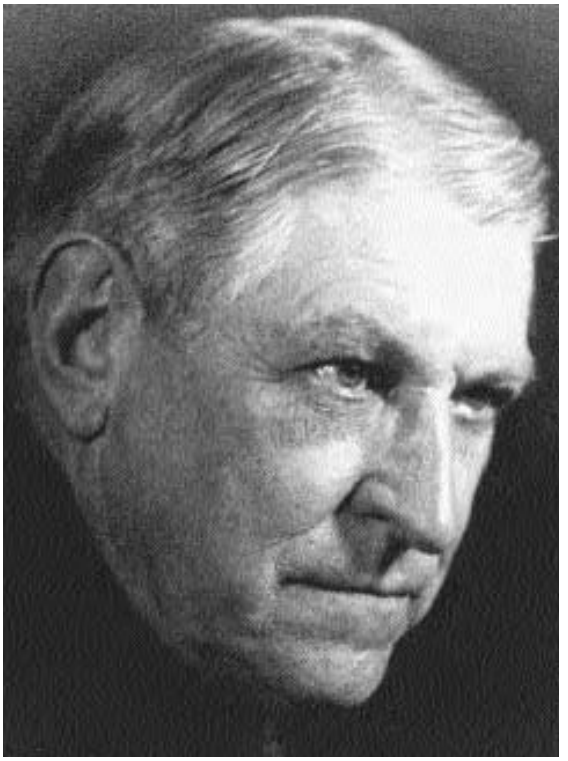
ROBERTS, OWEN J.

(1875–1955)



Owen J. Roberts
Library of Congress

Owen Josephus Roberts was a prominent Philadelphia corporate lawyer who served as a prosecutor in the Teapot Dome scandal. Impressed by Roberts's performance and his solid Republican credentials, President Herbert Hoover appointed him to the Supreme Court in 1930.

Roberts was born in the Germantown section of Philadelphia on May 2, 1875. His father, Josephus R. Roberts, was a wealthy hardware merchant. His mother's maiden name was Emma Elizabeth Lafferty.

He attended private schools and graduated from the Germantown Academy in 1891. Roberts received an A.B. degree in 1895 from the University of Pennsylvania, where he majored in Greek and was a member of Phi Beta Kappa. He considered a career as a professor of Greek but chose to attend law school at the University of Pennsylvania, where he was considered a brilliant student, receiving his LL.B. with highest honors in 1898. During the 1897–1898 academic year, he was an associate editor of the law review, *The American Law Register*. One of his law professors, George Wharton Pepper, was later elected as a Republican to the U.S. Senate and remained a lifelong influence. Roberts was admitted to the Pennsylvania bar in 1898 and began the private practice of law in Philadelphia as a solo practitioner. Roberts was disappointed that a large law firm did not offer him a position. To supplement his in-

come, he joined the faculty of the University of Pennsylvania law school as an instructor. He offered courses in bankruptcy, contracts, damages, and property. He taught part time at the law school until 1918, reaching the rank of professor in 1907. After 1903, his only course was real property.

On June 15, 1904, he married Elizabeth Caldwell Rogers of Fairfield, Connecticut. They had one child, a daughter, Elizabeth, who later married and became Mrs. Roger Hamilton. Roberts was a devout Episcopalian, a church trustee, and president of the House of Deputies in 1946. Roberts joined the Pennsylvania Bar Association in 1898 and became its president in 1947.

In the three years following law school, Roberts had few clients and only an adjunct position as a law professor. He took his first full-time job in 1901 when Philadelphia district attorney John C. Bell appointed Roberts first assistant district attorney for Philadelphia County, a post he held until 1904. Roberts tried cases against several fraudulent contractors and achieved local fame as an able prosecutor. Bell drove his small staff mercilessly, and Roberts learned to work into the evenings to meet pressing deadlines. In 1903, he published an article on the question of whether Private Wadsworth, a member of the Pennsylvania National Guard who had shot and killed a peaceful civilian during a coal strike in 1902, should be tried in a civilian or military court. Roberts argued that martial law cannot exist in times of peace and that Wadsworth must be tried in a civilian court for murder. The article brought Roberts statewide notoriety for the first time.

With his reputation as a litigator growing, a large law firm, White & White, finally took in Roberts in 1903. One of his principal clients was the Philadelphia Rapid Transit Company, whom he defended before juries in accident cases. In 1912, he formed a partnership with William W. Montgomery and Charles L. McKeehan. In 1923, the firm became Roberts & Montgomery. He practiced a variety of law, including criminal cases as a private prosecutor, personal injury cases representing both plaintiffs and defendants, probate cases, suits against building contractors representing the defendant, and taxation suits. One of his best-known cases from this period was a contract dispute between wholesale grocers and sugar refiners in which the grocers had orally agreed to pay inflated prices for sugar. Roberts successfully argued that under the Statute of Frauds such contracts must be in writing in order to be enforceable. Roberts believed that it was the obligation of an attorney to represent any client who requested counsel as long as he did not already represent the other side. No case was too large or too small.

His first stint as a federal prosecutor came in May 1918 when the U.S. attorney general appointed him special deputy attorney general to represent the U.S. government in the prosecution of cases in the Eastern District of

Pennsylvania arising under the Espionage Act of 1917 during World War I. He obtained several convictions and jail sentences against the editors and publishers of two foreign-language newspapers who were charged with publication of sedition.

Roberts was a gifted trial attorney. He often quipped that the only speeches he made that were any good were those he was paid to make. Roberts was a striking figure in the courtroom. He stood six feet three and a half and weighed two hundred pounds. He was energetic, with well-defined features, a square face, penetrating blue eyes, determined jaw, thick brown hair, and a strong, persuasive voice. He was a master of clear and concise English. His memory and self-confidence were such that he examined and cross-examined witnesses without notes. Arguing cases before a jury was what he loved most. He was equally successful before appellate tribunals, and many lawyers asked him to argue their clients' cases on appeal. By 1930, Roberts had established a reputation as one of the outstanding litigators in the nation.

Roberts spent nearly all his waking hours working. He labored into the evening every day except Sunday. When interviewing applicants for positions in his law firm, his first two questions were "How robust is your health?" and "Are you willing to work at night?" When preparing a case for trial or appellate hearing, he became completely absorbed in the task and pushed all personal and social pursuits aside. For relaxation, he would make sudden trips to the Pocono Mountains in Pennsylvania or the Maine woods or visit his farm near Valley Forge. At the farm every Sunday he enjoyed adjusting the time on his large collection of clocks to coincide with the Naval Observatory clock at the Philadelphia Navy Yard.

Roberts first came to national attention in February 1924 when President Calvin Coolidge appointed him and former U.S. Senator Atlee Pomerene, an Ohio Democrat, special U.S. attorneys to prosecute individuals suspected of wrongdoing in the Teapot Dome scandal that occurred during the administration of Warren Harding. Senator Pepper had urged Roberts's appointment on the president. Coolidge told Roberts and Pomerene that he wanted a thorough and nonpartisan legal inquiry into the scandal. Roberts faced opposition from Senator Thomas Walsh, a Democrat from Montana, who headed the Senate inquiry into the scandal, but the Senate confirmed his appointment two days after approving Pomerene's appointment. Roberts left for Washington with two junior associates borrowed from his law firm. He estimated that their work would take two or three months. Over the next six and half years, they would complete two civil suits, two contempt cases, and eight criminal trials. He personally argued every Teapot Dome case from beginning to end. Roberts remained special counsel until June 1930, when he received his nomination to the Supreme Court.

Sullivan & Cromwell

Although this book focuses on the contributions that important individuals have made to American law, law firms, like individuals, often have their own unique identities. Few firms have been more influential than the firm of Sullivan & Cromwell, which was founded in New York City by William Nelson Cromwell and Algernon Sydney Sullivan in 1879 and went on to become one of the largest and most powerful Wall Street firms, handling complicated matters of finance for more than a century.

Leading partners in this firm became known for their internationalism and established offices in a number of foreign countries. Cromwell is largely credited with eliminating the legal barriers for the United States to assume the work that the French had begun in building the Panama Canal. Later, John Foster Dulles (1888–1959), who cultivated extensive—and, in retrospect, highly questionable—financial ties in Germany between the two world wars, moved from a position as managing partner of Sullivan & Cromwell to become an advisor to Republican presidential candidate Thomas Dewey, a U.S. senator representing New York, and secretary of state under President Dwight D. Eisenhower. Dulles, a Presbyterian minister's son who was known for making highly moralistic pronouncements as secretary of state, advanced the doctrine threatening massive nuclear retaliation against Communist aggression as an economical way of providing deterrence. His brother Allen, also a one-time Sullivan & Cromwell partner, simultaneously served as director of the Central Intelligence Agency, a position that he kept into the John F. Kennedy administration.

Harlan Fiske Stone, later chief justice of the U.S. Supreme Court, served for a time at Sullivan & Cromwell, as did Ronald Dworkin, who, rejecting what he considered to be the firm's emphasis on working to the exclusion of a healthy family life, subsequently went on to establish a career as a prominent legal philosopher. Sullivan & Cromwell turned down Richard Nixon for a job in 1937 (David Hawkins, the Sullivan & Cromwell administrator who interviewed Nixon, noted his shifty eyes), and future justice William O. Douglas professed to have been so disgusted with the pomposity of John Foster Dulles during a job interview with him in 1926, in which Dulles helped Douglas put on his coat, that he gave Dulles a quarter tip! (Lisagor and Lipsius 1988, 101).

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In 1921, President Harding transferred supervision of the naval oil reserve from the navy to the Department of the Interior. In 1921 and 1922, the secretary of the interior, Albert B. Fall, secretly leased the Teapot Dome, Wyoming, reserves to Harry F. Sinclair, head of the Mammoth Oil Company, and reserves located at Elk Hills and Buena Vista, California, to Edward L. Doheny of Pan American Petroleum Company. In exchange for

the leases, Fall received large gifts of cash and no-interest loans. The secretary of the navy, Edwin Denby, signed each of the leases, believing that they were legal. When the affair became public, President Harding became disillusioned and exhausted and died.

Roberts moved slowly to gather the evidence against the accused. Liberals criticized him for not moving quickly. A $100,000 payment by Doheny to Secretary Fall was disclosed during the Senate hearings into the scandal, but a $230,500 bribe paid to Fall by Sinclair remained unknown until Roberts's investigation. Roberts convened several grand juries to issue subpoenas to compel testimony and documents. When a key witness refused to testify on Fifth Amendment grounds against self-incrimination, Roberts persuaded Congress to modify the statute of limitations so as to immunize his testimony. Roberts finally prosecuted Fall, Doheny, and Sinclair. Denby, he concluded, had been foolish but had done nothing criminal.

Fall's bribery case was the most important of the twelve trials. It began on October 7, 1929. Roberts faced defense attorney Frank J. Hogan of Washington, D.C., who had won an acquittal for Doheny in his criminal conspiracy trial. Hogan was short and wily. He was a natty dresser and had an Irish temper, a slight lisp, and a manner ingratiating with juries. Cocky and belligerent, Hogan was one of the most successful criminal lawyers in the country. He had worked his way up from poverty, and his fee from Doheny was one million dollars. Believing that public opinion would affect the jury's attitude toward his client, as soon as evidence favorable to Fall was offered in court, Hogan shared it with the press. Hogan's strategy to achieve victory was to play on the jury's sympathies by making Fall look old, frail, and sickly. A doctor and nurse and Fall's wife and daughter attended to him constantly in view of the jury.

By contrast, Roberts was large, boyish, and somewhat awkward. He came across as sincere but conservative and lacked the fiery oratory of Hogan. On the trial's first day Roberts argued that the jury should not witness Fall's entrances and exits in a wheelchair. Subsequently the judge allowed the jury into the courtroom only after Fall had been lifted from his wheelchair and placed in a stuffed green chair brought into the courtroom just for the defendant. In his closing argument, Roberts told the jury that the defendant's physical condition was of no concern to them. Roberts said that the government had proved all that was necessary to justify a conviction. The evidence showed, he said, that Doheny paid a $100,000 bribe to Fall. Fall had a criminal intent in soliciting and accepting the money. Doheny's intent was immaterial, since only Fall was on trial. Fall was charged with accepting a bribe; Doheny was not charged with making the payment. Hogan took more than a day to present his closing argument to the jury. He presented Fall as a patriot who had built oil storage tanks for the navy at Pearl Harbor

at little profit to himself. He described Fall as a sick old man who had had a long friendship with Doheny. Money exchanged between friends, he suggested, was not a bribe.

To Roberts's relief, the District of Columbia jury convicted Fall of accepting a bribe. The maximum possible penalty was three years in prison and a fine of $300,000. The judge, however, citing his physical condition and the jury's recommendation for mercy, sentenced him to one year in prison and to pay a fine of $100,000. For the sentencing, Fall walked into the courtroom with the wheelchair nowhere in sight. The *New York Times* wrote that the verdict showed "that justice, even when leaden-footed, at last overtakes the criminal" and would "put fear in the hearts of any public officials tempted to betray their trust" (Werner and Starr 1959, 285). Different juries, however, acquitted Fall, Doheny, and Sinclair of criminal conspiracy and Doheny of offering a bribe. Because the statute of limitations had run out, Sinclair could not be charged with bribery. Roberts, well versed in the peculiarities of the jury system, nevertheless was perplexed by the paradoxical outcomes. Sinclair, however, spent six and a half months in jail for contempt of court and contempt of the U.S. Senate. Roberts obtained a contempt conviction and fine against H. M. Blackmer, president of the Midwest Refining Company, who refused to return to the United States from France to testify.

Roberts had more success in the civil suits and contempt cases than he did in the criminal prosecutions. He made an impressive showing, however, during all the Teapot Dome trials. During the civil trial brought by the federal government against Sinclair to cancel his lease to the Teapot Dome reserves, someone pointed to Roberts and said, "That's one of the government counsel." Sinclair replied, "One of them? Hell, that's all of them!" (Werner and Starr 1959, 202). Congress ordered the president to cancel the leases and, in a case brought by Roberts, the Supreme Court declared them fraudulent and Harding's transfer of authority from the navy to the Interior Department illegal. The scandal failed to harm the Republican party, however, and Coolidge was elected to a full term as president in November 1924. As a result of the publicity surrounding the trials, Roberts earned for himself a great reputation.

In 1929, Roberts represented Pennsylvania in a suit brought by New Jersey against New York under the Supreme Court's original jurisdiction to enjoin the defendant from diverting huge amounts of water to New York City from the New York tributaries of the Delaware River. The Court allowed Pennsylvania to enter the suit as an intervener, and the Court's final judgment accommodated Pennsylvania's interests in the dispute.

When the Senate rejected Herbert Hoover's nomination of a southerner, John J. Parker of North Carolina, to the Supreme Court, Hoover nomi-

nated Roberts. The Senate confirmed him unanimously in 1930. During his fifteen years as an associate justice, Roberts wrote more opinions than any other justice. In favor of a mandatory retirement age for Supreme Court justices, Roberts resigned from the Court in 1945 when he turned seventy. Roberts is best remembered for changing his mind about the constitutionality of President Franklin Roosevelt's New Deal program. Roberts was a committed opponent during Roosevelt's first term, 1933–1936. However, following Roosevelt's reelection by a landslide in November 1936 and the introduction of his plan to pack the court with six new liberal justices in February 1937, Roberts, along with Chief Justice Charles Evans Hughes, became a consistent supporter of the president's policies, rendering the court-packing scheme unnecessary.

Although he was a Republican, Roberts strongly opposed isolationism. After the surprise attack by Japanese imperial forces on the U.S. fleet anchored at Pearl Harbor on December 7, 1941, President Roosevelt appointed Roberts to head a commission of inquiry into the disaster. The commission issued its report in 1942. The report exonerated the president of any wrongdoing and laid full blame upon the army and navy commanders in Hawaii. After his retirement from the Supreme Court, Roberts devoted himself to the cause of world government. He worked in favor of an Atlantic Union, or federation of the United States and the countries of Western Europe, as a first step.

Roberts's reputation as a master litigator and prosecutor was not matched by his career as a judge. His strength was in the practice, not the theory, of law. He had no coherent judicial philosophy, swinging frequently from left to right on constitutional questions, and he did not get along well with his brethren on the Supreme Court. Feelings were so strong that he did not even receive the customary farewell letter on his retirement in 1945.

Roberts's best-known book is *The Court and the Constitution* (1969), the published version of his Oliver Wendell Holmes lecture delivered at the Harvard Law School in 1951. The subject of the work is the evolution of American federalism. Roberts also contributed essays under the pseudonym Publius II, along with John F. Schmidt and Clarence K. Streit, to *The New Federalist,* a work devoted to the desirability of an Atlantic Union.

Roberts received honorary degrees from Beaver College, Ursinus College, the University of Pennsylvania, Lafayette College, the Pennsylvania Military College, Dickinson College, Trinity College, Williams College, Princeton University, Temple University, and Oxford University.

Roberts died of a heart attack on May 17, 1955, at age eighty, at his country home, Bryncoed, in West Vincent Township, Chester County, Pennsylvania. He was respected and honored.

—Kenneth M. Holland

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ROBINSON, SPOTTSWOOD W., III

(1916–1998)

Spottswood William Robinson III

Spottswood Robinson (left) and Oliver W. Hill Jr. shown arriving at federal court for the hearing before federal judge Albert V. Bryan on a plea of thirty Negro children for an order permitting them to attend several previously all-white Arlington schools, 2 August 1958. (Bettmann/Corbis)

Noted civil rights attorney Spottswood William Robinson III was born in Richmond, Virginia, on July 26, 1916. His father, Spottswood William Robinson Jr., was a lawyer and businessman. His mother was Inez Clements Robinson. At age twenty, Spottswood III married Marian B. Wilkerson. The couple ultimately had two children, Nina and Spottswood IV.

Robinson attended Richmond's Armstrong High School and then Virginia Union University, where he received his bachelor's degree in 1936. He immediately entered Howard Law School, where he graduated magna cum laude in 1939, finishing first in his class with the school's highest grade-point average to that time.

In *Simple Justice*, author Richard Kluger called Robinson "the finest legal technician Howard law school had ever produced" (Kluger 1975, 2:728). However, it is Howard law professor James Nabrit who probably comes the closest to capturing the essence of Robinson. As Nabrit put it, Robinson "was the best student

of law I ever taught. He was a superb pleader and writer and yet a modest man. He didn't have much of a voice, but he did well in court. He was always reading, always thinking, and worked harder than anyone I have ever known" (Kluger 1975, 2:598).

Robinson was not a gifted orator. In point of fact, he was blade thin, soft-spoken, and unassuming in posture, suggesting more of a scholar than an advocate. Yet, it was his superb mind and incredible drive that ultimately allowed him to become a highly distinguished litigator.

Considered to have a brilliant legal mind, he taught law for twenty years at Howard University Law School and ultimately became its dean and later a trustee. Yet, beyond teaching the law, he was also an accomplished practitioner. Besides practicing realty law and establishing a successful real estate business, he also served on the U.S. Civil Rights Commission under President John Kennedy and was later appointed as a federal judge, serving on the district court and the U.S. Circuit Court of Appeals for the District of Columbia. He was the first African-American to serve on the Washington, D.C., Court of Appeals. Yet, he was best known for his tireless work battling for civil rights in America's courtrooms.

Robinson was absolutely relentless in his legal assault on the Jim Crow laws that relegated African-Americans to the position of second-class citizenship. In the area of education, for example, with the possible exception of Thurgood Marshall, no lawyer of his time logged more hours toward achieving better schools for African-Americans. His long hours were legendary. For example, he was known to continue to work ten to twelve hours per day even past age seventy.

Very cautious and a perfectionist, Robinson would spend untold hours writing and rewriting his briefs and then preparing for court. As a case in point, he spent two weeks refining the language of the *Brown v. Board of Education* pleading. He also noted that he learned from National Association for the Advancement of Colored People (NAACP) legend Charlie Houston "to read over the (entire) record the night before arguing a case, so (you) might have all the facts and rebuttal arguments at (your) fingertips in the courtroom" (Kluger 1975, 2:246).

As Virginia NAACP executive secretary Lester Banks described him in 1948, "He is the most thorough, most methodical man in the world. . . . If he was going to cut a board ten inches long, he'd measure it fifteen times to make sure it was right. He'd think nothing of sitting up to three or four in the morning to search out a point of law he needed. He was always looking for just the right case in every situation. He was a terrific worker with a wonderful mind" (Kluger 1975, 2:599).

After his graduation from law school, and again after his successful foray into realty law, Robinson spent much of the 1940s and 1950s with Rich-

Clifford J. Durr, Southern Defender of Civil Liberties

Clifford J. Durr (1899–1975) was born to an old southern family in Montgomery, Alabama, and always considered himself a son of the South, but his work in Washington, D.C., in the service of the law eventually led him to question the institution of segregation. Educated in the law at a Milwaukee law firm after having previously graduated from the University of Alabama and going to England as a Rhodes scholar, Durr (a brother-in-law to senator and justice Hugo Black) returned to Alabama to practice law before being invited to Washington during the Great Depression.

Durr occupied a number of positions, including service with the Reconstruction Finance Corporation and the Defense Plant Corporation before serving on the Federal Communications Commission, where he established a record of standing up for the public interest and of resisting investigations that he thought unfairly impugned the integrity of other officials. After leaving the Federal Communications Commission and establishing a reputation for defending those whose loyalty was questioned, Durr served for a time as president of the National Lawyers Guild and later as president of the National Farmers Union.

After returning to his native Alabama, Durr found that his work on behalf of civil rights increasingly alienated him from friends and family in the area. Still deeply conservative in many ways, Durr continued to adhere to his beliefs, convinced that the cause of civil rights for African-Americans was essential to establishing civil liberties for all Americans.

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mond law partner Oliver W. Hill and Lester Banks challenging Jim Crow laws in cities and counties across Virginia. These laws were attacked as violations of U.S. constitutional rights such as the guarantees of due process and equal protection under the law.

In 1948, Robinson was named special NAACP counsel in Virginia, and his focus turned primarily to racial inequalities in education. Setting out to survey African-American schools in the state, by this time he and his legal cohorts were logging some thirty thousand miles per year. They would argue before school boards and then file federal lawsuits after the expected rebuffs occurred, with Robinson doing most of the courtroom work. At one point, they had active lawsuits filed against seventy-five different Virginia school districts.

Needless to say, their efforts met with considerable resistance, some of it bordering on violence. For example, in King County they faced farmers with pickaxes who opposed voluntary school desegregation. Similarly, in Cum-

berland County, a school board member stood up and said, "The first little black son of a bitch that comes down the road to set foot in that school, I'll take my shotgun to, and blow his brains out" (Kluger, 1975, 2:601).

Nevertheless, Robinson and his colleagues persevered, winning a series of breakthrough decisions in federal court as early as 1948. For example, they won equalization of African-American and white educator salaries in Chesterfield County as well as the equalization of expenditures for African-American and white high schools in King George County. They also won additional funding for improving African-American schools in Gloucester County; and they even won a contempt citation against a white school board when that board opted to make only token improvements.

Initially they pursued the more conservative route, arguing within the "separate but equal" precedent of *Plessy v. Ferguson,* simply asking that separate be more equal. But striking Moton High School students in Prince Edward County would not relent in their demand for legal desegregation. Robinson and Hill met with the students, and, when a sizable number of parents also signed on, a much more revolutionary federal lawsuit was filed on May 23, 1951. This was one month after the students began their school walkout in Farmville, initially protesting school conditions, including leaking roofs and poor heating.

The case was *Davis v. County School Board of Prince Edward County,* with Davis being Dorothy Davis, daughter of a local farmer, who happened to be first on the list of 117 plaintiffs. In their pleading, they asked for equal educational spending on African-American students as well as a finding that Virginia's school segregation law was unconstitutionally discriminatory.

Case evidence, presented by Carter, Hill, and Robinson, included a comparison between the county's white and African-American high schools. The white school was in a quiet neighborhood, whereas the African-American school was next to a highway. The former had a far more attractive physical plant valued at more than four times that of the all-black Moton High School. In addition, asphalt floors made the white high school easier to keep clean, besides the fact that it had a host of facilities that Moton did not, such as an industrial-arts shop, a gymnasium, an auditorium, and a cafeteria. Faculty at the white school averaged eleven years of teaching experience to four years at Moton. And where fifteen buses were assigned to transport 854 white students, there were only nine buses for 811 African-American students, six of which were hand-me-downs from the white system. Robinson and company also put on professional testimony about the negative psychological and learning effects caused by such inequality as well as by segregation itself.

Yet despite the mounds of evidence, things did not go well at the trial level. Richard Kluger describes Robinson's opening statement as "short and

dry" and his closing summation as "brief and cold" (Kluger 1975, 2:617, 639). In the end, they lost and would have to appeal.

Meanwhile, Robinson became one of the primary attorneys for the NAACP's Legal Defense and Educational Fund. It was in this capacity that he worked closely with the likes of the Fund's lead attorney, Thurgood Marshall. Kluger concludes that Robinson's "balanced judgment, scrupulous care, clarity of expression, and remarkable recall made him Marshall's most valuable all-around associate" (Kluger 1975, 2:815). His efforts were integral in the Fund's success at achieving major legal change from the federal courts, and especially the U.S. Supreme Court.

Arguably the most famous of these changes was set down in the U.S. Supreme Court's 1954 *Brown v. Board of Education* opinion. Consolidating cases from Virginia and four other states, Robinson was joined by William Coleman, Judge William Hastie, and Thurgood Marshall in crafting the *Brown* challenge. Robinson was most directly involved in the Virginia school segregation case. The frustrations of trying to get truly equal schools in Virginia was a key foundation in the *Brown* challenge to *Plessy*. Yet, once the consolidated cases worked their way onto the docket of the Supreme Court, they had to be argued twice before the justices finally handed down their final *Brown* decision, the second time being to determine remedies and pace of remediation.

In the first *Brown* case, Robinson's argument in the Virginia portion was "able, but rather listless and somewhat obscure . . . not very well organized . . . almost submissive (in style)" (Kluger 1975, 2:728). He belabored details of the case, dwelt on inequalities, and then made a weak argument for complete school desegregation by drawing on the logic of *Gaines v. Canada,* a marginally related precedent in which Missouri was forced to provide a law school African-Americans could attend rather than paying for them to go out of state. Yet, as Kluger describes it, Robinson did better in rebuttal. He noted that Virginia was still spending only sixty-one cents on its African-American students for every dollar spent on white children in the state. But more importantly, he was seen as arguing "genteelly" and with an "impressive command of legal history and scholarship" that Virginia's segregation laws were created initially to limit access to education by African-Americans, quoting earlier Virginia legislators to establish that legal intent to discriminate (Kluger 1975, 2:730).

Despite some flaws in the presentation of the case, the Supreme Court found for Robinson and the Fund, barring racial discrimination in public education. The legal principle of "separate but equal," which had been the accepted rule of the land since the *Plessy v. Ferguson* decision in 1896, had now been overturned. "Separate but equal" was now deemed to be "inherently unequal." This ruling had revolutionary implications not only for seg-

regated education but for many other Jim Crow laws as well. Yet local resistance would remain strong, making implementation excessively slow. Consequently, the second *Brown* case presented the opportunity to attempt to accelerate implementation.

In an internal NAACP memorandum to Jack Weinstein, Robinson pressed for acceleration of action, stating, "absent circumstances of an extraordinary character, desegregation of a public school system can be accomplished by school officials acting diligently and in good faith within a maximum of one calendar year" (Kluger 1975, 2:911). To do otherwise was seen as blatantly unfair to children currently in school. Then, before the U.S. Supreme Court in the 1955 *Brown v. Board of Education* case, Robinson was considerably better in making his arguments. According to Kluger, Robinson argued "briskly and forcefully" that state-imposed caste laws violated the "broad purpose" of the Fourteenth Amendment, as embraced in the 1866 Civil Rights Act (Kluger 1975, 2:843–844). Marshall, who also saved some of his time for an effective rebuttal, followed. Their combined arguments ultimately helped prompt the Supreme Court's compromise language in its 1955 *Brown* decision, which required school desegregation efforts to proceed "with all deliberate speed."

Besides school desegregation, other major legal victories for Robinson and the Fund included gaining African-Americans the right freely to buy property, to travel equally on public transportation, and to enjoy equal use of public recreational facilities. In *Shelley v. Kramer* (1948), for example, the U.S. Supreme Court outlawed the state practice of allowing racially restrictive covenants to be written into the deeds of homes, essentially precluding the homes from being sold to African-Americans. In *Morgan v. Virginia* (1946), the Court struck down state travel laws requiring segregated seating on interstate bus travel; and in *Gayle v. Browder* (1956), the justices supported the position of the Montgomery, Alabama, bus boycott by ruling city bus segregation laws to be unconstitutional as well. In *Baltimore v. Dawson* (1955) and *Holmes v. Atlanta* (1955), the Court also ended racial segregation at public beaches and parks.

Nevertheless, despite his many successes, Robinson experienced his share of setbacks as well. For example, he was part of the Fund team that unsuccessfully defended the Martinsville Seven, seven African-American men accused of raping a white woman in Martinsville, Virginia, in 1947. That legal defense spanned a three-year period from 1949 to 1951. The defendants were ultimately convicted, sentenced, and executed.

Robinson also ventured into the political arena in a limited way on occasion, in his pursuit of racial justice in the United States. In 1970, for example, he joined a host of black leaders in condemning the Nixon administration at the sixty-first annual meeting of the NAACP. Characterizing that

administration as "anti-black," they noted the administration's policies of signing defense contracts with firms that discriminated on the basis of race, retreating on school desegregation, continued attempts to dilute the Voting Rights Act, and nominating Harold Carswell and Clement Haynesworth to serve on the U.S. Supreme Court, despite their histories of insensitivity to African-Americans.

During the course of his lifetime, Robinson's honorary recognitions were numerous. Besides receiving an honorary doctorate from his alma mater, Virginia Union University, in 1955, he was also named to the Richmond African-American Honor Roll. He received a testimonial of merit in jurisprudence from the Phi Phi Chapter of Omega Psi Phi and from the National Bar Association. Howard University gave him a distinguished alumnus award, and the Beta Gamma Lambda chapter of Alpha Phi Alpha gave him a Non-Member Citizenship Award. He received the Social Action Achievement Award from Phi Beta Sigma and a citation of merit from both the Beta Theta Sigma Chapter of Delta Sigma Theta and the Richmond Chapter of Frontiers of America.

—Marcus Pohlmann

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ROGERS, EARL

(1870–1922)

Few American trial lawyers have enjoyed the success in the courtroom of Earl Rogers, who obtained more than 183 acquittals in criminal cases and lost fewer than 20 (Snow 1987, 96). Although criminal law was not his original pursuit, it soon became Rogers's passion. Few of the murder cases he defended were individually notable, but throughout the course of his career, Rogers had a significant influence on modern trial advocacy and the techniques that accompany it. Unlike some of his peers, Rogers rarely, if ever, expressed compunction about defending the guilty, and he often stretched acceptable defense tactics to the limit, if not the breaking point.

Earl Rogers
Library of Congress

Rogers was born in 1870 in Perry, New York, the son of a gifted mother who introduced him to foreign languages and music and a father, Lowell L. Rogers, who combined careers as a Methodist evangelist, college professor, and real estate developer. Although his father brought the family west, Earl followed his footsteps at Syracuse University before his father's financial re-

verses forced him out of college and back to California. He brought with him his beautiful wife, Hazel Belle Green, with whom he would have four children and with whom he would long have a tempestuous relationship that finally ended in divorce, remarriage, and divorce again. Rogers's second marriage to Teddy Landers ended with her death from influenza in 1919, three years before his own passing.

After a short stint as a newspaper reporter, Rogers became increasingly interested in the law, a career he entered after studying in the office of Judge W. P. Gardiner and Senator Stephen M. White, one of the state's most highly regarded attorneys, whom Rogers would later beat in one of his early cases. Indeed, in that case, Rogers reputedly preyed on White's penchant for drinking by going to lunch with him, buying him an extra drink, and hurrying back to the courthouse. Rogers quickly put the vulnerable defendant (whom he expected White to cross-examine mercilessly) on the stand and questioned him only in a perfunctory fashion so that White's unprepared assistant would have to conduct the cross-examination before White arrived back in the courtroom.

Curiously, Rogers appears to have emulated White's own drinking habits, well aware of the possible consequences. In a later case, Rogers would formulate what his daughter described as "the first alcoholic insanity defense" (St. Johns 1962, 220) in acquitting Colonel Griffith J. Griffith of shooting his wife in the head. During cross-examination, Rogers exhibited great kindness to Griffith's wounded wife. In the process, he effectively converted her into a defense witness. He did so by allowing her to maintain her own dignity and spare her husband's life by leading her to indicate that she had tried to conceal her husband's drinking and concluding that he must have been insane to shoot her after falsely accusing her of having an affair and of trying to poison him.

Although some observers believe that Rogers's desire to win cases drove him both to use questionable tactics and to shy away from cases that he thought he could not win, he nonetheless won many cases that were thought to be unwinnable and in which he himself believed his clients to be guilty. In addition to saving numerous individuals from the death penalty, Rogers guided the defense of Clarence Darrow against charges that he had attempted to bribe jurors.

Rogers was a courtroom innovator known for dressing meticulously and for cross-examining witnesses mercilessly. Rogers, who could use the tone of his voice to make ordinary witnesses appear despicable, often pulled out his trademark gold lorgnette (eyeglasses on a long handle) for effect. Rogers was also known for his ability to disguise the questions to which he was really seeking answers amid many others that were unimportant; for his willingness to stage dramatic scenes—often involving himself—to bait the op-

posing attorneys and to divert attention from a concession made by a witness; and for his colorful recreations of crime scenes and the introduction of other dramatic evidence in court. Rogers was renowned for his grasp of medical knowledge (he lectured on the subject of medical jurisprudence in Los Angeles–area colleges) and ballistics, which he is credited for introducing into U.S. courts from German scientific sources (which he first read in that language). Rogers also had a reputation for introducing newly discovered (or planted?) weapons and other evidence at trials and, in at least one case, for helping to destroy evidence. Rogers conducted meticulous investigations, amassed a remarkable knowledge of potential jurors, and had an ability to make emotional connections with them. He could use humor to ridicule opponents and witnesses; make outrageous suggestions in court that he knew could not be true but which might plant reasonable doubt in the jurors' minds (for example, the suggestion that a defendant might have an identical twin); and was in general a real showman. Rogers generally went for all or nothing, almost always putting the defendant on the stand, and he generally looked with contempt on criminal lawyers, including Clarence Darrow, who settled for reduced pleas.

Rogers forged alliances with police officers (a number of whom he had successfully defended against murder charges in an early case), with prostitutes and pimps, with members of the Chinese community, and with actresses. Rogers also cultivated goodwill among journalists who, in exchange for tips about dramatic trial developments, could often be counted on to give him inside information and to help him in the arena of public opinion. Although, like good actors, Rogers usually succeeded in making his performances appear effortless, he was also known for his intense drive and his meticulous preparation. The strain of the trial often sapped his energies during trial and, along with the responsibility of defending human life (and he did lose some death-penalty cases), arguably helped drive him to alcohol.

The biographies of Rogers, one of which was penned by his adoring daughter, an accomplished journalist, agree that Rogers reveled in the drama and spectacle of trial work as well as in the publicity that his accomplishments brought. Although he was involved in politics, the law was always his primary preoccupation. Rogers was often cheered as a celebrity at baseball games and other athletic events, where fans would yell "kill the umpire, we'll get Earl Rogers to defend you" (St. Johns 1962, 107). One who profited from this advice was Patrick Calhoun, the head of the United Railroads, whom Rogers helped exonerate on charges of bribing the San Francisco Board of Supervisors.

Rogers clearly enjoyed his own notoriety, but he carelessly spent the extensive fees that came his way. Moreover, he did little to hide his drinking

escapades (some with his friend novelist Jack London), and he eventually fell casualty to alcohol, which increasingly disrupted his practice and sometimes found him inexplicably absent from the courtroom. Through most of his life, a potential client's observation that "I'd rather have Earl Rogers drunk defending me than any other lawyer sober" (Kornstein 1987, 131) was true, but, in a rare occasion where Rogers found himself on trial, he had to put his own daughter on the stand to keep himself from being committed to a sanitorium. In the end, Rogers died alone of alcoholism in a cheap Los Angeles rooming house.

Many of Rogers's trials would be fitting subjects for movies. Early in his career in the aforementioned case against Senator White, Rogers defended William Alford for the murder of Jay E. Hunter by demonstrating that Hunter had provoked retaliation by beating Alford with a cane. Bringing Hunter's intestines to court in a jar filled with formaldehyde, Rogers purported to show that the wound had been inflicted from below, as the defendant was being beaten, rather than from above, as the prosecutor had argued. On another occasion, Rogers was able to comb through voluminous testimony to focus on an expert's use of the term "return spray" to suggest that his client, a well-known gambler, had shot and killed his mistress in self-defense *after* she had first thrown acid at him—a story that led some to believe that Rogers, who had apparently received the first telephone call about the incident, had actually advised his client to put acid on his own face (St. Johns 1962, 335).

In another case, Rogers defended a prostitute who murdered her boyfriend after she discovered that he was spending money she had given him to buy an engagement ring for another woman. When Rogers's daughter later told the story in "The Red Kimono," the defendant successfully sued a movie producer for including her name in the recreation of the story, and the resulting case of *Melvin v. Reid* became a stepping-stone in the development of the right of privacy (Kornstein 1987, 128).

In a case that showed Rogers's willingness to use trickery to question eyewitness testimony, Rogers had an assistant switch chairs and hats with the defendant seated beside him, eliciting a false identification of his assistant as a horse thief. In a case defending Charles F. Mootry for the death of his wife, for whom he had been a pimp, Rogers evoked jurors' own happy memories of being in love. Although arguing that this was a case of suicide and denying that any such man could have killed his wife, when the jury brought an acquittal, Rogers refused to shake Mootry's hand, telling him that he was "as guilty as hell" (Cohn and Chisholm 1934, 59). This incident led Rogers's upright father, who was otherwise pleased with his son's defense of the needy, to counsel him about crossing the line into unethical behavior (St. Johns 1962, 101–104).

On one, and apparently only one, occasion, Rogers teamed up with the prosecution to send a man to his death for the killing of the wife of a millionaire friend, who apparently feared that the killer would go free if Rogers were to defend him. Rogers succeeded in his role as a special prosecutor, and the man was sentenced to hang. Rogers's daughter reports that her father was remorseful about the outcome and even joined the medical examiner in performing an autopsy on the killer in the unfulfilled hope that he might find that he had acted under the impulse of a mental disorder brought about by a blow to his head. (St. Johns 1962, 213–215). Like Darrow, Rogers became a strong opponent of the death penalty.

There were times when Rogers's presence in the courtroom and his relentless cross-examination were almost hypnotic. Indeed, Francis Wellman, author of a book on cross-examination, said that "Earl Rogers invented the art of cross-examination as it is now practiced" (Kornstein 1987, 130). In the *Catalina Island Murder* case, involving a shooting in a card game, which Rogers meticulously recreated by bringing props into the courtroom, Rogers appeared to have gotten a witness for the prosecution to admit to having gone to the washroom to wash off gunpowder stains on his own hands. In this same case, Rogers actually pulled a gun on the chief opposition witness in the courtroom to demonstrate that he was lying about how he had reacted when he claimed that the same thing had happened during the card game.

Rogers demonstrated his cross-examination skills in a case in which he was defending a Chinese immigrant named Wong She, who had been charged with engaging in prostitution, against deportation. In addition to making jokes at the witness's own expense, Rogers was able to show that a seemingly perfect witness, a straitlaced missionary, was in fact basing his information on hearsay, which is severely limited under U.S. law:

Q. You say this child is a prostitute?
A. She most certainly is.
Q. You know for a fact that Wong She was a prostitute?
A. I do indeed.
Q. Of your own knowledge?
A. Yes, indeed of my own knowledge.
Q. But doctor, you are a married man. I thought your position . . .
A. Don't you try to make something of it. Of course no such thing happened.
Q. Then how can you know of your own . . . you peeped!
A. I did no such thing.
Q. You said you knew of your own personal knowledge.
A. Everybody in Chinatown knows about this woman. Her reputation is notorious.

Q. But that, my dear sir, is hearsay.
A. It is now, it's the truth and everybody in Chinatown knows it.
Q. Well, now we are getting somewhere, sir. Everybody in the world once knew it was flat, you recall. (Kornstein 1987, 131–132)

Rogers's defense of Clarence Darrow for bribery is still the subject of scholarly debate. Although Darrow had established a reputation as a labor lawyer, he had not yet defended his most important cases, so his defense had an important impact on history. Darrow was on trial for bribing jurors in the case of the McNamara brothers, who were accused of having bombed the *Los Angeles Times* building, killing twenty men—a case that Darrow (who had come to realize that the men were guilty) unexpectedly settled out of court after collecting large sums of money from labor organizations and promising a vigorous defense. Darrow had been in the immediate vicinity when cash had been given to a juror. Although Rogers accepted the case, he became extremely agitated with Darrow's abject demeanor, which Rogers thought contributed to an impression of Darrow's guilt, during much of the trial. Rogers, who focused on individuals and had few apparent ideological predispositions, also objected to Darrow's seeming willingness to justify his actions in ideological terms. Not surprisingly, Darrow in turn wanted greater control over his own case and worried about Rogers's drinking. Darrow's wife was also unimpressed with Rogers. Rogers helped obtain a hung jury in the first case, in which his daughter claims that he was extremely influential in crafting Darrow's final plea to the jury, which has been justly praised as a masterpiece. Rogers did not play as significant a role in the second trial, which also resulted in a hung jury (albeit by a closer margin) and Darrow's promise to leave the state and never return.

Toward the end of his life, Rogers became convinced that the increased regulation and the displacement of attorneys by other professionals was destroying the practice of law (see Cohn and Chisholm 1934, 282–287). Although Rogers decried the way that the public perceived lawyers, he seemed to make little connection between his own willingness to engage in courtroom antics and such a reputation. Clearly, Rogers, the loner, would be quite uncomfortable in modern firms employing hundreds of attorneys, and Rogers the actor could not have stood for assembly-line justice. It is unlikely that modern courts would have allowed Rogers the same leeway he had during his day, but he might continue to find himself at home cross-examining witnesses and be pleased at the role that expert witnesses and scientific evidence continue to play in modern trials.

—John R. Vile

Jake Ehrlich

Much like Earl Rogers and Jerry Giesler (with whom he worked in defending Alexander Pantages against charges of rape), Jake Ehrlich earned a reputation as one of California's outstanding defense attorneys. Dubbed "the Master" by his friends and acquaintances, Ehrlich, born in Maryland in 1900 and educated at Georgetown University and at the San Francisco Law School, defended fifty-six individuals accused of murder and never lost one to the executioner.

Although his murder defenses made him famous, they constituted only 3 percent of his practice. He earned most of his money in more routine civil matters.

Ehrlich's celebrated cases included his defense of Jean Collins for killing her pimp; his defense of singer Billie Holliday for illegal drug possession; his defense of Gertrude Morris (a woman who wanted to be executed) for the shooting death of her husband; his defense of drummer Gene Krupa for possession of drugs; his defense of Alfred Leonard Cline, who had married many women whom he was accused of poisoning and then cremating (the defendant refused to talk to his attorney or to the court, but Ehrlich succeeded in having him sentenced to prison for forgery rather than for murder); his defense of the movie *The Outlaw* for what was alleged to be revealing clothing worn by Jane Russell; and a defense of Sally Rand against charges that her fan dance was obscene.

Ehrlich, who was a meticulous dresser especially known for his large cufflink collection, could be particularly dramatic in the courtroom, especially in closing arguments, in which he literally took on the persona of the individuals he was defending, and in which, like Earl Rogers, he liked to use visual displays. Disclaiming that he pulled from a bag of tricks, however, Ehrlich claimed to adapt to the circumstances of each case (Nobel and Averbuch 1955, viii).

