

PROCEEDINGS IN THE SUPREME COURT OF
THE UNITED STATES IN MEMORY OF
MR. JUSTICE HARLAN*

TUESDAY, OCTOBER 24, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

The Court is in Special Session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to Mr. Justice Harlan.

Mr. Solicitor General Griswold addressed the Court as follows:

Mr. Chief Justice, and may it please the Court:

At a meeting of the Bar held earlier this afternoon Resolutions were adopted in honor and in memory of Mr. Justice John M. Harlan, which I am instructed to lay before the Court.

The Resolutions unanimously adopted are as follows:

RESOLUTIONS

The members of the Bar of the Supreme Court have met to record our respect and esteem for John Marshall

*Mr. Justice Harlan, who retired from active service on September 23, 1971 (404 U. S. ix), died in Washington, D. C., on December 29, 1971 (404 U. S. xix). Services were held at Emmanuel Church, Weston, Connecticut, on January 4, 1972, where interment followed.

Harlan, Associate Justice of the Supreme Court of the United States for 16 years from 1955 to 1971. His death on December 29, 1971, following by a few months his retirement from the Court, has saddened the members of the Judiciary and the Bar and many others, in the United States and elsewhere, who recognized and admired his outstanding contributions to the administration of justice and to the development of the law.

Justice Harlan was born in Chicago on May 20, 1899. He was descended from a long line of distinguished forebears, beginning in the United States with George Harlan, who landed in Delaware in 1687 and later became its Governor. His great-grandfather, James Harlan, was a prominent lawyer in the days of the great Chief Justice John Marshall and named his son born in 1833 in honor of the Chief Justice. Forty-four years later, that son, John Marshall Harlan, became a Justice of the Supreme Court, served on the Court for 34 years and has gone down in history as the "Great Dissenter" and the only Justice who dissented in the landmark case of *Plessy v. Ferguson*.¹

The first Justice Harlan's son, John Maynard Harlan, who was the father of our Justice Harlan, was a prominent Chicago lawyer, active in public and civic affairs and a man of great force and commanding personality. Those closest to the second Justice Harlan were aware that his father, as well as his better-known grandfather, was an important influence on the development of the qualities of mind and character which made possible his life's achievements.

After preparatory education in Canada and the United States, Justice Harlan entered Princeton in 1916. At Princeton, he was Chairman of the Daily Princetonian and President of his class for three years and was recognized by both faculty and fellow students as a man of

¹ 163 U. S. 537 (1896), which established the "separate but equal" doctrine in regard to public schools and was not overruled until *Brown v. Board of Education* (347 U. S. 483) in 1954.

marked distinction. In 1920, he was awarded a Rhodes scholarship and attended Balliol College at Oxford for three years, where he earned a "First" in Jurisprudence.² He maintained his contacts with Oxford and this led to the development of a close relationship with, and a deep appreciation of, the English Bench and Bar. This appreciation was reciprocated and is symbolized by his election as an Honorary Bencher of the Inner Temple.

In 1923, Justice Harlan began his career in the practice of law by accepting a position in the New York law firm of Root, Clark, Buckner and Howland, which was even then a leading firm and which, with various changes of name, has ever since maintained a position of high rank among the great law firms of New York. Emory R. Buckner of that firm was not only a prominent trial lawyer, but was also the partner most concerned with the management of the office, including the recruitment of young lawyers. From the very beginning of young Harlan's association with the firm, Buckner took him under his wing and over the years had a profound influence on his development as a trial lawyer.

In 1925, only two years after young Harlan arrived, Buckner was appointed United States Attorney for the Southern District of New York and Harlan was invited to go with him. There, he was entrusted with increasing responsibilities and was Chief of the Prohibition Section of the office by the time Buckner resigned in 1927 and went back to private practice, again taking Harlan with him. Four years later, Harlan became a partner of the firm and remained a partner, with additional intervals of public service as a Special Prosecutor and in the Air Force in World War II, until 1954, when President Eisenhower appointed him a Judge of the Court of Appeals for the Second Circuit.

² After Justice Harlan returned to the United States, he continued his legal education by enrolling at and earning a degree from New York Law School.

In 1928, Justice Harlan married Ethel Andrews, daughter of a distinguished Professor of History and sister of John Andrews, a fellow associate at Root, Clark. They had one daughter, Eve, now Mrs. Frank H. Dillingham, and five grandchildren who brought them much satisfaction and happiness.

Justice Harlan's great mentor, Emory Buckner, died in 1941, after several years of declining health. In 1964, some 23 years after Buckner's death, when Justice Harlan was immersed in his work at the Supreme Court, he participated with others in arranging for the writing of a biography of Emory Buckner. It is a measure of the debt which Justice Harlan felt that he owed to Buckner and an apt demonstration of the depth and sincerity of his quality of loyalty that he did this and that he also wrote personally an Introduction to the biography which is a masterpiece of concise and perceptive expression.³

In his career as a trial and appellate lawyer in private practice, Justice Harlan won increasing recognition as a leader of the Bar and, by 1954, when he became a Judge of the Court of Appeals for the Second Circuit, he had attained a position within his profession which made inevitable the enthusiastic reception accorded to his appointment by the Bench and Bar. This position had been earned, not only by his exceptional skill as an advocate, but also by his unremitting drive for excellence, his penetrating analysis of issues, his clarity and simplicity of expression and his insistence on painstaking attention to detail.

Justice Harlan's career in private practice has been admirably summarized in an article by his former partner, John E. F. Wood, which appeared in December 1971, in an issue of the *Harvard Law Review* dedicated to Justice Harlan on the occasion of his retirement from the Su-

³ Emory Buckner, a biography by Martin Mayer, published in 1968 by Harper & Row, under the auspices of the William Nelson Cromwell Foundation.

preme Court in September of that year.⁴ Since Mr. Wood is himself a leading member of the trial and appellate bar and was closely associated with Justice Harlan in various litigations over many years, it was deemed appropriate to adopt for these Resolutions the following from Mr. Wood's article:⁵

"Throughout his practice, Harlan devoted himself to litigation. His absorbing interest was in the work of the courts and the function of lawyers as officers of the court. . . .

"His first major civil trial as leading counsel was in the *Ella Wendel* case, a complicated and much publicized will contest which turned on Harlan's painstaking attention to detail and on his brilliant destruction of false claimants in cross-examination. In contrast to the drama of *Wendel*, he later brought his skills to bear on what some would term drier matters in a complex question of accounting for revenues among affiliated railroads. He entered the arena of political rights in attempting to overturn a decision requiring the New York Board of Higher Education to rescind their offer of employment to Bertrand Russell as a member of the faculty of the College of the City of New York.

"But the cases Harlan argued were as often destined for the law school casebook as for newspaper headlines. In *Randall v. Bailey*, he dealt with questions of state statutory construction having to do with the determination of surplus for the payment of dividends, and marshalled both legislative history

⁴ 85 Harv. L. Rev. 377-381. Mr. Wood's article was one of five in this issue, the other four being by former Chief Justice Earl Warren, former Chief Judge J. Edward Lumbard, of the Court of Appeals for the Second Circuit, the present Chief Judge of that Court, Henry J. Friendly, and Charles Nesson, Professor of Law at Harvard, and a former Law Clerk of Justice Harlan.

⁵ In quoting from Mr. Wood's article, his footnotes have been omitted.

and economic analysis in support of his cause. He examined the contours of federal judicial power with the perception and sensitivity of the academic in two celebrated cases on federal procedure, *De Beers Consolidated Mines, Ltd. v. United States* and *Cohen v. Beneficial Industrial Loan Corp.* His last task before appointment to the bench—the massive undertaking of both factual and legal analysis in the famous *du Pont-General Motors* case—required the concentration and dexterity of mind that typified his work as a trial lawyer.

“One of his great strengths was his mastery of the facts in every case in which he participated. In the course of his trial practice Harlan developed an amazing capacity to absorb complicated sets of facts, to arrange them in proper relationship to each other, and to state them simply and clearly. This capacity did not flow from any superficial brilliance or from a gift of clever utterance. It was accomplished by methodical and painstaking work pursued with an intensity of concentration that was a marvel to those who had the privilege of working with him.”