When in an early case a judge accused another lawyer named Christensen of sending in Ehrlich as "a mere beardless youth," Ehrlich showed his adaptability by saying that "if Mr. Christensen had known Your Honor attached such importance to whiskers, I am sure he would have sent over a billygoat!" (Nobel and Averbuch 1955, 28). In another case, Ehrlich won a verdict when the witness identified him, rather than the defendant he was representing, as her rapist! (Nobel and Averbuch 1955, 34).

Like other high-profile defense attorneys, reporters have used many adjectives to describe Ehrlich. His biographers have listed the following: "cynical, steely, brilliant, impudent, grasping, boisterous, maudlin, urchin, cocky, generous, sly, shrewd, ruthless, profane, flamboyant, gregarious, sentimental, egotistical, and tender" (Nobel and Averbuch 1955, 5). Such adjectives help confirm Ehrlich's ability to adapt his strategy to the situation at hand.

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ROOT, ELIHU

(1845–1937)

Elihu Root, corporate attorney and U.S. secretary of state and senator was born February 15, 1845, to Oren Root and Nancy Buttrick Root in Clinton, New York. At that time, his father served as principal and his mother was a teacher at the local academy. Oren Root would later teach mathematics at Hamilton College. Elihu Root was greatly impressed with and influenced by his paternal uncle, Philander Sheldon Root, an attorney and county judge in Utica. Root was also influenced by his father's love of botany, geology, and music. Growing up in the midst of an educational environment also affected young Root. Although his father and mother were often too busy to read to him, Root began reading at a very early age.

Elihu Root
Library of Congress

Root enrolled at Hamilton College in 1860, before he was sixteen years old, and was the youngest in a class of fifty-four freshmen. It was during the spring of Root's sophomore year that President Abraham Lincoln issued a call for volunteers for the Northern Army to fight in the Civil War. Although he tried to enlist, Root

was rejected because of his frail physique. During his junior year, a series of revival meetings were held at the new College Church, and Root was among the converts. His religious zeal often displayed itself in later years through his devotion to the church and the Young Men's Christian Association (YMCA).

Although he was a strong student, Root was not a strong speaker. His voice had a high pitch, which he would continue to consider a handicap throughout his life. Root graduated Phi Beta Kappa in 1864 at age nineteen with a B.A. degree.

What compelled Root to study law is not clear. It is likely that there were multiple influences, including the attorneys and judges who were affiliated with Hamilton College and, of course, his paternal uncle. His maternal uncle and his older brother, Oren Jr., were also attorneys.

Root spent a short time teaching at the Rome Academy. During this time he also enrolled as a private in the New York State Militia. In July 1865, Root traveled to New York City and worked out his rent by teaching Latin to his landlady's son. He attended the New York University School of Law. As he read and studied the law, Root also taught history at the Graham School on Fifth Avenue. He received his LL.B. degree in the summer of 1867. At the time, earning the degree was all that was required to practice law, which he began to do at the well-respected firm of Mann & Parsons. Root stayed there for one year, apprenticing without pay. On leaving the firm, he formed a partnership with John H. Strahan.

Root quickly discovered that he preferred and excelled at trial work. His first case was a criminal matter, in which he represented a man accused of accepting $10 in exchange for a false affidavit. The client was convicted, but Root successfully worked for the client's pardon. In his first year of practice, Root searched titles, argued a motion in federal court, won a suit for $36.00, and settled other claims for $241.66 and $212.36.

A major financial breakthrough for Root's law office came when he was recommended to teach Latin to John J. Donaldson, who was credit officer for the dry goods firm of H. B. Claflin & Co., and who would soon serve as president of the Bank of North America. Impressed with Root's abilities, Donaldson began giving him legal work. Root handled Donaldson's personal legal matters, as well as corporate cases for the bank. The largest among the earliest cases was a judgment for $6,712.45.

When the bank reorganized under a state charter, Root was given the responsibility of handling the legal aspects of the change. His outstanding work for the Bank of North America earned him the similar responsibility of changing the charter of the Pacific National Bank, for which he received a fee of $1,000. On October 31, 1869, the firm of Strahan & Root balanced its own books and calculated its income at $10,386.95.

Root soon changed his professional affiliation and formed a partnership with Alexander T. Compton, whom he had known in law school. Compton had represented James Ingersoll, who became one of the defendants in the William M. Tweed prosecutions. Not being a trial lawyer, Compton asked Root to handle the matter, which involved charges of bribery and fraud. During the trials, Root primarily assisted Tweed's lead counsel, David Dudley Field, although Root was also involved to some extent in conducting voir dire of jurors and cross-examining witnesses. In the end, the jury convicted the defendants on 204 of the 220 counts of the indictment. A portion of the criminal penalties was overturned on appeal, but Root was not involved in those proceedings. Root's chief client, Ingersoll, was convicted and sentenced to five years and seven months in prison; however, the governor later pardoned him.

Along with other counsel, Root continued through 1875 to participate in the defense in the many civil lawsuits against the "Tweed Ring" defendants. Root's total fee for the matter was approximately $15,000. The local press's reporting led the public to believe that Root was an intimate advisor to Tweed himself, which was not true. Nevertheless, the high-profile nature of the cases spotlighted Root's practice and established new contacts with important members of the bar.

The firm of Compton & Root became increasingly busy. Compton handled the office matters, and Root attended to all litigation. During the 1870s, Root's cases primarily focused on bank matters, railroad cases, wills, estates, and municipal government matters. In all of his cases, Root was a master of detail. He strove to know more about an opponent's case than did the opponent himself. His style in the courtroom was not flamboyant, but rather was serious and thorough. Root continued to handle collection cases for the Bank of North America and for H. B. Claflin. He also became involved in litigation that included the Erie Railroad.

Root married Clara F. Wales, daughter of Salem Wales, who was the editor of *Scientific American*. Over the course of time, they would have three children: Edith, Elihu Jr., and Edward. Although the postwar depression had set in, Root was financially sound. Although he was never wealthy enough to be considered a philanthropist, Root took great care to share his material possessions with those in need around him. He often provided pro bono legal work for family and friends.

In February 1878, Root defended General Oliver L. Shepard, who had been court-martialed for misappropriation of funds. The general was convicted, despite Root's competent representation. In 1879, Root traveled to Kansas City to represent famous restaurateur Charles Delmonico, who had been defrauded in a mining venture. The appeal of this case was Root's first to the U.S. Supreme Court. He was admitted to the Supreme Court bar on

November 14, 1881, but the case was settled to Delmonico's satisfaction before oral arguments were held.

The Delmonico case had taken Root to Denver, Colorado, in 1880, where he made several important contacts with the owners of large mining companies. Several such companies would place Root in charge of all their interests in the New York area. It was during this period that one of the associates in Root's office, Robert Strahan, became heavily involved in local and state politics. In Root's view, this involvement ruined an otherwise capable attorney. According to Root, witnessing Strahan's transformation convinced him always to place the practice of law above all other considerations.

However, it was also during this period that Root became involved in the local Republican party. Fellow Republican party members convinced him to seek the party's nomination for judge of the court of common pleas in 1879; Root was thirty-four years old at the time. As was typical for contemporary New York Republican candidates, Root lost the election. In later years, some Root supporters would charge that he was unfairly discriminated against because of his involvement in the *Tweed* cases. However, the media did not make an issue of *Tweed*, and Root's loss seems more properly attributable to the lack of strength of the Republican party in New York at that time.

Root also became a close friend and strong ally of Chester A. Arthur. In fact, when the Garfield/Arthur ticket won the presidential election of 1880, Root was invited to Washington for the inauguration and traveled there by special palace car. Seven months later, Root was with several friends at Vice-President Arthur's New York home when the telegram arrived announcing the death of the president and asking that Arthur take the oath of office at once. Root and a friend retrieved Judge Brady of the New York Supreme Court and witnessed as Brady administered the oath of office to Arthur. Many believed that Root would soon be appointed to a cabinet position. However, Arthur knew that Root did not desire such a position, and no offer was made.

Root continued an active practice of law, including the representation of several sugar importers and refiners. His representation of the Hannibal & St. Jo Railroad continued through two different company presidents. By that time, Root's legal abilities were widely known and respected. He continued to represent a wide variety of corporations, never considering becoming a full-time, in-house counselor for any one of them.

Root's involvement in New York City matters began when he defended Joel Erhardt, a police commissioner, in a termination proceeding against all the commissioners. Due in large part to Root's legal prowess, the mayor withdrew the demand for their dismissal. In 1878, Root successfully defended fifteen aldermen on misdemeanor charges, which turned out to be a

politically motivated matter. He continued to serve as counsel for the police commissioners and was successful a second time in preventing their termination by a political foe. However, when the issue arose again in 1881, both the public and the press seemed to favor the mayor's position that the commissioners' alleged neglect of duty (specifically the unclean state of the city streets) made them unworthy to continue in their positions. The judge held in favor of the mayor, but Root gained the actual victory. He had drafted a bill relieving police commissioners of street sanitation duties, which was introduced by a friend in the state legislature and passed by the Republican majority. Root's corporate work also continued; he conducted twenty-eight lawsuits on behalf of Claflin & Co. against insurance companies and successfully established the insurance companies' liability for a fire loss.

In 1880, the Havemeyer Sugar Refining Company retained Root as counsel. At that time, no sugar monopoly existed and his representation was limited to debt collection and advice concerning how to avoid needless litigation. The Sugar Trust was established in 1887, but it is not known whether Root had any involvement in its creation. It was in 1890 that New York courts declared the Sugar Trust illegal. The Havemeyers turned to Root for advice. Aware of more favorable corporate statutes in New Jersey, he suggested reorganizing there. Highly successful, the new American Sugar Refining Company soon controlled 98 percent of the national output. Root did not represent the Sugar Trust during its successful defense against the government's suit under the Sherman Anti-Trust Act.

Root also represented the Whitney-Ryan traction syndicate, which involved the consolidation of Manhattan street railways. His corporate involvement, especially as counsel for trusts and syndicates, reveals Root's deep belief that all clients deserved vigorous representation. Never willing to perform in an unethical manner, Root did take advantage of every benefit the law and ethical rules would afford his clients.

In the fall of 1881, Root served as a delegate to the Republican State Convention. He was very active in the nomination to the State Assembly of a young politician named Theodore Roosevelt. In 1882, Root became a member of the Republican Central Committee.

In 1883, President Arthur suggested that Root be appointed as U.S. attorney for the Southern District of New York. At that time, the position did not require full-time devotion to political duties, and Root was free to continue his private practice. Root accepted the appointment and usually spent mornings in the district attorney's office and afternoons in his private law office. While meeting the staff of the district attorney's office, Root was introduced to a clerk who would soon be leaving for law school; the clerk's name was Charles Evans Hughes, who would later be chief justice of the United States. Root's legal background well equipped him to run the office,

and he quickly initiated new policies that greatly lessened the office's overwhelming backlog of cases.

As district attorney general, Root was involved in many cases involving international law, as well as several tax cases and cases involving private postal systems. Probably the most well-known case was Root's prosecution of James C. Fish, president of the Marine National Bank. Fish was indicted on charges that he embezzled bank funds. Root prepared for the trial for six weeks, which included deposing former U.S. president Ulysses S. Grant (whose son had been Fish's partner). The trial lasted one month; Fish was convicted and sentenced to ten years in prison. Root retired as district attorney after Grover Cleveland was elected president.

In 1886, after he refused to run for the office himself, Root directed Theodore Roosevelt's unsuccessful mayoral campaign against Abram S. Hewitt and Henry George. Two years later, Root single-handedly preserved Roosevelt's eligibility to seek the office of governor.

Root was also a very valuable ally of President William McKinley. In fact, McKinley asked Root to travel to Madrid in 1897 to take part in negotiations concerning that year's Cuban controversy. Root declined, citing his lack of experience in diplomatic matters. However, Root accepted McKinley's 1899 nomination as secretary of war. He served in that capacity through 1904. During that time, Root planned the U.S. Army War College and also reorganized the administrative system of the department. In addition, he was also the primary author of the Foraker Act of 1900, which provided for civil government in Puerto Rico. Root also established U.S. authority in the Philippines.

In 1905, then-president Theodore Roosevelt appointed Root secretary of state, a position he held through 1909. During this time, Root concluded treaties of arbitration with more than twenty nations. He was chief counsel for the United States before the Hague Tribunal, which settled the controversy between the United States and Great Britain over the North Atlantic coast fisheries. He also served as honorary president of the Pan-American Congress in 1906.

Root successfully ran for the U.S. Senate in 1909. He served until 1915 and declined to be a candidate for a second term. While in the Senate, Root served as both chair of the Committee on Expenditures in the Department of State and chair of the Committee on Industrial Expositions. Root supported the Allies at the outset of World War I, and he criticized Woodrow Wilson's policy of neutrality. His greatest honor was bestowed in 1912, when he was awarded the Nobel Peace Prize for his international peace efforts.

Root traveled to Russia in 1917 as head of a special diplomatic mission. He was appointed a member of the League of Nations committee to revise

the World Court Statute in 1929. President Warren G. Harding also appointed Root in 1921 to serve as one of four U.S. delegates to the International Conference on the Limitation of Armaments. His writings include *Latin America and the United States* (1917), *Russia and the United States* (1917), and *Men and Policies* (1924). Elihu Root died in New York City, February 7, 1937.

—Chris Whaley

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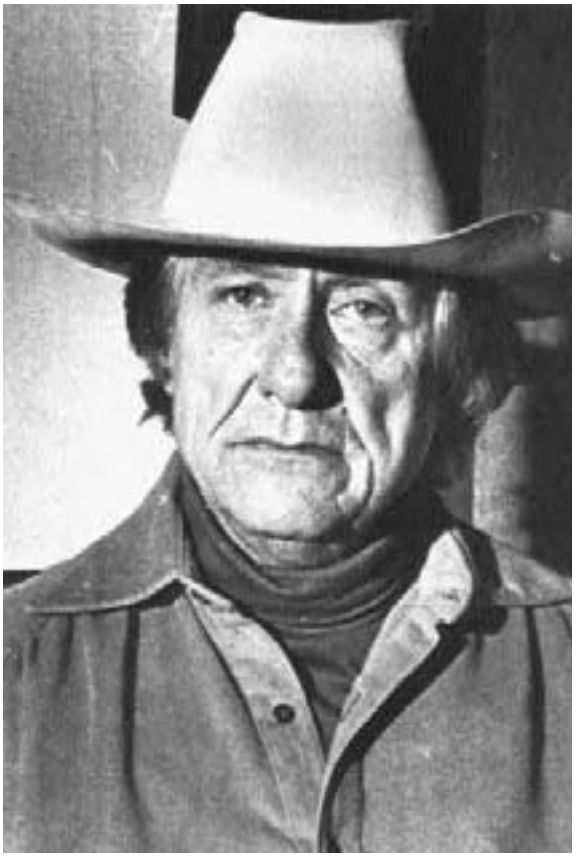
SPENCE, GERRY

(1929–)



GERRY SPENCE
Bettmann/Corbis

IF ONE SUGGESTS THAT GERRY Spence has mastered the craft of "lawyering," Spence is almost certain to be offended. If, however, one insists that Spence is accomplished in the *art* of storytelling, Spence will surely smile. Spence is some artist. He has not lost a jury trial since 1969, including several of the most high-profile civil and criminal cases in the twentieth century.

Although Spence is one of the United States' greatest trial attorneys, his life has also been a fascinating series of contradictions. For instance, he deeply loved his mother, but her suicide when he was a young man engendered a lengthy and deep depression predicated on feelings of personal guilt. He finished law school at the top of his class, yet he was the school's first graduate to fail the state bar examination. He ran for the House of Representatives as a conservative Republican, and yet, later in life, he gravitated toward a combination of socialism and libertarianism. He was so angry with the way his father was treated by insurance companies that he grew up determined to

make these companies pay for their callousness and cruelty. However, for several years he flourished as a defense attorney for the very same insurance companies.

Although Spence's life and career are often enigmatic, his record as a civil and criminal litigator over the last quarter century would be hard to equal. In 1974, he gained national prominence with his performance in a suit by the family of Karen Silkwood against the Kerr-McGee Corporation—a case in which a jury awarded his client a verdict in excess of ten million dollars. After this victory, he won a series of multimillion dollar verdicts, including one for fifty-two million dollars against McDonald's, a twenty-six-million-dollar verdict against *Penthouse* magazine on behalf of Kimberli Pring (a former Miss Wyoming), and a verdict of more than forty-five million dollars against Aetna Insurance Company. As a special prosecutor in the late 1970s, he secured a death penalty conviction against Mark Hopkinson, who bombed the home of a prominent Wyoming attorney. As a defense attorney, Spence obtained acquittals for such celebrated clients as Imelda Marcos and Randy Weaver.

Gerald Leonard Spence was born to Gerald Milner Spence and Esther Sophie Spence on January 8, 1929, in Laramie, Wyoming. Both his parents were college educated. Spence's father moved his bride from Colorado to Wyoming and accepted a position as a chemist. When Gerry was just a little boy, the family left Laramie to live in Sheridan, a small town more than three hundred miles to the north.

Growing up in northern Wyoming meant that Spence enjoyed hunting and fishing, crafting homemade slingshots, and raising pet sheep and cattle. Spence did not simply play cowboy like most American boys. He had an opportunity to *be* a cowboy, and worked, as a teenager, on several Wyoming ranches. However, life for Spence also meant that he arrived at school in clothes that his mother made from softened deer hide—a source of amusement for the other students—and that the animals he nurtured so carefully were eventually slaughtered and eaten. In Sheridan, his baby sister Peggy died at age three of meningitis. Her death proved to be traumatic both for Spence and for his parents' marriage.

His parents influenced young Spence greatly. As a boy, Spence learned how to flourish in the outdoors from his father. Although his father was indeed a "man's man," he was also tender and honest and provided for his family despite the obstacles put in his path by those with money and power. Spence grew up determined to make those responsible pay for the way they treated such men.

Spence's mother also profoundly influenced his life. A deeply committed Christian, Esther Spence instilled basic values in her son. She took him to church and taught him to pray. She encouraged him to have compassion for

those suffering financially during the Depression and World War II. She helped him to see that it was senseless to judge others by their race. She urged her precocious child to be humble because "nobody likes a smarty." When Peggy died, Esther dedicated her boy to God. She wanted him to be a minister and avoid the fleshly vices—smoking, drinking, gambling, and premarital sex. Despite his deep affection for his parents, though, young Spence was a rebellious teenager. He started working early and often was employed at jobs that brought him into contact with hard men and even rougher women. At a young age, Spence became sexually active. He visited prostitutes. He smoked, drank, and learned to play poker with professional gamblers.

The family moved back to Laramie when Spence was in high school. Spence decided he wanted to be a lawyer. One day he walked over to the law school and announced his plans to the dean. The dean administered him an aptitude test, on which Spence's score was the highest the dean had ever seen. Encouraging Spence to enroll in law school after graduation, he predicted that Spence would be a great lawyer. This prediction certainly did not stop the teenager's rebellion. In fact, midway through his senior year, he earned enough credits to graduate from Laramie High School and promptly quit school, preferring instead to leave Wyoming with a friend bound for California, where the two young men spent a summer at sea working as deckhands. By the time Spence enrolled at the University of Wyoming, his life experiences made him a rather unusual student.

In 1948, while Spence was a nineteen-year-old student at the University of Wyoming, he married Anna Fidelia Wilson of Cheyenne. A year later, he received his bachelor's degree and entered the University of Wyoming College of Law. During Spence's first year of law school, his mother committed suicide. Spence, who assumed that his rebellion was responsible for the depression that triggered his mother's suicide, would not unburden himself from this guilt for decades.

Spence was a successful law student who graduated at the top of his class in 1952. Ironically, the area where Spence failed to excel in law school was in the courtroom in a trial practicum course and in moot court competition. During a law school mock trial, a judge in Laramie told him, "You will *never* become a trial lawyer, Mr. Spence. You may just as well face that fact now. I am doing you a favor by being brutally honest with you" (Spence 1996, 249). After graduation, Spence earned another dubious distinction. He became the school's first graduate who flunked the bar examination. In 1952, Spence passed the bar on his second attempt.

After graduating and successfully passing the bar, Spence went to work in Riverton, Wyoming, with an attorney named Franklin Sheldon for two hundred dollars per month. He discovered that he was woefully ill-prepared

to practice law. Although trained to "think like a lawyer," he was not ready to do even the simplest legal assignments. As a result, he harbored a deep resentment against the kind of training given to prospective attorneys within the law schools.

After Sheldon left his practice to become a judge, Spence partnered with Frank Hill. The two attorneys found it difficult to build a lucrative practice in western Wyoming. Snubbed in his efforts to do legal work for the county attorney, Spence decided to run for that office. He was elected Fremont County attorney in 1954 and took office determined to clean up the county. He made some substantial enemies in doing so, but the voters agreed that he had kept his campaign promises, and Spence was reelected in 1958. After two terms as the county prosecutor, Spence ran for the House of Representatives in 1962. After incumbent William Henry Harrison soundly defeated him, Spence resumed his private legal practice.

After his failed bid for Congress, Spence's legal career can be divided into three phases. During the first interval, he became an important civil litigator and criminal defense attorney in Wyoming who aimed to help those he has described as the "little" or "ordinary" people. In the 1960s, Spence compiled some of the most impressive victories in Wyoming's legal history. He won a number of verdicts of more than one hundred thousand dollars for his clients and even a million-dollar verdict on behalf of a woman who was infected with gonorrhea by a wealthy, local playboy (a verdict subsequently set aside by the Wyoming Supreme Court).

Despite his courtroom success, Spence felt that he did not command the wealth, security, or prestige of Wyoming's leading attorneys who worked for the large corporations. As a result, Spence moved into the second phase of his postpolitical legal career when he started to represent insurance companies. Once again, Spence was an enormously successful civil litigator. For instance, he was once brought into a Denver courtroom as outside counsel for St. Paul Insurance Company. The company faced a multimillion dollar judgment, and it looked very much like the plaintiffs would collect. By the time Spence finished cross-examining the plaintiff, the jury returned a verdict awarding the plaintiffs twelve thousand dollars. Ecstatic, the insurance company paid the plaintiffs one hundred thousand dollars rather than allowing them to venture forward on appeal.

Although many now regarded Spence as the best trial attorney in Wyoming, his marriage was in trouble. In 1968, he began an affair with a woman named Imaging. A few months into their affair, Spence was plagued by guilt and grew determined to salvage his marriage. Having achieved some renown locally as a painter, Spence sold all of his Wyoming property, including his interest in his law practice, and enrolled in a graduate program in art at San Francisco State University. However, he could not shake

his love for the law, Wyoming, and Imaging. Shortly after his arrival in San Francisco, he dropped out of graduate school, left his family on the west coast, and returned to resume his life and career in Wyoming. Within days of his divorce from Anna, Spence married Imaging, initiating nuptials that have endured more than thirty years.

His marriage to Imaging helped Spence to put his personal life back on track and prompted him to revisit the direction of his professional life. He no longer felt comfortable representing large corporations. During his final trial for an insurance company, Spence's skillful cross-examination of the plaintiff helped to secure a verdict for his client. The plaintiff, an old man who had been hit by a drunk driver, walked away from the courtroom without compensation for his substantial physical pain. Pleased with his performance, Spence and Imaging went to the store to purchase the fixings for an opulent celebration dinner. While standing in line, Spence noticed that the older chap ahead of them looked remarkably like his own grandfather. When the man turned around, Spence recognized him as the plaintiff. Spence mumbled that he was sorry about the outcome of the old man's case. "You don't need to be sorry, Mr. Spence," the old man said. "You were just doing your job" (Spence 1996, 424).

Earlier in his career, Spence realized that the law gave attorneys power. In fact, he surmised, it gave them the authority to kill people. The killing occurred in the courtroom, where Spence and other gifted litigators turned the hallowed legal arena into a place of death. Spence observed,

> Men die in the courtroom from words that send them to the executioner's gurney or to the gas chamber. They die when their names or their fortunes are taken from them, die as their children are wrenched from them, die when they walk the long walk, in chains, to dark concrete places where living men cannot abide. When I walk into a courtroom, I am the hunter. When I step into the arena, I feel as if I step into eons of history, of bloody duels, of misery and killing. And fear. (Spence 1996, 99)

The old man was right. Spence was indeed just doing his job. However, he could not shake the fact that, in this case, he harmed an aged plaintiff who was simply seeking justice from a drunk driver and her insurance company. Spence vowed never to represent corporations again.

Likening himself to Robin Hood, Spence entered the third phase of his postpolitical legal career determined to champion the powerless. The courtroom is still a place of killing, Spence surmised, but since the killing is for the right reasons, the killing itself is honorable. Absent an overriding public issue at stake, Spence returned exclusively to representing the "little/ordinary" people. In this phase of his legal career Gerry Spence began to

achieve national prominence. He made his mark with the *Silkwood* decision. Victories against McDonald's, *Penthouse*, and *Hustler* magazine only solidified his national reputation as an effective hired gun.

Spence's success in the courtroom can be attributed, at least in part, to a particular rhetorical style. First, Spence's trademark is his use of the narrative. For Spence, the way to make a case come to life for a jury is to tell stories. "It is all about story telling—nothing more," notes Spence. He believes that effective use of the narrative is a lost art in the American courtroom largely because of the way students are prepared in law school. "The art of advocacy," Spence observes, "has become necrophilic at the hands of academicians. We have sent our young off to the morgues for training, to the morticians of the profession, to those who hate the art and who themselves abandoned it" (Spence 1986, 64–65). When Spence puts together a story for trial, the component parts are fairly straightforward. He places a premium on the beginning of the story (his opening argument) and how he believes the story must end (often voiced in both the opening and closing arguments). He develops a thesis for his story and uses a specific theme to crystallize the narrative. Like all good storytellers, Spence relates the facts of the story, anticipates his opponent's argument, and concedes points when he believes his opponent's case has merit (Spence 1995; Rodriguez and Doherty 1996).

He is a master storyteller who boils the complex legal problem down to a story of good against evil, with his client as the good guy. Spence appears in the stories as a narrator who guides the jury through the tale of woe and as the gladiator fighting for good. By positioning himself as a participant in the drama, Spence is able to extend the story. The tale did not end when Kerr-McGee leaked plutonium, when Mark Hopkinson bombed the home of Vincent Vehar, when *Penthouse* magazine published a vicious lie about Kim Pring, the former Miss Wyoming. No, Spence reminds the jury that the battle is still unfolding in the courtroom. Thus, Spence brings the jury into the story. He works to convince them that they are crucial if justice is to be achieved (Gill 1988).

Spence has transformed the rhetoric in the courtroom into an art form. Furthermore, Spence is a master of rhythm in his presentation. For centuries, people passed down their traditions from one generation to the next orally by learning to tell the stories to their audience's ears rather than to their eyes. Like such storytellers, Spence uses techniques such as repetition, a concise theme, and alliteration (Gill 1988).

In addition, Spence is willing to play a bit fast and loose with the rules of evidence in order to communicate with a jury. During his early experiences in the courtroom, Spence had difficulty directing a witness. His opponent repeatedly objected to his questions because Spence was consistently lead-

ing his witness. Initially, this was embarrassing. However, over time Spence discovered that the jury listened to his questions even when the judge sustained the objections of opposing counsel. Also, he found that the jury listened when he offered what the court later determined to be irrelevant materials. Thus, he took a weakness in his courtroom presentation and turned it into a strength. The judge might apply the rules of evidence, but the judge could not keep him from talking to the jury.

Finally, Spence prides himself on hard work. For most lawyers, substantial preparation means extensive legal research. For Spence, it might mean that he will pack up and move in with a client for a few weeks. While in the home of a client who, as the result of an accident, is a paraplegic, he can watch the client try to navigate around the home. He is there when the client endeavors to bathe or use the bathroom. He observes the client who might need to secure a specially enlarged spoon in order to eat his oatmeal. Spence can tell the jury in gripping detail just what the client has lost (Spence 1998).

Spence's work in the courtroom ranks beside that of Clarence Darrow at the beginning of the century. His performance is likened to Justice Robert Jackson's prosecution of war criminals in the Nuremberg trials, or Vincent Bugliosi's success in the Manson Family murder trial (Lief, Caldwell, and Bycel 1998).

In the *Silkwood* trial, Spence developed a central theme: "If the lion gets away, Kerr-McGee must pay." He used a principle of the common law to allow the jury to cut through the complicated, technical information by likening the corporation to a man in an ancient English community who brought a caged lion into the village. Concerned for his safety and the well-being of his neighbors, the man used the strongest cage, the best lock, and most able guards to secure the lion. Suppose, Spence argued, that the lion got away and killed a child. Citing his precautions, the man tells his neighbors that it cannot be his fault. The town's people acknowledge all the precautions. However, they deem the owner responsible for the lion's damages because *he* brought the lion into the town. Likewise, Spence noted in *Silkwood* that Kerr-McGee was responsible for plutonium leakage because it brought the "lion," plutonium, into the town. And, as Spence repeated often, "if the lion gets away, then Kerr-McGee must pay."

At the end of this case, Spence told the story of an old wise man and the challenge he faced from a younger man determined to better him. The young man captured a bird and cupped it in his hands. Approaching the old man, he asked, "Old man, will the bird live or die." The young man decided that if the old man announced that the bird would live, he would crush the bird. Likewise, if the old man guessed that the bird would die, he would free it. Instead, the old man simply acknowledged the obvious. "The bird," he

proclaimed, "is in your hands." Spence reminded members of the jury that, like the bird, the decision was in their hands.

Now in his seventies, Spence remains quite active. He is senior partner in the firm Spence, Moriarty & Schuster. A prolific writer, Spence is the author of several books, including *Gunning for Justice* (1982), *Of Murder and Madness* (1983), *Trial by Fire* (1986), *Popular Mechanics: With Justice for None* (1989), *Freedom from Slavery* (1995), *How to Win an Argument* (1995), *The Making of a Country Lawyer* (1996), *O.J.: The Last Word* (1997), and *Give Me Liberty* (1998). He is in demand as a speaker and has hosted *The Gerry Spence Show* on the cable network CNBC. As a frequent guest on television, he is often asked to comment on a wide range of subjects.

Spence, who once unsuccessfully sought a teaching position at the University of Wyoming College of Law, founded the Trial Lawyer's College in western Wyoming. Every summer, he invites a small number of attorneys to study in a month-long course. The attorneys learn from some of the most celebrated trial attorneys in the United States, including Roy Black, Phil Corboy, Morris Dees, Judy Clark, Richard "Racehorse" Haynes, Nancy Hollander, and Nfilton Grimes. The students take classes in drama and workshops in storytelling. They learn how to become gladiators in the courtroom. Spence's only requirement is that they not work as prosecutors or use their talents to represent corporations.

—Frank Guliuzza III

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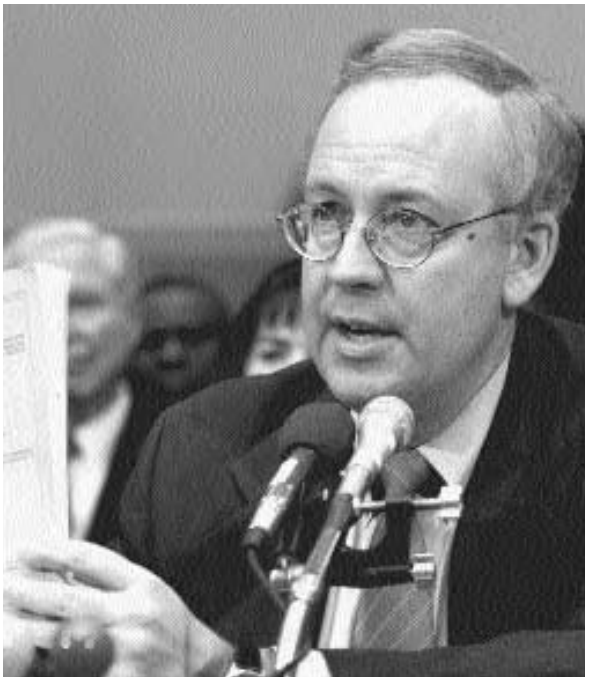
STARR, KENNETH W.

(1946–)

If a person ever seemed destined to don the robe of a U.S. Supreme Court justice it was Kenneth Starr. During the latter half of the twentieth century, Starr compiled one of the most impressive résumés in the history of U.S. jurisprudence and in the process gained a reputation as one of the country's most intellectually gifted appellate lawyers. Although he is primarily recognized for his role in the impeachment of President William Jefferson Clinton, there is much more to Kenneth Starr's career than his tenure as independent counsel for the Whitewater investigation.



Kenneth Starr

Independent Counsel Kenneth Starr holds a copy of his report while testifying on Capitol Hill, 19 November 1998, before the House Judiciary Committee's impeachment hearing. (AP Photo/Doug Mills)

Kenneth Winston Starr was born in Vernon, Texas, on July 21, 1946. His father, William Douglas Starr, was a Church of Christ minister and barber. His mother, Vannie, stayed at home to raise Kenneth's two older siblings—brother Jerry and sister Billie Jean—and him. The Starrs were devout Christians whose faith greatly shaped the character and development of their youngest child. To this day, Kenneth Starr remains a deeply religious man.

From the beginning of his scholastic career, Starr excelled in the classroom. He attended Sam Houston High School in San Antonio, Texas, where he was class president during his junior and senior years, a member of

the National Honor Society, and chosen as the "most likely to succeed" by his peers. After high school, he spent a year and a half at Harding University, a small, Church of Christ–affiliated school in Searcy, Arkansas. At Harding, Starr continued his record of scholastic achievement by making the dean's list every semester. He also wrote a column for the college newspaper, won a seat on the student government council, and was actively involved with the Young Democrats. He transferred to George Washington University in Washington, D.C., midway through his sophomore year and graduated in 1968 from the school's honors political science program. While attending George Washington, Starr served as a congressional aide to Bob Price, a "libertarian" republican from his home state of Texas. After college, Starr attended Brown University as a university fellow, receiving a master's degree in political science from the school in 1969. Thereafter, Starr decided to attend law school at Duke University. At Duke, Starr was selected for the prestigious Order of the Coif, served as the Note and Comment editor for the school's law journal, and was president of the International Law Society. Starr graduated from law school in 1973 with highest honors and was named the Hughes Inn Graduate of the Year for his class.

After passing the California bar, Starr moved to Miami to clerk for David W. Dyer, a judge with the U.S. Court of Appeals for the Fifth Circuit. He then worked briefly as an associate with the Los Angeles law firm of Gibson, Dunn & Crutcher before accepting an offer to serve as Chief Justice Warren E. Burger's law clerk. At the conclusion of his clerkship on the nation's highest court, Starr rejoined Gibson, Dunn & Crutcher. It was during this time that he became a confidant of William French Smith, who, after the election of 1980, was selected by President Ronald Reagan to be U.S. attorney general. After receiving his appointment, Smith asked Starr to return to Washington to serve as counselor and as chief of his immediate staff. Starr accepted Smith's offer just three weeks after being named the youngest partner in the history of his law firm. As counselor, one of Starr's more notable assignments was shepherding Sandra Day O'Connor's nomination to the Supreme Court through the U.S. Senate. He did not walk in lockstep with Smith on every issue, however, and he angered fellow conservatives by opposing the Reagan administration's decision to defend tax exemptions for religious institutions that discriminated against minorities. Ironically, as counselor, Starr was also intimately involved with the administration's effort to challenge the constitutionality of the independent counsel statute.

On October 11, 1983, Kenneth Starr, at age thirty-seven, became the youngest judge ever appointed to "the second most important court in the nation," the U.S. Court of Appeals for the District of Columbia Circuit. Judge Robert Bork, who also served on the D.C. circuit bench, noted that

as a judge, "Starr established a reputation for intelligence, diligence and unfailing courtesy to counsel and his fellow judges" (Bork 1998, 8). Liberal public interest groups also praised Starr for his willingness genuinely to consider their arguments and to rule in their favor "when he thought the law compelled him to" (Masters 1995). His opinions were generally conservative, but they occasionally displayed an "independent streak that pleased civil libertarians."

On May 27, 1989, Judge Starr reluctantly gave up his lifetime appointment to become President George Bush's solicitor general. The solicitor general is primarily responsible for supervising and conducting the executive branch's litigation before the Supreme Court. It is the only position in the federal government that requires the officeholder to be "learned in the law." The solicitor general's influence with the Supreme Court is so great that the person acting in this capacity is commonly referred to as the "tenth justice." Many in the legal community saw Starr's meteoric ascension to this post as a stepping-stone to an eventual appointment to the Supreme Court.

Kenneth Starr argued twenty-five cases before the Supreme Court during his tenure as solicitor general. Although many deserve mention, this essay will focus on three of the most highly publicized decisions in which he participated.

The "right to die" case of *Cruzan v. Director, Missouri Department of Health* (1990) marked the first time in our nation's history that the Supreme Court addressed the constitutional rights of dying medical patients. It was also Starr's first high-profile case as solicitor general. The issue before the Court in *Cruzan* was whether states could require the parent or guardian of a dying patient to demonstrate, by clear and convincing evidence, that the patient, while competent, expressed a desire not to be given life-sustaining medical treatment in the event of an irreversible medical condition. The Court's answer to this question hinged on whether the Constitution provides a fundamental right to dying patients, which would prohibit state involvement in such a decision. Starr agonized over the position his office would advocate on this extremely sensitive issue. He met with a representative from the family of Nancy Cruzan, and he visited Walter Reed Army Medical Center to discuss with doctors the ethical dilemmas they face in treating patients similarly situated. In his oral argument, Starr contended that although individuals might have a right to refuse unwanted medical treatment, the Constitution's silence on the issue required that "the due process clause . . . be interpreted to provide the states and the federal government with wide latitude . . . to develop approaches that reflect reasonably the values of the people." The Supreme Court agreed, holding that a state could require its citizens clearly to express their desire to refuse

life-sustaining medical treatment, in the event of a terminal illness, prior to the time in which they become incompetent.

On May 14, 1990, Starr publicly weighed in on one of the most highly charged political issues in recent history: flag burning. The question before the Supreme Court in *United States v. Eichman,* however, was not political but constitutional: Does Congress have the authority to enact a federal statute criminalizing desecration of the American flag? The Court had recently addressed the issue in *Texas v. Johnson,* striking down a similar state law as a violation of free speech. Nevertheless, Starr defended the constitutionality of the federal law vigorously, and forced the reconsideration of *Johnson* by invoking the statute's expedited review provisions. Starr argued that the American flag was a unique national symbol, and as such, Congress had a legitimate interest in protecting its integrity. He maintained that flag burning did not convey a "particularized message" and therefore was not entitled to First Amendment protection. He also contended that flag burning was akin to other categories of communication that the Court had previously held were not forms of protected speech (e.g., "fighting words"). Starr emphasized that the statute in question was not aimed at deterring offensive expressive conduct, but was instead directed at preventing all forms of flag mistreatment. A narrow majority of the Supreme Court rejected Starr's argument, holding that "although the Flag Protection Act contains no explicit content based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is 'related to the suppression of free expression.'"

On January 21, 1992, the Supreme Court granted certiorari in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey.* The constitutional and political stakes in *Casey* were extremely high. The official question before the Court was whether various Pennsylvania regulations (e.g., parental consent for minors) violated a woman's constitutional right to an abortion. The much larger issue, however, was whether the Court would overrule one of its most controversial precedents, *Roe v. Wade* (1973). In *Roe v. Wade,* the Supreme Court held that women have a fundamental, constitutional right to have an abortion. Many legal commentators believed that the question was no longer whether *Roe* would be overruled, but rather when and by what means the reversal would occur

Casey was, without question, the biggest case of Kenneth Starr's career as solicitor general. Oral argument began with a passionate defense of *Roe* by acclaimed American Civil Liberties Union (ACLU) attorney Kathryn Kolbert. Kolbert made it clear to the justices, in her opening remarks, that she would be satisfied with nothing less than a complete reaffirmation of the Court's holding in *Roe*. Several justices attempted to persuade, or badger, Kolbert into softening her stance, but she refused. After a rough outing by

Clark Clifford, Washington Fixer

Few contemporary lawyers have achieved the respect and acclaim of Clark Clifford (1906–1998). Born in Kansas and reared in St. Louis, Clifford earned his law degree at Washington University and began clerking for a local firm. Determined to master the art of litigation, Clifford served as an appointed counsel for indigents, losing his first fourteen cases but constantly improving his skills in the process. Clifford's future cases would include appearances before the U.S. Supreme Court on behalf of well-known clients and businesses, but he was far better known for the advice he gave, for the political levers he pulled, and for his ability to court key members of the press than for his litigation skills.

The strikingly handsome Clifford enlisted in the navy during World War II and became an assistant naval aide in the Harry Truman White House, where he became Truman's private legal counsel and an advisor on important matters of both domestic and foreign policy, including approaches to the Cold War and strategies for Truman's reelection in 1948. After Dwight Eisenhower was elected to office in 1952, Clifford decided to set up practice in Washington, D.C., where elected officials with whom he was acquainted often directed business his way and where his services were in high demand among big businesses and others who needed to maneuver through the capital's many legal minefields. Clifford was highly regarded as an "insider's insider" who could discreetly work both legal and political levers. In addition to representing numerous business clients, Clifford's firm also looked after the personal interests of Supreme Court Justice William O. Douglas and incoming president John F. Kennedy, for whom he helped craft a transition strategy.

(*continues*)

Pennsylvania's attorney general, Starr rose to argue as a friend of the court in support of the state regulations. He began by addressing the standard to be utilized by the Court in reviewing the abortion restrictions. Starr argued that state regulations on abortion should be upheld so long as there was a rational basis for their existence. The underlying premise of his position was evident: abortion was not a fundamental, constitutional right to which women were entitled, and *Roe* and its progeny should be expressly, or implicitly, overruled. The liberal wing of the Court, led by Justice John Paul Stevens, went after Starr with a vengeance, attempting to sidetrack him with questions about whether a fetus should be considered a "person" for purposes of the Court's analysis. Starr responded that the United States did "not have a position on that question" and that the issue did not bear on whether the regulations in question were constitutional. The Court eventually returned to the issue of the appropriate standard of review, and Starr was then questioned as to whether the "rational basis" test would permit

(*continued*)

Clifford and fellow attorney Abe Fortas were close advisors to President Lyndon Johnson, and Clifford's connections to government continued to bring in lucrative business until Clifford became secretary of defense in 1968. In that role, Clifford is credited with helping to persuade President Johnson that further escalation of the U.S. role in the Vietnam War would be counterproductive; at the end of his term, Johnson awarded Clifford a Medal of Freedom.

Unsuccessful in his hopes of becoming either president or secretary of state, Clifford rejoined his firm; his law practice continued to prosper as he took on diplomatic roles during the Jimmy Carter administration. Driven by an insatiable appetite for work and achievement, Clifford accepted the presidency of the Bank of America, long after the age that most people retire. This ultimately resulted in Clifford's greatest embarrassment, when it was discovered that, contrary to his own public assurances, stock in the bank was illegally owned by the Bank of Credit and Commerce International (BCCI), in which Clifford owned stock and which his firm represented. BCCI was a foreign-owned corporation engaged in unethical and illegal practices.

One of Washington's "wise men" was now indicted along with a much younger law partner, Richard Altman (husband of actress Lynda Carter, of Superwoman fame). Eventually exonerated of the charges, Clifford's near godlike reputation had nonetheless been tarnished, an example of the difficulties faced by lawyers who go through the "revolving door" between government service and private practice.

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states to ban abortion under any circumstance. Starr surmised that a complete prohibition of abortion would not be sustainable under "rational basis" scrutiny unless an exception existed for situations in which the life of the mother was threatened. He also reminded the Court that under a "rational basis" review, a state may not "proceed in an arbitrary or capricious fashion."

On June 29, 1992, the Court handed down its decision, and, in a surprising move, three justices—O'Connor, Anthony Kennedy, and David Souter—jointly authored the majority opinion. A 5–4 majority of the Court held that a woman has a constitutional right to an abortion. A different 5–4 majority, however, upheld all but one of the Pennsylvania regulations by using the less rigorous, newly adopted "undue burden" standard. *Casey* has been heavily criticized as a political compromise that is constitutionally groundless. The net effect of the decision, however, was a substantial shift in the Court's abortion jurisprudence. *Roe*, as it had previously ex-

isted, was no more. State restrictions on abortion are now evaluated by the Supreme Court with far less scrutiny, and a woman's "right to choose" can, in the post-*Casey* era, be significantly curtailed.