In addition to his service as an Assistant United States Attorney under Emory Buckner from 1925 to 1927, Justice Harlan interrupted his private practice on three occasions for substantial periods of time to undertake public service. The first such occasion was from 1928 to 1930, when Buckner was appointed by Governor Alfred E. Smith as a Special Assistant Attorney General to investigate a sewer scandal in the Borough of Queens and to prosecute Maurice Connolly, the then Borough President of Queens, for his part in this scandal, and Harlan was appointed to act as Buckner's principal assistant. This assignment involved for Harlan the supervision of a staff of five able young lawyers, all of whom were to achieve prominence in later years, in an unusually complicated and difficult investigation, analysis and correlation of a multitude of detailed facts, and resulted in the resigna-

tion of Connolly and his conviction and sentence to prison.⁶

The next interruption of Justice Harlan's private practice was his service from 1942 to 1945 as Chief of the Operational Analysis Section of the United States Eighth Air Force headquartered in England, at first as a civilian and later as a colonel. Harlan's function was to direct and coordinate the work of a group of scientists in their important task of analyzing, and endeavoring to improve, the selection of targets and methods of operation for the strategic bombing of Germany. The future Justice gave to the performance of his military duties the same intense concentration and devotion to duty that had characterized his earlier work in private practice. One incident in 1943 strikingly illustrates his dedication to the best possible performance of the task he had undertaken. This was his volunteered participation as a waist gunner in a daylight bombing raid on Gelsenkirchen in order to understand better the problems faced in such an operation. For his wartime service, Justice Harlan was awarded the Legion of Merit of the United States and the Croix de Guerre of Belgium and France.⁷

The final interruption of Justice Harlan's private practice was in 1951 and 1952 when, by appointment of Governor Thomas E. Dewey, he served as Chief Counsel of the New York State Crime Commission. This Commission, of which the late Joseph M. Proskauer was Chairman, held extensive hearings and rendered reports which led to important remedial action, including the estab-

⁶ Emory Buckner by Martin Mayer, pp. 252-262.

⁷ Article by Judge J. Edward Lumbard in 85 Harv. L. Rev. 372, at 373-374. During his service in the Air Force, Justice Harlan was appointed to a Commission of Air Force officers that met in London and Paris with corresponding representatives of the other services and our allies to set up a Joint Control Council to coordinate plans for the post-hostility occupation of Germany. Justice Harlan's advice and participation in the drafting of documents made a substantial contribution to this important project.

lishment of a Waterfront Commission of New York Harbor.

Justice Harlan had been a Judge of the Court of Appeals for the Second Circuit for only eight months when he was nominated by President Eisenhower to fill the vacancy on the Supreme Court created by the sudden death of Justice Robert H. Jackson. The nomination was confirmed on March 16, 1955, and Justice Harlan took his place on the Court on March 28.

It is safe to predict that history will accord to Justice Harlan a prominent place among the greatest Justices of the Court. This prediction is strongly supported by the views which have already been expressed by a long and growing list of eminent legal scholars who have studied his Supreme Court opinions and have begun the process of analyzing and evaluating their impact.⁸

During his 16 years on the Supreme Court, Justice Harlan wrote a total of 613 opinions, more than any other Justice during this period, of which 168 were opinions for the Court, 149 were concurring opinions and 296 were dissenting opinions. Many of Justice Harlan's opinions were written in cases of major importance in-

⁸ One notable example of such expressions of views is a volume of Selected Opinions and Papers of Justice John M. Harlan entitled "The Evolution of a Judicial Philosophy" and edited by David L. Shapiro, Professor of Law at Harvard Law School and a former Law Clerk of Justice Harlan. This volume, published in 1969 by the Harvard University Press, and sponsored by the William Nelson Cromwell Foundation, includes a superb foreword by Professor Paul A. Freund. Additional examples are the five articles in the special issue of the Harvard Law Review referred to in footnote 4 above. Further noteworthy examples are three addresses delivered by JUSTICE POTTER STEWART, former Attorney General Herbert Brownell and Professor Paul M. Bator at a memorial ceremony for Justice Harlan at the Association of the Bar of the City of New York on April 5, 1972, an article by Nathan Lewin, of the District of Columbia Bar, in the June 1972 issue of the American Bar Association Journal and an article by Professor Norman Dorsen of the New York University School of Law, in 44 N. Y. U. L. Rev. 249 (1969).

volving complex, difficult, and often novel, questions of substantive and procedural law, requiring extensive study of the applicability and effect of provisions of the Constitution, of the language of federal and state statutes and of prior decisions of the Supreme Court and other courts. In these cases, and also in the less important cases, Justice Harlan's opinions are noteworthy for the clear presentation of the facts of each case and the careful formulation of the issues presented. The opinions of Justice Harlan are admirable examples of the effective execution of the judicial function. They are regarded by the Judiciary and the Bar as models of legal analysis and craftsmanship, even by those who do not always agree with the conclusions reached in such opinions.

The sheer magnitude of the work represented by Justice Harlan's opinions, including, as they did, so many concurring and dissenting opinions which inevitably added materially to the time and effort required, is notable in itself. When it is remembered that during his later years on the Court he was severely handicapped by his impaired eyesight, his output of opinions is remarkable and is convincing proof of his devotion to the Court and his appreciation of its importance to the country.

The task of synthesizing from the many opinions of Justice Harlan his judicial philosophy and approach and the respects in which his contributions to the law and the administration of justice have been distinctive is one which cannot appropriately be undertaken at this time and on this occasion. There are, however, some ingredients of his opinions which are so pervasive that some reference to them seems appropriate.

One of these ingredients is the emphasis placed by Justice Harlan on the division of powers and functions between the Federal Government and the States. This concern on his part surfaced in many different types

of cases,⁹ but is aptly demonstrated by his position in the obscenity cases, such as *Roth v. United States*, 354 U. S. 476, 496 (1957), and *Ginzburg v. United States*, 383 U. S. 463, 493 (1966). In his opinion in the *Roth* case, where he dissents in that case but concurs in the result in a companion case decided on the same day, he says:

"The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. . . .

"Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories."¹⁰ (354 U. S., at 503-504, 505.)

⁹ See, for example, dissenting opinions of Justice Harlan in *Fay v. Noia*, 372 U. S. 391, 448 (1963), and *Henry v. Mississippi*, 379 U. S. 443, 457 (1965).

¹⁰ Justice Harlan's concern for the protection of free speech and related constitutional rights is illustrated, also, by a number of cases where he wrote the opinion of the Court. Examples of these are *NAACP v. Alabama*, 357 U. S. 449 (1958), where the Court reversed an Alabama civil contempt judgment against the NAACP

A related component of Justice Harlan's judicial approach is the emphasis placed by him on the separation of the powers and functions of the Legislative, Executive and Judicial Branches of the Government. This is forcefully brought out by his dissenting opinions in the landmark case of *Reynolds v. Sims*, 377 U. S. 533, 589 (1964), establishing the "one man, one vote" doctrine, and in *Avery v. Midland County*, 390 U. S. 474, 486 (1968), extending the doctrine to the 80,000 units of local government within the States. His dissenting opinion in *Reynolds* is a major exposition of his various reasons for finding it necessary to dissent, including his above-mentioned concern to preserve the federal system, and only a reading of the entire opinion reveals fully the extent to which his conclusion was based upon his conviction that the Court's decision went beyond the proper scope of the judicial powers and functions. However, his reliance on this factor can be glimpsed from the following excerpts from this opinion:

"In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. . . . These decisions, with *Wesberry v. Sanders*, 376 U. S. 1, involving congressional districting by the States, and *Gray v. Sanders*, 372 U. S. 368, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. . . .

"The Court's elaboration of its new 'constitutional' doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds

for its refusal to produce its list of members and agents in the State, and *Cohen v. California*, 403 U. S. 15 (1971), where the Court reversed a California conviction for wearing, in a corridor of the Los Angeles Courthouse, a jacket bearing an obscene slogan against the draft.

of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States. . . .