As solicitor general, Kenneth Starr established himself as one of the top appellate lawyers in the United States. His intellect and integrity were widely respected within the legal profession, and he was praised for depoliticizing the solicitor general's office. His work ethic was, according to coworkers, of "mythic proportions," even by Washington standards (Winerip 1998). Starr exhaustively prepared for cases before the Supreme Court by staging moot court rehearsals and studying videotapes of his performances. His colleagues marveled at his ability to give attention to the smallest detail in even the most complex of cases. Despite his sterling reputation, however, he was twice passed over by the Bush administration for an appointment to the Supreme Court. His candidacy was apparently extinguished at the crossroads of law and politics. It was, ironically, Starr's love for the law that ultimately proved to be his undoing. Many conservatives, while preaching the virtue of judicial neutrality, were agitated with Starr's steadfast adherence to the principle. Liberals, on the other hand, were furious with him for challenging the constitutionality of *Roe v. Wade*. In the end, these strange political bedfellows indirectly worked together to deny the extremely qualified Starr his dream job: a seat on the Supreme Court of the United States.

On January 20, 1993, shortly after President Clinton's election, Kenneth Starr left the solicitor general's office with enviable credentials. Although he had not been in private practice for twelve years, Starr's experience as solicitor general made him immensely attractive on the open market. After considering many lucrative offers, Starr decided to sign on with the legal powerhouse Kirkland & Ellis for a reported seven-figure salary. Shortly thereafter, he began feverishly building his corporate litigation practice, working seventy- to eighty-hour weeks. His colleagues recall that although Starr enjoyed many aspects of private practice, he yearned to return to public service. He did return, albeit briefly, when Judge Thomas Penfield Jackson, of Microsoft antitrust fame, appointed him as a special master in the widely publicized dispute between the Senate Ethics Committee and Senator Bob Packwood. As special master, Starr's job was to determine how much of Senator Packwood's personal diaries and tapes could be used in the ongoing investigation against him for sexual misconduct. Starr also dabbled in politics, and, in 1994, he briefly considered opposing Oliver North for the Republican nomination to one of Virginia's U.S. Senate seats in 1994.

On August 5, 1994, a three-judge panel appointed Kenneth Starr as the independent counsel charged with investigating whether President Clinton, first lady Hillary Clinton, and other individuals engaged in criminal

conduct through their involvement in a failed real estate transaction known as "Whitewater." Several prominent Democrats immediately criticized Starr's appointment, alleging that he was too partisan to oversee the investigation. These initial criticisms were muted when members of both sides of the political aisle rushed to his defense. This bipartisan support, however, ended as Starr's investigation quickly shifted from bank fraud to allegations of a cover-up by President Clinton and his aides of a sexual affair that the president had engaged in with a subordinate. The circumstances surrounding the affair were politically explosive and involved some of the most intimate and personal details of the president's private life. After thoroughly investigating the matter, Starr's office prepared a 453-page impeachment referral for Congress, which alleged that the president, in attempting to cover up the affair, committed perjury, obstructed justice, and tampered with the testimony of witnesses. The national news media portrayed Starr as an overly zealous, puritanical prosecutor whose actions were fueled by his disdain for the president. For his part, Starr maintained that his investigation was not driven by personal ideology, stating, "our job is to get at the truth, and the truth will speak for itself."

Lost in the vitriolic rhetoric surrounding Starr's performance as independent counsel are his considerable achievements in the courtroom. His office obtained fourteen convictions or guilty pleas during the course of its investigation, and Starr personally won each of the twenty-one legal questions that he argued at the appellate level. The most highly publicized appeal concerned whether his office could require members of the U.S. Secret Service to testify before the federal grand jury investigating President Clinton. Before the appeal, Clinton ordered Lewis Merletti, his secret service director, to research the question of whether its officers were legally permitted to assert a "protective function" privilege when being questioned about anything they witnessed while guarding the president. Notwithstanding the lack of any legal precedent for such a position, Merletti directed his officers to assert this novel privilege if called to testify. The basis for the assertion of this privilege was that "the continued absolute protection of the President of the United States depends on his faith and trust in the Secret Service members who constantly surround him." Starr filed a motion to compel the testimony of several officers, and the district court granted his request. A three-judge panel for the D.C. Circuit Court of Appeals unanimously affirmed the district court's decision, and the Supreme Court refused to grant the Secret Service's request to review the matter.

Although many still frequently criticize Starr's actions as independent counsel, others consider his role in the impeachment of President Clinton as a valiant defense of the "rule of law." As a result of the *Starr Report,* the House of Representatives impeached a president for only the second time in

the history of the United States. Although the Senate failed to remove President Clinton from office, only his most ardent supporters question the truth of Starr's findings. Two significant postimpeachment events have gone a long way toward vindicating the legitimacy of Starr's investigation. On April 12, 1999, Judge Susan Webber Wright, a Clinton appointee, held the president in contempt for giving "false, misleading and evasive answers" during the course of the *Paula Jones* litigation. On June 30, 2000, an Arkansas Supreme Court committee filed a complaint for disbarment against President Clinton, alleging that he had conducted himself "in a manner that violates the model rules of professional conduct." As time passes and political passions wane, it appears more probable than not that the legacy of Starr's investigation will not be one of prosecutorial overreach, but rather the idea that no one is above the law, not even the president.

Since resigning as independent counsel, Kenneth Starr has begun work on a book that will address the Supreme Court's effect on Americans' lives. He is also serving as an adjunct professor at New York University Law School and as a distinguished visiting professor at George Mason University. Speculations run rampant on how history will judge Kenneth Starr, but the tide appears to be shifting toward a more thoughtful and balanced view of his career (Schmidt and Weisskopf, 2000; Charen, 2000; Frolik, 2000). Within his own profession, however, there is no question that Starr is still greatly admired by his peers. Judge Griffin Bell, a former U.S. attorney general, sums up this sentiment nicely: "Kenneth Starr is, without a doubt, one of the top appellate lawyers in the country. He is a gentleman, a scholar, and the consummate professional. Simply put, he is the best that the legal profession has to offer" (Starr 2000). The conventional wisdom is that, notwithstanding his impeccable credentials, Starr will never be appointed to the Supreme Court. For his part, he has openly stated that he would not shy away from a confirmation fight. Regardless of what the future holds for Kenneth Starr, his place among the greatest American lawyers of his time is secure.

—Stephen Louis A. Dillard

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ST. CLAIR, JAMES DRAPER

(1920–)

A distinguished trial attorney involved in several nationally prominent cases, James Draper St. Clair participated in the Army-McCarthy hearings, defended Yale chaplain William Sloane Coffin on charges stemming from his antidraft activities during the Vietnam War era, and represented President Richard M. Nixon in proceedings arising from the Watergate scandal.

James Draper St. Clair

James D. St. Clair (2d from left), President Nixon's lawyer, arriving to attend a closed session of the House Judiciary Committee, tells newsmen he hopes the impeachment panel will summon Charles W. Colson and predicted that Colson's testimony would aid the President's defense. (Bettmann/Corbis)

James St. Clair was born April 14, 1920, in Akron, Ohio, to Clinton Draper and Margaret Glenn St. Clair. He served in the navy during World War II after graduating from the University of Illinois in 1941. He graduated from Harvard Law School in 1947, was admitted to the Massachusetts bar, and began work at Hale & Dorr, the most prominent law firm in Boston. He remained with Hale & Dorr throughout his entire legal career as an associate, a junior partner, and a senior partner from 1956 until his retirement in 1995. St. Clair married Asenath Nestle on November 25, 1944, and they had a daughter and two sons.

St. Clair was heavily engaged in educational and professional activities in addition to his legal practice. He lectured at Harvard Law School for twenty-five years, was a member of the American Bar Association's Council on Litigation, the Boston Bar Association, the American Law Institute, the

American College of Trial Lawyers, the National Advisory Council for the Practicing Law Institute, and the advisory council of the New England Law Institute. He was involved in many civic and philanthropic activities as well: he served for ten years as president of Horizons for Youth, a nonprofit group dedicated to the needs of underprivileged children; he was a long-term trustee for the Walker Home for Children; and he was a member of the boards of directors of both the Boston Opera Association and Massachusetts General Hospital.

Although St. Clair typically represented corporate clients, most recently in the high-technology industry, he also was involved in a number of high-profile cases. His first national exposure occurred in 1954 when Joseph N. Welch, a senior attorney at Hale & Dorr, asked him to assist in representing the army during the Army-McCarthy hearings. Senator Joseph R. McCarthy chaired a Senate subcommittee that conducted a number of so-called investigations aimed at exposing Communist infiltration of the federal government. The army was one of the governmental institutions targeted by McCarthy, and throughout the autumn of 1953, the senator had pressed the Defense Department for access to confidential files on loyalty and security (Griffith 1987, 244). Perhaps the most important problem facing the subcommittee was the role of McCarthy himself (Griffith 1987, 252).

The Army-McCarthy hearings extended nearly two months and featured typical McCarthy tactics such as cropped photographs and phony letters. His assertions during the hearings were credible only to "diehards on the Far Right" (Reeves 1997, 636). After the hearings had concluded, President Dwight Eisenhower privately congratulated Welch and St. Clair. Welch observed that if the hearings had accomplished nothing else, the army had been able to keep McCarthy on television "long enough for the public to get a good look at him" (Reeves 1997, 636). Before the hearings ended, a resolution ultimately leading to McCarthy's censure was introduced in the Senate (Griffith 1987, 265).

After the hearings, St. Clair returned to Hale & Dorr, resuming his litigation practice. Most of his cases with high profile were local—visibility was largely confined to the Boston area. For example, in 1962 he served as special investigator in the case of Leo J. Sullivan, Boston police commissioner. A television report suggested that the police under Sullivan's command were "out of control." St. Clair agreed and recommended that Sullivan be replaced, an action taken subsequently by Massachusetts governor John Volpe. A few years later, St. Clair led an effort to clean up the corrupt Rivers and Harbors Commission. Reform of the commission was determined to be impossible, and it eventually was placed within the Massachusetts Department of Public Works. As with the Sullivan investigation, St. Clair's services were provided pro bono (Montgomery 1992).

Another of St. Clair's more visible cases involved the federal government's prosecution of Yale chaplain William Sloane Coffin on charges of conspiring to counsel young men to violate the draft laws. Dr. Benjamin Spock was one of the four codefendants, who with Coffin were called the Boston Five. Those close to Coffin recommended that St. Clair conduct his defense. They assured Coffin that St. Clair was well suited to represent him, but they acknowledged that he was a "Wellesley Hills Republican" and that no one seemed to know where he stood on the war. Coffin was reminded that St. Clair had participated in the Army-McCarthy hearings in the 1950s. More important, St. Clair had a reputation as a superb trial lawyer. Coffin had misgivings, however, saying St. Clair sounded like one of those lawyers who's "all case and no cause," but chose him nonetheless (Coffin 1977, 266–267). During the lengthy pretrial conversations between Coffin and St. Clair, it seemed to Coffin that his lawyer knew of none of the people associated with the antiwar movement, and he tired of hearing St. Clair asking "Who's that?" every time he mentioned a name. Coffin said, "Look St. Clair, you know none of the cast of characters in this play and you can't even pronounce conscientious objection. How in hell do you propose to defend me?" According to Coffin, St. Clair was not the least perturbed and reminded him that the trial was still some time off, and "because you have to explain all this to me I'm exactly the man to explain it to the jury" (Coffin 1977, 268).

The Boston Five considered taking a Gandhian civil disobedience approach and pleading guilty. Instead, they chose to mount a full-scale legal defense, using what the media called a "battery of top-notch lawyers" (Mitford 1969, 74–75). Even after the decision to contest the government's charges at trial, counsel for the various defendants did not approach defense in the same way. Spock's lawyer undertook a Nuremberg defense, arguing that it is unjust to compel a citizen to choose between violating a federal law and participating in an international crime (Mitford 1969, 81–83). St. Clair, by contrast, filed a motion for severance of the cases seeking a separate trial for Coffin. It was St. Clair's view that there is an inherently prejudicial impact on the jury in a joint conspiracy trial; the defendants *look* like coconspirators, sitting together in court (Mitford 1969, 84).

St. Clair sought to establish that Coffin did not try to persuade young men to refuse induction into the military, but that he provided support to those who had already decided to turn in their draft cards (Mitford 1969, 141). Throughout the trial, St. Clair attempted to disengage the war and draft as issues in the trial, focusing instead on the sufficiency of the evidence the government offered supporting criminal charges (Mitford 1969, 179). Coffin and three of his codefendants were convicted. At the sentencing hearing a month later, St. Clair characterized Coffin as an "upstanding,

honorable man, a family man." He also suggested that Coffin was a leader in a substantial public debate on a substantial public issue and that his actions did not have demonstrably harmful results. He urged the court to suspend Coffin's sentence (Mitford 1969, 206). The trial court was unpersuaded and sentenced Coffin to two years in federal prison. Execution of sentence was waived pending appeal. The convictions were set aside on appeal because of prejudicial statements by the judge to the jury. Acting on a motion from the Justice Department, a federal court judge in Boston agreed on April 22, 1970, to drop government draft-conspiracy charges.

Some of St. Clair's more visible cases reinforce Coffin's "all case and no cause" observation. His clients have been quite diverse. In 1958, he defended a Harvard professor who allegedly sympathized with Communists. While representing the Boston School Committee, a group attempting to forestall racial balancing in the Boston public schools, he defended Randolph Lewis, one of a gang of young African-American youths indicted for attacking Richard Poleet, a white Boston-area resident. Despite extensive brain surgery, Poleet died six weeks after the assault without regaining consciousness (McNamera 1981). Two weeks before the attack on Poleet, an African-American businessman was beaten severely by white youths attending an antibusing demonstration at City Hall. As a result, racial tensions were unusually high, and St. Clair received death and bomb threats because he was Lewis's defense counsel. He required a police escort virtually everywhere he went (Montgomery 1992). St. Clair argued in a motion for a new trial that he should have been allowed to question two prosecution witnesses about their own criminal records. The Massachusetts appeals court concluded that failure to allow a thorough cross-examination had denied Lewis a fair trial, but he was never retried, as the state dismissed charges against him. St. Clair also defended Frank J. Pilecki, president of Westfield State College, on charges of sexually assaulting two students. A Suffolk County Superior Court jury eventually acquitted Pilecki on both counts of indecent assault and battery in June 1984. Two jurors said the jury believed there was consent by the alleged victim. Michael Engel, Westfield State's faculty union president, said the incident was certainly unethical, if not criminal, and commented that "having a rich man's lawyer to make the prosecution's witnesses look silly certainly does help" (Curwood, 1987, 2).

In 1991, the *Boston Globe* wrote a series of highly critical articles about the Boston Police Department, and Mayor Raymond Flynn appointed a special commission headed by St. Clair to examine the management of the department after publication of the *Globe* series (Ellement and Rezendes 1991, 1). The *Globe* reported that the department's Internal Affairs Division appeared to have ignored vital evidence while investigating seven cases in which officers were accused of misconduct. The commission exam-

ined confidential police records to determine whether police had adequately investigated citizen complaints of police brutality. In some cases, confidential reports appeared to indicate that the Internal Affairs Division had not contacted witnesses who disputed the police account of a beating or shooting.

After a six-month investigation, the commission's work ended in January 1992. It was estimated that St. Clair contributed upwards of $250,000 of his professional time to the investigation and the writing of the final report. The commission made a number of recommendations focusing on improving the department, including a comprehensive overhaul of the Internal Affairs Division. Removal of Police Commissioner Francis (Mickey) Roache, a close friend of Mayor Flynn, was recommended as well. The Flynn administration received the commission's report and formally ended its operations. Top police officials reported that the department had implemented many of the commission's recommendations and would implement several more (Ellement and Murphy 1993). The three recommendations rejected by Mayor Flynn and the police department were considered by many to be the most important ones: replacing Roache, not placing lower-ranking officers on the command staff, and transferring the former commander of the police academy back to the academy. Changes were made in the Internal Affairs Division, including naming experienced detectives to the division and promising that their careers would not suffer because they investigated fellow police officers (Ellement and Murphy 1993, 1). Commissioner Roache dismissed the scathing critique of Roache's management of the department, disparaging St. Clair as a "downtown lawyer" (Black 1993, 13).

St. Clair's highest-profile client was, of course, President Richard M. Nixon. A break-in of the Democratic National Committee's offices in the Watergate complex occurred on June 18, 1972, and a number of people from Nixon's White House and campaign staff were eventually indicted. The following summer, it was disclosed that Nixon had secretly taped all conversations in the Oval Office. The Watergate special prosecutor was appointed, first Archibald Cox and then Leon Jaworski; both were interested in obtaining the tapes as possible evidence.

The Watergate case presented several legal problems for Nixon, including potential criminal liability as a party to attempt to obstruct justice by covering up the crimes linked to the break-in. Watergate also presented significant political problems for Nixon, including his possible impeachment. St. Clair was engaged to lead the Nixon defense for all the Watergate-related matters, replacing J. Fred Buzhardt and Leonard Garment, who had headed the Nixon defense team until that time. The special prosecutor subpoenaed a number of tapes, and although some tapes were delivered, the

White House resisted turning over a number of other tapes on executive privilege grounds.

The Supreme Court eventually entertained Nixon's executive privilege claims. St. Clair argued that for the presidency to function, communications between top officials and advisers had to be kept confidential. He also argued that the separation of powers doctrine conferred legal immunity to the president that gave him the right to withhold the tapes. The Supreme Court disagreed in *United States v. Nixon,* 418 U.S. 683 (1974). The Court accepted St. Clair's contention that executive privilege was a legitimate shield for the executive branch but ruled that the privilege was not absolute. The president's need for complete candor and objectivity calls for great deference from the Court, but absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the Court was not convinced that presidential communications would be significantly diminished by production of the tapes. Indeed, recognizing such a broad claim of executive privilege could seriously compromise the criminal process.

Shortly after the Supreme Court decision, St. Clair learned that one of the sixty-four tapes in question, the June 23 tape, included a conversation between Nixon and his chief of staff, H. R. Haldeman, in which Nixon sought to stop the Federal Bureau of Investigation from investigating the Watergate burglary. The conversation, which took place only five days after the break-in, was the so-called "smoking gun" proving Nixon had obstructed justice (Lukas 1976, 456). *U.S. v. Nixon* was a devastating blow to the president's position in Congress as well as in the courts. Impeachment resolutions charged Nixon with assisting in the Watergate cover-up, abusing his powers, and failing to honor committee subpoenas for the White House tapes.

After reading the Supreme Court's opinion, Nixon asked if there was "any air" in the decision—any way around it. St. Clair answered "no." The more frantically the president sought an avenue of escape, the more emphatic St. Clair became, warning that the country would not understand an outright defiance of the Supreme Court and that such defiance would ensure his impeachment by the House and his conviction by the Senate (Lukas 1976, 546). The timetable for the president's resignation was a series of decisions by St. Clair, Haig, and Buzhardt, driven to large degree by their own growing jeopardy. The June 23 tape showed Nixon's awareness of the cover-up five days after the Watergate burglary. The June 23 tape completely contradicted the version of events St. Clair had given the House impeachment inquiry. St. Clair, and Buzhardt and Garment before him, had continually asserted that Nixon first learned of the Watergate cover-up in March 1973. After release of the June 23, 1972 tape, the contention of

Nixon's ignorance was no longer available, and they had no further room to maneuver (Doyle 1977, 343).

St. Clair was never informed as to the true extent of the president's involvement in the Watergate cover-up, and when the June 23 transcript was released, he threatened to resign unless Nixon made it clear that St. Clair had not known about this evidence. Both St. Clair and Haig insisted that the statement be unequivocally clear that they had known nothing about the June 23 conversations (Lukas 1976, 551). Nixon complied, and in his August 5 statement said, "I did not inform my staff or my counsel of it, or those arguing my case. . . . This was a serious omission for which I take full responsibility ("Nixon Friends," 1974, 2115). St. Clair would later say that Nixon's resignation was in the public interest. Until release of the June 23 tape, St. Clair thought Nixon would not be impeached. He speculated that had he prevailed before the Court on the absolute privilege point, no impeachment resolution against Nixon would have emerged from the House (Micciche, 1984).

St. Clair was regarded as a brilliant courtroom tactician and a methodical trial advocate. Associates of St. Clair said that although he was not flamboyant in the courtroom, he had remarkable recall of minutiae. He was a scrupulously thorough pretrial planner who routinely compiled elaborate trial books before the start of a case and was rarely surprised by courtroom developments. St. Clair was seen as "all case and no cause" by some. It was intended as a pejorative description, but it came as flattery to those who preferred a lawyer committed to the work at hand rather than to philosophy.

—Peter G. Renstrom

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STEUER, MAX

(1871–1940)

The truth about Max Steuer, garnered from very sparse sources—and sources, it must be said, that are so fawning in their assessment of his career as to be of limited value—leaves the author of this essay with the notion that Steuer is to be included in a list of "lawyer greats" because of one very famous (and very successful) cross-examination of a witness in the criminal prosecutions stemming from the Triangle Shirtwaist Company fire. This is certainly not to say that Steuer was not a highly publicized and well-respected attorney practicing in New York during the first three decades of the twentieth century, during which he is reputed to have made one million dollars per year at the height of his career ("Steuer, Max David" 1940).

Max Steuer

Joseph M. Schenck, film mogul (left), in federal court with his lawyer, Max Steuer, to plead not guilty in the government's income tax fraud case, 12 June 1940. (UPI/Corbis-Bettmann)

It is also not to say that Steuer was not a lot of things to a lot of people: son, immigrant, child entrepreneur on the Lower East Side, college student, law student, postal worker, Tammany Hall politico, civil lawyer, criminal lawyer, special prosecutor, and much more (Boyer 1932, 13–15; Steuer 1950, 7–10). By all accounts, whatever Steuer attempted, he generally successfully attained, and if he was not entirely popular (he was the subject of unsuccessful disbarment proceedings initiated by one of his many enemies), he was certainly respected and praised.

His inclusion in this book of great attorneys seems to suggest that Steuer handled many notorious cases or at least exemplified *in extremis* the traits and skills that attorneys and lay people have long associated with attorneys. Diligent work, copious preparation, industrious investigation, and an ability to relate to all types of people are characteristics of perhaps all professions but most particularly the legal profession. Although Max Steuer seemed possessed of an adequate level of these qualities, his true skills seemed to be his strong personal will, his intuition, and his sense of showmanship (Boyer 1932, 25–27).

Certainly his reputation as a great trial strategist and teacher would not be based on his stated and often cited list of things that attorneys should never do. For example, his admonitions that attorneys should "not be late for court," "not make a long opening speech," "not use big words in front of a jury" and "not eat a big meal during a court recess" (Boyer 1932, 41) are sound and make pretty decent common sense, but they do not hint at the musings of a great scholar or intellect.

On the other hand, his intuition about how the public perceived the bar, even in the early part of the twentieth century, was significant and perhaps radical. Included in the same "do not" list were some interesting nuggets over which today's trial lawyer should pause. For example, his notion that attorneys should not guard their case file or papers, but rather let them "wander" all over counsel table (Boyer 1932, 40), is at first a peculiar thought. This notion, however, based on the idea that jurors should think that the attorney has nothing to hide, is clever and useful and has practical application.

Some of Steuer's notions about how to try a case fly directly in the face of every first-year law school's trial advocacy course. Steuer preached to attorneys to refrain from making notes of the witness's testimony and never to take notes to cross-examine a witness (Boyer 1932, 40–41). This advice is contrary to much of the training most young attorneys have been exposed to for the last twenty-five years. The idea that a lawyer would attempt to cross-examine a witness without notes is heresy to most. An attorney would always want to have a clear idea of the points and topics that are critical in a particular witness's cross-examination, and most modest craniums when tested in the heat of battle need the security of notes or an outline to do just that.

Even his most famous cross-examination, discussed in greater detail below, violates two of the cardinal rules of cross-examination—do not allow a witness to use cross-examination simply to give direct testimony to the jury once again, and do not ask open-ended questions ("Tell us what happened, Mr. Witness" type questions), which allow the witness to narrate and delve into many areas that otherwise would and should be limited.

Although sometimes trite and countertraditional, Steuer's methods and rules of practice worked for him. Perhaps it took a figure like Steuer to make clear a point that is often ignored during the lengthy conditioning and apprenticeships that most students endure on the way to becoming attorneys. That is, Steuer showed that success is in large measure an unquantifiable commodity, coming as much from timing, intuition, guesswork, fear, boldness, and maybe, as much as anything, luck. Max Steuer in many respects defied convention and—through his will, his risk taking, and his youthful immigrant spirit that continued throughout his life—forged a successful career that often bordered on celebrity.

Steuer was born in Homino, Austria (later Czechoslovakia), to Aaron and Dinah (Goodman) Steuer in 1871 (some sources say 1870), and the family immigrated to the United States when he was six. As was the custom for most Jewish immigrants, the Steuer family then settled in the Lower East Side of Manhattan. Steuer's youth was devoted to school, where his early efforts showed no particular forecasting of greatness, and to his entrepreneurial endeavors. He was a paperboy who took many of his earnings and invested in the purchase of taxless matches, which he then sold to restaurants and coffee shops along Second Avenue. He attended City College and worked at the post office (Steuer 1950, 4–8).

It was at Columbia Law School that Steuer began to excel academically. By all accounts, he was an enthusiastic student who loved the "case method" of study, loved the research, and actually won cash prizes for his excellence in his academic work (Steuer 1950, 9).

Despite his noteworthy law school career, Steuer was rejected for all clerkships for which he applied and ended up—with little money and no business background—taking a huge risk and opening his own office on the East Side. For the next twenty years, Steuer became not only the trial counsel for the East Side but a well-known figure throughout the city. He got there primarily through bold perseverance. It is legend that he did not reject any client who walked through his door; he handled civil cases, criminal matters, and cases before administrative and review boards. No case was too small or too grand for him (Steuer 1950, 13–14).

One of his early cases, which typified his involvement in local community matters that did not generate huge fees, was a matter concerning a funeral procession for a beloved local rabbi. It seemed that a police inspector had ordered the funeral procession dispersed before its conclusion. When the mourners resisted and pleaded to be allowed to continue, they were beaten and arrested. Some of those arrested filed charges against the officer. Those charges were heard before the police commissioners, a majority of whom were Tammany Hall members well versed in the politics of violence.

The officer retained two of New York's finest members of the bar, and Steuer pursued the case on behalf of the petitioners (Steuer 1950, 14–15).

Steuer's successful prosecution of the officer is a testament not only to his skill at the time, but to his enthusiasm for cases that other attorneys avoided. It does appear, however, that his decision to tackle the police and Tammany Hall in that case stemmed as much from his efforts to establish his name and reputation as from any political convictions or deeply held moral beliefs about power. Steuer was just as easily at home in his career taking cases representing the other side—men and women with money and power—and in fact he became lawyer to many of Tammany Hall's power elite and was considered as something of an in-house counsel for that political machine for many years (Boyer 1932, 93).

Steuer represented throughout his lengthy career as many corrupt judges as poor neighbors from the East Side. For every case in which he successfully defended an indigent person charged with a crime, he represented someone like Queens borough president Maurice E. Connally, accused of defrauding the city of millions of dollars in a sewer scandal. It appears quite clearly that what drove Max Steuer was the thrill of the courtroom drama, the power that being a skilled and much-demanded attorney gave him, and the desire to drift as far from his poverty-laden immigrant childhood as he was able.

Steuer's success in the courtroom likely did not stem from his overwhelming physical presence. He was a small man (five feet six inches, 160 pounds), his voice was low and conversational, his manner was informal and polite, and he spoke using simple and old-fashioned terms (Steuer 1950, 21–22). In Steuer's jargon, for example, a woman had limbs, not legs. What Steuer did possess was a memory that was photographic, a trap for facts and figures and nuggets of testimony. His ability to remember small details from a witness's testimony helped him assemble effective cross-examinations and summations and impress the judges and jurors who witnessed such skill (Boyer 1932, 32).

In one published account, the author points to a famous instance where Steuer's memory served to end a rancorous exchange in a trial and put everyone in his place. During a summation in a criminal case, the district attorney objected to a comment about some testimony that Steuer was making. The attorney asserted that Steuer was going outside the record and telling the jury something that was not true. In defending his position and his recollection of the events, Steuer not only proceeded to advise the court of the exact context of his rendered statement, but advised the court reporter and all present of the page number of the transcript that contained the disputed testimony (Steuer 1950, 23).

Tocqueville's View of American Lawyers: A Natural Aristocracy?

Alexis de Tocqueville, who visited the United States in the 1830s to study the prison system, penned one of the most perceptive books ever written about the United States. In the course of his visit, Tocqueville authored *Democracy in America* (1838), which is still being studied for its insights into U.S. institutions and mores.

Tocqueville, himself a lawyer, thought that American lawyers had an especially important role in moderating "the tyranny of the majority" that he thought to be endemic to American democracy. Tocqueville noted that the study of law led to "habits of order, something of a taste for formalities, and an instinctive love for a regular concatenation of ideas" that were "strongly opposed to the revolutionary spirit and to the ill-considered passions of democracy" (Tocqueville 1969, 264).

Tocqueville noted how British and U.S. laws both emphasized adherence to precedents and how lawyers in these nations accordingly combined "a taste and respect for what is old with a liking for regularity and legality" (Tocqueville 1969, 267). He noted that, "If you ask me where the American aristocracy is found, I have no hesitation in answering that it is not among the rich, who have no common link uniting them. It is at the bar or the bench that the American aristocracy is found" (Tocqueville 1969, 268).

Tocqueville would not have been surprised at how many U.S. statesmen have been drawn from the ranks of lawyers. He noted that as "the only enlightened class not distrusted by the people," lawyers were "naturally called on to fill most public functions." As he noted, "The legislatures are full of them, and they head administrations; in this way they greatly influence both the shaping of the law and its execution" (Tocqueville 1969, 269). Alluding to judicial review, the power of U.S. judges to overrule legislation judged to be unconstitutional, Tocqueville noted that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one," and that, as a consequence, "the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions" (Tocqueville 1969, 270).

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Max Steuer's most famous courtroom moment came in the Triangle Shirtwaist Company criminal case, which originated when the district attorney charged the officers of the company with criminal negligence in their role in one of the most horrendous industrial accidents in U.S. history. On March, 25, 1911, a ten-story loft building on the edge of Greenwich Village owned by the Triangle Shirtwaist Company caught fire and erupted in mo-

ments in a conflagration that claimed the lives of most of the five hundred women and girls employed there. The public reaction to the accident was loud and clear: Someone had to pay for the deaths of the employees. The question of culpability, however, was not that clear. The cause of the fire itself was never clearly ascertained. The owners of the building were found to have been in compliance with existing codes (Steuer 1950, 83–110).

It fell to the district attorney's office to pursue an investigation that led to a theory of criminal responsibility on the part of the company's officers. The theory on which any hope of a conviction lay was that the Triangle Shirtwaist Company had not ensured that the exit doors from the factory were unlocked and clear in the event of an emergency. Once this was established, coupled with a showing that the locked doors contributed to the deaths of the employees, the criminal responsibility was complete—actually for purposes of criminal culpability, all that needed to be shown was that the locked door was the legal cause of one death.

The prosecutor saved for the dramatic conclusion of the trial a witness named Kate Alterman, an employee of the company who took the stand in an effort to prove that as she witnessed the confusion and chaos of the disaster, she observed the escape attempts of a girl named Margaret Schwartz. Alterman would establish that Schwartz died in flames as she was putting her whole strength into an effort to pull open one of the unyielding escape doors. Steuer's successful defense of the corporate executives rested on his ability to discredit Alterman's dramatic testimony concerning the locked door.

Kate Alterman testified in great detail about what she witnessed as the fire broke out in the factory. The testimony was lengthy and very specific and included phrases like "Bernstein (another of those trying to escape) was throwing around like a wildcat" and "the door was a red curtain of fire" (Steuer 1950, 90). Steuer's famous cross-examination began with a series of seemingly innocuous questions designed to allow the jury to know that this witness had met on numerous occasions with the district attorney to go over her testimony.

Then, Steuer asked the question that all first-year law students are trained not to ask: "Now, I want you to tell me your story over again just as you told it before." The witness then told the story again in the same detail. This time, however, the witness left out the specific phrases "throwing around like a wildcat" and "red curtain of fire." Steuer's next question (statement) was "It looked like a wall of flame?" Alterman's answer: "like a red curtain." Steuer's next question (revealing his strategy): "Now there was something in that that you left out, I think, Miss Alterman. When Bernstein was jumping around, do you remember what that was like? Like a wildcat, wasn't it?" Her answer: "Like a wildcat" (Steuer 1950, 96–99).

Steuer at other points during the cross-examination came back to his strategy and had the witness narrate again and again what had transpired on the day of the fire. On both those occasions, the witness related in close detail her prior testimony, including the phrasing that Steuer found unusual (Steuer 1950, 99–103).

The acquittal of the defendants was suggested by court critics and spectators then, and is regarded today, as the obvious result of Steuer's magic in the courtroom, the only logical verdict the jury could return based on the obviously rehearsed testimony of the chief witness, Alterman. Steuer's "magical" cross-examination, however, deserves critical investigation. His prelude to the essence of the questioning succeeded in establishing that the witness had communicated with, indeed, had practiced her testimony with the assistance of, the district attorney. Although this might be worth a passing comment in a trial as part of an overall defense strategy, its significance is overrated. Most jurors would not only imagine but assume that witnesses from both sides of a dispute will have prepared their testimony with their attorneys—especially in an important criminal case with as much at stake as the Triangle fire. It would be incompetent and perhaps unethical for attorneys to parade an unprepared witness into court, and their attempt to avoid this would certainly not shock anyone.

In addition, the fact that a witness would give virtually the identical version of her recollection time after time speaks just as forcefully to the witness's veracity as it does any other suggestion. A witness who has lived with a traumatic experience and has gone over it with his or her advocate would certainly be inclined to relate the facts in much the same way. At least the material elements of the version would be substantially similar. Maybe the characterizations of those elements would vary, and that is exactly what transpired with Alterman. The fact that she omitted or, more properly, recharacterized a description of an event as a "wall of flame" and not a "curtain of fire" is not a shocking example of a witness who is manufacturing her testimony any more than it is of a witness who in good faith under much pressure is attempting to recreate a traumatic event in the distant past.

Those who cite this famous cross-examination seem to focus on Steuer's prized intuition at knowing just exactly on whom of the several possible "major" witnesses to employ this strategy. Perhaps Steuer's notion that Alterman, as a poor, lower-class laborer with a meager vocabulary, could not devise the term "red curtain of flame" on her own rang true with the jury, and it was Steuer's cultivation of a cloak of trust with that body that perhaps lay at the heart of his genius.

There were many other legal battles that Steuer fought, many of which contributed to his aura as the epitome of the American success story, the

rags-to-riches journey from steerage to the high-priced and high-powered New York litigator. Many, such as the successful defense of Senator Frank Gardner on bribery charges, established Steuer as the man to see if one was in major trouble (Boyer 1932, 44). Some of the battles found Steuer himself as the subject of the litigation, as in his messy disbarment proceedings over allegations (ultimately unproven) that he had counseled a witness in a civil case to commit perjury.

But it was Steuer's successful defense in the Triangle Shirtwaist case that has forever cemented his reputation as a great trial attorney. If his methods were unorthodox and his motivations often unclear, it is impossible to discount his results. He was fearless in his choice of cases and opponents and seemingly immune to public and political pressure. It was perhaps his great will to succeed that set him apart from his colleagues at the bar in the early twentieth century.

—William Shulman

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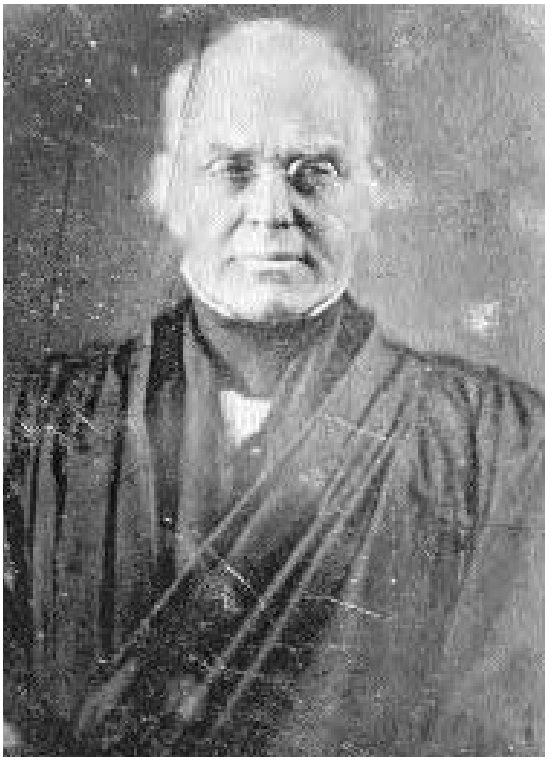
STORY, JOSEPH

(1779–1845)

When evaluating the relatively short history of American jurisprudence, the imprimatur left by Joseph Story stands in stark contrast to the contributions of other prominent lawyers. Although he is best known for his brilliant tenure as a justice on the U.S. Supreme Court, he was also a prolific legal scholar, beloved law professor, reluctant politician, patriotic statesman, and, for ten years, a remarkable lawyer.



Joseph Story
Library of Congress

Joseph D. Story was born in the small fishing village of Marblehead, Massachusetts, on September 18, 1779. His father, Elisha Story, was a prominent Boston physician who served with George Washington in the Campaign of 1777, participated in the Boston Tea Party, and was one of the Sons of Liberty. Elisha Story practiced medicine in Boston until 1770, when he decided to move his family to Marblehead. His first wife, Ruth Ruddock Story, died in 1777 while giving birth to their eighth child, who, tragically, died as well. Elisha Story was now a widower with seven children. In the fall of 1778, he married Mehitable Pedrick, the nineteen-year-old daughter of a local "opulent merchant" (Story 1971, 1:2). Joseph was the first of eleven children produced by this marriage, and by all accounts was his parents' favorite.

Marblehead's public education was "primitive and sporadic" (Burns 1839, 11). Joseph Story, however, was fortunate enough to attend the town's only

established academy. He received a solid education from Marblehead Academy, but his academic success was largely the result of his own efforts outside of the classroom. During Story's final year at the academy, a heated exchange with another student led to his early withdrawal from the school. This placed the young scholar in quite a conundrum. The academy was the only school in town with a college preparatory curriculum, and he wanted to apply for early admission to Harvard. Fortunately, the town's principal schoolmaster agreed to oversee his studies for the remainder of the year, and he began diligently studying to pass the college's entrance examination.

In the fall of 1794, Story traveled to Cambridge, confident that he would gain early admittance to Harvard. His confidence, however, was short-lived when the president of the school informed him that before he could be enrolled he would have to be examined "not merely in the previous preparatory studies, but in all studies which the freshman class had been pursuing for the last six months" (Story 1971, 1:15). With only six weeks to prepare, he returned to Marblehead, depressed but determined to meet the challenge before him. Fueled by unbridled ambition and an enormous amount of self-discipline, he was able to cover the necessary materials in three weeks. He spent the remaining time mastering the subjects and ended up passing the entrance examination with great ease.

Story joined the freshman class at Harvard in January 1795. Compared to Marblehead, Cambridge was "a delightful new world" (Dunne 1970, 34) that brought him into contact with "a large circle of young men engaged in literary pursuits" who were "warmed and cheered by the hopes of future eminence" (Story 1971, 1:43–44). His classmates were initially skeptical of the "newcomer" and made fun of him on several occasions. In a few short weeks, however, they came to admire Story for his "good nature," intelligence, and self-deprecating humor. Story graduated from Harvard in 1798 with "second honors" and thereafter immediately obtained a legal apprenticeship with Samuel Sewell. Sewell was a well-respected Marblehead attorney, a prominent Federalist, and a member of Congress. Story, like his father, was a staunch Republican, but he prudently decided to avoid politics during his time as an apprentice, devoting himself entirely to the study of law.

Story's studies began with an examination of the "theory and general doctrines" of English common law. His first exposure to the law was the elegant prose of *Blackstone's Commentaries on the Laws of England,* which he enjoyed immensely. His next assignment, *Coke upon Littleton,* proved to be much more difficult, and he shed "bitter tears" attempting to understand the intricacies of real property law. He eventually mastered *Coke* and remarked that thereafter he "breathed a purer air" (Story 1971, 1:73–74). Story's victory over *Coke* marked the turning point of his legal education. He now had a "new power," and the remaining treatises and case reporters

he studied seemed elementary by comparison. The greatest challenge he now faced was determining which part of the English common law was still authoritative in U.S. courts. Legal systems in the United States were just being developed, and there were no widely available treatises or case reporters on U.S. law. To assist him in this endeavor, he compiled a formbook to keep track of key distinctions between English precedent and leading U.S. cases.

Story's study habits were fueled by unquenchable ambition, and he routinely read for fourteen hours a day "to the point of nervous exhaustion" (Story 1971, 1:73). The theoretical, however, eventually gave way to the practical, and he was able to gain a great deal of experience as an apprentice. After a year of study, he was able to draft pleadings, enter actions, and learn the business side of a law practice. The citizens of Marblehead held the young apprentice in such high esteem that in February 1800 he was chosen to deliver the town's eulogy of George Washington. After a year of study, his mentor, Sewell, was appointed to the Massachusetts Supreme Court, and Story moved to Salem to finish his apprenticeship with Samuel Putnam.

At the outset, Story's law career in Salem looked bleak. A self-professed Jeffersonian Republican, he was seeking to practice law in a state that had only four or five lawyers "who *dared* avow themselves republican" (Burns 1839, 14). The Essex County bar was one of the most prestigious in the country at the time he sought admittance, and it had very strict requirements. To be admitted, an attorney needed a college education, a three-year legal apprenticeship, and "the consent and recommendation of the bar." The Essex County bar was completely Federalist, and its members sought to maintain this unanimity by preventing Story from joining their ranks. This effort, however, proved to be unsuccessful, and he was admitted in 1801.

Joseph Story was an exceptional lawyer at both the trial and appellate levels. In a relatively short period of time he became a prominent member of the bar and "was engaged in nearly all the cases of importance" (Story 1971, 1:116). In 1804, his stature among the citizens of Salem had grown as well, and he was asked to deliver "the annual oration on the 4th of July." Later that year, he married Mary Lynde Oliver, "a refined and accomplished woman," and the daughter of a local minister (Story 1971, 1:112). By 1805, Story's law practice was flourishing. His first significant book of law, *A Selection of Pleadings in Civil Actions*, was published that same year and was "received favorably by the profession." The publication of this treatise only enhanced Story's growing reputation as a scholarly lawyer. In 1806, Story had become so popular within the bar that he was asked to help oversee the admission of its new members. The tragic death of his wife on June 22,

1805, and of his father two months later, however, overshadowed these accomplishments. Story sought refuge from "painful thoughts by severe and exclusive labor in his profession" (Story 1971, 1:116). His personal life, however, "reawakened" in 1808 when he married Sarah Waldo Wetmore, the daughter of William Wetmore, a judge with the court of common pleas in Boston. They were married thirty-seven years and had six children. Sadly, four of the their children died early in life, and only Mary and William grew to see adulthood.

Story approached his clients' causes with characteristic zeal and energy, and he was considered "sagacious in the management" of the cases entrusted to him (Colton 1846, 70). His client base represented a true cross-section of the community. From carpenters and painters to some of the most influential families and businesses in the community, Story's practice was diverse and wide-ranging. Most of his cases involved debtor-creditor relations, but he also had a steady stream of probate business, as well as "chamber" and appellate work. One of his more interesting cases was a defamation action in which he successfully defended a client accused of maligning the reputation of another by associating him with Aaron Burr and Benedict Arnold.

Story was quick on his feet at trial, "ready in attack or defense," and he was noted to have "great eloquence of expression." Juries responded to his courtroom disposition, describing him as persuasive, ingenious, and "earnest and spirited" (Newmyer 1985, 64). Story's case preparation was "cautious and scrupulous" (Story 1971, 1:116). Prior to each of his court appearances, he meticulously examined the underlying facts and applicable law "never relying on first views and general knowledge" (Story 1971, 1:116). In his first appearance before the Supreme Judicial Court of Massachusetts, Story dazzled the court with citations from both English and Continental law to demonstrate that a certain individual was an alien and therefore not permitted to vote in a town election. Judges at both the state and federal level were amazed at the depth of Story's understanding of the law and by his brilliant oratorical abilities.

Story's ability as a lawyer is perhaps best illustrated by examining the case of *Rust v. Low,* 6 Mass. 90 (1809). *Rust v. Low* was a replevin action in which the plaintiff sought return of cattle that had "strayed" from his land onto the defendant's. The cattle caused damage to the defendant's property and were "being held hostage" by him in lieu of monetary damages. The salient question before the court was "whether, in the absence of any covenant or prescription, the tenant of a close [an enclosed piece of land] is bound to fence against the cattle of strangers, or only against such cattle as are rightfully on the adjoining land" (Story 1971, 1:117). The plaintiff was

represented by William Prescott, a lifelong friend of Story's and one of the most respected lawyers of the period. Story, along with co-counsel Nathan Dane, represented the defendant and faced a seemingly uphill battle. Sir Matthew Hale, the lord chief justice of the King's Bench in England from 1671 to 1676, had written a "note" on the issue, which opined that in such a situation the plaintiff was entitled to the return of the cattle. This established precedent gave Story's adversary great confidence, and Mr. Prescott informed him, in no uncertain terms, "we shall beat you, Lord Hale is against you" (Story 1971, 1:117). Story was well aware of the note, but he thought that Lord Hale misunderstood the law. In preparation for the appeal, Story translated "nearly thirty cases from Year Books" to support his position. At the outset of his argument, Story informed the court that "I think I shall satisfy the court that Lord Hale is mistaken." Theophilus Parsons, chief justice of the Massachusetts Supreme Court, was taken aback by such a bold assertion, "What, Brother Story, you undertake a difficult task." Story, undeterred by the justice's obvious lack of confidence in his position, calmly responded, "Nevertheless, I hope to satisfy your Honor, that he [Lord Hale] has misapprehended the authorities on this point" (Story 1971, 1:117). Story's presentation of the law was so forceful that at its conclusion, William Prescott, while still advocating the note on stare decisis grounds, conceded that Hale's interpretation of the law was indeed erroneous. Before announcing his opinion, Justice Parsons contacted Story and requested that he once again explain his refutation of Lord Hale's note. Some time had passed, and Parsons apparently could not glean from his notes the nature or basis for Lord Hale's error. Story obtained the books that he had used to fashion his argument, and dutifully reargued the point in chambers, with Parsons taking copious notes all the while. Shortly thereafter, the court issued a judgment in favor of the defendant. Justice Parsons's opinion prominently noted Lord Hale's error and tracked all of the authorities that Story had provided. Notwithstanding the magnitude of the decision, and the young lawyer's brilliant performance, Parsons failed to give Story even the slightest amount of credit. A "manuscript note," in Story's handwriting, is included in his copy of the *Massachusetts Reports* volume containing *Rust v. Low,* and it sarcastically notes, "I well remember that this mistake of Lord Hale was first noticed and explained by Story, of counsel for the defendant, in the original argument, and that the authorities were cited and commented on by him in illustration. It is not a little remarkable that not one word is suggested either by the reporter or the Court on this fact. From aught that appears, the Court was the sole discoverer of all this nice learning. Is this right?" (Story 1971, 1:118). Because of cases like *Rust v. Low,* Story's reputation as a lawyer reached well beyond the boundaries of his

home state. As a result, he was able to try several cases in nearby states, holding his own against some of the finest attorneys of his time, including Jeremiah Mason.

The highlight of Story's legal career was undoubtedly his participation in *Fletcher v. Peck* 1810). *Fletcher v. Peck* was the first case to appear before the Supreme Court involving the contract clause of the U.S. Constitution. The question before the Court was the constitutionality of a Georgia statute that repealed a grant from the state authorizing the sale of tracts of property in the "Yazoo area" (now known as Mississippi and Alabama) to land speculators. The circumstances surrounding the issuance of the grant certainly seemed to justify its repeal. Virtually every member of the Georgia legislature was bribed to vote for the grant, and as a result the state sold thirty-five million acres of land for the astonishingly low price of five hundred thousand dollars. The citizens of Georgia were outraged, and in 1796 they elected an entirely new legislature that, in turn, immediately repealed, and ceremoniously burned, the "corrupt" grant. In the meantime, however, several tracts of land were subsequently sold to third parties who, allegedly, had no knowledge of the scheme. In May 1803, Robert Fletcher brought suit against John Peck, in the federal circuit court in Boston, seeking rescision of the sale of a tract of the disputed land.

Story's first involvement with this case came as a result of his lobbying efforts as a federal congressman on behalf of the New England Mississippi Land Company. The shareholders of this company purchased several tracts of the Yazoo land and were seeking to have Congress enact a "compensation law" to indemnify them for losses they incurred as a result of the repeal. The Southern members of Congress, however, resoundingly quashed these efforts. Thereafter, Story succeeded John Quincy Adams as Robert Goodloe Harper's co-counsel in *Fletcher v. Peck*.

On February 15, 1810, Story appeared before the U.S. Supreme Court and eloquently argued that Georgia's repealing statute violated the contracts clause of the U.S. Constitution. A prominent Story biographer, R. Kent Newmyer, believes that Story's appearance before the Court may have been a contributing factor in his subsequent elevation to its ranks (Newmyer 1985, 66). On March 16, 1810, the Court announced its opinion holding that the original grant was a contract amounting to "a extinguishment of the right of the grantor [Georgia], and implies a contract not to reassert that right." The broader implication of the decision was the Court's use of the contracts clause as "an instrument of judicial nationalization"(Dunne 1970, 75). The direct effect this case had on Story's jurisprudential philosophy is uncertain, but there is no doubt that at some point he and Jefferson parted ways, and Story remained a Republican in name only.

Story's reputation as a lawyer was greatly enhanced by his legal scholarship and public service. In addition to his authorship of *A Selection of Pleadings in Civil Actions,* Story also penned or edited the following books as a practicing lawyer: *American Precedents of Declarations* (1802), Joseph Chitty's *A Practical Treatise on Bills and Exchange* (1809), Charles Abbott's *A Treatise of the Law Relative to Merchant Ships* (1811), and Edward Lawe's *A Practical Treatise on Pleading in Assumpit* (1811).

Shortly after he began practicing, President Jefferson offered to appoint him as a bankruptcy commissioner (1802) or a naval officer (1803), but Story declined to accept either post "without hesitation" and expressed his "determination to devote my life to the law" (Story 1971, 1:102–104). While eschewing federal appointments, he was willing to sit on local committees charged with revising city ordinances and overseeing public education. In 1805, at age twenty-six, he was elected to represent Salem in the Massachusetts legislature. He also agreed to serve as Essex County's attorney in 1807. Story served in the state legislature until the fall of 1808, when he was elected to represent "Essex South" in Congress for the remaining year of Jacob Crowninshield's term. He returned to Salem after only one session, and, after declining to run for reelection, was immediately reelected to the state legislature. In January 1811, he became the speaker of the house and served in that capacity until his appointment to the Supreme Court later that year.

On November 18, 1811, the U.S. Senate confirmed President James Madison's appointment of Story to the Supreme Court. Story was only thirty-two at the time of his senate confirmation, and he is the youngest person ever elevated to the Court. His appointment had more to do with luck than ability, although Story's ability was considerable. Madison had little choice but to select a lawyer from New England to fill the vacancy. During this period, Supreme Court justices, in addition to their traditional duties, spent most of their time traveling the "circuits" handling both original actions and intermediate appeals. The justice filling this seat would be charged with handling the First Circuit, a territory covering the states of Massachusetts, New Hampshire, Rhode Island, and Maine. It was also necessary for Madison to maintain the sectional balance of the Court. It was therefore imperative that the appointee be from one of these states. Madison's choices were further limited by political considerations. Federalists dominated the First Circuit, and there were very few Republican lawyers of any renown from whom to choose. Story was selected only after two of Madison's choices declined to serve and the Senate overwhelmingly rejected another. Nonetheless, it was Story's reputation as a lawyer that placed him in a position to be appointed to the Supreme Court at such a young age.

Story spent thirty-three years as an associate justice, and it was during this time that he left an indelible impression on the fabric of the American republic. As "the thinking man's John Marshall" (McClellan 1971, vii), Story's legal scholarship, in both his opinions and his treatises, provided the foundation for the nation's constitutional jurisprudence. He authored more than two hundred opinions as a justice of the Supreme Court, and from 1832 to 1845, Story wrote nine exhaustive "commentaries" on the law. His *Commentaries on the Constitution of the United States* is still considered by many to be the greatest exposition on the history and text of the federal Constitution ever written.

For all of his accomplishments, Joseph Story was most proud of his title as the Dane Professor of Law at Harvard University, a distinction bestowed on him in 1829. He simply wished to be remembered as a "teacher of jurisprudence." Story's jurisprudential vision, however, was formulated during his thirteen years as an apprentice and practicing attorney. His experience as a lawyer was inextricably connected to his performance as a justice and legal scholar. It was as an attorney that he began his love affair with the law, and as a result the landscape of U.S. law was forever changed. Joseph Story died on September 10, 1845; he is buried in the Mount Auburn Cemetery in Cambridge, Massachusetts. The Sunday after his death, the Reverend R. C. Waterston offered a eulogy on the life of Joseph Story, stating, "Within a few days our country has lost one of its greatest and best men,—one who was universally respected and beloved" (Waterston 1845, 1). The United States had also lost one of its greatest lawyers, but there is little doubt that Story's "spirit continue[s] to inspire a love for the science of law" (Sumner 1846, 35).

—Stephen Louis A. Dillard

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TIGAR, MICHAEL E.

(1941–)

MICHAEL E. TIGAR

Michael Tigar, attorney for Terry Nichols, with associates behind him, responds to a question during a news conference in Denver on Tuesday, 9 April 1996, during a recess at a hearing for Oklahoma City bombing suspects Timothy McVeigh and Terry Nichols. (AP Photo/David Longstreath)

MICHAEL EDWARD TIGAR IS a law professor and defense attorney noted for representing controversial defendants. Tigar was born on January 18, 1941, in Glendale, California, the son of Charles and Elizabeth Tigar. Charles Tigar, who died when his son was fifteen, was an executive secretary of Local 727 of the Machinists Union at Lockheed.

Michael Tigar attended the University of California at Berkeley, graduating with a B.A. degree in 1962. While an undergraduate at Berkeley, he was an early leader in the 1960s protest movements. He opposed the House Un-American Activities Committee, attended a leftist youth conference in Helsinki, and demonstrated against segregation. Tigar continued his education at Boalt Hall, as the law school at the University of California, Berkeley, is known. Tigar served as editor-in-chief of the law review. In 1966, he graduated first in his law school class.

Soon after receiving his law degree, Tigar moved east with his wife and two children to Washington, D.C., to accept a clerkship with Supreme Court Justice William J. Brennan. Justice Brennan, under pressure from several other justices and Federal Bureau of Investigation (FBI) director J. Edgar Hoover, asked Tigar's permission to release a list of the young lawyer's

political activities. Tigar refused to permit release of the list, so Brennan fired him on the day the new clerk reported for work. Shortly before his death, Justice Brennan admitted that he often had second thoughts about firing Tigar.

Instead of working at the U.S. Supreme Court, the young lawyer landed a position at Williams & Connolly, the Washington-based law firm headed by Edward Bennett Williams. Admitted to the District of Columbia bar in 1967, Tigar was a member of the legal team headed by Williams defending Lyndon Johnson aide Bobby Baker. Despite a spirited defense, Baker was convicted of tax fraud. Tigar remained an associate at Williams & Connolly until 1969, when he returned to California to teach.

His tenure as an acting professor of law at the University of California at Los Angeles (UCLA) was marked by controversy. He was jailed briefly during the 1969 *Chicago Seven* trial. Tigar had attended pretrial hearings to aid in the defense, but he did not wish to participate in a long trial. In an attempt to force their presence, U.S. district judge Julius J. Hoffman issued warrants for the arrests of Tigar and three other defense attorneys. Judge Hoffman wanted the lawyers to step in as primary defense counsel after another attorney became ill. Tigar and a second attorney were jailed for contempt. The lawyers were released after Judge Hoffman, under pressure from civil libertarians, relented.

In 1969, Tigar argued his first case before the U.S. Supreme Court, defending a war protester whose name had been moved up the induction list by the Selective Service because of his antiwar protest activities. The Supreme Court found the Selective Service's practice to be unconstitutional in *Gutknecht v. United States*, 396 U.S. 295 (1970). While he was an associate at Williams & Connolly, Tigar founded a publication called the *Selective Service Law Reporter*. The journal was a "repository of legal information for draftees and their counselors and lawyers" (Toobin 1996, 51).

Tigar left UCLA and moved to France to practice law in 1972. While in France, Tigar researched and wrote *Law and the Rise of Capitalism*, which he published in 1977. The book examines the role of lawyers in developing the European economy from a system of feudalism to capitalism. Tigar argued that lawyers played a central role in the social changes that resulted in the economic transformation. The book was criticized for its heavy reliance on Marxist thought.

Tigar returned to the United States and Williams & Connolly in 1974. Williams asked Tigar to come back to the firm to assist in John Connally's defense. The former Texas governor and secretary of the treasury was alleged to have accepted ten thousand dollars from milk producers who wanted Connally to speak with President Nixon about increasing milk price supports. Williams, with Tigar's assistance, won an acquittal for Con-

nally. The Texan rewarded Tigar with four pregnant purebred heifers. According to one account, the lawyer gave one of the offspring to a Cuban agricultural cooperative (Toobin 1996, 51).

Another case handled by Michael Tigar in the mid-1970s brought him back to his student radical roots. Cameron David Bishop was a leader in the Students for a Democratic Society who was charged with dynamiting four high-voltage transmission towers in Colorado in 1969. The goal of sabotage was to disrupt the military-industrial complex aiding the war effort in Vietnam. After evading capture for a number of years, Bishop was arrested and brought to Denver for trial in 1975. Bishop was convicted of three of the four charges, but he was saved from jail by Tigar's legal ingenuity. On appeal to the U.S. Court of Appeals for the Tenth Circuit, Tigar argued that Bishop's original indictment was invalid. He had been charged with committing sabotage during a time of "national emergency," but the only national emergency found to exist in 1969 was the Korean conflict. The appeals court agreed, and Bishop's conviction was reversed (*United States v. Bishop,* 555 F.2d 771 [1977]).

Tigar left Williams & Connolly in 1977 to form his own practice in Washington, D.C. His partner was another Washington attorney, Sam Buffone. All lawyers working for the firm were required to devote a third of their time to pro bono work. One of the significant cases handled by Buffone and Tigar involved the politics of the South American country of Chile. In September 1976, Orlando Letelier, the Chilean ambassador to the United States, was killed by a car bomb in Washington. Letelier's family hired Buffone and Tigar to prove that the Chilean government, led by President Augusto Pinochet, had arranged the bombing (*Letelier v. Republic of Chile,* 748 F.2d 790 [1984]). For two decades, Buffone, aided on a regular basis by Tigar, who had left the firm, pursued the case, eventually winning more than one million dollars for the victims' families. In January 1999, Tigar was present in a courtroom in London when a British court refused to grant immunity to Pinochet. For his work in pursuing the bombing plotters, Tigar was awarded the Letelier-Moit Memorial Human Rights Award in 1992.

Michael Tigar returned to legal academe in 1983, taking a position as professor of law at the University of Texas at Austin. In 1987, he was named Joseph D. Jamail Centennial Professor of Law. While teaching and writing as an academic, he continued to practice law. Most of Tigar's cases in the 1980s and 1990s followed a common theme, one of protecting defendants from an overbearing government. In the early 1990s, Tigar took the case of John Demjanjuk, a retired Cleveland autoworker, who after being accused of being a Nazi concentration camp guard was stripped of his citizenship and extradited to Israel to stand trial. A court in Israel found Demjanjuk

Roy Black

Few contemporary cases have received the attention garnered by the rape charges leveled against William Kennedy Smith, a nephew of Edward Kennedy. The Miami trial before six jurors, which resulted in a verdict of not guilty, was broadcast around the world for eleven days, catapulting defense attorney Roy Black (1945–) into the headlines.

Black was born to Richard and Minna Black in 1945, but his parents divorced, so Black got to know his stepfather—an English executive and former Grand Prix race-car driver for Jaguar—better than his birth father, an electrical engineer. At an early age, his mother read Perry Mason stories to her son, despite her mother's fears that he would grow up to be a murderer (Jordan 1991). Black's stepfather moved the family to Jamaica, where Black attended an English school. He subsequently received a swimming scholarship to the University of Miami and went on to enroll in the law school there, after which he received the highest score on the 1970 Florida bar examination.

Black began his career as a public defender and subsequently went into private practice. The six-foot, three-inch Black is said to have "the air of a country gentleman" and is often called "the Professor" (Jordan 1991) for his calm and unassuming manner that enables him to bond easily with juries—indeed, he is now married to one of the jurors he met in the *Smith* case. The *Palm Beach Post* once noted that Black had "the bedside mannerisms of a kindly country doctor and the heart of an assassin" (Carlson 1997).

Black is known for meticulous preparation. Defending his law partner, Frank Furci, for shooting a neighborhood sheep dog, Black is said to have taken an aerial photograph of the area, deposed seventeen witnesses, had an autopsy performed on the animal, and located national experts before having charges dropped (Jordan 1991). Black notes that it is not so much the will to win that results in victory, "It's the will to prepare that makes the difference" (Pesce and Puente 1991).

A fellow Miami attorney has called Black "the Michael Jordan of criminal defense lawyers in America" (Carlson 1997). Black is more modest about his abilities, but he admits to having been inspired not

(*continues*)

guilty and sentenced him to death. Before he could be executed, additional evidence was discovered, a result of the collapse of the Soviet bloc in Eastern Europe and the fall of the Soviet Union. Israel's Supreme Court dismissed the conviction. Working pro bono, Tigar in 1993 argued before the U.S. Court of Appeals for the Sixth Circuit that the government had withheld evidence that could have helped Demjanjuk fight his 1986 extradition to Israel. The appellate court agreed and overturned its extradition in *Demjanjuk v. Petrovsky,* 10 F.3d 388 (1993). As the century ended, Michael Tigar, joined by his wife, Jane Blanksteen Tigar, continued to represent Demjanjuk as he tried to clear his name.

(*continued*)

only by his mother's reading of Perry Mason but also by his readings of Louis Nizer's *My Life in Court* and of everything he could find about Clarence Darrow (Carlson 1997).

Black, who is frequently interviewed about contemporary cases by national news networks, has detailed four of his prominent courtroom victories in a recent book. The first was his defense of Luis Alvarez, a Hispanic police officer charged with negligent homicide in the shooting death of an African-American man in Overtown, Miami. The second was his attempt to show that court-appointed attorneys for a vicious killer named Thomas Knight had not adequately presented the court with the extenuating circumstances (including the fact that he witnessed his father rape his sister) in his childhood. The third was his demonstration that Stephen Hicks had not intentionally murdered his live-in girlfriend but had killed her by accident when he grabbed a gun away from her. The fourth was his defense of a Hispanic banker, Fred De La Mata, against charges that he had used his bank to hide drug transactions.

Black rails against prosecutors who offer deals to prisoners to snitch against individuals accused of crime. He often tells his juries the story of the American Indian who finds a frozen rattlesnake in the winter and gets ready to kill it. The snake (who just happens to talk) persuades the Indian to save its life, promising that it will never bite him. As soon as it is taken to the Indian's tent and warmed, it strikes the Indian. When asked why it broke its promise, the snake responds, "When I made that promise, you already knew that I was a snake." Likening snitches to snakes, Black exhorts the jury, "Snakes have their own morality. Never blame a snake for acting in character; it's our fault if we trust them" (Black 1999, 301).

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Tigar argued a significant First Amendment case before the U.S. Supreme Court in 1991. In *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991), the Court decided the scope of lawyers' First Amendment rights to talk about their cases outside the courtroom. Because of public statements he had made in advance of the trial of a client, the Nevada State Bar had privately reprimanded Las Vegas criminal defense attorney Dominic Gentile. The Nevada bar prohibited attorneys from making out-of-court statements if a lawyer knew, or should have known, that the remarks could affect the judicial proceedings. Tigar attacked the constitutionality of the rule, arguing that unless the public remarks presented a clear and present danger to a fair

trial, lawyers should not be punished for speaking outside the courtroom. The Court, finding that the rule was too vague, reversed the Nevada Supreme Court's decision to uphold the reprimand, and Gentile was not punished for his statements.

Despite his leftist credentials, Michael Tigar has defended noted conservatives, including former Treasury Secretary Connally and Republican U.S. Senator from Texas Kay Bailey Hutchison. A Travis County, Texas, grand jury indicted Senator Hutchison on four felony counts and one misdemeanor count of official misconduct, tampering with government records and tampering with physical evidence. The charges stemmed from her tenure as state treasurer. Hutchison argued that Democrats who did not want her to be reelected to the Senate seat she had taken from Senator Bob Kruger, a Democrat, in 1993 drove the investigation and charges. Kruger had been appointed to the seat when Democratic Senator Lloyd Bentsen was named to President Bill Clinton's cabinet. Through some legal and political maneuvering, Hutchison was acquitted of the charges in 1994.

Tigar is a staunch opponent of the death penalty. He was responsible for bringing the Texas Resource Center to Texas in 1988. The Texas Resource Center, a federally funded program, provided training for lawyers to conduct postconviction appeals in capital punishment cases. Tigar was chairman of the center's board from 1988 until 1993. He unsuccessfully represented Texas death row inmate Gary Graham before the U.S. Court of Appeals for the Fifth Circuit and the U.S. Supreme Court (*Graham v. Collins*, 506 U.S. 461 [1993]). A Harris County jury convicted Graham for killing a Florida man in a Houston parking lot in 1981. Graham was seventeen at the time of the murder. His appeal to the U.S. Supreme Court argued that the jury as a mitigating circumstance should have considered his age during the penalty phase of the trial. The opinion of the Court was that a new rule governing mitigating circumstances did not apply to Graham because he was convicted before the rule took effect. After a series of stays, Graham was scheduled to be executed in the summer of 2000. The Texas Resource Center lost most of its funding in 1995 when the new Republican majority in Congress reduced appropriations for legal services.

Michael Tigar gained a reputation for representing notorious defendants, but no defendant had the notoriety of Terry Nichols. Nichols was accused of assisting Timothy McVeigh in planning the 1995 bombing of the Murrah Federal Building in Oklahoma City. The blast destroyed the building and resulted in the deaths of 168 people. Tigar was appointed by U.S. District Judge David Russell of Oklahoma City to represent Nichols after a number of other lawyers refused the case. The core of Tigar's defense was very similar to those used in the Demjanjuk case and other cases: The gov-

ernment, specifically the FBI, broke the rules in pursuing Nichols. Although the jury was not convinced by Tigar's defense and found Nichols guilty in December 1997, the attorney was able to keep Nichols off death row. After the jury deadlocked during the sentencing phase of the trial, U.S. District Judge Richard Matsch sentenced Nichols to life in prison with no chance of parole.

While preparing Nichols's defense, Tigar took a leave from the University of Texas law school. In 1996, he took some time away from the bombing case to defend a female Air Force officer charged with sodomy and conduct unbecoming an officer. A civilian, Pamela Dillard, had accused twenty-two-year veteran Major Debra Meeks, Dillard's landlord, of threatening her with a gun. When an investigation found that the threat had not occurred, Dillard stated that she had been involved in a lesbian relationship with Meeks for two years. This relationship violated the military's 1993 "don't ask, don't tell" directive regarding homosexuality. Attacking the government's modes of investigation, Tigar was able to direct attention away from his client's behavior and toward the behavior of the government. The defense worked; Meeks was acquitted on all charges on August 16, 1996.

Tigar often portrays his clients as victims of an overbearing government. In his textbooks, he tells readers that every defense needs a theme, a simple statement that the jury can understand. The theme in John Demjanjuk's defense was that the government, in its extradition procedures, "hoodwinked the court" (Toobin 1996, 52). In the Terry Nichols trial, the defense contended that the government had the wrong man and that the FBI investigation was conducted incorrectly and was incomplete. Tigar has been accused of playing to the jury. Defending Major Meeks, Tigar was able to convince the military jury that his client was one of them—a professional soldier under attack by a deranged civilian. Tigar often quotes from Scripture or classic Greek epics in court, but he can adopt a folksy style that appears to endear him to the juries. He also has been accused of being a showoff (see Abbott 1997). In short, Michael Tigar treats the courtroom as it if were a stage with the jury as the audience.

Tigar married Jane Blanksteen on August 22, 1996. Blanksteen, a writer seeking a second career, became interested in public interest law as a Columbia University law student and, seeking an internship, posted her résumé on the Internet. Tigar saw the résumé and invited her to work at the Texas Resource Center. Blanksteen refused the invitation, indicating that she was not interested in the death penalty or moving to Texas. In 1995, she called Tigar after learning that he was defending Terry Nichols in the Oklahoma City bombing case. A course required her to do forty hours of pro bono work, and she offered the time to Nichols' defense team. Tigar ac-

cepted, and the two lawyers eventually fell in love. Blanksteen is Tigar's third wife; he has three children from his previous marriages.

Tigar left the University of Texas law school in 1998 to take a position at American University's Washington College of Law. His move was spurred by two considerations. First, his wife practices law in Washington, D.C. Second, an attempt to become dean of the Texas law school was unsuccessful. In addition to his duties as a law professor in the United States, Tigar teaches at the faculty of law in Aix-en-Provence every year.

In addition to being a legal academic and practitioner, Tigar has maintained an active publishing schedule. He has written numerous articles for legal publications, including a regular column in the *National Law Journal* and essays published under the pen name "Edward Michaels." Tigar also has written several textbooks introducing students to his techniques as a litigator. The books, *Examining Witnesses* (1993), *Persuasion: The Litigator's Art* (1999), and *Federal Appeals: Jurisdiction and Practice* (1999) (written with his wife), are replete with examples from Tigar's own cases.

Tigar also is a playwright. His play, *The Trial of John Peter Zenger,* was first performed at the Waldorf Astoria Starlight Roof on August 10, 1986. The *Zenger* trial served as the background for the First Amendment's freedom of the press. The play was commissioned by the American Bar Association's Section of Litigation, which Tigar chaired in 1989 and 1990. The second play, *Haymarket: Whose Name the Few Still Say with Tears* (first performed by the Remains Theater in Chicago in October 1987), features Tigar's hero Clarence Darrow, who represented the Haymarket strikers. Tigar earned critical acclaim for both plays due to his ability to weave compelling stories out of the legal record.

Michael Tigar has been criticized throughout his career for agreeing to represent unpopular and notorious clients. His defense of alleged concentration camp guard John Demjanjuk attracted particular scorn from the legal community. Tigar's response to the criticism can be found in the following story. When he was eleven or twelve, Tigar informed his father that he wanted to be a lawyer. The elder Tigar went to his room and returned with a copy of Irving Stone's *Clarence Darrow for the Defense*. Tigar's father told him, "This is the kind of lawyer you should be. He fought for people's rights" (Tigar 1993, xvii). Tigar patterned his career on Darrow's example. He has earned a reputation for fighting for people's rights.

—John David Rausch Jr.

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TRIBE, LAURENCE H.

(1941–)

Laurence Tribe is one of the leading constitutional litigators, scholars, teachers, and rights advocates of the twentieth century. Tribe was born in Shanghai, Republic of China, October 10, 1941, to George and Paulina Tribe, and moved to San Francisco in 1947. After attending public school in San Francisco, Tribe entered Harvard College, graduating summa cum laude in mathematics in 1962. While at Harvard College, Tribe was a national intercollegiate debate champion in 1961, demonstrating the qualities that would make him one of the most important advocates for individual rights ever to appear before the Supreme Court. Since 1978, Tribe has appeared before the Supreme Court at least thirty times as lead counsel in cases raising some of the most important constitutional questions of his times.

Laurence Tribe

Laurence Tribe, lawyer for former Vice-President Al Gore, speaks to reporters gathered outside the U.S. Supreme Court after making arguments in the case of the hand-counted Florida ballots that helped decide who would win the presidency. (Reuters NewMedia Inc./Corbis)

In 1966, he received the J.D. degree from Harvard Law School. After law school, Tribe clerked for Justice Mathew O. Tobriner of the California Supreme Court in 1966–1967, and Justice Potter Stewart of the U.S. Supreme Court in 1967–1968. Since 1968, he has been at Harvard Law School. In 1982, he was named the Ralph S. Tyler Jr. Professor of Constitutional Law. Tribe has been a member of the California bar since 1966, and the U.S. Supreme Court bar since

1978. He also is a member of the bars of numerous U.S. circuit courts and the state of Massachusetts. Tribe married Carolyn R. Kreye of New Haven, Connecticut, in 1964 and has two children: a son, Mark, born in 1966, and a daughter, Kerry, born in 1973.

Tribe's stature as a constitutional litigator, scholar, and teacher is demonstrated by the numerous honors he has been awarded. He was elected as a Fellow to the American Academy of Arts and Sciences in 1980, and he was named by *Time* magazine as "one of the ten most outstanding law professors" in the United States in 1977.

Tribe has received honorary degrees from the following universities: Hebrew (1998), Colgate (1997), Illinois Institute of Technology (1988), American (1987), University of the Pacific (1987), and Gonzaga (1980). The range of Tribe's interests and accomplishments are truly unmatched in his generation. Tribe's accomplishments are seen in the following reasons stated by universities when awarding an honorary doctor of laws degree: The Illinois Institute of Technology noted Tribe's "profound and far-reaching influence on the understanding and development of constitutional law." American University awarded the honorary degree for his "scholarship, writing and advocacy showing a stunning breadth of expertise . . . from mathematics to . . . technology assessment . . . demonstrating a sensitivity to a world undergoing massive technological change." Gonzaga University awarded the honorary degree for "producing the leading treatise on American constitutional law" and "do[ing] much to build a bridge between law and technology."

In the 1970s, Tribe was an important interpreter of science to the legal community and of the law to scientists. In the 1980s and 1990s, Tribe's technical expertise was used to further groundbreaking lawsuits for damages against tobacco and asbestos producers, in which he sought to demonstrate that these producers were responsible for the deaths and medical costs associated with the use of their products. Since the 1980s, Tribe has been an advocate of the weak and politically unpopular in a period in which the Supreme Court has been reticent to expand individual rights. To reach the wider public, he has appeared before congressional committees thirty-one times and has written more than seventy-one magazine articles and op-ed essays.

Tribe has presented numerous named lectures: the Alexander Meiklejohn Lecture at Brown University, 1998; the First Annual Louis D. Brandeis Lecture at the Israel Academy of Science and Humanities in Jerusalem, 1994; the Keynote Lecture at the Bill of Rights Bicentennial at the U.S. National Archives, 1991; the Forty-third Annual Cardozo Lecture to the Association of the Bar of the City of New York, 1989; the Inaugural Lecture of the Richard Salomon Distinguished Lecture Series at the New York City

Public Library, 1988; and the Tanner Lecture on Human Values at the University of Utah, 1986.

As a legal advocate, Tribe has received awards from the groups whose causes he has championed. For his work in support of gay and lesbian rights, he received the Eleventh Annual "Honoring Our Allies" Award from the National Gay and Lesbian Task Force in 2000, and the Distinguished Lifetime Achievement Award from the National Gay Rights Advocates in 1988. In 1985, he received the Legal Achievement Award from the Bay Area Lawyers for Individual Freedom and the prestigious Roger Baldwin Award of the Massachusetts Civil Liberties Union Foundation.

Tribe is a world-renowned constitutional expert. He was a constitutional consultant to Chief Justice Valery Zorkin of Russia in 1992, a member of the United States–European Committee on Revision of the Czechoslovak Constitution in 1990–1991, and a Fulbright Distinguished Lecturer in Brazil in 1982 and in India in 1991. He helped the Marshall Islands draft a new constitution in 1978–1979 and was chairman of the Marshall Islands Judicial Service Commission in 1979–1980.

It is as lead counsel in important cases before the U.S. Supreme Court that Tribe has proved himself a brilliant litigator. Tribe has won eighteen of the twenty-nine cases he litigated before the Supreme Court. It is rare for a person other than the solicitor general of the United States to appear before the Supreme Court in so many cases, and so many cases that resulted in landmark decisions. What is impressive about Tribe as a litigator is both the number of appearances before the Supreme Court and the range and complexity of constitutional questions that he has brought to the Court as lead counsel. There are four major areas of cases that Tribe has brought to the Court. The first group involves constitutional questions affecting whether individuals and government will be able to use state and federal courts to redress grievances due to the health effects of products that corporations produce. The second group of cases center on key First Amendment issues. The third group of cases (all of which Tribe lost) involve cutting-edge issues of the right of privacy. A fourth group of cases covers a wide range of policy areas and centers on the power of local and state governments to limit the nationalizing effects of federal law and constitutional principles, which in many instances further the interests of corporations and limit those of citizens as consumers.

Tribe has been a leader in ensuring that those seeking damages for the wrongs of corporations get their day in court. In *Pennzoil v. Texaco,* 481 U.S. 1 (1987), Tribe was successful in getting the Supreme Court to agree that federal courts may not interfere with state court enforcement of a multibillion-dollar judgment for Pennzoil against Texaco. Tribe supported

Pennzoil's claim that lower federal courts should have abstained from enjoining payment under the rules of court deference to state courts. This allowed Pennzoil to collect a multibillion-dollar judgment. More important, it helped keep federal courts open as venues to limit unfair business practices that are very costly to consumers.

Perhaps the most important impact of Tribe as a litigator was his leadership in efforts to make the tobacco industry pay to individuals and governments the costs of smoking, which he argued should be paid because the tobacco industry covered up what they knew were the full risks of smoking. This case was key to the use of state courts to secure multibillion-dollar punitive damage awards against the tobacco industry. In *Cipollone v. Liggett*, 505 U.S. 504 (1992), Tribe was successful in getting the Supreme Court to agree that the Federal Cigarette Labeling and Advertising Act of 1965 did not preempt state-law damage actions. The required warnings on cigarettes do not foreclose additional obligations by manufacturers under state law. State claims of conspiracy among manufacturers or claims of an express warranty are not preempted by the 1965 law. In the 1990s, the lack of federal preemption in such cases opened the way to successful multibillion-dollar lawsuits won by states for the health costs associated with diseases from smoking, and for direct payments to smokers and their families. The rancor with which business viewed Tribe's work in the tobacco cases can be seen in a *Forbes* magazine article on lawyer's fees that stated, "Media-savvy Harvard law professor Laurence Tribe is representing Florida, Massachusetts, and Mississippi, pro bono, (at no fee), but he stands to collect $2,000,000 in 'juicy consulting fees from the Texas lawyers'" (www.forbes.com, 6 November 1995).

In *TXO v. Alliance Resources*, 509 U.S. 443 (1993), Tribe got the Supreme Court to affirm a state court award and declare that the $10 million punitive damage award in a case whose regular damage award was only $19,000 was not so grossly excessive as to be violative of the due process clause of the Fourteenth Amendment. The Court said the dramatic disparity between the actual and punitive damages is not controlling, or a per se violation of the Constitution.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Supreme Court invalidated a $1.3 billion asbestos class-action settlement because it included an improperly certified class of citizens under Rule 23 (b)(3). Tribe led the fight against efforts by Amchem Products and some of those hurt by the asbestos it produced to limit the class of individuals with health effects, including death, from asbestos poisoning. The class would preclude nearly all individuals who had not previously participated in the class action but were injured by the products of this company. The Supreme Court

emphasized that Rule 23 (e) inquiries by a court must protect unnamed class members from unjust or unfair settlements agreed to by faint-hearted or self-interested class representatives.

Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999), is a follow-up case to *Amchem*. As lead attorney, Tribe succeeded in getting the Supreme Court to invalidate a $1.53 billion asbestos class-action settlement because the class improperly either failed to provide funds or provided too little funds for parties hurt by asbestos exposure. The record of the district court demonstrated that funds were limited by agreement of the parties, rather than through fact-finding on the needs of those exposed to asbestos (but not part of the suit) and on the resources of the company.

In a case that also ensured that individuals get a their day in court and that damage cases get the best information on which to make decisions, *Baker v. General Motors*, 522 U.S. 222 (1998), the Supreme Court said that the full faith and credit clause of the Constitution does not require Missouri courts to honor a Michigan court's ruling that enjoined Ronald Elwell, a former General Motors employee, from testifying against General Motors in claims of product liability. Michigan's injunction need not be enforced, because blocking Elwell's testimony would violate Missouri's public policy that shielded from disclosure only privileged information or otherwise confidential information.

In *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), Tribe succeeded in getting the Supreme Court to support the power of migrant farm workers to sue a fruit company for whom they were working for intentional violation of the motor vehicle safety provisions of a federal law, the Migration and Seasonal Agricultural Protection Act, even though they received benefits under Florida's workers' compensation law for injuries they suffered in an automobile accident while traveling to work in the fruit company's van.

Tribe lost two cases in which he sought to help cities secure damages for wrongful actions. One involved government, the other a corporation. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), Tribe sought to secure the right of a person whose disability benefits were terminated because of due process violations to sue one Arizona and two federal officials individually for emotional distress and for the loss of necessities proximately caused by the application of government policies. The Court said there is no damages action for wrongful denial of social security disability benefits. In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), Honda Motor Company successfully argued that Oregon's constitution, which prohibits judicial review of the amount of punitive damages by a jury "unless the court can affirmatively say there is no evidence to support the verdict," violates the Fourteenth Amendment's due process clause. In that case, Dean Erwin Griswold of Harvard Law School filed an amicus brief opposing Tribe's position.

These cases demonstrate Tribe's mastery of constitutional principles, technical data, judicial procedure, and how justices of quite different judicial philosophies will react to arguments. These cases also demonstrate Tribe's belief that damage awards and ensuring claimants their days in court are important ways to protect citizens from the negative effects of corporate power.

Tribe also appeared in some of the most important First Amendment cases to be brought to the Supreme Court since 1978. In *Boston v. Anderson,* 439 U.S. 951, 1389 (1978), Tribe's first appearance before the Supreme Court, he succeeded in convincing the Court to protect the power of the city of Boston to spend funds to influence the result of a state referendum even though the Supreme Judicial Court of Massachusetts had held that a city may not appropriate such funds. In *Larkin v. Grendel's Den,* 459 U.S. 116 (1982), Tribe succeeded in getting the Supreme Court to find unconstitutional a Massachusetts law that had vested to the governing bodies of schools and churches the power to prevent the issuance of liquor licenses to premises within a five-hundred-foot radius of the church or school by simply objecting to the license. The Court found that this law violated the First Amendment, which does not allow states to establish religion. This law substituted the reasoned decision making of a public body to make zoning decisions, based on evidence and guided by standards, with the unilateral and absolute power of a church. This law enmeshed churches in the processes of government and created the danger of political fragmentation and divisiveness along religious lines.

In *Board of Education of Oklahoma City v. National Gay Task Force,* 470 U.S. 903 (1985), Tribe successfully protected First Amendment speech rights of gay teachers. He was able to get the Supreme Court to affirm a Tenth Circuit Court decision that had found unconstitutional an Oklahoma school board policy that allowed teachers to be fired for "advocating, soliciting, imposing, encouraging public and private homosexual activity" without a finding of incitement and the presence of imminent lawless action, which is required before political speech can be limited. *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980), was a very important case that established the right of the press and public to attend criminal trials, as implicit in the press guarantees of the First Amendment.

In *Sable Communications Co. v. FCC,* 492 U.S. 115 (1989), Tribe won a case that restricted Congress from prohibiting the use of telephones for indecent, but not obscene, "dial-a-porn" services. Although the Federal Communications Commission (FCC) could limit interstate transmission of obscene commercial telephone messages, the Court found that the ban on indecent, but not obscene, telephone messages violated the First Amendment.

Lowell J. Myers

Few contemporary trials have been more dramatic or raised thornier legal issues than the trials of Donald Lang. Lang was an African-American deaf-mute from Chicago who was known in his neighborhood as "Dummy." Lang was accused of the murder of Ernestine Williams (1965) and Earline Brown (1971), both prostitutes.

Lang, who had fallen through the cracks in the educational system and had never received formal schooling when he was first accused of murder at age twenty, largely communicated through grunts and crude gestures. He had never learned to sign, to read or write, or to read lips, although he was a good worker who had been able to hold a job loading and unloading trucks and often seemed to have a good sense of what was going on around him. He was also known to use the services of prostitutes and to have been with Williams, and later Brown, on the dates of their violent deaths.

In the first case, courts ruled that Lang (whom police had no way of informing of his legal rights) was physically incompetent to stand trial. The state had nonetheless confined him in various institutions for about five years until the Illinois Supreme Court, responding to petitions filed by Lang's attorney, had ruled that he was entitled to a trial. When this trial was finally ordered, key witnesses had died and evidence had been destroyed. The state prosecutor decided not to prosecute, and Lang was released to his father and stepmother and returned to his old job.

Months later, Earline Brown's body was found in a motel closet a day and a half after she and Lang had been seen together there. This time the police investigation and laboratory follow-up was more thorough, and, although the case was circumstantial, Lang was convicted and sentenced to incarceration.

In both cases, Lowell J. Myers (1930–) represented Lang. Like Lang, Myers, who was white, was also deaf, but because he lost his hearing later in life, he was able to speak to the judge and jury. After earning degrees at Roosevelt University and the University of Chicago in business and accounting, Myers had later gravitated toward the law, completing a law degree at night at John Marshall Law School, where he was second in his class (Tidyman 1974, 29). Myers helped secure passage of a law requiring court interpreters for deaf-mutes and allowing deaf people to drive in Illi-

(*continues*)

Tribe lost two important First Amendment cases. In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the Supreme Court allowed the state of Minnesota to restrict speech and solicitation on state fairgrounds. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), Tribe was not successful in getting the Supreme Court to invalidate a Minnesota law that banned a candidate from appearing on a nominating ballot of more than one political party. The ban on fusion candidates was said by Tribe to violate the New party's associational rights under the First and Fourteenth Amendments. The Supreme Court feared that nomination

(*continued*)

nois. Myers wrote a book for deaf children about their legal rights, as well as a book entitled *The Law and the Deaf* (1967) for attorneys and judges (Tidyman 1974, 30–31).

Myers, who was adept at lip reading and sign language, and was for a time the only Illinois lawyer with knowledge of deaf-mute language (Tidyman 1974, 29), undoubtedly devoted more time, effort, and understanding to Lang's defense than many other court-appointed attorneys would have done. He was particularly adept at cross-examining experts in the field and questioning their views of Lang's competence. In the first case, Myers eventually succeeded in establishing the principle, never before established in a U.S. court, that the state could not continue to incarcerate an individual who was not insane and whom it was unable to bring to trial because of physical incapacities. In the second case, Myers at one point had to request that his own client—who could hear nothing and whose conduct often appeared threatening to the jury—be removed from the courtroom.

Although Myers lost the second case, observers agreed that he did his best to raise reasonable doubt in a case in which circumstantial evidence was relatively strong. An observer of both cases has estimated that Myers's payment as a court-appointed attorney in his first defense—one thousand dollars—amounted to less than two dollars an hour (Tidyman 1974, 169).

As someone who was deaf, Myers undoubtedly understood Lang's difficulties in communicating in a way that other lawyers did not. By contrast, some police investigators and prosecutors continued to believe that Lang's demeanor in the courtroom was all an act designed to elicit sympathy and hide his own culpability.

Evidence from Lang's trial, as well as his experience at various institutions where he was incarcerated, seems to suggest that he was much more comfortable and self-controlled in dealing with men than with women. Although his motives may never be known for certain, it appears that Lang may have become enraged when Brown took his money without intending to provide her services. Asked his opinion at the end of the second trial, Myers said, "If Donald had been given a little education *at the proper time* it would have made all the difference in the world" (Tidyman 1974, 275).

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of major parties' candidates by minor parties might enable minor parties to blur the message of the major party and help them bootstrap their way to major-party status in the next election and thereby circumvent the state's nominating-petition process.

The third group of cases involves issues of the right to privacy, with regard to the right of abortion choice, the right of sexual intimacy for homosexuals, and right to physician-assisted suicide. Tribe lost all three of the cases. In *Bowers v. Hardwick,* 478 U.S. 186 (1986), the Supreme Court found that there was no right of privacy for consensual sodomy among ho-

mosexuals. In *Rust v. Sullivan,* 500 U.S. 173 (1991), Tribe unsuccessfully argued against the constitutionality of the regulations made under Section 1008 of the Public Health Service Act, which prohibited federal funds to be used for counseling, referrals for, and activities advocating abortion as a method of family planning in federally funded clinics. The Court found that this regulation did not violate a woman's right to terminate a pregnancy under privacy rights granted by the Fifth Amendment's due process clause, which covers the federal government; nor did these regulations violate the First Amendment free speech rights of practice of doctors, fund recipients, their staffs, or patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies. In *Vacco v. Quill,* 521 U.S. 793 (1997), the Supreme Court refused to accept Tribe's argument that New York's law that makes it a crime to aid another to commit or attempt suicide, but permits patients to refuse even lifesaving medical treatment, violates the Fourteenth Amendment's equal protection clause. Because the statutes outlawing assisted suicide neither infringe fundamental rights nor involve classifications in the law that have been traditionally held suspect, like race classifications, the Supreme Court said they are entitled to a strong presumption of validity. The Supreme Court found that the distinction between letting a patient die and making that patient die is important, logical, rational, and well established. In this case, Tribe won a partial victory, since the Court did not speak to issues of limits on pain relief, which would hasten death. These cases, all losses for Tribe, show that he is willing to bring cases that are difficult to win to the Supreme Court in order to expand individual rights.

Finally, the fourth major group of cases in which Tribe appeared before the Supreme Court sought to limit the nationalizing effects of constitutional principles and federal law on citizens, cities, and states. In *Pacific Gas & Electric Co. v. California Resources Conservation and Development Commission,* 461 U.S. 190 (1983), Tribe was successful in getting the Supreme Court to agree that all state moratoriums on nuclear power plants are not preempted by the Atomic Energy Act of 1954. States continue to have authority over economic questions like the need for electric generation, while safety issues continue to be under federal law.

Tribe succeeded in getting the Supreme Court to agree that cities are not limited by the commerce clause of the Constitution and the Sherman Anti-Trust Act when they act as participants in the economic system. In *White v. Mass. Council of Construction Employers,* 460 U.S. 204 (1983), the Court said that the commerce clause does not bar cities from preferentially hiring their own citizens. The Court noted that when a state or city enters the market as a participant it is not subject to the restraints of the commerce clause. In *Fisher v. Berkeley,* 475 U.S. 260 (1986), Tribe got the Supreme

Court to accept the view that local rent control laws were not preempted by the Sherman Anti-Trust Act.

In *Northeast Bancorp v. Federal Reserve System,* 472 U.S. 159 (1985), the Supreme Court agreed with Tribe that states may limit bank mergers to banks in a several-state region without violating the commerce clause, compact clause, or equal protection clause of the Constitution. In another case that favored economic competition and the consumer, in *AT&T v. Iowa Utilities Board,* 119 S. Ct. 721 (1999), Tribe successfully got the Supreme Court to uphold Bell Operating Companies' challenge to FCC jurisdiction over interconnection with local exchange networks. In this case, Tribe fought to allow local telephone companies to buy elements outside the AT&T network and thereby overturn a rule made by the FCC. Finally, Tribe was lead counsel in *United States v. Chesapeake & Potomac Telelphone Co.–N.C.T.A. v. Bell Atlantic,* 516 U.S. 415 (1996), for local telephone companies in support of a lower-court decision that said Congress may not ban video programming by telephone companies, a case that was remanded below and mooted by the passage of the 1996 Telecommunications Act.

Tribe appeared before the Supreme Court in three other cases of note. In *Crawford v. Board of Education of Los Angeles,* 458 U.S. 527 (1982), Tribe lost a case in which he argued against the constitutionality of an amendment added to the state constitution by a public referendum that said state courts could not order mandatory pupil assignment and transportation unless a federal court would have been permitted to do so to remedy a violation of the equal protection clause of the Fourteenth Amendment. Tribe viewed the amendment as an unconstitutional racial classification. Tribe represented Hawaii in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), in its efforts to sustain a state land reform law that forced landowners to sell land to occupants. The fact that the property taken by eminent domain was transferred in the first instance to private beneficiaries did not undermine the legality of such acts. Finally, in an effort to secure the greatest amount of time to gain passage of the Equal Rights Amendment, Tribe won the case of *NOW v. Idaho,* 445 U.S. 918 (1982), in which the Supreme Court said that federal courts may not interfere with Congress's time extension for ratification of the Equal Rights Amendment.

Laurence Tribe has gained a superb reputation for his ability to earn the respect of Supreme Court justices, many of whom do not share his views on the role of the Supreme Court as a venue for social change, nonoriginalist interpretive philosophy, and individual rights. His arguments before the Court are detailed, lively, and always directed at arguments that will sway a majority of justices while not enraging those with whom he disagrees. Tribe draws on his unmatched understanding of constitutional law and the Supreme Court as an institution to demonstrate to the Court that support-

ing his position will place the justices in line with principles—such as adherence to precedent and due process—that they hold deeply.

Tribe has commented on the most important and controversial news events with legal ramifications. *Time* magazine quoted Tribe as viewing the Immigration and Naturalization Service raid on the Gonzalez family home to capture Elián Gonzalez to return him to his father and to Cuba as "unlawful and unconstitutional" (Duffy 2000, 39). Tribe appeared on major news programs to discuss his view on the Gonzalez affair, a view with which the Bill Clinton administration, most liberals, and a majority of Americans disagreed.

Tribe took another position to which liberals have been opposed. *USA Today* reported that Tribe—"probably the most influential living American constitutional law scholar"—has received hate mail for writing in the second edition of his constitutional law treatise that the right to bear arms is an important political right that should not be dismissed as "wholly irrelevant." Tribe believes that the Second Amendment ensures that "the federal government may not disarm individual citizens without an unusually strong justification." Tribe argued in the edition that the Second Amendment gives citizens a right—"admittedly of uncertain scope"—to "possess and use firearms in the defense of themselves and their homes" (Mauro 1999, A4).

Tribe also was a leader in opposing the impeachment of President Clinton. On October 8, 1998, in the impeachment debate on the House floor, Democratic representative Patrick Kennedy of Rhode Island quoted Laurence Tribe as stating that this Congress was "twisting impeachment into something else, instead of keeping it within its historical boundaries. And our nation and its form of government are in peril as a result. . . . [We are] losing sight of the constitutional wreckage that this vote will cause as we lay down historical precedent that a president of the United States can be impeached for something other than official misconduct as president of the United States" ("Transcript" 1998). As reported by CNN, Senator Edward Kennedy referred to Laurence Tribe's testimony to the House Subcommittee on the Constitution that to impeach Clinton would "rewrite" the impeachment clause, when Kennedy's closed-door impeachment statement was released to the *Congressional Record* on February 12, 1999 ("Sen. Kennedy's" 1999).

Tribe is a prolific scholar. His brilliant treatise *American Constitutional Law,* which was published in 1978, received the triennial Order of the Coif Award, which is awarded for the outstanding work of legal scholarship, and the Scribes Award for the Outstanding Legal Publication. The book is one of the most cited of all twentieth-century legal treatises. The first volume of a two-volume third edition of the treatise was published in 2000. It is rare that a litigator of Tribe's stature is also a scholar of international reputation.

Tribe's early scholarship centered on technology and the law, with an emphasis on issues of the assessment of environmental damage and its reduction. In 1969, Tribe wrote *Technology: Processes of Assessment and Choice*, which was prepared for the House Committee on Science and Astronautics (National Academy of Sciences 1969). His next two books were *Environmental Protection* (Tribe and Jaffe 1971) and *Channeling Technology through Law* (1973). Tribe also co-edited *When Values Conflict: Essays on Environmental Analysis, Discourse, and Decision* (Tribe et al. 1976).

In 1985, Harvard University Press published *Constitutional Choices*. In this book we see Tribe the constitutional litigator melding with Tribe the constitutional scholar. In sixteen superb essays, Tribe argued against the trend of the day, grand constitutional theory. He writes,

> Much of what constitutional scholars write these days either focuses so closely on constitutional doctrine, or looks to matters so distant from doctrine, as to bear no real resemblance to *doing* constitutional law—to constructing constitutional arguments and counterarguments or exploring the premises and prospects of alternative constitutional approaches to concrete settings. Such constitutional *problem solving*, I recognize, is in less academic vogue nowadays than is discussion of constitutional *voice:* what it means for judges to expound the Constitution, how the vulnerability of judges relates to their authority. . . . The core of my concern is the making of constitutional law itself—its tensions and tendencies; its puzzles and patterns they make; its limits as a form of activity; in a word, its horizons. (Tribe 1985, x)

Tribe describes the themes that cut across the essays: the domination of constitutional theory and practice by "the dangerous allure of proceduralism," "the paralyzing seduction of neutrality," "the morally anesthetizing imagery of the natural," "the hidden tilt of various constitutional doctrines towards the perpetuation of unjust hierarchies of race, gender and class," and "the potential of various forms of constitutional argument to deflect judicial responsibility from crucial substantive choices onto external circumstances or remote actors" (Tribe 1985, ix).

For Tribe, both Robert Bork's focus on original intent and John Hart Ely's nonoriginalist constitutional theory, which emphasizes keeping the political system open for minorities, do not provide sufficient rights protections for the politically weak and unpopular. In contrast to *Constitutional Choices*, Tribe describes his treatise as a "global effort; it was an attempt to roll the constitutional universe into a ball and show it as a unified whole" (Tribe 1985).

The strength of *Constitutional Choices* is that it demonstrates the foremost constitutional litigator of his age working out how (and why) the Supreme

Court should interpret the Constitution. Tribe would like the Supreme Court to make affirmative choices about the effects of economic, social, and political power on institutional power and individual rights, rather than trying to resort to what he considers to be falsely neutral categories in the law. If such affirmative choices are made, then constitutional law will not replicate, or increase through law, the inequalities that already exist in our nation.

Since the publication of *Constitutional Choices* in 1985, Tribe has concentrated on books for a more general readership. In these works, Tribe has addressed some of the key constitutional questions facing our nation. *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (1985) argues that it was just and proper for the Senate to reject President Reagan's nominee to the Supreme Court, conservative jurist and scholar Robert Bork. *Abortion: The Clash of Absolutes* (1990) is a superb argument for why the right of abortion choice should be constitutional and why *Roe v. Wade* (1973) should stand. One can see a superb litigator, as scholar, presenting the history of abortion here and overseas, arguing why the right to abortion choice is in the Constitution, that the presence of a fetus does not automatically negate the "private" character of the abortion decision, and that it does not matter whether the fetus is a person or not. *On Reading the Constitution* (Tribe and Dorf 1991) argues against an originalist interpretation of the Constitution.

Laurence Tribe's scholarship is not without its critics, in part because it is about how to litigate specific constitutional questions, not grand theory. Perhaps the most pronounced critic of Tribe's scholarship is Robert Bork, who writes,

> Laurence Tribe's constitutional theory is difficult to describe, for it is protean and takes whatever form is necessary for the moment to reach a desired result. This characteristic, noted by many other commentators, would ordinarily disqualify him for serious consideration as a constitutional theorist. But Tribe's extraordinarily prolific writings and the congeniality of his views to so many in the academic world and in the press have made him a force to be reckoned with in the world of constitutional adjudication." (Bork 1990, 199)

Tribe's stature as a leading constitutional scholar and adjudicator was enhanced by his arguments before the U.S. Supreme Court in the first case of *Bush* v. *Gore,* 531 U.S. _____, 2000, involving the presidential election results in the state of Florida.

Laurence Tribe's involvement in the most important constitutional and political issues of his times, including his opposition to Judge Bork's appointment to the Supreme Court, and his work as lead counsel in some of

the most controversial cases that have ever come before the Supreme Court, makes him perhaps the most gifted constitutional litigator and scholar who has little chance of appointment to the Supreme Court.

— Ronald Kahn

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VAN BUREN, MARTIN

(1782–1862)

Best known as the eighth president of the United States, Martin Van Buren also enjoyed great success as a lawyer. Van Buren's legal career stretched from 1796, when he was first apprenticed to a lawyer, until 1828, when he stopped practicing law and became a full-time politician. In that period, Van Buren gained a reputation as one of New York's finest attorneys, known especially for his work in the appellate courts. Moreover, Van Buren's biographers agree that his legal work greatly influenced his political career.

Van Buren was born on December 5, 1782, in Kinderhook, New York, a small Dutch town near Albany. His parents, Abraham and Maria Van Buren, operated a small tavern in their home and farmed. Farming had been the way of life for the Van Burens in America for six generations, but Maria Van Buren had other aspirations for her children. As she had done with her two sons from a previous marriage, Maria encouraged Martin to become an attorney. She also helped foster in him a love of politics.

Martin Van Buren
Library of Congress

Van Buren received his only formal education at the village school in Kinderhook. Van Buren long felt inadequate because of his meager schooling, and he tried to make up for it through hard work and self-study. His family's modest means prevented him from attending college. In 1796, the fourteen-year-old Van Buren decided to pursue a legal career and signed on as an apprentice with Francis Silvester, a Kinderhook lawyer.

Few details are known about Van Buren's legal apprenticeship. In a typical arrangement, the apprentice's parents paid the master to train and house their son for a seven-year period. Silvester was known as a capable attorney, but the average small-town lawyer in that period did not own many law books. Van Buren put in long hours and demonstrated a knack for the law, and his mentor gave him increasing responsibility.

An active Federalist—as were most of Kinderhook's residents—Silvester pressured his promising student to join that party. At the risk of harming his career, Van Buren refused, maintaining the firm allegiance to republicanism he had inherited from his father. In 1801, Van Buren's increasing involvement in Republican politics led to a break with Silvester, and he was forced to find another mentor with whom to complete his legal studies. Nevertheless, years later Van Buren described Silvester as "a just and honorable man" (Van Buren 1920, 13).

Van Buren eventually found a position in the New York City law office of William P. Van Ness. Van Buren loved the legal and political activity of New York City, and he became active in the Aaron Burr wing of the Republican party. Beset by financial woes, however, Van Buren returned to Kinderhook in the spring of 1803 to study for the bar examination. On November 23 of that year, Van Buren was examined by three prominent lawyers in New York City. "They declared themselves perfectly and entirely" satisfied, Van Buren reported to a friend, and Van Buren was admitted to the bar thirteen days before his twenty-first birthday (Mushkat and Rayback 1997, 22).

Van Buren then accepted an offer from his half brother, James Van Alen, to join him as a partner in his well-established legal practice in Kinderhook. The practice flourished, and Van Buren's financial problems soon disappeared. Van Buren's skillful handling of cases in the justice of the peace courts, his ability to deal with all kinds of people, and his political activity all helped him attract clients.

In his early years as an attorney, Van Buren focused mainly on small civil cases and commercial transactions, but he also helped Van Alen draft briefs for the appellate courts. Van Buren's small stature (he stood about five feet six inches) and unimpressive voice hampered him in the courtroom, and he was not a particularly eloquent speaker. He compensated for these problems, however, through exhaustive research, careful preparation, and his

analytical abilities. His attractive features, erect posture, and sharp dress also enhanced his courtroom image. Van Buren continued his political involvement, earning the approval of DeWitt Clinton, one of New York's leading Republicans. Still, Van Buren made his legal career his top priority during this period, and he was pleased to be earning a nice living.

In 1806, Van Buren won his first public office when the citizens of Kinderhook named him a "fence viewer," which entailed overseeing the boundaries and fences between farms. That same year, Van Buren became licensed to practice before the state supreme court. In November 1806, he argued and won two cases before that court. In 1807, Van Buren married his cousin and childhood sweetheart, Hannah Hoes. The couple had four sons.

In 1808, Van Buren's partnership with Van Alen, who had won election to the U.S. House of Representatives, ended. The Van Burens moved to nearby Hudson, New York, the county seat of Columbia County and home to an array of talented lawyers. Van Buren quickly established a fine legal reputation, and he soon was appointed as county surrogate, the government official responsible for probate and related issues. Not only did this office enable Van Buren to deal with interesting legal issues, but it also put him in contact with many of the county's citizens.

In addition to serving as county surrogate, Van Buren vigorously pursued his own legal practice, including an increasing amount of work before the state's appellate courts. Van Buren faced in court some of the state's finest lawyers, including the noted Federalist attorney Elisha Williams, and he practiced in a variety of courts. His reputation grew so large that Williams and other Federalists sometimes asked him to be co-counsel.

In 1809, Van Buren was involved in a series of court actions on behalf of tenants on some of the large estates in the Hudson Valley. Two years later, he clashed with the powerful Van Rensselaer and Livingston families over the issue of landlord-tenant relations. Van Buren advised a group of tenants that the two families had fraudulently claimed land that really belonged to the state, and he wrote a lengthy report to support his position. Realizing that the courts would probably side with the landowners, Van Buren called on the state legislature to remedy the situation.

Van Buren's stance sparked a bitter political and legal debate, with both sides making public pronouncements and threatening lawsuits. Tensions ran so high that challenges for a duel were traded between Van Buren and John Suydam, a surveyor for the landowners (no duel ever took place). Although the legislature did not act and the issue was not settled until years later, Van Buren's work for the tenants, and against the wealthy landlords, was later used by his political supporters as proof of his affinity for the common man. This image helped him win election to the New York state senate in 1812.

Van Buren also had his eyes on another office—attorney general of New York. Partly because he believed the move would help him attain that office, he supported the 1812 presidential candidacy of DeWitt Clinton, who was then New York's lieutenant governor as well as mayor of New York City. Clinton was a controversial candidate, however, because he opposed the War of 1812 and was challenging an incumbent Republican, James Madison. Clinton won New York's electoral votes, largely because of Van Buren's efforts in the state senate, but he lost the election. Van Buren was not appointed attorney general.

In March 1813, when Van Buren sat as a judge on New York's court of errors (where state senators acted as judges), he issued an important decision in *Barry v. Mandell,* a case that dealt with imprisonment for debt. John W. Barry had been jailed for debt but was released on bond with the provision that he stay within certain boundaries. When Barry chased one of his cows a few feet beyond his boundary, his creditor, Mandell, sued for the amount of Barry's bond and won the case before the state supreme court. After carefully reviewing the case, Van Buren wrote a lengthy judgment criticizing the supreme court's decision and blasting imprisonment for debt, which he called "a practice fundamentally wrong" (Mushkat and Rayback 1997, 76). Debtors were jailed, Van Buren wrote, "for the misfortune of being poor; of being unable to satisfy the all-digesting stomach of some ravenous creditor" (Cole 1984, 25). The other members of the court agreed with Van Buren; the court overturned the supreme court's decision and ordered Mandell to pay Barry's costs.

Van Buren's involvement in *Barry v. Mandell* (which some mockingly referred to as the "cow case") prompted him to deal with the issue of debt in his political life. The month after the case, he introduced in the senate a bill designed to provide some relief for small debtors. The senate did not pass the measure, but Van Buren sponsored similar bills in later sessions and when he was a U.S. senator. His efforts reinforced his image as a man sympathetic to the common person.

In 1814, Van Buren served as a special judge advocate for the prosecution in the court-martial of General William Hull. The general, a hero during the American Revolution, had been called back into service when the War of 1812 began and was put in charge of the army in the West. His job was to invade Canada and protect Michigan, but his invasion failed and he ultimately surrendered Detroit to the British without firing a single shot. He was brought before the court-martial on charges of treason, cowardice, and neglect of duty.

The case drew great attention not only because it involved a military calamity, but because an acquittal for Hull would shift blame for the event to President James Madison and others. After he familiarized himself with

the procedures of military justice, Van Buren performed his usual meticulous case preparation. He conducted the prosecution skillfully, presenting more than sixty documents and calling a variety of witnesses. In his summation, Van Buren discounted the charge of treason, calling it "unsupported and insupportable," but hammered Hull on the other charges. The court found Hull guilty and sentenced him to death by firing squad, but recommended that the president grant him clemency in light of his age and service during the Revolution; Madison concurred. Van Buren's work in the difficult case solidified his reputation as a courteous and highly skilled attorney. More important, he gained his first exposure as a national figure.

In the wake of the Hull trial, Van Buren renewed his efforts to be named New York's attorney general. Van Buren was better placed to achieve his desire than he had been two years earlier; he was more widely known because of his legal work and his strong support of the War of 1812 in the New York senate (he had severed his ties with the antiwar Clinton after the election of 1812). Van Buren was especially proud of the classification act he engineered; the measure authorized the state of New York to draft men for service in the war. In early 1815, Van Buren was selected as attorney general. The office enhanced both his legal and political careers, and it secured his position as one of the leading Republicans in New York.

Van Buren exercised a variety of functions as attorney general. His overall mandate, according to the state constitution, was to act as the state's attorney in "all cases where the people of this state shall be interested." Statutes gave the attorney general a range of more specific duties, including checking the state and local governments for malfeasance, ruling on the legality of bail set in certain cases, serving on several state boards, giving the state legislature legal opinions, preparing contracts for the state, and seeing that chartered corporations operated according to the law. His job entailed substantial trial work. These responsibilities, in addition to his continued service in the state senate (he was reelected in 1816) and his private legal practice and business interests, made Van Buren an extremely busy man. His hectic schedule forced him to end the legal partnership he had enjoyed with Cornelius Miller since 1810. He received valuable assistance, however, from his clerk, Benjamin F. Butler (Mushkat and Rayback 1997, 43, 101–103).

In 1816, Van Buren tried to ease his tremendous workload by moving his family to Albany, the state capital. The next year, he made Butler a partner in his private legal practice, which was suffering due to the heavy demands on Van Buren's time. Yet 1817 was a difficult year for Van Buren in both his legal career, because he lost an uncharacteristically high number of cases, and his political career, because DeWitt Clinton—by then a bitter political

enemy of Van Buren—won election as governor of New York. Van Buren became the leader of the "Bucktails," Republicans who opposed Clinton.

With Clinton's position strengthened by the elections of 1818, Van Buren realized that he might be removed as attorney general. Nevertheless, he continued his frenetic pace in office. Perhaps his finest legal moment as attorney general came in 1818, when he used the quo warranto writ in an original way; he was the first lawyer to apply that type of writ against a corporation (Mushkat and Rayback 1997, 125–126).

Van Buren faced a series of devastating personal losses in this period. His father died in 1817, followed by his mother in 1818. Then, in February 1819, his wife, Hannah, died of tuberculosis. Van Buren admitted to Butler that Hannah's death had left him in a "delicate" condition (Cole 1984, 53). Van Buren never remarried. Soon after Hannah's death, Butler ended his legal partnership with Van Buren, a crippling blow to his private practice. Finally, in July 1819, Clinton ousted Van Buren as attorney general.

With Van Buren pledging to concentrate on his legal career, he and Butler (who later served as U.S. attorney general under Presidents Jackson and Van Buren) formed a new partnership based in Albany in 1820. Although he did not run for reelection to the state senate in 1820, Van Buren could not forsake politics for long. With the support of the Bucktails, who had become the dominant force in New York Republican politics, Van Buren was elected to the U.S. Senate in 1821.

Van Buren continued to practice law part-time throughout his tenure in the senate, but the time he devoted to the law decreased each year. He became an increasingly important player in national politics, eventually forming an alliance with Andrew Jackson and helping to form the new Democratic party. Van Buren's legal career ended in 1828, when he was elected governor of New York. Van Buren's political career soared; he became President Jackson's secretary of state in 1829, vice-president in 1833, and president in 1837.

Even though frequently preoccupied with politics, Van Buren had been a highly successful lawyer. He won almost 89 percent of his 255 appellate cases and successfully handled innumerable other cases of many types. He won 11 of 21 cases before the court of errors and, as a senator-judge on that court, he wrote 15 opinions. As attorney general, he won another 258 cases. Over the course of his twenty-five-year legal career, he faced hundreds of other attorneys and rose to the top of the crowded and talented New York legal profession (Mushkat and Rayback 1997, 179–180). Van Buren was probably the most accomplished lawyer among the twenty-five (of the first forty-one) presidents who practiced law at some point in their lives (Cole 1984, 25).

Moreover, his legal work facilitated his political career. It helped him achieve public visibility throughout his home state, it provided him with a large income that freed him to pursue politics, it enhanced his sense of security and self-esteem, and it allowed him to develop a sizable network of friends and supporters. More important, perhaps, it was as a lawyer that Van Buren's political ideology, a mixture of classical and liberal republicanism, evolved. Those republican principles—including a belief in limited government, individual liberty, equal opportunity, and antipathy to aristocracy—laid the groundwork for Jacksonian democracy (Mushkat and Rayback 1997, vii, 177–186). Thus, not only did Van Buren's legal career help him launch his political career, it ultimately influenced a movement that transformed the United States.

—Mark Byrnes

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VANDERBILT, ARTHUR T.

(1888–1957)

Arthur T. Vanderbilt
Bettmann/Corbis

Although he is widely known in American legal circles for his writings, for his work as a law professor and law school dean, for his efforts to bring about judicial reform, and for his service as chief justice of the New Jersey Supreme Court, Arthur T. Vanderbilt is less known for his skills as an attorney. However, his biographer has said that his main contribution to the law was "as a lawyer and not as a judge"; his biographer further referred to Vanderbilt as the "complete lawyer" (Gerhart 1980, 211). There can be little doubt that Vanderbilt's lawyerly skills contributed to his widespread success and that they have earned him a place among the United States' greatest attorneys.

Born in Newark, New Jersey, on July 7, 1888, to Louis and Ellen H. Leach Vanderbilt, Vanderbilt apparently grew up believing that his father—who was a telegraph operator for a railroad—lacked sufficient ambition. Arthur was, however, greatly influenced by his mother, whose Methodist background emphasized hard work and high goals.

Ephraim Tutt

Long before Erle Stanley Gardner invented Perry Mason, Arthur Train had been writing stories about Ephraim Tutt, described as "a combination of Robin Hood, Abraham Lincoln, Puck, and Uncle Sam" (Tutt 1944, xii). Tutt's persona was loosely based on a successful attorney by that name, who was born in Vermont in 1869, graduated from Harvard Law School, and practiced in rural New York and later in New York City.

In Tutt's autobiography, he tells of a case in which he was defending an Italian named Angelo Serafino who was charged with the murder of a man who had once jilted Serafino's wife and who subsequently professed still to be enjoying her favors. In jail, Serafino had bragged, "I killa him—I killa him again."

Tutt had almost no exonerating evidence to go on, and, faced with closing arguments, Tutt had wandered the streets until morning, when he had entered St. Patrick's Cathedral and fallen asleep on one of the back pews. All he could do the next day was to admonish the jury to acquit his client if they had any reasonable doubt.

As the jury deliberated, Serafino shrieked in open court, "I killa that man! He maka small of my wife. He no good—bad egg! I killa him once—I killa him again!"

Tutt's offer to enter a plea to second-degree murder was rejected, and he awaited the inevitable judgment. No one—except perhaps the judge and prosecuting attorney—was more surprised than he when his client was declared not guilty. An Irish juror, Patrick Henry Ross, whom Tutt had hoped to exclude from the jury, explained the verdict:

> At first we couldn't see that there was much to be said for your side of the case, Counsellor; but whin Oi sthepped into St. Patrick's on me way down to court this mornin' and spied ye prayhin' there fer guidance, I knew ye wouldn't be defendin' a guilty man, and so we decided to give him the benefit of the doubt. (Tutt 1944, 398–400)

Train's version of this story is entitled "The Human Element" (Train 1940, 1–25).

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Vanderbilt graduated from high school at age sixteen, and, after a year of work as a surveyor, he attended Wesleyan University in Middleton, Connecticut. There he participated in a variety of activities, including debate, managed the football team, edited the college paper, was active in Delta Kappa Epsilon (in which he would maintain a lifelong interest), served as student body president in his senior year, and won numerous academic awards while simultaneously pursuing his B.A. and M.A. degrees and being selected for Phi Beta Kappa. The college president described Vanderbilt as

"the most unusual and gifted undergraduate I have known in all my college experience" (Vanderbilt 1976, 6). Vanderbilt subsequently began clerking for a civic-minded attorney named Frank Sommer, earned his law degree at Columbia Law School, and soon after began many years of teaching at New York University Law School. Unlike many other top students who remained in New York to practice, however, Vanderbilt moved back to Newark, New Jersey, where he was active in state politics until his death.

In 1914, Vanderbilt married Florence Althen, a high school sweetheart who had graduated from the Juilliard School of Music and gave piano lessons. Although he was in a number of early partnerships, Vanderbilt extolled the single practice but apparently worked best in what has been described as a "solar" system of practice, consisting of "a single bright sun, like Arthur T. Vanderbilt, surrounded by satellite young lawyers who are dependent on him and work with him" (Gerhart 1980, 25). In addition to being strongly influenced by his mother, Vanderbilt admired Henry Churchill King's inspirational book *Rational Living* (1905) and the self-help philosophy of Benjamin Franklin.

These influences helped Vanderbilt lead an extremely well-organized life, which enabled him to excel in multiple activities. Vanderbilt's first cases involved debt collection; he earned 5 percent of the seven hundred thousand dollars he collected, being prudent enough to aggregate all his collections together rather than allowing the attorney who hired him to change his fees (Vanderbilt 1976, 18–19). Vanderbilt continued his specialization in bank and insurance litigation and amassed an awesome record by winning all twenty-five cases that he argued before New Jersey's court of errors and appeals (the state's highest court) between 1928 and 1932. His biographer notes that he was soon "regarded as one of the foremost trial lawyers, not only in New Jersey, but in the East" (Gerhart 1980, 36). Other attorneys increasingly referred cases to Vanderbilt, who, between 1927 and 1937, argued more cases before state and federal courts than all but one other New Jersey attorney (Gerhart 1980, 41).

Vanderbilt's most notable win was probably the case of *State v. Butterworth* (1928), in which he defended leaders of a parade during a strike against charges of unlawful assembly. Challenged during his argument for pointing to evidence that was not otherwise in the record that the defendant had been accompanied by two "attractive girls carrying American flags," Vanderbilt quickly responded—to the apparent satisfaction of the court—that "I would assume that the Court would take judicial notice of the fact that any young, American girl leading a parade, carrying the American flag, is an attractive girl" (Gerhart 1980, 37). At age thirty-seven, Vanderbilt received $175,000 in fees for serving as a receiver of the Virginia-Caroline Chemical Company, and he used this money to move to an

eighteen-room house in nearby Short Hills to accommodate his family of three girls (two of whom eventually married lawyers) and twin boys (both of whom later became attorneys).

Vanderbilt helped found and served as first president of the Essex County Republican League, an influential organization devoted to "clean government" in Newark and the surrounding Essex County. Noting that some attorneys "will doubtless sneer and say 'politics,'" his own view was that, called by whatever name, politics "represents the only process thus far devised by which society may permanently advance itself" (Gerhart 1980, 58). Successfully backing many candidates for state and local offices, Vanderbilt also served as counsel to Essex County from 1922 to 1947, a job that some regarded as a plum for political service but for which Vanderbilt clearly performed yeoman service (Vanderbilt 1976, 38–39). Vanderbilt was less successful in his role as founder of the Public Fire Insurance Company of Newark, which had a successful beginning but went bankrupt during the Great Depression.

Vanderbilt's participation in politics did not keep him from deepening his knowledge of the law. He served as chair of the New Jersey Judicial Council from 1930 to 1940 and was widely regarded for his expertise in insurance law and for his growing equity practice (Gerhart 1980, 77). Vanderbilt was also chosen as chairman of the National Conference of Judicial Councils and as the chairman for the National Committee on Traffic Law Enforcement. Vanderbilt served as president of the American Bar Association (ABA) from 1937 to 1938, and he flew more than seventy thousand miles during this tenure. The following year he served as president of the American Judicature Society.

As president of the ABA, Vanderbilt helped create the Section of Judicial Administration; Judge John J. Parker chaired this section and issued seven reports, which did much to advance the cause of efficient judicial administration. As ABA president, Vanderbilt also helped push for legislation that resulted in the creation of the Administrative Office of the United States Courts (Gerhart 1980, 131).

Although he was increasingly recognized for his political connections, an English client who hired Vanderbilt for his New Jersey influence only to find the venue changed to Philadelphia was happy when Vanderbilt won the case. The client remarked, "I thought I hired a politician but I am pleased to know I hired a lawyer" (Gerhart 1980, 81).

Vanderbilt was appointed as a member of the Constitution Commission to write a new New Jersey constitution. Although this proposal was rejected in 1944, Vanderbilt helped bring about the proposals that eventually resulted in the New Jersey Constitution of 1947. His successful work in unifying and systematizing the previously antiquated system of New Jersey

courts—described as "a hydraheaded monster of confusion for litigants and a legal maze for lawyers" (Vanderbilt 1976, 79)—during this time has been compared to the work of England's Jeremy Bentham and that of New York's David Dudley Field and Roscoe Pound (Gerhart 1980, 85).

In the 1940s, Vanderbilt served as chairman of the advisory committee to draft rules of procedure for criminal cases being argued in U.S. federal district courts—work that eventually resulted in 1946 in the promulgation of the Federal Rules of Criminal Procedure. In 1942, he directed the first Annual Survey of American Law. Vanderbilt also continued his work as a litigator. In 1939, Vanderbilt successfully argued before the U.S. Supreme Court against the expulsion of socialist Norman Thomas from Jersey City in attempts to limit public meetings and union activities in *Hague v. CIO*. In 1945, Vanderbilt further succeeded in *U.S. v. Michener,* a case before a U.S. district court, in acquitting a defendant accused of criminal conspiracy relating to government contracts. Perhaps in part because of his prodigious efforts in this case, as well as his numerous other commitments, Vanderbilt suffered a stroke, which slowed, but did not stop, his work.

Vanderbilt continued to work for improvements in judicial administration. The highlights of the judicial system he proposed for New Jersey called for unification, flexibility, and control over the administration of justice (Gerhart 1980, 153). Vanderbilt also emphasized the importance of pretrial conferences. Many of Vanderbilt's ideas were expressed in his *Cases and Other Materials in Modern Procedure and Judicial Administration* (1952), one of the many books that he authored.

Vanderbilt had begun in 1914 as an instructor at the law school at New York University. By 1918, he was appointed as a professor, and from 1943 to 1948 he served as dean. Vanderbilt was particularly concerned about prelegal education, and he was convinced that lawyers needed to engage in continual "self-education." Citing Ben Jonson, Vanderbilt said that

> "It is not growing like a tree. In bulk, doth make men better be." Knowledge is only worth while when it has been assimilated and thus made usable. The capacity to work hard, the ability to think straight, training in expressing oneself well both orally and in writing, the understanding and sympathy with people one meets, a social consciousness, a keen interest in life, are more important than any amount of knowledge. (Gerhart 1980, 264–265)

Despite his own emphasis on other roles, Vanderbilt noted that "lawyers carry on a wide variety of activities but in the final analysis the advocate representing his client in court typifies the profession, for it is in the courts and other tribunals that the rights which the law protects must be vindicated" (Gerhart 1980, 192). Vanderbilt is credited with inventing the con-

cept of the "law center," emphasizing continuing education (the building that now houses this center at New York University, and for which Vanderbilt helped raise funds, now bears his name), and he also established honors courses at New York University.

After New Jersey adopted its new constitution, it was only logical that Vanderbilt would be asked in 1948 to serve as the state supreme court's first chief justice (the court had seven members), a position that required him to step down as dean at New York University. As would be expected, Vanderbilt issued a number of important decisions during his tenure as chief justice. The court's most controversial decision highlighted the fact that Vanderbilt's most important contribution as chief justice was in his continuing effort to promote sound judicial administration. The case, *Winberry v. Salisbury* (1947), involved the interpretation of the provision in the New Jersey state constitution granting the supreme court the power "to make rules governing the administration of all courts in the State and, subject to law, the practice and procedure of all such courts" (Gerhart 1980, 237). Although his decision appeared to be in conflict with the arguments he had made concerning the phrase "subject to law" when the constitution was being argued, Vanderbilt now argued that this phrase referred not to the power of the state legislature but to the supreme court itself. Thus ruling in favor of the power of his court, Vanderbilt ensured that the judicial branch would maintain its independence.

As chief justice, Vanderbilt sought to ensure that the *Canons of Judicial Ethics* were enforced throughout the state. Lower courts were required to establish uniform hours and to fill out what critics called judicial "report cards" indicating how quickly they were resolving cases. When a number of such judges suffered heart attacks, Vanderbilt was criticized for having driven them too hard. Asked whether Vanderbilt might be named as the replacement for Chief Justice Frederick Vinson on the U.S. Supreme Court (the position went to Earl Warren, to whom President Dwight Eisenhower had promised it), Justice Felix Frankfurter reflected the view that Vanderbilt was "a pompous martinet who treats his court as though it were a factory where men punch clocks" (Gerhart 1980, 231). The fact that one of the judges who worked on the New Jersey court with Vanderbilt was William Brennan, who later had such a distinguished career on the U.S. Supreme Court, is one indication that Frankfurter's critique, while reflecting elements of truth, was wide of the mark.

Just as he promoted judicial efficiency, so too Vanderbilt was willing to use his decisions to adapt the law to the times (Schwartz 1993, 496). Vanderbilt ruled on a fairly consistent basis that legal certainty, or stare decisis, should be subordinate to the need for social justice. A grandson has de-

scribed the "common thread" running through Vanderbilt's decisions as chief justice as the attempt

> to make the substantive law of New Jersey suitable to contemporary conditions by pushing aside procedural or technical intricacies and discarding legal doctrines, no matter how ancient or revered, that were no longer compatible with a modern court system or with the economic and social realities of the new age. (Vanderbilt 1976, 198)

Vanderbilt appears to have been more conservative in adapting criminal laws than in adopting new rules of civil liability. Vanderbilt thus failed to extend the lawyer-client privilege to conferences believed to involve the defense of gangsters. This opinion led a biographer to observe that "many lawyers felt that on issues of this kind Vanderbilt let his noble desire to reach a particularly felicitous end of which he approved, dictate the law" (Gerhart 1980, 261).

Vanderbilt received many honors during his life, including thirty-two honorary degrees (including one from Princeton University in New Jersey), the American Bar Association Medal, the Gold Medal of the New York State Bar Association, the Golden Anniversary Award of the American Judicature Society, and the Columbia University Award. He was also named in 1950 as the Outstanding Citizen of New Jersey (Gerhart 1980, 262–263).

Vanderbilt's devotion to the law has been described as being "religious" in nature (Gerhart 1980, 277). Often called a "lawyer's lawyer" (Gerhart 1980, 285), Vanderbilt had an excellent memory for details, was well organized, prepared for cases thoroughly, had a deep sense of public service, and wrote briefs and opinions clearly. Thomas E. Dewey described Vanderbilt as

> a man with a twinkle in his eye—a man with two tough fists and a sharp tongue who could go in and fight harder and better than anybody else around him when it was necessary for a client or for a cause. He was a man who selected his causes with wisdom and then gave them a degree of vigor and imagination which has rarely been equaled in our history. (Vanderbilt 1976, xii)

Vanderbilt's motto has been described as "organize, delegate, supervise" (Gerhart 1980, 290). Had he not been able to follow this motto so closely, it is unlikely that he could have accomplished all that he did before dying on June 16, 1957, three days after rupturing his aorta. Former U.S. Supreme Court justice Lewis Powell noted that Vanderbilt's "contributions to the improvement of judicial administration . . . will rank among the great achievements of American lawyers" (Gerhart 1980, vii). Similarly, Justice

William Brennan, who had worked with Vanderbilt on the New Jersey Supreme Court, observed at his death that "his contribution toward improvement of judicial administration and substantive law are an imperishable monument to his memory" (Gerhart 1980, 296).

—John R. Vile

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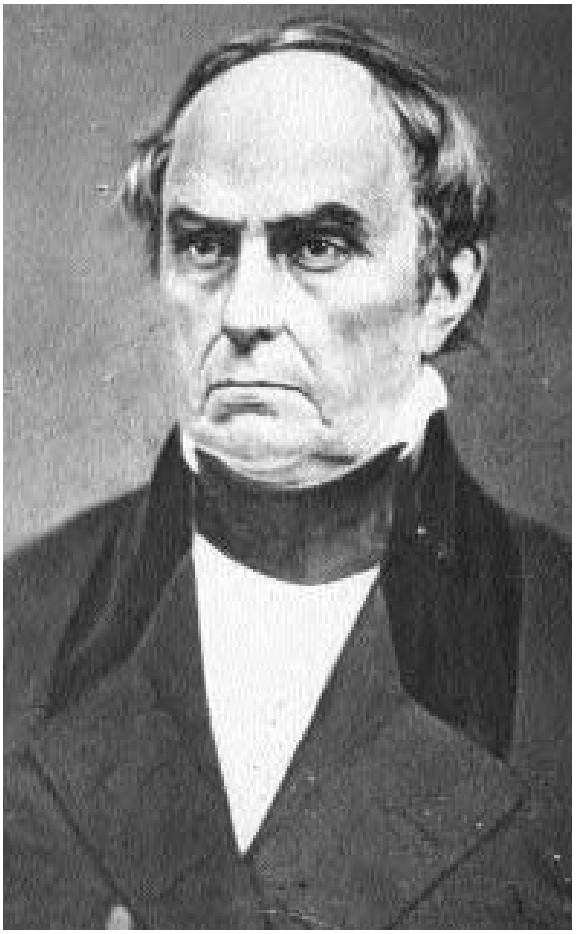
WEBSTER, DANIEL

(1782–1852)



Daniel Webster
Library of Congress

Daniel Webster, best remembered for his powerful advocacy and staunch defense of the federal union, maintained a wide-ranging law practice. Webster played a major role in shaping constitutional jurisprudence, and at the height of his practice, from 1819 to 1827, he participated in many leading cases interpreting the contract clause and the commerce clause of the U.S. Constitution. He also litigated numerous private cases, dealing primarily with real property and commercial issues.

Webster's practice covered almost every class of case, including civil and criminal, law and equity, trial and appellate. He appeared in state courts at every level, as well as in federal district and circuit courts and the U.S. Supreme Court. Webster generally represented propertied interests and advocated national supremacy over state power. Many of his clients were corporations, such as insurance companies, banks, railroads, and shipping houses. The Bank of the United States kept him on annual retainer, as did other companies.

He viewed the judiciary as a necessary check on legislative power, and he even spoke against the doctrine of judicial self-restraint, urging that courts should not defer to legislatures because they had a duty to decide the validity of statutes.

Daniel Webster was born in January 1782 to Ebenezer and Abigail Webster. His father was a New Hampshire pioneer who raised a large family in Salisbury, New Hampshire, about twenty miles north of Concord. In 1796, at age fourteen, Webster attended Phillips Academy, studying Latin and Greek. The next year, he entered Dartmouth College, and after graduating in August 1801, he became a clerk in the law office of his father's neighbor in Salisbury, Thomas W. Thompson. This clerkship was interrupted in December 1801 when Webster helped to finance his older brother's college education. Webster left in early 1802 to teach at Fryeburg Academy in Maine. He returned to his clerkship in September 1802 to continue studying law.

In July 1804, Webster left Thompson's office to join his brother, Ezekiel, in Boston. There he secured a clerkship in the office of Christopher Gore, and in the spring of 1804, Webster was admitted to the Massachusetts bar. Soon after, he moved back to New Hampshire to open a law office in Boscawen, which was near his father's farm. His practice in Boscawen from 1805 to 1807 dealt primarily with debt collection and disputes over promissory notes. Webster primarily represented creditors. During this time, he also began to represent Boston merchants, a practice he continued throughout his professional life. When collecting debts for these merchants against local proprietors with failing businesses, he helped to create arrangements among creditors who claimed the same property of the debtor. His debt cases by nature involved property law, which became another continuing aspect of his practice.

In late 1807, Ezekiel took over the Boscawen office and Webster moved to Portsmouth, New Hampshire, taking his Boston clients with him. The first few years of his Portsmouth practice were similar to that of his Boscawen experience, consisting primarily of debt collections. But by 1816, he had begun to handle more contract litigation cases. These contract cases focused on express or implied agreements involving loans, goods, or services. Moreover, he started to handle maritime issues, naturally arising from Portsmouth's status as eastern New Hampshire's principal port, and from 1814 to 1819 he concentrated on admiralty cases.

Webster continued a strong maritime practice throughout his career. He argued cases dealing with prize issues, liability for cargo losses, and liability for accidents aboard ships. An important maritime case he tried in a lower federal court was *United States v. La Jeune Eugenie* (1822). A U.S. naval officer seized the ship off the coast of West Africa because it appeared to be equipped for transporting slaves. He sent the vessel to Boston, where the

French owners faced charges of participation in the slave trade, which the United States had outlawed. Webster, appearing on behalf of the United States and the captor, contended that slave trade was against the law of nature, which he asserted was part of the law of nations. Since the civilized countries of the world had banned such trade in humans, Webster argued that the French owners had violated international law. Justice Joseph Story, in the circuit court, agreed with Webster, castigated the international slave trade, and ruled that the vessel was subject to condemnation.

In 1816, Webster moved to Boston, where he continued to practice in both state and federal court, focusing on debtor-creditor issues. His early practice also included appearing for Boston merchants and insurance companies before the Spanish Claims Commission in Washington. In 1819, the United States and Spain signed the Adams-Onis Treaty, which arose partly as a result of claims concerning Spain's seizure of U.S. ships. The treaty provided for a three-member commission of U.S. citizens to resolve these U.S. claims. Webster filed more than two hundred claims with the commission during the its three-year existence from 1821 to 1824.

While maintaining his practice in commercial law, Webster began to handle property, marine insurance, corporate, and patent cases. An example of Webster's property law practice was *Drake v. Curtis* (1848). The defendant's predecessor had built a wharf on the plaintiff's shoreline property in Massachusetts. Curtis claimed title to the land by adverse possession. He had bought the land, including the wharf, from Jabez Hatch. Drake owned the adjoining land and eventually discovered that he held title to the land that Curtis had bought. Drake was sued to recover the land. The jury determined that Curtis owned the wharf and the immediately surrounding shore, but that the rest of the property described in Curtis's title belonged to Drake because Curtis had not "used" this land as required for adverse possession. Webster represented Curtis in his appeal to the Massachusetts Supreme Judicial Court. Webster's argument combined the facts that Curtis had partially occupied the land, that Drake had not attempted to occupy any part of it for thirty years, and that Drake had knowledge of Curtis's use and intent to possess, hoping that this combination of facts would be enough to prove title by adverse possession. However, the court affirmed the jury's verdict for Drake.

In addition to his law practice, Webster had an active career in public service. He was nominated for the presidency by Massachusetts Whigs in 1836, but he received electoral support only in New England. Twice appointed U.S. secretary of state, Webster served in that post from 1841 to 1843 and again between 1850 and 1852.

In November 1812, Webster was elected to the U.S. House of Representatives and served in this capacity from 1813 to 1817. He was a member of

the Massachusetts House of Representatives in 1822, and returned to the U.S. House of Representatives in 1823 as a representative from Massachusetts, serving until 1829. He also represented Massachusetts in the U.S. Senate from 1827 to 1841 and from 1845 to 1850.

Webster maintained his practice of law while serving as a member of Congress, and he took advantage of being in Washington by arguing cases before the U.S. Supreme Court. In fact, he was admitted to practice before the Supreme Court in 1814 and made his first appearance in the same year. He argued 168 cases before the Supreme Court, winning about half of them.

The effectiveness of Webster's advocacy can be traced to several sources. He prepared arguments carefully, and he aimed his presentation to match the predilections of the judges before whom he appeared. Moreover, at a time when the Supreme Court had no time limit for oral argument, Webster's masterful oratory could hold the attention of the Court for hours. Twenty-four of the cases Webster argued before the Supreme Court raised constitutional questions. Of his Supreme Court practice, Webster's cases concerning the scope of the contract clause provide the most insight into his ability for creative legal argument.

The *Dartmouth College* case (1819), Webster's first well-known Supreme Court case, involved the contract clause. The college was founded during the colonial era with a royal charter. The New Hampshire legislature in 1816 enacted a law that changed the governmental structure of the college, transforming it into a state institution. The trustees of the original college brought suit in state court against a former trustee who had joined the newly created university for the return of the charter, records, and seal. Webster was one of the college's counsel, and he argued that Dartmouth was a private corporation. He maintained that the charter was a contract with the state, and thus the legislature had no power to amend its charter.

Acting as lead attorney before the U.S. Supreme Court on an appeal from an adverse state court ruling, Webster focused on corporate rights at common law. He emphasized that the state constitution's due process clause protected the property rights of the trustees and the president to govern the institution. He also asserted that the contract clause of the U.S. Constitution prohibited the New Hampshire legislation because the charter of a private corporation was a contract with the issuing state. Describing Dartmouth College, Webster famously declared: "It is, sir, as I have said, a small college. And yet there are those who love it" (Stites 1972, 1).

Vindicating Webster's position, Chief Justice John Marshall held that the college was a private corporation and that New Hampshire had unconstitutionally impaired the obligation of the contract between the corporation and the state.

Daniel Webster as Mythological Hero

Daniel Webster most certainly ranks among America's greatest lawyer-statesmen. One measure of his fame is the manner in which he has been immortalized in a story by Stephen Vincent Benét entitled *The Devil and Daniel Webster* (Benét 1937).

The story describes a mythological case in which Webster defends New Hampshire citizen Jabez Stone. In the story, Stone had sold his soul to the devil in exchange for prosperity for his family and himself, and he now faces Scratch (the Devil) who comes to collect his part of the bargain. The contest is portrayed much as a contest of equals; at one point Satan is described as "the King of Lawyers" (Benét 1937, 38).

The exchange between Webster and the Devil goes relatively poorly for Webster (after all, Stone had signed a contract) until the Devil, noting his presence when Indians were first wronged and Africans were first loaded on ships to America, claims American citizenship. Webster then demands a jury trial; in what must be every lawyer's nightmare, the Devil literally brings in a jury from hell presided over by the most fanatical judge in the Salem Witch Trials.

Although the Webster of history is generally known for the overpowering intensity of his oratory, in Benét's story, Webster realizes just before he gives his closing statement that he will lose the case if he resorts to the devil's own tools and is motivated by hate (Benét 1937, 48). Just in time, Webster alters his strategy and speaks to the jury in a low voice of "the simple things that everybody's known and felt" (Benét 1937, 49) and especially about what it means to be a man. Thus managing to touch the hearts even of the judge and jury from hell, Webster gains a victory, albeit "not strictly in accordance with the evidence" (Benét 1937 55).

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In *McCulloch v. Maryland* (1819), Webster served as counsel for the Bank of the United States. Maryland had levied a tax on all banks in the state that were not chartered by the legislature. The Baltimore branch of the Bank of the United States refused to comply, and the state sued the branch cashier. Webster argued that Congress had the authority to charter a bank, and that the state tax interfered with the execution of a national law. This contention prevailed. Chief Justice Marshall upheld the authority of Congress to create a national bank and relied on the U.S. Constitution's supremacy clause to invalidate the Maryland bank tax.

Another significant contract clause case handled by Webster was *Ogden v. Saunders* (1827). The issue was whether states had the power to enact bankruptcy legislation affecting future contracts. Webster contended that the national bankruptcy power excluded concurrent state bankruptcy

power, and also argued that the state law was invalid due to its violation of the contract clause. Webster's position was that the contract clause forbade legislation whenever it discharged the debtor's liability to pay its debt. However, the Court held that the contract clause only applied retrospectively to protect existing contracts. Chief Justice Marshall, in his only dissent in a constitutional case, agreed with Webster's argument.

In *Charles River Bridge v. Warren Bridge* (1837), the Massachusetts legislature incorporated the Charles River Bridge Company to build a toll bridge, conferring on the company the right to collect tolls for forty years. Later, the legislature incorporated the Warren Bridge Company to build a free bridge. Webster argued the case in the Massachusetts Supreme Court for the Charles River Bridge Company, concluding that it had the exclusive right to a bridge over the river from Boston to Charlestown, under its charter. He classified the charter as a contract obligating Massachusetts not to effectively destroy the value of the plaintiff's right to collect tolls. Thus, the state had violated the contract clause. He also asserted that the state had taken the company's property without compensation, violating the eminent domain clause of the state constitution. The court was split on the validity of the statute granting the Warren Bridge charter. Webster appealed, but the U.S. Supreme Court rejected his argument and ruled that legislative grants should be strictly construed to preserve state police power.

Webster was counsel in several cases from 1824 to 1849 in which the courts analyzed the unsettled issue of the division of state and national power over commerce. He advocated maximum national power, preferably exclusive of state authority. Webster urged his views in *Gibbons v. Ogden* (1824), the first commerce clause case in constitutional history. Representing Gibbons before the Supreme Court, Webster opposed a New York state–granted steamboat monopoly in state waters that had been granted to two men, of which Aaron Ogden was an assignee. He insisted that national power to regulate interstate commerce was exclusive. Since Gibbons held a license under the Federal Coasting Act of 1793, Webster also argued that this license conferred a right freely to navigate the waters of the United States because federal statutes were superior to inconsistent state laws. Although the Supreme Court stopped short of endorsing Webster's claim of exclusive federal jurisdiction over interstate commerce, it construed the federal license to nullify the New York steamboat monopoly.

In *Smith v. Turner* and *Norris v. Boston* (1849), known as the *Passenger Cases*, Webster, along with Rufus Choate, represented the plaintiffs against the states of New York and Massachusetts, which were represented by John Davis. The states had enacted laws to tax alien passengers arriving at their ports, with the intent to protect the eastern states from infiltration

by undesirable persons. The western states viewed this as an unjustified regulation of foreign commerce, which prevented them from attracting immigrants. Webster based his argument on the federal commerce clause, maintaining that Congress had the exclusive power to regulate national commerce, and thus Massachusetts was interfering with national commerce by taxing passengers. Webster's arguments proved persuasive. The Court invalidated the statutes as violations of the commerce clause of the U.S. Constitution but had difficulty articulating the basis for its decision.

As his practice grew, Webster handled more cases dealing with property rights, including real property and intellectual property, and at least one state boundary dispute. In 1846, he successfully represented Massachusetts before the Supreme Court in a boundary dispute with Rhode Island. An important case involving real property ownership was *Johnson v. McIntosh* (1823). Webster represented the plaintiff, who had purchased land in Illinois from Indians, against the defendant, who had later purchased the same land from the U.S. government. The Court held that Johnson's title was invalid because the Indians' rights to land were subordinate to the title established by discovery of North America by European countries. A defeat for Webster, *Johnson* was the initial Supreme Court decision to define the relationship between Indians and the government.

In the later years of his practice, Webster represented patent and copyright claimants. In *Wheaton v. Peters* (1834), he handled Henry Wheaton's appeal before the Supreme Court. Peters planned to publish a condensed work of Wheaton's reports of U.S. Supreme Court cases. Wheaton asserted a copyright in his work, and Webster argued that English common law conferred such right on Wheaton. The majority rejected this argument and held that Wheaton had not complied with Congressional copyright laws and could not assert a common law copyright. The ruling established the principle that copyright protection rested solely on a statutory foundation. Similarly, in *Pennock v. Dialogue* (1829), Webster argued for broad protection for inventors, urging the Supreme Court to recognize the natural rights of inventors. The Court, however, held that claimants must comply with the federal statute to gain patent protection.

Webster gave his last full-scale oral argument in *Goodyear v. Day* (1852), a patent case in which Charles Goodyear, the inventor of a process for vulcanizing rubber, sought to enjoin an infringement of his patent. The defendant was represented by Rufus Choate, and the case was heard in the federal circuit court in Trenton, New Jersey. The court held for Goodyear and established a rule that was important for patent claimants generally. Webster convinced the court that instead of presenting the issue to a jury, the court, as a matter of equity practice, could make findings of fact and grant

an injunction. Webster viewed this as a victory because he thought inventors' rights were better protected by judges than by juries sympathetic to assertions of monopoly power against patent holders.

Webster died in Marshfield, Massachusetts, on October 24, 1852.

—James W. Ely Jr.

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WILLEBRANDT, MABEL WALKER

(1889–1963)

Mabel Walker Willebrandt
Library of Congress

Mabel Walker Willebrandt served as a U.S. assistant attorney general from 1921 to 1929 with jurisdiction over prohibition cases, federal income and estate taxes, prisons, and war risk insurance. Dubbed "Prohibition Portia," she focused primarily on enforcing prohibition laws by prosecuting major bootleggers. After leaving the Justice Department, Willebrandt turned her attention to defining and developing aviation law, serving as the Washington counsel for the Aviation Corporation and chairing the Committee on Aeronautical Law of the American Bar Association, the first woman to head an American Bar Association committee. At the same time, Willebrandt worked in communication law, another relatively new legal field, as well as international claims and tax law. Throughout the 1940s and 1950s, many of her clients were famous Hollywood actors, directors, and film executives.

Born Mabel Elizabeth Walker on May 23, 1889, the only child of Myrtle Eaton and David W. Walker, Willebrandt began life in the southwest Kansas frontier town

of Woodsdale. Until 1902, when the family settled in Kansas City, they led a nomadic life, moving from Kansas to Putnam County, Missouri, to Blackwell, Oklahoma, and back to Putnam County. During these early years of Willebrandt's life, her father worked as a printer and newspaper editor, and both parents taught in local schools. Before the move to Kansas City, Willebrandt received little formal schooling; instead, her parents taught her to read, set type for the newspaper, and work on the farm. They worked to develop Willebrandt's character and relied on local church services to impart religious training. In Kansas City, Willebrandt completed grammar school and took some courses at Manual Training High School. In September 1906, she began further study at Park College and Academy in Parkville, Missouri, but she left in 1907 after disagreeing with the school's president on religious doctrine and resisting the strict rules of the Presbyterian-based school. She then moved with her family to Buckley, Michigan, so that her father could care for his ailing mother. During the next two years, Willebrandt passed the teachers' examination, taught in a nearby county school and in the Buckley grammar and high schools, and studied during the summer at Ferris Institute in Big Rapids, Michigan. On February 7, 1910, she married the school principal, Arthur F. Willebrandt, in Grand Rapids, Michigan, and moved with him to Arizona in his effort to regain his health after suffering from pneumonia and the threat of tuberculosis.

During two years in Arizona, Willebrandt earned a diploma from Tempe Normal School while she nursed Arthur back to health. In 1912, the couple moved to Los Angeles, where Mabel worked as both teacher and principal in area schools and, along with Arthur, studied at the College of Law of the University of Southern California. In 1916, she earned her LL.B. and was admitted to the bar, opened a private practice with law school friends Fred Horowitz and John Shepard, continued her earlier work as an assistant to the city's police court defender's office handling women's cases, and worked toward an LL.M., which she earned the following year. In 1916, she and Arthur also separated and eventually divorced in 1924.

In private practice, Willebrandt refused to take criminal or divorce cases, focusing instead on civil cases that tended to benefit the underdog. During World War I she won a sedition case when she defended an elderly woman accused of speaking against the government. She also offered legal advice and help in contacting family members to women arrested for vagrancy near the army camp established in Los Angeles during the war. Yet even in the early years of her practice, she also served as counsel for a bank, handling land ownership cases, mortgage foreclosures, damage suits, and guardianship cases. As a new lawyer, Willebrandt was not afraid to challenge authority, as evidenced by her request for and the granting of a

change of venue when a well-known judge discussed details of the case with attorneys over lunch before the trial began.

Besides deciding early in her career the type of law she would practice, Willebrandt also determined that she had a special role to play as a woman attorney. She joined Phi Delta Delta, a legal fraternity begun by five women students at the College of Law shortly before she began her studies at the school. In 1918, Willebrandt was instrumental in founding the Women Lawyers' Club in Los Angeles County, a small but influential organization that expanded on the work of Phi Delta Delta and sought to help women lawyers in working with the traditional male-dominated Los Angeles courts. In keeping with her belief that she had a responsibility to participate in civic and political life, Willebrandt also joined a number of professional women's clubs that focused on legislative issues, including passage of a married woman's property bill. Although she opposed a political office for herself, Willebrandt's support of progressive Republican party politics in California throughout the 1910s earned her the appointment as a U.S. assistant attorney general in 1921. Serving under several attorneys general during her eight-year tenure, her most significant long-term impact occurred in the area of prison reform. There she oversaw the improvement of conditions in federal penitentiaries, provided for prison industries, and won authorization and appropriations for the first federal prison for women at Alderson, West Virginia.

Yet Willebrandt concentrated on upholding the Eighteenth Amendment, with over 50 percent of her division's forty thousand yearly cases dealing with prohibition. She led a multipronged approach toward making the country dry that included attempts to stop the illegal smuggling, production, and distribution of alcohol as well as illegal activities of corrupt politicians. She worked closely with the Treasury Department to arrest and prosecute smugglers and bootleggers for violating the Volstead Act and for income tax evasion. In 1923, she focused on ending the illegal activities of the biggest offenders, including "the King of the Bootleggers," Willie Haar, the leader of a four-family smuggling operation known as the Savannah Four. Although she did not personally argue the case against them, choosing instead White B. Miller, a southern lawyer, as prosecutor, Willebrandt worked carefully behind the scenes to win indictments from the grand jury against the Savannah Four. She followed the same procedure in pursuing bootleggers in the Mobile, Alabama, area when she chose Hugo Black from Birmingham to head the prosecution that resulted in the conviction of five members of the Mobile Big Six.

Willebrandt also sought to stop the illegal flow of alcohol from distilleries, breweries, and warehouses. Her most successful case in this effort was

Abortion Crusaders: Sarah Weddington and Linda Coffee

Great lawyers are often identified by the significance of the cases they argued. Most of the lawyers singled out for full essays in this volume have established their reputations through many cases, but there are some lawyers who have appropriately gained notoriety from a single important case.

Proponents and opponents of abortion rights would have to agree that there has been no more important case on the subject than *Roe v. Wade* (1973), in which the U.S. Supreme Court decided that women had the constitutional right of privacy, at least to the point of fetal viability, to seek abortions. This case was brought by Sarah Weddington, then a recent graduate of the law school of the University of Texas at Austin, and a former classmate, Linda Coffee, whom Weddington recruited to make up for her own lack of knowledge about making federal appeals. Weddington and Coffee took the case of Jane Roe (a pseudonym for Norma McCorvey), an unmarried woman with one child who was being raised by McCorvey's mother, and who was seeking an abortion—then prohibited by Texas law. After undergoing a religious conversion, Norma McCorvey now opposes abortion, but Weddington and Coffee continue to fight for what they believe to be an important right.

Weddington, the daughter of a Methodist minister who as a law student had obtained an abortion in Mexico at a time when the procedure was illegal in Texas, has written a book describing her role in this case and defending her pro-choice views. She has been the subject of a made-for-television movie (*Roe v. Wade*) that was first played in 1989, and she was among those who testified against the confirmation of Clarence Thomas as a Supreme Court justice.

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the prosecution and conviction of George Remus, a Chicago lawyer, who oversaw an illegal alcohol distribution operation that netted him over $6 million in just a few years. In this case, Willebrandt insisted through an appeal that Remus be subject to the stiffer penalties for tax evasion on liquor sold for beverage purposes rather than the weaker Volstead statutes. In an October 1922 decision, the Supreme Court supported her argument.

Willebrandt participated more directly in the trials to prosecute corrupt politicians. In the case of Kentucky congressman John W. Langley, indicted and found guilty of conspiracy for bootlegging whiskey from a local distillery, Willebrandt cross-examined witnesses and addressed the jury in the trial's summation. In 1925, she prosecuted an Ohio conspiracy case that involved the state prohibition director and his assistant, and allegations that

illegal money had ended up in the Warren G. Harding campaign fund. Believing "that the case was her responsibility," Willebrandt examined witnesses and presented an argument that not only won praise from both the judge and the defense lawyer but also gained her a guilty verdict (Brown 1984, 69).

Yet Willebrandt believed that winning cases was "much less important than clarifying the law." To this end, she argued more than forty cases before the Supreme Court, submitting 278 petitions for a certiorari by 1929 (Willebrandt 1929, 239). Willebrandt was instrumental in obtaining numerous decisions that represented "permanent gains in the government's huge task of enforcing the Eighteenth Amendment" (Willebrandt, 1929, 249). These included the *Grace and Ruby,* 283 F. 475 (1922), case, which allowed the U.S. government to seize a foreign vessel beyond the agreed-upon three-mile territorial limit if that vessel had made a "constructive entry" into U.S. territory through the use of smaller boats or dories, crew, and tackle to facilitate the landing of alcohol on U.S. shores. In an attempt to strengthen enforcement, Willebrandt also successfully argued before the Supreme Court in *Donnelley v. United States* (1928) that the prohibition law was intended to punish not only people who committed crimes against the law but also omissions by prohibition agents who failed to report and prosecute these crimes. In addition, Willebrandt, believing that she could deter bootleggers by punishing them financially and making crime less profitable, argued successfully in 1928 in *United States v. Manley Sullivan* that income tax was due on illegally gained money. She also argued and won *Carroll v. U.S.* (1925), a decision that determined that federal agents could stop and search a car if they "observed enough to be reasonably certain of its violation of law" (Willebrandt, 1929, 239). Although Willebrandt was ultimately proved wrong, she believed these various decisions provided the necessary foundation on which "orderly enforcement" of the prohibition law would be built. She considered them "a permanent contribution to the development of constitutional law" (Willebrandt, 1929, 249).

Similarly in the area of tax law, Willebrandt's division in the Justice Department sought to clarify the implications and limits of federal taxing power. Although most of her appearances before the Supreme Court on tax issues related to prohibition, she argued tax cases that she believed would set a new interpretation or extension of the relatively new tax laws. She eventually served as a member of the Taxation Committee of the American Bar Association, a reflection of her increasing knowledge in the field.

Throughout her tenure as an assistant attorney general, Willebrandt hoped for an appointment to a federal judgeship. When this failed to materialize by the time Herbert Hoover took office in 1929, Willebrandt, with

an offer to serve as Washington counsel for the Aviation Corporation, resigned her position and left the Justice Department in June 1929. She quickly established a private legal practice with offices in both Washington, D.C., and California, serving a variety of clients. Her work for the Aviation Corporation focused first on aiding in the drafting of legislation to regulate the young air industry. The McNary-Watres Act resulted and dealt primarily with regulation of airmail rates and routes. In 1931, Willebrandt filed an amicus curiae brief for the Aviation Corporation in *Swetland v. Curtiss Airports Corp.* in the U.S. Court of Appeals for the Sixth Circuit. In her highly praised brief, she compiled the first comprehensive review of common law and state and national statutes on control of air space. Soon recognized as one of the leaders in the field of aviation law, Willebrandt chaired the American Bar Association Committee on Aeronautical Law from 1938 to 1942 (Brown 1984, 201–203).

Willebrandt also moved into the area of communication law after she left the Justice Department. She first served in an advisory position in cases dealing with patent law. Then in 1933 she successfully argued before the Supreme Court in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage* that the Federal Radio Commission had the power to regulate broadcasting. In part because of her California connections and a long friendship with Louis B. Mayer, Willebrandt also represented Metro-Goldwyn-Mayer (MGM), focusing on federal regulation, tax issues, and public relations in Washington. Her association with MGM brought her many famous Hollywood clients, and in 1938 she represented the Screen Directors Guild in the organization's labor struggles with producers. Her association with the guild continued throughout the 1940s, and in 1950, in the midst of the Red Scare, Willebrandt drafted the guild's loyalty oath.

Although Willebrandt continued to follow a heavy work schedule throughout the 1950s, including active participation in Republican party politics, she focused much of her attention on her family life. After the death of her mother in 1938, Willebrandt spent more time with her aging father, sharing a home with him in Temple City, California, and carving out time to vacation with him. David Walker died in 1954. Willebrandt's daughter, Dorothy, whom Willebrandt adopted in 1925 when Dorothy was two years old, was married with a family of her own by the 1950s. Willebrandt kept in close contact with her daughter and son-in-law, Hendrick Van Dyke, and their three sons. During this time, Willebrandt's health steadily declined due in part to a chronic ear problem that increasingly affected both her balance and her hearing. She argued her last case in February 1962 and shortly afterward closed her law practice. Willebrandt died of lung cancer on April 6, 1963, in her home in Riverside, California.

—Janice M. Leone

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WILLIAMS, EDWARD BENNETT

(1920–1988)

Edward Bennett Williams was one of America's foremost attorneys. He established an early reputation in the field of criminal law and subsequently became known as "the man to see" among the rich and powerful.

Edward Bennett Williams

Teamsters boss Jimmy Hoffa (left) with attorney Edward Bennett Williams (right), ca. 1957. (Bettmann/Corbis)

Born in Hartford, Connecticut, the son of a department store floorwalker Joseph Williams and his wife Mary Bennett, Edward Bennett Williams was a man of contradictions. An Irish Catholic who went to Mass daily, could be prudish, and valued family life, Williams also drank heavily, enjoyed "going out with the boys," and loved parties and the company of showgirls. Williams could go into the courtroom and blast the government use of wiretaps, and yet he argued behind closed doors for the Central Intelligence Agency's (CIA's) authority to bug foreign spies in the United States. Williams worked both to defend Senator Joseph McCarthy and to protect the reputations of some of the Hollywood figures and others whose reputations McCarthy sought to vilify. Williams pursued the only successful libel suit against columnist Drew Pearson on behalf of Norman Littell but successfully defended the magazine *Confidential* against censorship by the post office. Williams brilliantly defended a U.S. soldier, Aldo Icardi, falsely accused of a war crime in Italy (Williams, who showed that a

murder blamed on Icardi was committed by Communist partisans, got charges dismissed by showing that the congressional committee that had accused him of perjury had not been investigating with the intention of formulating new laws), but he also defended a Soviet spy, Igor Melekh, against whom the government dropped charges. Williams's fees could be among the highest of any attorney of his day, and yet he often worked free for clients (like ex-CIA Director Richard Helms) whom he admired. Williams enjoyed flying his own jet and owned a number of houses, but he was also generous to charities, especially Catholic universities.

Williams graduated in 1941 from Holy Cross College, where he had been a champion debater. After a brief and unsuccessful stint in the air force, he went to the Georgetown University Law School, where he graduated first in his class. He worked for four years in the firm of Hogan & Hartson in Washington, D.C. (marrying Dorothy Gilder, the granddaughter of the firm's founder, with whom he would adopt three children), and then set up his own practice in the nation's capital, which eventually grew to encompass nearly one hundred other attorneys. For much of his life, Williams was in partnership with Paul Connolly; for a time, Joseph Califano (who left the firm to join the cabinet in President Jimmy Carter's administration) was also a partner. Williams taught criminal law and evidence at Georgetown (among whose law students he developed a faithful following), and he also served as a guest lecturer at other universities, including Yale.

Williams's clients included mafia dons, cabinet members, members of Congress, and corporate leaders. Strongly competitive, Williams was early a master of the courtroom with an ability to use a nearly photographic memory to conduct relentless cross-examinations and to communicate effectively with jurors—it was said that he did "not so much address a jury as woo it" (Thomas 1991, 320). Williams also developed the art of the backroom deal. Particularly in later years, his successes often appeared to depend on the force of his own expansive personality and on friendships he had cultivated with the prosecuting team and with presiding judges.

Williams almost always demanded complete control of his cases and complete cooperation from his witnesses, and he had the most trouble defending those, like Joseph McCarthy, whose statements, especially out of the hearing room, he could not control. Williams encouraged defendants to take the stand in their own defense, and, although his pretrial conferences could be brutal, he was often also fairly creative in suggesting noncriminal explanations of their behavior to them that they could use on the stand. Williams attempted to give dignity to his role as a criminal defense attorney, distinguishing a "criminal lawyer" from a "trial lawyer who practices criminal law" (Thomas 1991, 123). Williams often cited the Sixth Amendment for the principle that everyone was entitled to a good defense and

comparing a good attorney to a good doctor, who went about his business and left moral judgments to others. Still, there were clients (among them Richard Nixon and Benjamin Spock) that Williams himself refused, and, like other such attorneys, Williams sometimes seemed to have greater interest in those who were rich than those who were not. In a similar vein, although Williams could wax eloquent about constitutional rights, it has been said that "the liberty he really cared about was that of his clients" (Thomas 1991, 337).

Although Williams's early association with Senator Joseph McCarthy even caused Mafia don Frank Costello to worry about hiring him, Costello overcame this reluctance, and Williams successfully defended him against deportation after he had been convicted of income tax evasion. In another early case, Williams successfully defended Teamsters boss Jimmy Hoffa against bribery charges. Robert Kennedy, then working for a Senate committee, had been so certain that Hoffa would be convicted that he claimed he would jump off the Capitol building if the case was lost—Williams subsequently sent him a parachute.

In 1960, Williams defended the flamboyant New York congressman Adam Clayton Powell against charges of income tax evasion. Williams mastered an impressive array of facts and succeeded in obtaining a hung jury. At one point, an observer who noticed a look of "utter amazement" on Powell's face during Williams's defense reported that "he was shocked to find he was innocent" (Thomas 1991, 143).

Although best known for his trial work, Williams was also an effective appellate advocate. He argued a number of cases before the U.S. Supreme Court, including some pathbreaking cases on Fourth Amendment rights and (on behalf of a Catholic college) *Tilton v. Richardson* (1971), which involved the defense of federal grants to religious institutions. Justice William Brennan, a personal friend, identified Williams as one of the two or three best attorneys whose presentations he had witnessed before the Supreme Court (Thomas 1991, 175).

Williams often entertained Supreme Court justices and other politicians. Williams largely took on the defense of Bobby Baker, an aide to Lyndon Johnson, against fraud and tax evasion at the request of Justice Abe Fortas and President Lyndon Johnson. Williams once told an interviewer that the difference between a good attorney and a bad one was only about twenty percent (Sheresky 1977, 24), but although he knew he could not win every case, Williams was extremely depressed, and even cried, when Baker was convicted and sent to jail.

Williams was more successful in defending financier Robert Vesco, *Playboy* magazine owner Hugh Hefner, and one-time cabinet member John Connally. Connally was tried for attempted bribery. Williams succeeded in

The Contradictions of Roy Cohn

Few contemporary lawyers have had a greater flair for publicity or been more loved and hated than Roy Cohn (1927–1986). The son of a New York Supreme Court justice and a doting mother, Cohn first came to prominence in 1953 with his appointment to the internal security section of the Department of Justice. Cohn and a colleague, David Schine, garnered extensive publicity by touring American libraries in Europe looking for "subversive" books. Roy subsequently beat out Robert Kennedy to become the chief counsel to Wisconsin Senator Joseph McCarthy and led McCarthy in the hearings that eventually resulted in McCarthy's disastrous confrontation with Joseph Welch, then representing the U.S. Army.

Cohn went on to establish a law practice in New York City, where he delighted in representing and associating with a diverse array of politicians, millionaires, and literary figures, and where he frequented a trendy nightclub known as Studio 54. Recognized for his brilliance and his capacity for friendship, Cohn cultivated numerous press outlets, where his own reputation and legal victories were lauded. Cohn successfully defended himself against three different prosecutions, most of which can be traced to Attorney General Robert Kennedy.

Cohn spent little time in preparation for court battles, preferring to resolve cases through personal influence and back-room dealings and to leave the courtroom to lawyers just out of law school. Cohn often seemed to do little for his clients once he received his retainer. Cohn was a lavish spender who traveled widely, threw magnificent parties, and maintained a yacht and a Rolls-Royce, but he boasted that he rarely paid his bills, even to the Internal Revenue Service. Moreover, although he remained a strong public defender of conservative family values, Cohn engaged in a vast number of homosexual affairs, and he eventually contracted acquired immune deficiency syndrome, which killed him.

Despite the favorable press that he received, Cohn was excluded from the Martindale-Hubbell directory of U.S. attorneys. Shortly before his death, Cohn was disbarred from the New York bar. Among the charges were that Cohn had refused to pay back a $100,000 loan to a client and that he had misrepresented this loan as a legal fee.

Cohn is a prominent example of how a lawyer's image before the public may be very different from the lawyer's reputation among members of the bar.

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helping Connally put an innocuous face on his transactions, and he called in numerous character witnesses, including evangelist Billy Graham, on Connally's behalf.

Williams was close friends with columnist Art Buchwald and *Washington Post* editor Ben Bradlee—the threesome claimed to be members of an exclusive club, of which only they were members. Williams was also friends with Phil and Katharine Graham, owners of the *Washington Post* (Williams protected Katharine's interest when Phil, who was having mental problems and eventually committed suicide, tried to cut her out of his will), and his firm defended the *Post* in a number of cases. Williams, who had advised editor Bradlee to publish the *Pentagon Papers* despite government opposition, was arguing another case and thus did not defend the paper in its ultimately successful *Pentagon Papers* case. Just as Williams, especially in his early years, had a flair for positive publicity, on occasion, he was able to use his friendships with the editors to quash stories unfavorable to his clients or to himself. Williams succeeded in getting a 7–1 verdict written by Judge Kenneth Starr in a decision by a U.S. Circuit Court of Appeals in which Williams had defended the *Post* against libel charges. Arguing that a *Post* story accusing the president of Mobil Oil Corporation of easing the path of his son was largely true, Williams had told the judges that one would have to believe in "the tooth fairy" to believe that the son had risen in a single year from the position of clerk to 75 percent owner without such help (Thomas 1991, 443–444).

In defending ex-CIA director Richard Helms against perjury charges involving testimony he gave before the Senate Foreign Relations Committee, Williams perfected the strategy of "graymail" that he also used in other cases. Williams hinted at numerous other scandals that would be revealed if the government proceeded with its case, and Helms got by with a judicial slap on the wrist.

As his career progressed, Williams took on more and more corporate clients. He and his partners perfected the art of delay and often attempted to bury rival prosecutors in such mounds of arguments and motions that they would either give up or negotiate a relatively favorable outcome for Williams's clients. Williams lost his last jury trial defending Victor Posner, a corporate empire builder, against criminal tax fraud, but he got the verdict overturned and used his connections with the judge to get Posner's sentence reduced to community service and donations to a homeless organization. Junk bond tycoon Michael Milken had hired Williams to defend him, but, much to Milken's consternation, Williams died before he could do so.

Williams greatly admired fellow Washington attorney Clark Clifford and tried, especially in his later years, to cultivate a reputation like Clifford's for

being a wise counselor and Washington insider. Williams had many close friends. He was often able to calm clients and persuade them that bringing a case of libel or the like was only likely to yield further negative publicity.

Williams, himself a mediocre sportsman, enjoyed the company of sports figures (especially baseball great Joe DiMaggio, whom he once defended) and the competitiveness of sports. Williams loved to attend boxing matches. He was a longtime part owner of the Washington Redskins football team, for whom he successfully recruited his friend Vince Lombardi as a coach, before Lombardi died of cancer. Williams often invited prominent Washingtonians to watch the games with him in his box, and he distributed free tickets to many others. Williams later became the majority owner of the Baltimore Orioles baseball team, which won the World Series once during the time he owned it.

Williams, who earned just under $2 million in the year he died, also owned a Washington motel. When Williams died in 1988 after a long-running battle with cancer, his estate was valued at more than $100 million. He left most of his estate to his second wife (his first wife died), former law associate Agnes Neill Williams, with whom he had four children. An old-style Catholic who had always loved fame and power, Williams noted when he knew his own death was imminent, "I'm about to see true power" (Thomas 1991, 493). More than two thousand mourners, including a host of dignitaries, attended Williams's funeral at St. Matthew's Cathedral in Washington. Although Williams was lauded by priests for his many accomplishments, a biographer, Evan Thomas, has said that Williams was the victim of what he called "the 'betrayal of success." As Thomas explained, as one who was "addicted to winning," Williams "could never quite satisfy his yearning" (Thomas 1991, 495).

On a number of occasions, Williams toyed with running for a Maryland Senate seat or even for the U.S. presidency, but he never did so. He did serve on the President's Foreign Advisory Board, and he was also treasurer for a time of the Democratic party—a position that did not keep him from later supporting the candidacy of Republican Gerald Ford. Williams turned down a request from President Lyndon Johnson to serve as mayor of Washington, and he twice turned down the directorship of the CIA, the first time in order to stay in control of his law firm and because of concern that he could not keep secrets (the job went instead to George H. W. Bush), and the second time because of ill health. Williams left an account of some of his cases in a book entitled *One Man's Freedom* (1982), but his primary focus in the book was on constitutional principles. Williams included chapters opposing capital punishment, urging more humane treatment for individuals who commit crimes because of mental illnesses, opposing discrimination on

the basis of race, and advocating expanded jurisdiction for the world court—Williams had long hoped that the rule of law might be used to moderate international tensions.

Other lawyers from Williams's firm have also distinguished themselves. They include Michael Tigar, whom Williams had hired after Justice William Brennan let him go because of his association with radicals; Vincent Fuller, who conducted the successful insanity defense of John Hinckley in the attempted assassination of President Ronald Reagan; and Brendan Sullivan, who led the successful defense of Oliver North in congressional hearings dealing with the Iran-Contra scandal.

—John R. Vile

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WIRT, WILLIAM

(1772–1834)

WILLIAM WIRT
Library of Congress

WILLIAM WIRT, THE LONGEST-seated attorney general in U.S. history, is equally well known for the many cases he argued before the U.S. Supreme Court in his private capacity. Among the 170 cases in which he appeared before the highest court are *Dartmouth College v. Woodward* (1819), *McCulloch v. Maryland* (1819), *Gibbons v. Ogden* (1824), *Cherokee Nation v. Georgia* (1831), and *Charles River Bridge v. Warren Bridge* (1831). Wirt also prosecuted Aaron Burr for treason and successfully defended the man who probably murdered George Wythe, chancellor of the Virginia courts.

William Wirt was born in Bladensburg, Maryland, on November 8, 1772, the youngest son of Jacob and Henrietta Wirt. Orphaned at age eight, Wirt spent the next eight years at boarding schools and studying in the home of the Reverend James Hunt in Montgomery County, Maryland. After two years as a tutor in Maryland and a visit to his sister in Georgia, in 1791 Wirt returned to Montgomery County and began his study of law in the office

of William Pitt Hunt, son of his former teacher. In early 1792, Wirt crossed the Potomac River to Leesburg, Virginia, to continue his legal studies with Thomas Swann. In the fall of 1792, Wirt obtained his license to practice law in Virginia.

For the next three years, Wirt attended court in the counties around Culpeper Court House, his place of residence, taking any client who came his way. He found Albemarle County to his liking, and soon married into one of the established families there. His marriage to Mildred Gilmer, daughter of Dr. George Gilmer, brought the young lawyer to the attention of Thomas Jefferson, James Madison, and James Monroe, also residents of Albemarle. Although he kept an office near the courthouse in Charlottesville, Wirt's reading in Dr. Gilmer's library contributed more to his future legal career than the cases that came his way at that time. But the pleasures of Albemarle soon vanished with the sudden death of Mildred in 1799.

Within months, the twenty-eight-year-old widower moved to Richmond, Virginia, and with the endorsement of Jefferson and John Taylor of Caroline, was quickly elected clerk of the House of Delegates. In addition to performing his legislative recording duties, Wirt also took cases in the local and federal courts and soon found himself recruited by Governor Monroe as one of the defense attorneys for James Thomson Callender, a Republican journalist charged with violating the Sedition Act of 1798. Although the all-Federalist jury rendered a verdict of guilty, Wirt's argument before the domineering Supreme Court justice Samuel Chase (hearing the case as a federal circuit court judge) enhanced the young lawyer's reputation in Republican circles. In 1802, when the General Assembly of Virginia established two new chancery courts, Wirt received the appointment as judge of the High Court of Chancery for the Williamsburg District, a position he held briefly. While he was chancellor, he married Elizabeth Washington Gamble, daughter of prominent merchant (and Federalist) Robert Gamble, and resumed private practice in Norfolk, Virginia. In 1806, he acceded to his wife's wishes and returned to Richmond, where he practiced for the next decade.

Wirt had hoped for an important case to mark his return to the Richmond courts, and he found it when he agreed to join in the defense of George Wythe Swinney, who had been accused of poisoning his great-uncle, George Wythe, longtime chancellor and judge and former professor of law at the College of William & Mary. The defense showed that Swinney had not been proven guilty beyond a reasonable doubt, and Wirt's argument was described as "eloquent and ingenious."

Within a year, Wirt was engaged in another sensational case, this time as one of the prosecutors of former vice-president Aaron Burr for treason. In a

trial heavy with political overtones, Wirt is said to have "aenraptured [the audience] with an eloquence that has lived for a century." He reminded Chief Justice John Marshall, sitting as a federal circuit court judge, not to be diverted by defense maneuvers to implicate Burr's codefendant Harman Blennerhassett. "Who is Blennerhassett?" Wirt began, and went on to describe him as an innocent man of letters living a peaceful life on an "enchanted island" in the Ohio River. But Blennerhasset's Eden was changed to hell by the arrival of the serpent Burr, "a soldier, bold, ardent, restless, and aspiring, . . . the contriver of the whole conspiracy." Although failing to convince the ardent Federalist Marshall, whose restricted definition of treason made conviction impossible, Wirt's speech was immensely popular with the public in attendance. It was immediately published and became the typical declamation of schoolboys throughout the nineteenth century.

By the 1810s, Wirt was recognized as one of the leading attorneys of the Richmond bar. He had represented Jefferson in several private matters, served briefly in the house of delegates, declined to run for Congress, and found the spare time to write three well-received collections of character sketches and a biography of Patrick Henry. In 1813, President Madison appointed Wirt federal district attorney for Virginia.

In addition to the duties of district attorney, Wirt continued his private practice and accepted young men in his office who worked as clerks and read law under his guidance. Wirt encouraged his students "to speak like Henry, to write like Jefferson, and to reason like Marshall." His personal forensic ideal balanced eloquence and reason, but by modern standards his speeches often sound emotional and overblown. At the time, they were considered impressive, with an appropriate blend of imagery and logic. Wirt himself believed his speech was too rapid: "I have been trying all my life to learn to speak in the time of Lady Coventry's minuet—but I began with a Virginia jig and shall go on shuffling all the days of my life." He was especially good in jury trials, in which he stood beside his trial table and addressed the jury at a distance. Like Henry Clay, his gestures, though practiced, were artfully elaborated, with his snuffbox held in his hand. In appellate argument he became known for the thoroughness of his legal presentation, which he supported with "the truths of philosophy, the experience of history, and the beauties of poetry" and a wit that on occasion demolished the argument (and composure) of his adversary.

In 1816, Wirt argued his first case before the U.S. Supreme Court, and in late 1817 he and his family moved to Washington, D.C., where he assumed the post of President Monroe's attorney general. Most of Wirt's more than 170 Supreme Court cases date to his years as attorney general, yet most of his appearances there were on behalf of private clients. Until well into the nineteenth century, the attorney generalship was a part-time job whose ma-

jor duties consisted of conducting suits in the Supreme Court when the United States was a party and advising the president and department heads when required. Soon after he assumed office, Wirt complained that it was difficult to accomplish even these limited roles without a clerk, an office, or even furniture. While waiting for Congress to act, Wirt began his duties alone. He was the first attorney general to maintain official opinion and letter books, remarking to a friend in 1824 that publication of his opinions "would do me more honour than anything else I have ever done." By the end of his eleven years as attorney general, he had researched and written more than 370 formal opinions.

But it was as a private advocate that Wirt was best known. During his years in Washington (1817–1829) and Baltimore (1829–1834), Wirt argued with or against the best legal talent in practice: Joseph Hopkinson, Thomas Addis Emmet, Walter Jones, William Pinkney, Luther Martin, Roger Taney, and Daniel Webster. When Wirt and Webster appeared before the Supreme Court, the chamber filled with Washington political and social figures intent on hearing the best speakers of the era. They were rarely disappointed. Of the two, Wirt's powers were probably the less appreciated, partly because he chose not to serve in Congress, where a political forum would have provided further publicity. Wirt's Supreme Court arguments also appear to have suffered at the hands of court reporters and his own failure to publish them privately, a modesty not indulged by Webster. At the time, however, Wirt's advocacy was so admired that he had more than enough clients, averaging twelve cases in each Supreme Court term during his fourteen full years of attendance. And it was Wirt who was asked to deliver the congressional eulogy on the deaths of Thomas Jefferson and John Adams in 1826.

Although Wirt's Republican sentiments can be easily identified with his early mentors, Jefferson, Madison, and Monroe, a personal legal philosophy is harder to find. Largely an appellate lawyer, Wirt accepted cases referred by other attorneys. Rarely did he have firsthand knowledge of his clients or a thorough grounding in the issues before accepting their causes. Like other lawyers, Wirt furthered the cause of each day's client but recognized that the next day's client could require arguing the other side of the same issue. Some of his earliest Supreme Court appearances—for example, the *Prize Cases* (1863)—provide evidence of these case-by-case shifts.

Another early case, *Dartmouth College v. Woodward* (1819), shows a less workmanlike side to Wirt's practice, for it was one of two cases in which he admitted he was unprepared. His opponent, Daniel Webster, also a neophyte before the Supreme Court bench, had represented the college at the hearing before the New Hampshire Supreme Court, where the college had lost. The appeal to the U.S. Supreme Court argued that the college charter

was a contract within the meaning of the U.S. Constitution's prohibition of state impairment of the obligation of contracts (Article I, Section 10). Webster, hoping favorably to impress both the court and the representatives of his alma mater, argued the legal and policy points of his client for over four hours, ending on a highly sentimental note. Wirt, recently hired by the university (Woodward), and conducting his duties as attorney general without assistance, failed in the limited time available to him to rise to the challenge of either the issues presented by the case or Webster's rhetoric. However, the justices, while captivated by Webster's presentation, were not readily convinced, and their decision that the New Hampshire legislature had impaired the charter of the college was not forthcoming until 1819. By then Wirt was allied with Webster in one of the most important constitutional cases of the era.

Three weeks after Marshall announced the decision in *Dartmouth*, the Court heard arguments in *McCulloch v. Maryland* (1819), an appeal by the Bank of the United States (BUS) from a decision in Maryland courts that the state's tax on BUS banknotes was legal. The bank had retained Webster and William Pinkney; Wirt (also retained by the bank) appeared at the request of President Monroe in his official capacity as attorney general. Webster began the BUS argument, relying on the authorization of the necessary and proper clause (Article I, Section 8) to permit Congress to create the bank. He then denied the state's ability to tax federal institutions, claiming that the supremacy clause (Article VI) forced the Maryland tax law to yield to Congress's charter of the bank. Joseph Hopkinson for Maryland replied to Webster's argument, denying that the BUS was necessary.

In his argument the next day, Wirt insisted that Congress's powers to create the bank had been expressly given because the BUS was necessary to the fiscal operation of the government. Wirt believed "necessary" meant "useful," and Congress, not the Court, decided what was useful for carrying out its purposes. Wirt worried that if the Court found for Maryland, it would deny Congress the choice of how to execute its powers. On the matter of taxation, Wirt declared that the federal act creating the bank prevailed over the state tax.

Walter Jones responded for Maryland with an extended exposition on states' rights. He was followed by Luther Martin, also defending Maryland, who rambled for three days. Pinkney's three-day response elaborated Webster's and Wirt's arguments and brought them to a masterful conclusion. Marshall's decision, delivered three days later, reflected much of Pinkney's argument.

Five years later, Wirt and Webster again shared the appellant's table in *Gibbons v. Ogden* (1824), a case testing New York's grant of a monopoly to

George Sullivan

George Sullivan (1771–1838), who served for twenty years as the attorney general of New Hampshire, was the son of an earlier state attorney general, John Sullivan (a general in the Revolutionary War), and the father of another. Sullivan, a Federalist, served for a time in the U.S. House of Representatives and in the New Hampshire state legislature.

George Sullivan was ranked among the top attorneys in a state bar that included Daniel Webster and Jeremiah Mason. Sullivan actually prevailed in the superior court in the famous *Dartmouth College* case when that court decided that the college was a public corporation whose charter the state could alter, but Daniel Webster prevailed when he argued the case before the U.S. Supreme Court.

Lawyers are often known not only for the famous cases they argued but also for the manner in which they treated colleagues. The author of a sketch of Sullivan noted that he worked among colleagues who yielded "no advantage" in the courtroom but forced opponents to "take the consequences" of their mistakes. By contrast, Sullivan was recorded as offering "no objection to any reasonable amendment" (Bell 1894, 672). Sullivan was described as a fine orator, whose speech, logic, and charm "rendered him the most attractive advocate of his time in the State" (Bell 1894, 672).

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the Fulton-Livingston steamboat interests (Ogden). Ranged against them were Thomas Oakley, former attorney general of New York, and Thomas Addis Emmet, a brilliant Irish-American lawyer. Webster began the argument on behalf of the rival New Jersey steamboat interest (Gibbons) by discussing Congress's power to regulate commerce (Article I, Section 8). According to Webster, if Congress had not exercised its commerce power, then the subject should be left free of restraint. Where states had appeared to regulate commerce, they had merely exercised their police powers, while Gibbons's federal coasting license gave him the right to freely navigate the waters of the United States.

Oakley and Emmet argued that the states had concurrent powers to regulate commerce based on their reservations protected by the Tenth Amendment. They denied that navigation by steamboats constituted "commerce," which they defined narrowly as trade, and therefore the state of New York could grant a monopoly without interfering with Congress's power under the commerce clause. Furthermore, the New York monopoly grant to Ogden pertained only to the internal waters of the state.

Wirt responded that navigation was commerce and the exclusive subject matter of Congress. He declared that once Congress had legislated, state in-

terference with the subject was void. Congress had so legislated with the Coasting Act of 1793 under which Gibbons held his coasting license, and therefore the New York grant to Ogden, conflicting with the Coasting Act, was void. He closed with a rebuttal of Emmet's quotation of the hero's lament in Virgil's *Aeneid*, correcting Emmet's misquotation and thereby stealing Emmet's thunder. It was a typical Wirt flourish: classical scholarship in aid of legal eloquence. The audience was thrilled, and praise followed in newspapers around the country. Three weeks later, Marshall announced the unanimous decision of the Court, which paralleled Wirt's argument.

In late 1824, president-elect John Quincy Adams asked Wirt to serve as attorney general in the new administration. In accepting and completing this appointment, Wirt's eleven-year cabinet service under Monroe and Adams became the longest tenure of any attorney general in U.S. history. In 1826, Wirt was elected president and professor of law by the faculty at the new University of Virginia, an honor he declined, pleading financial concerns. In addition to his public duties as attorney general, Wirt continued to appear before the Supreme Court in private cases. Some of the more famous of his later years include *Ogden v. Saunders* (1827), *Willson v. Blackbird Creek Marsh Company* (1829), and the initial argument of *Charles River Bridge v. Warren Bridge* (1831), which was reargued and decided after his death.

By the early 1830s, Wirt's career had taken another turn. John Quincy Adams's failure to win reelection ended Wirt's tenure as attorney general, and he and his family moved to Baltimore, where he practiced before the state and federal courts, returning to Washington to argue before the Supreme Court during its winter sessions. Among the caseload of his last years was *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832), which raised the issue of the legal status of Native Americans in the United States. President Andrew Jackson and Georgia (as well as other states) wanted the Indians, in these cases Cherokees, removed so that their lands would be available for white settlement. The Cherokees wanted to stay on their native soil. They hired William Wirt.

Wirt initially requested the governor of Georgia to join the Cherokees and submit their grievances to the arbitration of the Court, but the governor refused. Wirt then published in the major newspapers an extended position paper on behalf of the Cherokees. His circumspection was due to the legal concern about how to achieve standing for the Cherokees before the Supreme Court. In the meantime, Georgia officials arrested, tried, convicted, and hanged a Cherokee whose "crime," if he committed it, had taken place in Cherokee country. Forced to act immediately, Wirt and his co-counsel John Sergeant asked the Supreme Court for an injunction to re-

strain Georgia from executing its laws in Cherokee territory. Georgia refused to appear.

Nonetheless, the Court heard the Cherokees' arguments in the absence of Georgia. Sergeant spoke first, claiming that the Court had jurisdiction to grant relief. Wirt later discussed the same legal points but added an impassioned plea for Native American rights. The case turned on the status of the Cherokee Nation, which Sergeant and Wirt declared was a foreign state. Since the Cherokees had never been conquered, and had merely placed themselves under the protection of the United States, they had the right to sue Georgia. Their treaties with the United States reinforced their nationhood and their right to self-government and control of their lands. Those same treaties also limited Georgia, since the supremacy clause made federal laws and treaties supreme.

Marshall's majority opinion sympathized with the Cherokees' plight but denied their argument, finding them a "domestic dependent nation" with no right to sue in federal courts. Two concurring opinions went further still, finding the Cherokees a conquered people under the authority of Georgia. However, Justice Smith Thompson's dissent, joined in by Justice Joseph Story, accepted the arguments of Sergeant and Wirt and found that the Court had jurisdiction to hear the case and that the remedy of an injunction against Georgia was appropriate.

In 1832, Wirt and Sergeant were again before the Supreme Court arguing for Cherokee rights in a new case, *Worcester v. Georgia;* once again Georgia failed to appear. Here the similarity to *Cherokee Nation* ended, for in the intervening year Marshall had changed his mind. Writing for a new majority, Marshall borrowed from Wirt's new argument and Justice Thompson's dissent in *Cherokee Nation* and found that the Cherokees were a nation able to enter into treaties. Therefore, the Georgia acts limiting Cherokee rights within Native American territory were clearly unconstitutional. The Cherokees had won the legal battle with the help of William Wirt, and Wirt's representation of them placed him in the political spotlight in opposition to President Andrew Jackson, whose policy was to remove Indians beyond the Mississippi River. Wirt was mentioned as a possible Whig vice-presidential running mate to Henry Clay, but instead, to the surprise of his family and friends, Wirt accepted the presidential nomination of the Anti-Masonic party and ran a distant third in the election of 1832.

William Wirt died after a brief illness on February 18, 1834. Characteristically he died while in Washington attending the winter session of the Supreme Court. Congress and the Court adjourned in honor of his service to the country, and President Jackson and many members of the government accompanied his body to National Cemetery.

—Elizabeth Brand Monroe

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WYTHE, GEORGE

(1726–1806)

One of the most scholarly and gifted attorneys in colonial Williamsburg (where tourists can still tour his stately two-story brick house), George Wythe went on to become one of the most venerated teachers, capable attorneys, and esteemed judges to serve in Virginia after the winning of independence.

Wythe was born in 1726 (some sources say 1727) in Elizabeth City County, Virginia, to Thomas and Margaret Walker Wythe, the second of three children. Thomas Wythe, a planter, served, like his Virginia father and grandfather before him, in a number of governmental positions but died when George was only three years old. His remarkable mother, the granddaughter of preacher and scholar George Keith, apparently took primary responsibility for her son's education (which included an introduction to Greek and Latin), and, at age sixteen, he became an apprentice to his uncle by marriage Stephen Dewey, the king's attorney for Charles City. Wythe was admitted to the bar in 1746, within a year of his mother's death. Wythe subse-

George Wythe
Library of Congress

quently settled in Spotsylvania County, where he assisted attorney Zachary Lewis, the king's attorney there, and subsequently married his daughter Ann Lewis, who was about his age.

Ann died within eight months of the marriage, and Wythe moved to the colonial capital at Williamsburg. There, under apparent sponsorship of Ann's uncle, Benjamin Waller, he became clerk to a legislative committee of the House of Burgesses. Wythe subsequently served in a number of positions in the colony, including that of acting attorney general, mayor of Williamsburg, vestryman in the Bruton Parish Church, and elected member and, later, clerk of the House of Burgesses.

Wythe quickly established a reputation for integrity. Often compared to the Greek statesman Aristides "the Just," Wythe was identified by a contemporary clergyman as "the only honest lawyer I ever knew" (Brown 1981, 36). Unlike many lawyers who perceive it to be their obligation to defend anyone who comes to them, Wythe refused to take cases from clients whose causes he thought to be unjust. Wythe was even known to send money back to a client as he researched the client's case and decided that he was in the wrong. John Randolph of Roanoke would say that Wythe "lived in the world without being of the world, and . . . was a mere incarnation of justice" (Kirtland 1986, 166). When later serving as judge, Wythe returned even the smallest gift (a bottle of alcohol and an orange tree) to avoid the appearance of impropriety (Dill 1979, 59).

In 1755, Wythe's older brother died, leaving Wythe in possession of his family's considerable estate in Chesterfield and guaranteeing him relative financial independence. Wythe subsequently married Elizabeth Taliaferro, then about fourteen or fifteen, and her father, an architect and owner of Powhatan Plantation, designed and built an imposing house for them in Williamsburg. The couple had only one child, who died either at birth or in early childhood.

Wythe became close friends with the scholarly lieutenant governor, Francis Fauquier, College of William & Mary professor William Small (who taught natural philosophy and mathematics), and student Thomas Jefferson. After leaving William & Mary, Jefferson, for whom Wythe served much as a surrogate father, studied from three to five years under Wythe's direction before starting his own short-lived legal career and entering political service; the two men remained friends throughout their lives.

Wythe may have been one of the best-read and erudite lawyers of his day, and, like Jefferson (to whom Wythe would will some of his scientific equipment), he mixed a love for natural science with his love of law and languages. Wythe had numerous clients, including George Washington. As one of the few complete records of his cases revealed (see Schwartz 1997), he sprinkled his oral arguments and briefs with allusions to Roman and English

law and Latin phrases, and he was an able courtroom advocate. Sitting on the board of examiners in 1760, Wythe had hesitated before giving Patrick Henry (who had spent but a few months in the study of law) a license.

In the courtroom, Wythe was often thwarted by EDMUND PENDLETON. Unlike Wythe, Pendleton was willing to take on all clients. Although Pendleton's knowledge was not as deep, he was more outgoing, and his oratorical skills and physical presence were more imposing. A contemporary observer thus noted that "Mr. Pendleton was the more successful practitioner, altho' Mr. Wythe was considered as the better lawyer" (Littleton Waller Tazewell, cited in Brown 1981, 69). The expansive Pendleton was often able to drive the more serious and pedantic Wythe to distraction with legal quibbles. Whereas Wythe was the master of the written brief, Pendleton was quicker in responding to oral arguments. One observer noted that

> as a speaker he was always able, often most impressive, and at times even eloquent. His preparations were made with conscientious care, and he was most successful in presenting his case in its best aspect; but he sometimes lost, under the skilled cross-fire of skillful opponents, his self-possession in reply, and not infrequently failed to rally until the day was lost. (Dill 1979, 11)

Wythe appeared to love law for its own sake, while Pendleton appeared to view law more as an instrument for advancing his own interests (Blackburn 1975, 71).

One noteworthy occasion when Wythe's quick thinking gained an advantage over Pendleton occurred when Pendleton (who was facing both Wythe and Robert Carter Nicholas) had moved for a continuance because of his client's delay in arriving at court. Governor Dunmore had told him, "Go on, sir, for you'll be a match for both of them." Much to the governor's embarrassment, Wythe rebuked the governor by rising and bowing toward Dunmore, saying, "with your Lordship's assistance" (Dill 1979, 18).

As tensions between the American colonies and England developed over taxation, representation, and other issues, Wythe was one of the early advocates of independence. Wythe was elected to the Virginia Committee of Safety, and when George Washington was appointed head of the Continental Army, Wythe was elected to the Second Continental Congress to replace him. He, or an authorized agent, subsequently signed the Declaration of Independence (his name heads that of the Virginia delegation), and, on returning to Virginia, where he arrived too late to effect Jefferson's plans for a new state constitution, he helped design the state seal urging resistance to tyranny and was assigned to the committee to revise the state's laws. Thomas Jefferson and he assumed primary work on this project, in which Edmund Pendleton also participated. Wythe and Jefferson prevailed in

their belief that the existing laws should be incorporated wherever possible into the new system rather than starting completely anew, as Pendleton apparently favored. Not all their alterations were accepted, but those that were included the Virginia Statute for Religious Liberty, one of the three accomplishments that would be listed on Jefferson's tombstone.

After being elected speaker of the house of delegates, Wythe was subsequently appointed in 1778, along with his nemesis Edmund Pendleton and Robert Carter Nicholas, to the state's high court of chancery. This position was not viewed as being incompatible with service in a professorship—created in 1779 when Jefferson was governor—of law and police at the College of William & Mary. This was the first such professorship of law in America and only the second in the English-speaking world (the first was held by the English jurist William Blackstone).

Although Wythe resigned in apparent frustration with fellow professors in 1790 when the college was reorganized (his resignation may also have signaled his impending move to Richmond), Wythe was as successful in this position as his earlier tutelage of Thomas Jefferson might have suggested. Indeed, one scholar has observed that "if a teacher is to be judged by the success of his pupils, then George Wythe must certainly be ranked as the greatest teacher this nation has ever produced" (Brown 1981, 224). Wythe regarded his function as that of forming "such characters as may be fit to succeed those which have been ornamental and useful in the national councils of America" (Dill 1979, 2). Wythe's students included future chief justice John Marshall—who appears to have been largely distracted by love for his future wife, Polly, during the six months he sat under Wythe's lectures; James Madison, cousin of the fourth president, future president of William & Mary, and first bishop of the Protestant Episcopal Church of Virginia; future secretary of state and president James Monroe, who, however, got most of his legal training from Thomas Jefferson; John Brown, one of Kentucky's first two senators; future Virginia judge Spencer Roane; and a host of others who would later serve as governors, state legislators, and members of Congress. Moreover, St. George Tucker—Wythe's successor at William & Mary—read law with him in the 1770s as Thomas Jefferson had done earlier, and, in later years, Henry Clay would also serve for a time as a clerk to Wythe. In addition to his lectures, Wythe successfully engaged the interests of his students through moot court and mock legislative sessions, for both of which he was able to draw on his own personal experience.

Wythe was elected as a delegate to the Constitutional Convention in 1787 but left for home out of concern for his wife's health after chairing the Rules Committee and leaving a proxy vote on behalf of a single executive. His wife died shortly thereafter at age forty-eight, and Wythe never remarried.

Is Thomas Jefferson among the Top Ten?

In a list of America's top ten attorneys, Professor Bernard Schwartz included one name, namely that of Thomas Jefferson (Schwartz, Kern, and Bernstein 1997), that is not included as a separate entry in this book, even though this book includes ten times as many lawyers. In part, this difference shows the difficulty implicit in any attempt at rankings; in part, it stems from the fact that this book, unlike Schwartz's list, focuses chiefly on lawyer litigators rather than on lawyer statesmen.

Certainly, it would be difficult to find a lawyer whose contributions to the nation have matched those of Jefferson. The primary author of the Declaration of Independence (which reads in part like a legal indictment against the English king, George III), Jefferson served as a governor of Virginia, a minister to France, the nation's first secretary of state under George Washington, the founder of the Democratic-Republican party, vice-president under John Adams, and two-term president. He had a gift for languages, a facility and appreciation for music, and abilities as an architect, planter, educator, and political philosopher. President John F. Kennedy once told a distinguished group of Nobel laureates at the White House that there had never been a more gifted gathering there "with the possible exception of when Thomas Jefferson dined alone" (Schwartz, Kern, and Bernstein 1997, 24).

Jefferson attended the College of William & Mary. He subsequently studied from two to five years (estimates vary) under George Wythe, who would later be appointed to the first chair of law at the College of William & Mary that Jefferson helped create when he was governor. By all accounts, Wythe was a Renaissance man who considered Jefferson much like he would a son.

Jefferson practiced law between 1767 and 1774 and for a brief six-month period in 1782 (Schwartz, Kern, and Bernstein 1997, 57, 67), but he spent the rest of his life in politics. Although he was a gifted writer, Jefferson was a mediocre speaker. During his time as an attorney, Jefferson appears to have been blessed with many clients and to have found practice to be reasonably financially rewarding.

Records of most of Jefferson's cases are lost, but one is not. The case, *Bolling v. Bolling* (1770–1771), involves a dispute between two brothers regarding a will written by a third. Jefferson left a 239-page manuscript in his handwriting and that of a friend, which is apparently the "most complete account in existence of the arguments made in a late eighteenth-century case" (Schwartz, Kern, and Bernstein 1997, 1). Jefferson's arguments demonstrate familiarity with a wide variety of legal sources, including both cases and statutes. He also demonstrated that he had learned how to assess these sources and argue for their validity against a veteran of many more years at the bar. And who was Jefferson's opponent in this case? It was none other than his mentor, George Wythe!

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Wythe, who was elected without running for the position, played a key role in the Virginia convention that ratified the U.S. Constitution. On this occasion, he appears to have worked successfully with Pendleton, who served as president and appointed Wythe to chair the Committee of the Whole. Wythe's and Pendleton's support for ratifying the document before the adoption of a bill of rights or other amendments was quite influential in setting the convention's course and helped counter Patrick Henry's fiery oratory against such ratification.

In 1782, Wythe voted with the court of chancery in Richmond in the case of *Commonwealth v. Caton,* with John Marshall sitting in the audience. In dealing with the constitutionality of a pardon issued by a single house of the state legislature, Wythe clearly articulated the view that legislative acts were subject to constitutional restraints, a view that Marshall would later make justly famous at the national level in *Marbury v. Madison* (1803).

In 1788, the Virginia courts were reorganized. Wythe remained as a chancellor, with Pendleton and others joining a newly created court of appeals. Wythe continued to be known for pursuing justice, even in cases in which it went contrary to popular opinion. In 1793, in *Page v. Pendleton and Lyons,* Wythe ruled against a Virginia agreement (that would have hurt the financial interests of Pendleton) allowing individuals to repay debts to England in deflated currency. In *Hudgins v. Wright* (1806), Wythe, who had himself owned slaves, a number of whom he had freed, not only ruled that a woman claiming to be descended from an Indian mother and a slave father was free but went on to state that slaves were entitled to freedom "on the ground that freedom is the birthright of every human being, which sentiment is strongly inculcated by the first article of our 'political catechism,' the bill of rights" (Brown 1981, 191).

As it often did in such cases, the court of appeals accepted Wythe's verdict in the case while repudiating his expansive reasoning. Often frustrated by what he believed to be the appellate court's misinterpretation of the law in overruling and modifying his own precedents, in 1795 Wythe published a book airing his grievances with that court—and especially with Pendleton (Wythe 1852). Displaying Wythe's vast knowledge of the law, the book was above the heads of most lay readers and appears to have had little impact on most citizens, who probably attributed his attack to differences in personality between Wythe and Pendleton.

In 1791, Wythe moved to Richmond; it was there that Henry Clay served as his law clerk before later teaching at Transylvania and becoming Kentucky's premier statesman. Wythe headed several public meetings in Richmond during Washington's administration, served as an elector for Thomas Jefferson in the elections of 1800 and 1804, and took up the study of He-

brew with a local rabbi, apparently to be able to read the Old Testament in its original language.

Wythe, who had frequently allowed students he was tutoring to room at his house, had custody of his great-nephew (his sister Ann's grandson) George Wythe Sweeney, as well as of a mulatto boy named Michael Brown. Sweeney, who had amassed gambling debts and who had forged Wythe's signature on a number of checks, may or may not have realized that he was one of Wythe's heirs. In any event, he apparently obtained arsenic and put it in the household coffee. A freedwoman, Lydia Broadnax, who kept Wythe's house, was poisoned but survived, but the arsenic killed both Michael Brown and, after two weeks of suffering, Wythe himself. Wythe, who realized what his nephew had done, was able both to disinherit and forgive Sweeney during this time. When he died in Richmond in 1806 at age eighty-one, he was likely the most venerated attorney in the state of Virginia. Wythe appears to have embraced Christian (and not simply Deist) doctrine; his last reported words were "Let me die righteous!" (Dill 1979, 81).

Both because Virginia courts would not accept the eyewitness testimony of Wythe's African-American housekeeper and because there was no existing Virginia law against forgery, Edmund Randolph and William Wirt successfully defended Sweeney, who disappeared from public view. There is some evidence that Sweeney's contemporaries may have believed him to be insane (Blackburn 1975, 141).

At his death, Thomas Ritchie, writing for the *Richmond Enquirer,* noted that "kings may require mausoleums to consecrate their memory; saints may claim the privilege of a canonization; but the venerable George Wythe needs no other monument than the services rendered to his country, and the universal sorrow that country sheds over his grave" (Brown 1981, 294). Jefferson wrote, "His virtue was of the purest tint; his integrity inflexible, and his justice exact; of warm patriotism, and, devoted as he was to liberty, and the natural and equal rights of man, he might truly be called the Cato of his country, without the avarice of the Roman; for a more disinterested person never lived" (Dill 1979, 82).

One difficulty in studying Wythe is that his lecture notes have been lost, relatively few of his papers survive, and many of his opinions were destroyed in various fires. One observer, who is somewhat critical of Wythe for not doing more to eliminate slavery in Virginia, has noted that "Wythe saw the law as a temple in which he functioned as a priest" (Noonan 1976, 32). Another more sympathetic student of Wythe's thought, who contrasts Wythe's exalted view of the law with what he considers to be Pendleton's more instrumentalist approach, has concluded that Wythe was an early exponent of "a government of law" rather than of men (Kirtland 1986, 52).

This same scholar notes that, shaped as he was by his defense of the American Revolution, Wythe was not impressed by English laws that had not been ratified by colonial legislatures and thought that English precedents should only be given the weight that their reasoning might warrant. He also argues that Wythe attempted to implement the plain meaning of statutes and was only willing to repudiate legislation through the exercise of judicial review when he thought it was in direct violation of the Constitution (Kirtland 1986, 215–216).

—John R. Vile

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WYZANSKI, CHARLES E., JR.

(1906–1986)

Charles Wyzanski was one of the five lawyers selected to argue the five cases that would decide the validity of the National Labor Relations Act. The Supreme Court's decisions in these cases would set the standard of review for all of President Roosevelt's New Deal legislation (Irons 1982, 182). These decisions were the beginning of a constitutional revolution that expanded the regulatory power of government and ended the Supreme Court's support of laissez-faire attitudes toward government's control of business.

Wyzanski was born in Boston, Massachusetts, to Charles and Maude Wyzanski on May 27, 1906. Charles was raised in the affluent Boston suburb of Brookline. He attended Phillips Exeter Academy and graduated from Harvard magna cum laude and Phi Beta Kappa in 1927.

On completion of his undergraduate degree, Wyzanski corresponded with Justice Oliver Wendell Holmes about his future plans. Justice Holmes replied,

> However a man feels about his work, nature is likely to see to it

Charles E. Wyzanski Jr.
UPI/Corbis-Bettmann

> that his business becomes his master and an end in itself, so that he may find that he has become a martyr under the illusion of self-seeking. . . . For your sake I hope that where your work seems to present only mean details you may realize that every detail has the mystery of the universe behind it and may keep up your heart with an undying faith. (Bok et al. 1987, 711)

This letter was framed and kept near his desk for a lifetime, as a caution and credo. Based on the encouragement of Justice Holmes, Wyzanski attended Harvard Law School.

During his law school education, Wyzanski came under the influence of Felix Frankfurter, legal scholar, advisor to President Franklin Roosevelt, and future Supreme Court justice. Wyzanski excelled at law school, serving on the *Harvard Law Review* and graduating magna cum laude.

After his graduation, Wyzanski, with assistance from Professor Frankfurter, obtained a clerkship with Judge Augustus N. Hand of the U.S. Court of Appeals for the Second Circuit, but rejected a second clerkship with Justice Louis Brandeis. Wyzanski began practicing corporate law with the firm of Ropes & Gray in 1931. His final clerkship was with Judge Learned Hand, who had a great influence on Wyzanski and his approach to the law and public service. Many have said that Judge Hand was the greatest American jurist not to serve on the Supreme Court, and the same comments were later made about Charles Wyzanski (Garraty and Carnes 1999, 96).

The New Deal and the country's many economic problems were the critical issues of the day when Wyzanski returned to private practice in 1933 with Roper & Gray. As an associate, he was confronted with a moral dilemma when he was asked to draft a brief challenging a state anti-injunction law that he believed to be desirable and valid. Wyzanski declined the assignment and was supported by several senior partners in the firm. This refusal came to the attention of President Roosevelt, probably through Wyzanski's mentor, Felix Frankfurter.

In 1933, Wyzanski was appointed to the post of solicitor of the Department of Labor, where he worked closely with Secretary Frances Perkins for two years (Bok et al. 1987, 711). During Wyzanski's time as the Department of Labor's solicitor he played an important role in drafting the public works provision and labor sections of the National Recovery Act as well as the charter of the International Labor Organization. He was instrumental in liberalizing the immigration laws, which were then under the Labor Department's jurisdiction (Garraty and Carnes 1999, 94).

The opportunities and experiences made available to Wyzanski during his time in Washington were extraordinary. He drafted legislation, lobbied for its passage, and eventually argued that the law was constitutional. In 1935, Wyzanski was transferred to the Department of Justice as special assistant in

the legal defense of key New Deal programs, principally the National Labor Relations Act and the Social Security Act. This work culminated in Wyzanski's participation in the following cases: *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 57 S. Ct. 615; *National Labor Relations Board v. Fruehauf Trailer Co.,* 57 S. Ct. 642; *National Labor Relations Board v. Friedman–Harry Marks Clothing Co.,* 57 S. Ct. 645; *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,* 57 S. Ct. 648; *Associated Press v. National Labor Relations Board,* 57 S. Ct. 650. All five decisions were handed down April 12, 1937 (Nathanson 1937, 196).

The National Labor Relations Act, which created the National Labor Relations Board (NLRB) and the procedures necessary to enforce the law, were signed into law on July 5, 1935. Approximately four months later, the NLRB began a fourteen-month-long campaign to accumulate sufficient cases to support its theory that the new law was valid through the commerce clause of the Constitution.

The NLRB was looking for companies that clearly engaged in business that would be viewed as interstate commerce. The board was also interested in a company engaged in manufacturing, which had interstate connections. For years the courts had viewed these types of businesses as intrastate endeavors and excluded them from governmental control under the commerce clause.

The two cases that provided the NLRB with the best opportunity to support their theory were the *Jones & Laughlin Steel* and the *Associated Press* cases. The facts concerning the unfair labor practices were fairly well documented in both cases. The *Associated Press* case dealt with the firing of Morris Watson, a political reporter and national vice-president of the American Newspaper Guild. The company's own personnel file contained documents showing the firing was motivated by Watson's union activities. The Associated Press clearly engaged in interstate commerce. The real issue to be decided by the Court was whether the government had the power to prevent discrimination against union activities from disrupting interstate commerce in transportation and communication (Irons 1982, 265, 284–285).

The *Jones & Laughlin* case involved the nation's fourth-largest steel corporation and a longtime antiunion company. It was an integrated steel manufacturer that owned iron ore, coal, and limestone properties in several states as well as railroads and large subsidiaries. It shipped approximately 75 percent of its products out of Pennsylvania. The company engaged in many antiunion activities, including creating a company union, threatening workers' employment if they did not vote for the company union, and firing union activists. The NLRB's regional director, Clinton Golden, expressed concerns about violence and potential strikes (Irons 1982, 260–262).

One Question Too Many

Because they take depositions prior to trial, in important cases attorneys often know the key points that witnesses will make before they put them on the stand. Trial advocacy professors accordingly often exhort lawyers not to ask questions, especially of witnesses on the other side, to which they do not know the answers. In a chapter devoted to legal anecdotes in *The Trial Lawyer's Art,* Sam Schrager allows attorney Boyce Holleman to report a story, attributed to Clarence Darrow, that illustrates what can happen when a lawyer forgets to follow this maxim.

> This young lawyer was defending a fella. The charge was biting another fella's ear off in a fight. There was only one witness, and he had this witness on the stand. And after a number of questions, he got to the big question.
>
> He said, "Did you see my client bite this man's ear off?"
>
> [The witness] said, "No, sir, I didn't see that."
>
> He oughta set down. But he didn't. He said, "Well, then, how is it you come here and tell this jury that he bit his ear off? How'd you know that?"
>
> He said, "I saw him spit it out." (Schrager 1999, 203)

Edward Bennett Williams learned a similar lesson early in his career when he was cross-examining the son of a man who had been killed by a streetcar. Williams was convinced that the man was drunk and that his son, who had bent over him after the accident, had removed a bottle from his father's pocket. Williams questioned the son accordingly:

> "You leaned over him, didn't you?" A. "Yes."
>
> "You were sniffing for alcohol, weren't you?" A. "No, sir."
>
> "You were reaching into his pocket for a bottle, weren't you?" A. "No, sir."
>
> "Other witnesses have testified that they saw you bending over your father. Now why *were* you bending over him?" A. "Because he was my father, and I wanted to kiss him good-bye." (Thomas 1991, 44–45)

Not surprisingly, Williams asked for a recess, called the insurance company, and recommended that it settle.

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The company took the position that its manufacturing of steel was performed within the state of Pennsylvania. Earl Reed, counsel for Jones & Laughlin Steel, argued that this made the company's activities intrastate and not subject to the jurisdiction of the NLRB. This argument had been used in the past to deny union organizing activity. The Supreme Court had ruled that intrastate business activity was not subject to governmental control. The board needed to convince the Supreme Court that the corporate

structure of Laughlin Steel and its many subsidiaries constituted interstate commerce by a manufacturing entity under the law.

The other three cases that were decided by the board had similar fact patterns or dealt with similar issues contained in the *Jones & Laughlin* and *Associated Press* cases. The different appellate courts decided or reviewed the board's action in the spring and summer of 1936. The different parties filed their writs to the Supreme Court in the fall, and the petitions for writ of certiorari were granted on November 9, 1936. The five cases would be argued before the Supreme Court on February 9, 1937 (Irons 1982, 268–271).

The responsibility of preparing the board's brief to the Supreme Court fell on five young lawyers. The two lawyers from the NLRB were Tom Emerson and Philip Levy, and from the Department of Justice and the solicitor general's office came Charles Wyzanski, Charles Horsky, and Abe Feller. Wyzanski took the lead of this group, whose members shared government expertise, age, and Ivy League legal educations. The group worked well together on a personal level, but sometimes their institutional loyalties conflicted. The Justice Department and the NLRB differed in their approach to arguing these cases before the Court. The Justice Department's main focus was pushing the cases it believed it could win. The NLRB's focus was on obtaining the broadest interpretation of the National Labor Relations Act. The two interests were finally merged into a three-pronged approach to the difficult arguments.

The brief for NLRB began with an argument focused on the effect of labor strife in a "far-flung, integrated enterprise," which was "likely to spread to other enterprises for the purpose of stopping shipments out of all plants in order to bring pressure to bear upon the industry as a whole." In these larger-scale cases, the NLRB would presume an intent to directly obstruct interstate commerce. The second argument did not depend on the "magnitude" of the industry, but measured a company's size "in relation to the industry as a whole" and "whether it is within a stream or flow of commerce." The impact of labor strife in such cases would depend, not on the intent of the strikers to directly obstruct commerce, but on whether the potential curtailment of production would have the "necessary effect of burdening or obstructing interstate commerce." The third argument expressed the concern of Charles Fahy (from the general counsel of the NLRB) with the limitations of the first two. It would focus attention on "the prevention of certain activities, even though usually only of local concern, which recur with such frequency as to constitute an undue burden on commerce." The board would thus be able to deal with unfair labor practices in any industry "where those practices and burdens are reasonably found constantly to recur." What most distinguished this argument from the other two was its em-

phasis on the Wagner Act, dealing with labor relations, as a preventive rather than a remedial statute. This was an argument "which [was] advanced vigorously" as the best way to stretch the act to cover smaller industries with only a minimal involvement in interstate commerce, Levy said. As finally written, the briefs somewhat uneasily accommodated the positions of both sides, leaving the Court free to stop at any rung on the ladder (Irons 1982, 280–281).

The Supreme Court arguments on this historical case began on February 3, 1937, and the parties were allotted three days. The Court heard from eleven attorneys, seven representing the different business interests and four arguing the government's position. John Davis argued the Associated Press's case and Earl Reed represented Jones & Laughlin Steel; both were considered the premier appellate attorneys for arguments before the Supreme Court. Charles Wyzanski argued the *Associated Press* and *Friedman–Harry Marks* cases with Charles Fahy.

The business interest represented in these cases took the traditional approach of laissez-faire ideology for labor relations between employer and employee. A century of business practices and court decisions kept the representatives of business from really dealing with the arguments presented by the government's counsel. Wyzanski's delivery, working without notes, was flawless as he argued before the Court. The performance was described as a tour de force by Tom Emerson, a coauthor of the Supreme Court briefs (Irons 1982, 283).

On the final day of arguments, Wyzanski artfully summarized the board's arguments and their application to the different-sized business entities represented in the five cases. He returned to the question of "whether or not this act may be so applied as to cover all industry and labor in this country" to distinguish among the three arguments advanced by the government. The steel corporation, due to its size and interest, would engender intentional interference with interstate commerce as a result of labor strife. The importance of Fruehauf to the transportation industry would support the board's "necessary effect" argument as the stream or flow of commerce and its effect on interstate commerce. Finally, the smaller businesses, like Friedman–Harry Marks, had to deal with labor strife on a recurring basis, and the board should have jurisdiction to deal with these problems and eliminate any danger to interstate commerce (Irons 1982, 285–286).

The Court announced its decision upholding the National Labor Relations Act on April 12, 1937, when the opinion of the Court was read by Chief Justice Charles Evans Hughes. This decision was a culmination of the efforts by the New Deal lawyers to recognize a national crisis and provide a mechanism through government agencies and administrative law to

provide a solution. This decision provided Congress the ability to deal with problems created by a national economic system and level the playing field between the employer and the employee (Irons 1982, 285–286).

The Court's more liberal reading of the commerce clause and due process clause led to an almost unlimited approval of New Deal legislation. Wyzanski returned to the Supreme Court six weeks later to argue the constitutionality of the Social Security Act, specifically dealing with the unemployment taxes being imposed on employers. A second case was heard on the federal old-age pension program. Once again, Wyzanski went head to head against John W. Davis, who was representing the interest of business in these cases. Wyzanski's performance before the court was so stellar that his worthy opponent Davis said, "In my palmiest days I could not have matched that argument" ("Ceremonial Presentations" 1996, lxix).

After these successes, Wyzanski left government service to return to private practice with Roper & Gray. He remained in private practice until he was appointed to the U.S. district court, where he served nobly for the next forty-five years. Although his time before the bar as a litigator had ended, his influence on the trial process continued in his capacity as a federal trial court judge. Wyzanski's tenure on the court was a continuation of the principles and ideals set down by many of the great justices he had known in his lifetime—Holmes, Augustus Hand, Learned Hand, Brandeis, and Frankfurter—whose voices could be heard in Judge Wyzanski's court.

A summary of some of Wyzanski's more memorable decisions was made by Judge Mark L. Wolf on the occasion of Wyzanski's portrait being presented to the U.S. District Court after his death in 1986. Judge Wolf made the following statement:

> During his tenure, Judge Wyzanski brought the ideals articulated by his mentors on the Supreme Court to the firing line of the District Court. In 1953, he affirmed the vitality of Brandeis' commitment to competition by ordering the break-up of the United Shoe Company. Extending the tradition of courageous support for civil liberties that earned Holmes and Brandeis their reputations as the "Great Dissenters," in the 1960s Judge Wyzanski ruled that a sincere, but not religious, conscientious objector could not be drafted for combat in Vietnam because that individual's interest in not killing was more compelling than the country's need for him to do so. Earlier, however, with Justice Frankfurter's former law clerk Elliot Richardson as the prosecutor, Judge Wyzanski decided that the vital need to prosecute public corruption trumped an individual's claim of conscience in requiring a reluctant probationer to identify the official he had bribed. ("Ceremonial Presentations" 1996, lxviii)

The final case mentioned by Judge Wolf drew quite a bit of criticism, with which Wyzanski did not totally disagree. In dealing with the Watergate scandal in the early 1970s, Judge John Sirica successfully used a similar sentencing practice (Bok et al. 1987, 712).

Wyzanski was a strong supporter of his alma mater, Harvard University. He was president of the Harvard Board of Overseers and senior fellow of the Harvard Society of Fellows. He served as a trustee for twenty-five years on the Ford Foundation and from 1942 was councilor of the American Law Institute.

Wyzanski's inclusion in this book of great litigators is best explained by his work as special assistant in the Department of Justice protecting New Deal legislation. As he put it, he was "enrolled in [a] battle to bring to a successful conclusion the third great period in United States Constitutional development—a period in which 'ancient powers given to and preserved for Union' were 'invoked to make a democratic government function in a modern world'" (Irons 1982, 289). Wyzanski was always aware of the outside influences that affected the decisions made in the law. In responding to Felix Frankfurter about the Supreme Court's decision in the five NLRB cases, he made the following observation: "Right along I have said that the cases were won not by Mr. Wyzanski but either by Mr. Roosevelt or, if you prefer it, by Mr. Zeitgeist" (Irons 1982, 289 n55).

— James Wagoner

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Appendix A

Great American Lawyers Listed by Year of Birth

Andrew Hamilton (1676–1741)
Edmund Pendleton (1721–1803)
James Otis Jr. (1725–1783)
George Wythe (1726–1806)
John Adams (1735–1826)
Patrick Henry (1736–1799)
Luther Martin (1744–1826)
Tapping Reeve (1744–1823)
Edmund Randolph (1753–1813)
John Marshall (1755–1835)
Alexander Hamilton (1757–1804)
Thomas Addis Emmet (1764–1827)
William Pinkney (1764–1822)
John Quincy Adams (1767–1848)
Jeremiah Mason (1768–1848)
Joseph Hopkinson (1770–1842)
William Wirt (1772–1834)
Walter Jones (1776–1861)
Henry Clay (1777–1852)
Joseph Story (1779–1845)
Martin Van Buren (1782–1862)
Daniel Webster (1782–1852)
James Louis Petigru (1789–1863)
Edward Bates (1793–1869)
Reverdy Johnson (1796–1876)
Rufus Choate (1799–1859)
Caleb Cushing (1800–1879)
David Dudley Field (1805–1894)
Salmon P. Chase (1808–1873)
Benjamin Robbins Curtis (1809–1874)
Abraham Lincoln (1809–1865)
Jeremiah Sullivan Black (1810–1893)
Judah P. Benjamin (1811–1884)
John Archibald Campbell (1811–1889)
Stephen A. Douglas (1813–1861)
Richard Henry Dana Jr. (1815–1882)
William M. Evarts (1818–1901)
Roscoe Conkling (1829–1888)
John Mercer Langston (1829–1897)
Belva Lockwood (1830–1917)
John Forrest Dillon (1831–1914)
Joseph H. Choate (1832–1917)
John Garner Johnson (1841–1917)
Elihu Root (1845–1937)

Attorneys born in the same year are arranged alphabetically rather than by birthday.

Louis Dembitz Brandeis (1856–1941)
Clarence Darrow (1857–1938)
William Dameron Guthrie (1859–1935)
Charles Evans Hughes (1862–1948)
Homer Stille Cummings (1870–1956)
Earl Rogers (1870–1922)
Max Steuer (1871–1940)
John W. Davis (1873–1955)
Arthur Mullen (1873–1938)
Owen J. Roberts (1875–1955)
Francis Beverly Biddle (1886–1968)
William J. Fallon (1886–1927)
Arthur T. Vanderbilt (1888–1957)
Mabel Walker Willebrandt (1889–1963)
Thurman Wesley Arnold (1891–1969)
Robert H. Jackson (1892–1954)
Samuel Simon Leibowitz (1893–1978)
Charles Hamilton Houston (1895–1950)
Carol Weiss King (1895–1952)
John Marshall Harlan II (1899–1971)
Thomas E. Dewey (1902–1971)
Percy Foreman (1902–1988)
Louis Nizer (1902–1994)
Erwin Nathaniel Griswold (1904–1994)
William Henry Hastie (1904–1976)
Leon Jaworski (1905–1982)
Charles E. Wyzanski Jr. (1906–1986)
Melvin Mouron Belli Sr. (1907–1996)
Thurgood Marshall (1908–1993)
Leo Pfeffer (1909–1993)
Abe Fortas (1910–1982)
Hayden C. Covington (1911–1978)
Archibald Cox (1912–)
Mary Metlay Kaufman (1912–1995)
Spottswood W. Robinson III (1916–1998)
William M. Kunstler (1919–1995)
James D. St. Clair (1920–)
Edward Bennett Williams (1920–1988)
John Michael Doar (1921–)
Constance Baker Motley (1921–)
Jack Greenberg (1925–)
Richard "Racehorse" Haynes (1927–)
James F. Neal (1929–)
Gerry Spence (1929–)
F. Lee Bailey (1933–)
Ruth Bader Ginsburg (1933–)
Vincent T. Bugliosi Jr. (1934–)
Rex E. Lee (1935–1996)
Morris Dees Jr. (1936–)
Johnnie L. Cochran Jr. (1937–)
Alan Morton Dershowitz (1938–)
Marian Wright Edelman (1939–)
David Boies (1941–)
Michael E. Tigar (1941–)
Laurence H. Tribe (1941–)
Kenneth W. Starr (1946–)

Appendix B

Great American Lawyers Listed by Century

Colonial and Revolutionary Times

John Adams (1735–1826)
Thomas Addis Emmet (1764–1827)
Alexander Hamilton (1757–1804)
Andrew Hamilton (1676–1741)
Patrick Henry (1736–1799)
John Marshall (1755–1835)
Luther Martin (1744–1826)
James Otis Jr. (1725–1783)
Edmund Pendeton (1721–1803)
Edmund Randolph (1753–1813)
George Wythe (1726–1806)

Nineteenth Century

John Quincy Adams (1767–1848)
Edward Bates (1793–1869)
Judah P. Benjamin (1811–1884)
Jeremiah Sullivan Black (1810–1893)
John Archibald Campbell (1811–1889)
Salmon P. Chase (1808–1873)
Joseph H. Choate (1832–1917)
Rufus Choate (1799–1859)
Henry Clay (1777–1852)
Roscoe Conkling (1829–1888)
Benjamin Robbins Curtis (1809–1874)
Caleb Cushing (1800–1879)
Richard Henry Dana Jr. (1815–1882)
John Forrest Dillon (1831–1914)
Stephen A. Douglas (1813–1861)
William M. Evarts (1818–1901)
David Dudley Field (1805–1894)
Joseph Hopkinson (1770–1842)
John Garner Johnson (1841–1917)
Reverdy Johnson (1796–1876)
Walter Jones (1776–1861)
John Marcer Langston (1829–1897)
Abraham Lincoln (1809–1865)
Belva Lockwood (1830–1917)
Jeremiah Mason (1768–1848)
James Louis Petigru (1789–1863)
William Pinkney (1764–1822)
Tapping Reeve (1744–1823)
Joseph Story (1779–1845)
Martin Van Buren (1782–1862)
Daniel Webster (1782–1852)
William Wirt (1772–1834)

Twentieth Century

Thurman Wesley Arnold (1891–1969)
F. Lee Bailey (1933–)

Melvin Mouron Belli Sr. (1907–1996)
Francis Beverly Biddle (1886–1968)
David Boies (1941–)
Louis Dembitz Brandeis (1856–1941)
Vincent T. Bugliosi Jr. (1934–)
Johnnie L. Cochran Jr. (1937–)
Hayden C. Covington (1911–1978)
Archibald Cox (1912–)
Homer Stille Cummings (1870–1956)
Clarence Darrow (1857–1938)
John W. Davis (1873–1955)
Morris Dees Jr. (1936–)
Alan Morton Dershowitz (1938–)
Thomas E. Dewey (1902–1971)
John Michael Doar (1921–)
Marian Wright Edelman (1939–)
William J. Fallon (1886–1927)
Percy Foreman (1902–1988)
Abe Fortas (1910–1982)
Ruth Bader Ginsburg (1933–)
Jack Greenberg (1925–)
Erwin Nathaniel Griswold (1904–1994)
William Dameron Guthrie (1859–1935)
John Marshall Harlan II (1899–1971)
William Henry Hastie (1904–1976)
Richard "Racehorse" Haynes (1927–)
Charles Hamilton Houston (1895–1950)
Charles Evans Hughes (1862–1948)
Robert H. Jackson (1892–1954)
Leon Jaworski (1905–1982)
Mary Metlay Kaufman (1912–1995)
Carol Weiss King (1895–1952)
William M. Kunstler (1919–1995)
Rex E. Lee (1935–1996)
Samuel Simon Leibowitz (1893–1978)
Thurgood Marshall (1908–1993)
Constance Baker Motley (1921–)
Arthur Mullen (1873–1938)
James F. Neal (1929–)
Louis Nizer (1902–1994)
Leo Pfeffer (1909–1993)
Owen J. Roberts (1875–1955)
Spottswood W. Robinson III (1916–1998)
Earl Rogers (1870–1922)
Elihu Root (1845–1937)
Gerry Spence (1929–)
Kenneth W. Starr (1946–)
James D. St. Clair (1920–)
Max Steuer (1871–1940)
Michael E. Tigar (1941–)
Laurence H. Tribe (1941–)
Arthur T. Vanderbilt (1888–1957)
Mabel Walker Willebrandt (1889–1963)
Edward Bennett Williams (1920–1988)
Charles E. Wyzanski Jr. (1906–1986)

Appendix C

Great American Lawyers Listed by Birthdate, State, and College

Name[1]	*Nation or State of Birth*	*Education*[2]	*Practice*[3]
Andrew Hamilton (1676–1741)	Scotland	St. Andrews/ Read law[4]	VA/MD/PA/ DE
Edmund Pendleton (1721–1803)	VA	Read law	VA
James Otis (1725–1783)	MA	Harvard/Read law	MA
George Wythe (1726–1806)	VA	Read law	VA
John Adams (1735–1826)	MA	Harvard/Read law	MA
Patrick Henry (1736–1799)	VA	Read law	VA
Luther Martin (1744–1826)	NJ	Col. of NJ/Read law	MD
Tapping Reeve (1744–1823)	NY	Col. of NJ[5]/Read law	CT
Edmund Randolph (1753–1813)	VA	William & Mary/ Read law	VA
John Marshall (1755–1835)	VA	William & Mary	VA
Alexander Hamilton (1757–1804)	W. Indies	Kings College[6]/ Albany	NY
Thomas Addis Emmet (1764–1827)	Ireland	Trinity/Edinburgh/ I. Temple	Ireland/NY
William Pinkney (1764–1822)	MD	Read law	MD
John Quincy Adams (1767–1848)	MA	Harvard/Read law	NH/MA
Jeremiah Mason (1768–1848)	CT	Yale	CT/VT/NH

Joseph Hopkinson (1770–1842)	PA	U. PA/Read law	PA
William Wirt (1772–1834)	MD	Read law	VA/MD
Walter Jones (1776–1861)	VA	Read law	VA
Henry Clay (1777–1852)	VA	Read law	KY
Joseph Story (1779–1845)	MA	Harvard/Read law	MA
Martin Van Buren (1782–1862)	NY	Read law	NY
Daniel Webster (1782–1852)	NH	Dartmouth/Read law	MA
James Louis Petigru (1789–1863)	SC	Col. of NJ/SC College	SC
Edward Bates (1793–1869)	VA	Read law	MO
Reverdy Johnson (1796–1876)	MD	St. Johns	MD
Rufus Choate (1799–1859)	MA	Dartmouth/Harvard Law	MA
Caleb Cushing (1800–1879)	MA	Harvard/Harvard Law	MA
David Dudley Field (1805–1894)	CT	Williams/Read law	NY
Salmon P. Chase (1808–1873)	NH	Dartmouth/Read law	OH
Benjamin Curtis (1809–1874)	MA	Harvard/Harvard Law	MA
Abraham Lincoln (1809–1865)	KY	Read law	IL
Jeremiah Black (1810–1893)	PA	Read law	PA
Judah P. Benjamin (1811–1884)	St. Croix	Yale/Read law	LA/England
John Archibald Campbell (1811–1889)	GA	West Point/Read law	AL/LA
Stephen A. Douglas (1813–1861)	VT	Read law	IL
Richard Henry Dana Jr. (1815–1882)	MA	Harvard/Harvard Law	MA
William M. Evarts (1818–1901)	MA	Yale/Harvard Law	NY
Roscoe Conkling (1829–1888)	MA	Read law	NY
John Mercer Langston (1829–1897)	VA	Oberlin/Read law	OH/DC/VA
Belva Lockwood (1830–1917)	NY	Syracuse[7]/Nat. Law Sch.	DC
John F. Dillon (1831–1914)	NY	Iowa/Read law	NY
Joseph H. Choate (1832–1917)	MA	Harvard/Harvard Law	NY
John Garner Johnson (1841–1917)	PA	U. PA/Read law	PA

Elihu Root (1845–1937)	NY	Hamilton College/ NYU Law	NY
Louis Dembitz Brandeis (1856–1941)	KY	Germany/Harvard Law	MA
Clarence Darrow (1857–1938)	NY	Allegheny/Michigan/ Read law	IL
William D. Guthrie (1859–1935)	CA	Columbia Law	NY
Charles Evans Hughes (1862–1948)	NY	Colgate/Brown/Col. Law	NY
Homer Stille Cummings (1870–1956)	IL	Yale/Yale Law	CT
Earl Rogers (1870–1922)	NY	Syracuse/Read law	CA
Max Steuer (1871–1940)	Austria	City Col. NY/ Columbia Law	NY
John W. Davis (1873–1955)	WV	Wash. & Lee/W&L Law	WV/NY
Arthur Mullen (1873–1938)	Canada	U. Mich. Law	NE
Owen J. Roberts (1875–1955)	PA	U. PA/U. PA Law	PA
Francis Biddle (1886–1968)	France	Harvard/Harvard Law	PA
William J. Fallon (1886–1927)	NY	Fordham/Fordham Law	NY
Arthur T. Vanderbilt (1888–1957)	NJ	Wesleyan (CT)/Col. Law	NJ
Mabel Walker Willebrandt (1889–1963)	KS	Tempe Normal/ S. Cal. Law	CA/DC
Thurman Wesley Arnold (1891–1969)	WY	Princeton/Harvard Law	DC
Robert H. Jackson (1892–1954)	PA	Albany/Read law	NY
Samuel Simon Leibowitz (1893–1978)	Romania	Cornell Law	NY
Charles Houston (1895–1950)	TN	Amherst/Harvard Law	MA
Carol Weiss King (1895–1952)	NY	Barnard/NYU Law	NY
John Marshall Harlan II (1899–1971)	IL	Princeton/Oxford/NYU	NY
Thomas E. Dewey (1902–1971)	MI	U. MI/Columbia Law	NY
Percy Foreman (1902–1988)	TX	U. Texas, Austin	TX
Louis Nizer (1902–1994)	England	Columbia/Col. Law	NY
Erwin Griswold (1904–1994)	OH	Oberlin/Harvard Law	OH/NY
William Hastie (1904–1976)	DC	Amherst/Harvard Law	MA
Leon Jaworski (1905–1982)	TX	Baylor Law/G.W. Law	TX
Charles E. Wyzanski Jr. (1906–1986)	MA	Harvard/Harvard Law	TX
Melvin Mouron Belli Sr. (1907–1996)	CA	Berkeley/Boalt	CA

Thurgood Marshall (1908–1993)	MD	Lincoln/Howard U.	MD/DC
Leo Pfeffer (1909–1993)	Hungary	City College/NYU Law	NY
Abe Fortas (1910–1982)	TN	Southwest[8]/Yale Law	DC
Hayden C. Covington (1911–1978)	TX	San Antonio Bar Assoc.[9]	NY
Archibald Cox (1912–)	NJ	Harvard/Harvard Law	MA
Mary Metlay Kaufman (1912–1995)	GA	Brooklyn C./ St. Johns Law	NY
Spottswood W. Robinson III (1916–1998)	VA	VA Union/Howard Law	VA/DC
William Kunstler (1919–1995)	NY	Yale/Columbia Law	NY
James D. St. Clair (1920–)	OH	U. IL/Harvard Law	MA
Edward Bennett Williams (1920–1988)	CT	Holy Cross/ Georgetown Law	MD/DC
John Michael Doar (1921–)	MN	Princeton/U. CA	WI/DC/NY
Constance Baker Motley (1921–)	CT	Fisk/NYU/Col. Law	NY
Jack Greenberg (1925–)	NY	Columbia/Col. Law	NY
Richard "Racehorse" Haynes (1927–)	TX	Houston/Houston Law	TX
James F. Neal (1929–)	TN	Wyoming/Vanderbilt	TN
Gerry Spence (1929–)	WY	WY/WY Law/ Georgetown Law	WY
F. Lee Bailey (1933–)	MA	Harvard/Boston U. Law	MA/FL
Ruth Bader Ginsburg (1933–)	NY	Cornell/Harvard Law	NY
Vincent T. Bugliosi Jr. (1934–)	MN	Miami, FL/UCLA Law	CA
Rex E. Lee (1935–1996)	CA	Brigham Y./U. Chicago	AZ/UT
Morris Dees Jr. (1936–)	AL	U. AL/U. AL Law	CA
Johnnie L. Cochran Jr. (1937–)	LA	UCLA/Loyola L.A.	CA
Alan Dershowitz (1938–)	NY	Brooklyn/Yale Law	MA
Marian Wright Edelman (1939–)	SC	Spelman/Yale Law	MS/DC
David Boies (1941–)	IL	Redlands/N.western/ Yale Law	NY
Michael E. Tigar (1941–)	CA	Cal. Berkeley/U. CA Law/CA/France/	TX/DC
Laurence H. Tribe (1941–)	China	Harvard/Harvard Law	MA
Kenneth W. Starr (1946–)	TX	Harding/G.W./Brown/ Duke	CA/DC

[1]Attorneys born the same year are arranged alphabetically rather than by birth day.

[2] Schools attended are listed even when individuals did not receive a degree.

[3] Notable attorneys often take cases in other states. I have tried to identify the key state, or states, in which each attorney practices, but I have undoubtedly left out a number of such locales.

[4]Especially in early American history, most attorneys studied for the law by "reading law" in the office of an established practitioner.

[5]Now Princeton University.

[6] Now Columbia University.

[7] The college was then called Genese Wesleyan.

[8] This is now called Rhodes College.

[9] This is now St. Mary's.

Editor's Comments: In reviewing this list, it is noteworthy that eleven of one hundred great American attorneys identified were born abroad, just over half in Britain or its colonies. Close to half the states were birthplaces to the remaining outstanding lawyers, with New York, Massachusetts, and Virginia leading the list, in part because of their prominence in early American history.

Just over one-third of the attorneys read law in the offices of other attorneys. One-fifth of the attorneys in this book attended Harvard either as undergraduates and/or as law students. Columbia, Yale, Princeton, and New York University are the only other schools to have educated a handful or more of the attorneys covered in this book.

—John R. Vile

How Well Do You Know Your Great American Lawyers?

Which great American attorney:

- Helped direct the education of Thomas Jefferson? [George Wythe]
- Wrote "Hail Columbia"? [Joseph Hopkinson]
- Argued the *Zenger* case, and designed Pennsylvania Hall? [Andrew Hamilton]
- Served as secretary of war in the Confederate cabinet before moving to England and practicing law there? [Judah P. Benjamin]
- Helped defend the Scottsboro Boys against charges that they had raped two white women? [Samuel Leibowitz]
- Was imprisoned as an Irish revolutionary before coming to America? [Thomas Addis Emmet]
- Defended the Redcoats in the Boston Massacre Trial and later became president of the United States? [John Adams]
- Helped argue the *Amistad* case and served in the House of Representatives after having been president of the United States? [John Quincy Adams]
- Was the grandson of William Evarts and a long-time Harvard law professor who was ousted as Watergate special prosecutor in the "Saturday Night Massacre"? [Archibald Cox]
- Was known as "the Little Giant"? [Stephen A. Douglas]
- Was the first African-American ever appointed to the U.S. Supreme Court? [Thurgood Marshall]
- Brought the most important cases involving the rights of women to the U.S. Supreme Court before being appointed as a U.S. Supreme Court justice? [Ruth Bader Ginsburg]

- Prosecuted Charles Manson and wrote the book *Helter Skelter* about the experience? [Vincent Bugliosi]
- Won millions of dollars in judgments against the Los Angeles Police Department before helping to defend O. J. Simpson? [Johnnie Cochran]
- Had a type of legal brief citing voluminous studies and statistical data named after him? [Louis Brandeis]
- Led the U.S. prosecution of the Nuremburg trials of Nazis after World War II? [Robert Jackson]
- Helped as secretary of state to precipitate a case that later resulted in the establishment of judicial review of congressional legislation? [John Marshall]
- Served as a Harvard professor and Supreme Court justice and wrote one of the most influential works on the U.S. Constitution in the nineteenth century? [Joseph Story]
- Was said to have birthed the American Revolution when arguing against the hated Writs of Assistance? [James Otis]
- Authored the Gettysburg Address? [Abraham Lincoln]
- Defended Elvis Presley's doctor against charges that he had illegally prescribed drugs? [James Neal]
- Served as a de facto defender of Lee Harvey Oswald, was scheduled to defend Jack Ruby, and later advised James Earl Ray to plead guilty to assassinating Dr. Martin Luther King Jr.? [Percy Foreman]
- Is often credited with inventing the modern art of cross-examination and defended Clarence Darrow against bribery charges? [Earl Rogers]
- Delivered a famous speech in which he proclaimed, "Give me liberty or give me death"? [Patrick Henry]
- Brought over fifty cases (most of which he won) to the U.S. Supreme Court on behalf of Jehovah's Witnesses? [Hayden C. Covington]
- Was the key subject in a famous play by Steven Vincent Benét? [Daniel Webster]
- Often considered to be the greatest lawyer in American history, was the key subject in the play *Inherit the Wind* and a strong opponent of the death penalty? [Clarence Darrow]
- Is a Harvard law professor, specializing in appellate advocacy, who helped defend Leona Helmsley? [Alan Dershowitz]
- Is a Harvard law professor who unsuccessfully argued for gay rights in the case of *Bowers v. Harwick?* [Laurence Tribe]
- Resigned from the U.S. Supreme Court at the beginning of the Civil War and later served on the Confederate cabinet? [John Archibald Campbell]

- Dissented in the *Dred Scott* decision of 1857? [Benjamin Curtis]
- Created one of the most influential schools for training lawyers in the early nineteenth century? [Tapping Reeve]
- Was the first African-American to be appointed as a U.S. federal judge? [William Hastie]
- Served as the nation's first secretary of the treasury and helped found the Federalist party? [Alexander Hamilton]
- Was designated as "the King of Torts"? [Melvin Belli]
- Is best known for his cross-examination in the New York Triangle Shirtwaist Factory fire? [Max Steuer]
- Was a cabinet officer in the administration of Andrew Jackson who advocated a two-party system and later became U.S. president? [Martin Van Buren]
- Resigned from the U.S. Supreme Court to run unsuccessfully for president but was later appointed as chief justice? [Charles Evans Hughes]
- Achieved a reputation as a prosecutor and was incorrectly projected to beat Harry S Truman in the election of 1948? [Thomas E. Dewey]
- Was the grandson of the dissenter in the case (*Plessy v. Ferguson*, 1896) that established the doctrine of "separate but equal" who became almost equally well known for his own dissents as a justice on the Warren Court? [John Marshall Harlan II]
- Defended Clarence Gideon in the case (*Gideon v. Wainwright*, 1963) that established an indigent's right to appointed counsel in felony cases before being appointed to the U.S. Supreme Court by President Lyndon Johnson? [Abe Fortas]
- Authored *Two Years before the Mast?* [Richard Henry Dana]
- Has been identified by his biographer as "the most hated lawyer in America"? [William Kunstler]
- Formulated the key to success as "IQ + WQ^2 = S or Intelligence Quotient plus Work Quotient squared equals Success"? [Louis Nizer]
- Was a former Teapot Dome prosecutor who, as a U.S. Supreme Court justice, is generally thought to be responsible for the "switch in time that saved nine" on the Supreme Court in 1937? [Owen Roberts]
- Argued the case of *Meyer v. Nebraska* (1932) and helped establish the right of parents and private schools to educate children? [Arthur Mullen]
- Represented President Richard Nixon in making his claims against the special prosecutors for executive privilege? [James St. Clair]
- Was the author of *The Folklore of Capitalism* who was said to be a combination of "Voltaire and the Cowboy"? [Thurman Arnold]

- First came into national prominence with his successful appeal of the *Sam Shepard* case and his work analyzing polygraph tests? [F. Lee Bailey]
- Was a descendant of Edmund Randolph and served as both solicitor general and attorney general of the United States? [Francis Biddle]
- Resigned from the U.S. Supreme Court and later argued for the butchers in the famous *Slaughterhouse Cases* that helped determine the interpretation of the Fourteenth Amendment? [John Archibald Campbell]
- Helped persuade the U.S. Supreme Court that the income tax was unconstitutional? [Joseph H. Choate]
- Attended Dartmouth College during the time that Daniel Webster represented the school before the U.S. Supreme Court? [Rufus Choate]
- Was a Kentucky senator who served as a key architect of the Missouri Compromise and the Compromise of 1850? [Henry Clay]
- Was told during a law school mock trial that he would "*never* become a trial lawyer"? [Gerry Spence]
- Defended leading American Communists after returning from prosecuting Nazis at Nuremberg? [Mary Kaufman]
- Was founder and president of the Children's Defense Fund? [Marian Wright Edelman]
- Was the subject of a movie, *Boomerang,* which described a prosecutor who brought out evidence favorable to a defendant? [Homer S. Cummings]
- Was America's longest-serving attorney general who helped defend George Wythe Sweeney against charges that he poisoned his uncle, George Wythe? [William Wirt]
- Was a U.S. solicitor general who served for a time after leaving the post as president of Brigham Young University? [Rex Lee]
- Was a key attorney for the NAACP's Legal Defense Fund who became the first African-American to serve on the Washington, D.C., court of appeals? [Spottswood Robinson III]
- Was one of the attorneys who argued before the U.S. Supreme Court for the validity of the National Labor Relations Act before serving for forty-five years as a U.S. district judge? [Charles E. Wyzanski Jr.]
- Used his role in the adoption of the Fourteenth Amendment to back his later claim that the amendment was designed to protect corporations? [Roscoe Conkling]
- Served as attorney general under James Buchanan, fought against congressional reconstruction, and successfully argued against governmental actions in *Ex parte Milligan* and *Ex parte McCardle?* [Jeremiah Black]
- Was appointed by President McKinley as secretary of war and by Theodore Roosevelt as secretary of state? [Elihu Root]

- Was the first woman to receive a degree from an American law school? [Belva Lockwood]
- Was the unsuccessful Democratic nominee for president in 1924 who later argued for upholding segregation in the case of *Brown v. Board of Education* (1954)? [John Davis]
- Was a law school dean and chief justice of the New Jersey Supreme Court who was America's greatest advocate of judicial reform? [Arthur T. Vanderbilt]
- Had the reputation in Washington, D.C., as an insider who was "the man to see"? [Edward Bennett Williams]
- Was the first African-American elected to public office in the United States and helped establish the law department at Howard University? [John Mercer Langston]
- Was the Virginia governor who offered the Virginia Plan at the Constitutional Convention, refused to sign the Constitution in September 1787, but later advocated its ratification in the Virginia Ratifying Convention and became the nation's first attorney general? [Edmund Randolph]
- Was a cofounder of the Southern Poverty Law Center known for formulating strategies by which the Ku Klux Klan could be sued for violent actions by its members? [Morris Dees Jr.]
- Served as director of the NAACP's Legal Defense Fund from 1961 to 1994 and for a time as dean of the Columbia Law School? [Jack Greenberg]
- Was the son of a Church of Christ minister best known for leading the Whitewater and Lewinsky investigations involving President Clinton? [Kenneth Starr]
- Was called "the Ajax or Agamemnon" of the Rockingham (New Hampshire) bar and often bested Daniel Webster in legal arguments? [Jeremiah Mason]
- Was known as "the attorney general for runaway slaves"? [Salmon P. Chase]
- Became known as "Prohibition Portia" for her role in enforcing prohibition as assistant U.S. attorney general from 1921 to 1929? [Mabel Walker Willebrandt]
- Argued more cases before the U.S. Supreme Court than any other American attorney in history? [Walter Jones]
- Described herself as a "he-woman with a heart" and helped defend accused American Communists against deportation? [Carol Weiss King]
- Was a longtime litigator for the NAACP's Legal Defense Fund who became the first African-American woman to sit in the New York Senate and as a U.S. district court judge? [Constance Motley]

- Was fired as a clerk to Justice William Brennan after refusing to release a list of his political activities? [Michael Tigar]
- Authored the influential *Commentaries on the Law of Municipal Corporations?* [John Dillon]
- Followed his service as dean of the Harvard Law School from 1946 to 1967 by serving as U.S. solicitor general from 1967 to 1973? [Erwin Griswold]
- As chief justice of a Virginia court of appeals often reversed decisions of Virginia's chancellor, George Wythe, whom he had frequently bested in arguments as a litigator? [Edmund Pendleton]
- Served as president of the American Bar Association before being selected as the second Watergate special prosecutor? [Leon Jaworski]
- Was a Texas attorney known for arguing over a thousand death penalty cases and losing only one defendant to the executioner? [Percy Foreman]
- Argued against the constitutionality of the national income tax, against extensive congressional powers under the commerce clause, and against the Oregon law prohibiting children from attending private schools at issue in *Pierce v. Society of Sisters* (1921)? [William Guthrie]
- Participated in more than 50 percent of the cases before the U.S. Supreme Court dealing with the establishment clause during his career, including the case that established the "Lemon Test"? [Leo Pfeffer]
- Was a prominent attorney for railroads in the late nineteenth and early twentieth centuries who was often called "the King of the American Bar" and who left an extensive art collection to Philadelphia? [John Garner Johnson]
- Was lead counsel in what has become known as the *Mississippi Burning* trial? [John Doar]
- Defended T. Cullen Davis against charges of murder and of plotting the assassination of a judge? [Richard "Racehorse" Haynes]
- Was a fastidious dresser who delivered an influential three-day speech on the constitutionality of the national bank in *McCulloch v. Maryland* (1819)? [William Pinkney]
- Although blinded in one eye by a ricocheted bullet and in the other by apparent eye strain, went on to argue the Southern case in *Dred Scott v. Sandford* (1857)? [Reverdy Johnson]
- Is generally credited with helping to gain President Andrew Johnson's acquittal in impeachment charges before the U.S. Senate? [William Evarts]
- Was the key nineteenth-century American proponent of codification and brother to an influential U.S. Supreme Court justice? [David Dudley Field]
- Served as attorney general under Lincoln? [Edward Bates]

Questions about the lawyers described in boxes rather than in full entries: Which American lawyer(s):

- Defended Eric and Lyle Menendez against charges that they murdered their parents? [Leslie Abramson]
- Successfully argued in *Wisconsin v. Yoder* on behalf of the Amish parents who did not want to send their children to public schools beyond the eighth grade? [William Bentley Ball]
- Is best known for his defense of William Kennedy Smith against rape charges? [Roy Black]
- Was known, along with Daniel Webster and Henry Clay, as one of the three great congressional leaders in the first half of the nineteenth century? [John C. Calhoun]
- Was an "insider's insider" who advised presidents from Truman to Lyndon Johnson? [Clark Clifford]
- Was Senator Joseph McCarthy's chief legal counsel? [Roy Cohn]
- Wrote *Constitutional Limitations?* [Thomas Cooley]
- Was called "the Napoleon of the Western Bar" and won nineteen acquittals in nineteen murder cases? [Delphin Michael Delmas]
- Although born to an old Southern family in Montgomery, Alabama, went on to serve as president of the National Lawyers Guild and the National Farmers Union and to work on behalf of civil rights? [Clifford J. Durr]
- Appears to have been the first woman lawyer to practice in America? [Margaret Brent]
- Was a "country lawyer" who became known for his role in leading the Senate Watergate investigation? [Sam Ervin]
- Headed up the Manhattan Sex Crimes Prosecution Unit that prosecuted assailants who participated in the gang rape of a Central Park robber? [Linda Fairstein]
- Was the law partner of Abraham Lincoln? [William H. Herndon]
- Was the fictional hero in *To Kill a Mockingbird?* [Atticus Finch]
- Was known for the defense of celebrities and defended Paul Wright for the murder of his wife and best friend after he discovered them in a compromising situation? [Jerry Giesler]
- Is known for writing a legal thriller each year, and who returned to the courtroom to win a substantial award for a client who had lost her husband in a railroad accident? [John Grisham]
- Was called "the Greta Garbo of the bar"? [Fanny Holtzmann]
- Helped draft the constitution of Texas and twice served as its president? [Sam Houston]

- Are perhaps the two best-known attorney scoundrels in New York and U.S. history? [William F. Howe and Abraham H. Hummel]
- Wrote the Declaration of Independence? [Thomas Jefferson]
- Wrote the "Perry Mason" series? [Erle Stanley Gardner]
- Defended a deaf-mute in a murder trial? [Lowell J. Myers]
- Wrote *Unsafe at Any Speed* before running for president of the United States? [Ralph Nader]
- Served two jail terms before becoming a lawyer in the Indian Territory and defending 342 accused murderers? [Moman Pruiett]
- Is said to have achieved acquittals for 99 percent of his clients in Minnesota courts? [Eugene A. Rerat]
- Resigned as U.S. attorney general rather than fire Archibald Cox? [Elliot Richardson]
- Went to jail rather than put a defendant on the stand who he thought was about to perjure himself? [Ellis Rubin]
- Helps head the Innocence Project to release individuals from jail when it can be proved through DNA evidence that they are not guilty of the crimes for which they have been incarcerated? [Barry Scheck]
- Was the inspiration for the Johnny Cash song, "A Boy Named Sue"? [Sue Hicks]
- Served as secretary of state under President Eisenhower? [John Foster Dulles]
- Served for twenty years as attorney general of New Hampshire and often argued against Daniel Webster? [George Sullivan]
- Once persuaded a Supreme Court justice to alter a reference made to him in an opinion? [Littleton Waller Tazewell]
- Was described as "a combination of Robin Hood, Abraham Lincoln, Puck, and Uncle Sam"? [Ephraim Tutt]
- Successfully argued the case of *Roe v. Wade?* [Sarah Weddington and Linda Coffee]
- Is credited with exposing Senator Joseph McCarthy during nationally televised hearings? [Joseph Welch]
- Is best known for his book *The Art of Cross-Examination?* [Francis L. Wellman]

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About the Editor & Contributors

Lee Allen (Ph.D., University of Utah; J.D., University of Houston) is an associate professor of political science who teaches in the Public Administration Program at Valdosta State University in Valdosta, Georgia.

Sarah Bartholomew (LL.M., University of Georgia; J.D., Mercer University) teaches in the Department of Political Science at Valdosta State University in Valdosta, Georgia.

Christian Biswell (M.A., Southern Illinois University) is a law student at Southern Illinois University in Carbondale.

Brandi Snow Bozarth is a recent graduate of Middle Tennessee State University and is attending law school at the University of Dayton in Dayton, Ohio.

Mark Byrnes (Ph.D., Vanderbilt University) is a professor of political science at Middle Tennessee State University. The author and editor of two previous books, he is now at work on *James K. Polk: A Biographical Companion*.

Cornell W. Clayton (D. Phil., Oxford University) is an associate professor of political science at Washington State University. He is the author of *The Politics of Justice: The Attorney General and the Making of Legal Policy* (1992), editor of *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (1995), and coeditor of *Supreme Court Decision-Making: New Institutionalist Interpretations* (1998).

Douglas Clouatre (Ph.D., University of Tennessee) teaches political science at Kennesaw State University in Kennesaw, Georgia.

Susan Coleman (J.D., Texas Tech University) is an instructor of political science at West Texas A & M University in Canyon, Texas.

Derek H. Davis (J.D., Baylor University; Ph.D., University of Texas at Dallas) is director of the J. M. Dawson Institute of Church-State Studies, Baylor University, and editor of *Journal of Church and State*. He is the author of *Original Intent: Chief Justice Rehnquist & the Court of American Church-State Relations* (1991) and *Religion*

and the Continental Congress, 1774–1789: Contributions to Original Intent (2000) and is the editor or coeditor of eight other books.

Brannon P. Denning (J.D., University of Tennessee; LL.M., Yale University) is an assistant professor of law at Southern Illinois University in Carbondale.

Stephen Louis A. Dillard (J.D., Mississippi College) works with Stone & Baxter and is president of the Federalist Society of Georgia.

James W. Ely Jr. (LL.B., Harvard University; Ph.D., University of Virginia) is the Milton R. Underwood Professor of Law and professor of history at Vanderbilt University. His publications include *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1992) and *The Chief Justiceship of Melville Fuller, 1888–1910* (1995). He has served as an editor of the *American Journal of Legal History*, and he is currently editing a book on the history of the Tennessee Supreme Court.

Jane Elza (Ph.D., University of Tennessee) is a professor of political science at Valdosta State University in Valdosta, Georgia.

Norman B. Ferris (LL.B., Blackstone School of Law; Ph.D., Emory University) is a professor emeritus of history at Middle Tennessee State University. His writings include *The Trent Affair* (1977).

Peter G. Fish (Ph.D., Johns Hopkins University) teaches political science at Duke University. He is the author of *The Politics of Federal Judicial Administration* (1973), *The Office of Chief Justice* (1984), *Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas: 1789–1835* (forthcoming), and numerous articles on federal courts and judges.

Michael S. Foley (Ph.D., University of New Hampshire) is a visiting faculty member of the Department of History at the University of New Hampshire.

Lorien Foote (Ph.D., University of Oklahoma) wrote her dissertation on Francis George Shaw and is now an assistant professor of history at the University of Central Arkansas in Conway.

Richard A. Glenn (Ph.D., University of Tennessee) is an assistant professor of political science at Millersville University in Millersville, Pennsylvania.

Ken Gormley (J.D., Harvard University) teaches at the Duquesne University School of Law in Pittsburgh, Pennsylvania, and is the author of *Archibald Cox: Conscience of a Nation* (1997), which was nominated for a Pulitzer Prize and received the 1999 Bruce K. Gould Book Award for best book relating to the law. He is the mayor of Forest Hills, Pennsylvania, where he lives with his wife and four children.

Frank Guliuzza III (Ph.D., University of Notre Dame) is an associate professor of political science at Weber State University in Ogden, Utah, and is the author of *Over the Wall: Protecting Religious Expression in the Public Square* (2000).

Kermit L. Hall (Ph.D., University of Minnesota; M.S.L., Yale University) is president of Utah State University in Logan, Utah. He is the author and editor of nu-

merous books, including *The Magic Mirror: Law in American History* (1989), the award-winning *Oxford Companion to the Supreme Court of the United States* (1992), and *The Oxford Guide to United States Supreme Court Decisions* (1999).

Jennifer Harrison teaches English composition and coordinates the disability and advising programs at North Carolina Wesleyan College, Rocky Mount, North Carolina.

Judith Haydel (Ph.D., University of New Orleans) is a professor of political science at McNeese State University in Lake Charles, Louisiana. She is coauthor of *Judicial Reform in the States* (1993).

Kenneth M. Holland (Ph.D., University of Chicago) is a professor of political science at the University of Memphis and the author and editor of numerous books.

Robert D. Howell is a lawyer with Lord, Bissell & Brook in Atlanta, Georgia.

Tim Hurley (Ph.D., University of Notre Dame) teaches philosophy at Furman University in Greensboro, South Carolina.

Margaret Jessup (M.L.S., Simmons College) is assistant curator for the Sophia Smith Collection at Smith College in Northampton, Massachusetts, where she processes manuscript collections, including the Mary Kaufman papers.

Ronald Kahn (Ph.D., University of Chicago) is James Monroe Professor of Politics and Law at Oberlin College, where he heads the Law and Society Program. He is also the author of *The Supreme Court and Constitutional Theory, 1953–1993* (1994) and numerous contributions to edited volumes, law reviews, and political science journals.

James A. Keim (Ph.D., University of Virginia) is a labor specialist doing legal research and writing related to labor and employment law for Husch & Eppenberger, a regional law firm with offices in St. Louis, Kansas City, Peoria, Jefferson City, Springfield, and Wichita.

Tyson King-Meadows (Ph.D., University of North Carolina) is an assistant professor of political science at Middle Tennessee State University.

David J. Langum (LL.M., S.J.D., University of Michigan) practiced law for twelve years and is now a professor of law at the Cumberland School of Law at Samford University in Birmingham, Alabama. He is the author of *Crossing the Line: Legislating Morality and the Mann Act* (1994), *From Maverick to Mainstream: Cumberland School of Law, 1847–1997* (1997), and *William M. Kunstler: The Most Hated Lawyer in America* (1999).

Paul Lawrence has taken graduate courses at the University of Tennessee, Knoxville, and is now a graduate student in political science at the University of Virginia in Charlottesville.

Emery G. Lee III (Ph.D., Vanderbilt University) teaches political science at Case Western Reserve University in Cleveland, Ohio, and is training to be a trial lawyer

at the Case Western Reserve University School of Law, where he is a law review associate and winner of the 1999 Federal Bar Association Constitutional Law Award.

Janice M. Leone (Ph.D., Ohio State University) is an associate professor of history at Middle Tennessee State University, where she focuses on American women's history and the history of higher education.

Connie Mauney (Ph.D., University of Tennessee) is a professor of political science at Emporia State University, Emporia, Kansas.

Elizabeth Mazzara is a doctoral candidate in political science at Washington State University, Pullman, Washington, where she studies lawyering and the judiciary, with special emphasis on litigation strategies and social movements.

Robb A. McDaniel (Ph.D., Vanderbilt University) is an assistant professor of political science at Middle Tennessee State University.

Elizabeth Brand Monroe (Ph.D., University of Florida) is an associate professor and director of the graduate program in public history at Indiana University in Indianapolis. She is the author of *The Wheeling Bridge Case* (1992), which, like other articles she has written, addresses the interaction of law and technology. Monroe is currently working on a biography of William Wirt.

Bruce Murphy (Ph.D., University of Virginia) is the Fred Morgan Kirby Professor of Civil Rights at Lafayette College, Easton, Pennsylvania. His books include *The Brandeis/Frankfurter Connection* (1982), *Fortas: The Rise and Ruin of a Supreme Court Justice* (1988), *Portraits of American Politics* (1994), and (with Larry Berman) *Approaching Democracy* (1998). Murphy was assisted in the writing of his essays by Scott Featherman, a student at Lafayette College.

Marcus Pohlmann (Ph.D., Columbia University) teaches political science at Rhodes College, Memphis, Tennessee. His publications include *Black Politics in Conservative America* (1990), *Racial Politics at the Crossroads: Memphis Elects Dr. W. W. Herenton* (1996), and *Governing the Postindustrial City* (1993).

Lisa Pruitt (Ph.D., Vanderbilt University) is an assistant professor of history and director of the Al Gore, Sr., Center at Middle Tennessee State University.

John David Rausch Jr. (Ph.D., The Carl Albert Congressional Research and Studies Center and the University of Oklahoma) is a member of the Department of History and Political Science at West Texas A & M University in Canyon, Texas.

Peter G. Renstrom (Ph.D., Michigan State University) is a professor of political science at Western Michigan University, Kalamazoo, Michigan, and author of such books as *Constitutional Law and Young Adults* (2d ed., 1996), *The American Law Dictionary* (1991), and the *Constitutional Law Dictionary* (1985). He has served two terms on the Kalamazoo County Board of Commissioners and has successfully managed a number of political campaigns.

Steve Robertson (A.B.D., Vanderbilt University) is an adjunct professor of political science at Middle Tennessee State University and a contributor to Congressional Quarterly's *Guide to the Presidency* (1996) and other works.

William G. Ross (J.D., Harvard University) is a professor of law at the Cumberland School of Law at Samford University in Birmingham, Alabama. He practiced law for nine years in New York and is the author *of Forging New Freedoms: Nativism, Education, and the Constitution, 1917–1927* (1994), *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (1994), and *The Honest Hour: The Ethics of Time-Based Billing of Attorneys* (1996).

John M. Scheb II (Ph.D., University of Florida) is a professor of political science at the University of Tennessee, Knoxville, and is the coauthor of a number of books, including *Criminal Law and Procedure* (4th ed., 2001), *American Constitutional Law* (2d ed., 1998), and *American Government: Politics and Political Culture* (1995).

William Shulman (J.D., University of Tennessee) is an associate professor of criminal justice administration at Middle Tennessee State University.

Henry B. Sirgo (Ph.D., University of New Orleans) is a professor of government at McNeese State University, Lake Charles, Louisiana.

M. Keith Siskin (J.D., University of Georgia) is in private practice with Burger, Siskin, Whatley, Scott & Goad in Murfreesboro, Tennessee.

Thaddeus M. Smith (Ph.D., Brown University) is a professor and chair of the Department of History at Middle Tennessee State University. He has served as a consultant for the Southern Humanities Council; has published reviews in the *Journal of Mississippi History, Tennessee Historical Quarterly,* and the *Filson Club Quarterly;* and has contributed to the *Encyclopedia of African American Civil Rights*.

Donald Grier Stephenson Jr. (Ph.D., Princeton University) is Charles A. Dana Professor and chair of the Department of Government at Franklin and Marshall College in Lancaster, Pennsylvania. He is author and coauthor of numerous books, including *American Constitutional Law: Introductory Essays and Selected Cases* (1998) and *An Essential Safeguard: Essays on the United States Supreme Court and Its Justices* (1998).

Ruth Anne Thompson (J.D., University of Tennessee; Ph.D., Vanderbilt University) is an assistant professor of history at Georgia Southern University in Statesboro, Georgia.

John R. Vile (B.A., The College of William and Mary; Ph.D., University of Virginia) is professor and chair of the Department of Political Science at Middle Tennessee State University. In addition to writing numerous articles, essays, and reviews, he is the author and editor of ten previous books, including *Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–1995* (1996), *A Companion to the U.S. Constitution and Its Amendments* (2001), and a CD-ROM en-

titled *History of the American Legal System* (1999). He is also a coach of MTSU's mock trial teams.

Matthew Vile is a graduate student in the Department of Political Science at the University of New Orleans, where he serves as a graduate assistant in the University of New Orleans Survey Research Center.

James Wagoner (J.D., University of Louisville) is a solo practitioner in Louisville, Kentucky, and has contributed to a number of legal manuals. He is one of the coaches of the Bellarmine University, Lousiville, Kentucky, mock trial teams.

Chris Whaley (J.D., University of Tennessee) is an assistant professor of law and director of the Pre-Law, Paralegal, and Child Support Enforcement programs at Roane State Community College in Harriman, Tennessee. He is also associated with the firm of Cantrell, Pratt & Versalona in Clinton, Tennessee.

Frank J. Williams (J.D., Boston University), founding chairman of the Lincoln Forum, is chief justice of the Supreme Court of Rhode Island. He has been a leader in the Lincoln community for thirty years, first as president of both the Lincoln Group of Boston and the Abraham Lincoln Association. He is a member of the U.S. Lincoln Bicentennial Commission. In addition, he is a major collector of Lincolniana, a peripatetic lecturer before Lincoln and Civil War groups, and a scholar who serves as literary editor of the *Lincoln Herald*. His works include *Abraham Lincoln: Sources and Styles of Leadership* (1994) and *Abraham Lincoln Contemporary* (1995). His next book, due in 2001, is a collection of his articles entitled *Judging Mr. Lincoln*. He resides in Hope Valley, Rhode Island.

Clyde Willis (J.D., Ph.D., University of Tennessee) is an associate professor of political science at Middle Tennessee State University. He is working on a book on landmark congressional legislation involving the First Amendment.

Tinsley Yarbrough (Ph.D., University of Alabama) is a professor of political science at East Carolina State University. His books include *A Passion for Justice: J. Waties Waring and Civil Rights* (1987), *Mr. Justice Black and His Critics* (1988), *Judge Frank Johnson and Human Rights in Alabama* (1981), *John Marshall Harlan: Great Dissenter of the Warren Court* (1992), and *The Rehnquist Court and the Constitution* (2000).

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