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“ . . . As I have said before, . . . I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform” (377 U. S., at 589, 615, 624.)

The dissenting opinion in the *Reynolds* case also includes a succinct statement of another well-defined component of Justice Harlan's judicial approach. This is his firmly held belief that it is a mistake to assume that it is within the functions of the Court to provide a remedy for every persistent major problem of society for which a remedy has not otherwise been provided. Thus, he says:

“Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional ‘principle,’ and that this Court should ‘take the lead’ in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise

that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process." (377 U. S., at 624-625.)

This thesis, expressed in various ways, recurs frequently in Justice Harlan's opinions, and must be counted as one of the significant bases of his decisions in many cases.¹¹

Still another pervasive ingredient of Justice Harlan's judicial approach is the view that, in considering the validity of legislative enactments or executive action challenged on constitutional grounds, the asserted infringement of constitutional rights involved in such enactments or action must be balanced against the legitimate interests of society which the Legislative or Executive Branch was seeking to protect. Coupled with this concept of balancing of interests is his further view that determinations by the Legislative or Executive Branch as to the existence of a social problem requiring remedial action and as to the appropriateness of the measures adopted, should be given great weight by the judiciary in determining whether such measures should be invalidated. An example of a major opinion by Justice Harlan illustrating his application of these two related principles is his dissenting opinion in *Poe v. Ullman*, 367 U. S. 497, 522 (1961), involving a Connecticut statute making it a crime for any person, including married

¹¹ The importance which Justice Harlan attached to this subject and the amount of thought which he gave to it are demonstrated by the fact that, in one of his infrequent public addresses, delivered at the dedication of the American Bar Center in Chicago in August 1963, he devoted substantially his entire address to a carefully formulated exposition of the bases upon which the notion had been supported, and his own reasons for opposing, the proposition that "all deficiencies in our society which have failed of correction by other means should find a cure in the courts."

couples, to use any contraceptive drug or device. In this instance, after an extensive analysis and detailed appraisal of the individual rights infringed and of the method adopted by the State—invoking criminal sanctions—to carry out its purpose of protecting the morals of the community, he reached the conclusion that the statute should be held invalid. This conclusion was subsequently confirmed by the Court in *Griswold v. Connecticut*, 381 U. S. 479 (1965), involving the same statute, with Justice Harlan concurring in the result in a separate opinion. In many other cases, the application of these principles by Justice Harlan was a factor in his reaching the conclusion that the statute or executive action challenged should be sustained.¹²

In the field of enforcement of laws protecting citizens from crimes, particularly crimes of violence, where the governmental interest was unquestioned, Justice Harlan believed strongly that, in balancing such interest against the asserted constitutional rights of those accused of such crimes, the decisions of the Supreme Court had in some respects gone too far in upholding the constitutional challenges to convictions. This resulted in his dissenting from a number of such decisions. One of the most notable of such dissents is his opinion in the much-discussed case of *Miranda v. Arizona*, 384 U. S. 436, 504 (1966), where the Court reversed a conviction because there had been admitted at the trial a confession obtained while the defendant was in custody and before he had been warned about his right to remain silent and his right to a lawyer.¹³

¹² See, for example, *Lathrop v. Donohue*, 367 U. S. 820, 848 (1961); *Scales v. United States*, 367 U. S. 203 (1961); *Shapiro v. Thompson*, 394 U. S. 618, 655 (1969); *New York Times Co. v. United States*, 403 U. S. 713, 752 (1971)—Justice Harlan's last opinion prior to his retirement from the Court.

¹³ See, also, Justice Harlan's concurring opinion in *Orozco v. Texas*, 394 U. S. 324, 327 (1969), in which the *Miranda* doctrine was applied to questioning of a suspect immediately after arrest.

In the *Miranda* opinion, in addition to expounding his reasons for believing that the Court's decision did not give adequate "recognition to society's interest in suspect questioning as an instrument of law enforcement," *id.*, at 509, Justice Harlan expressed the view that the practical effects of the decision would be disappointing with regard to its influence on policemen and unfortunate in that the new rules propounded would handicap massive ongoing efforts to bring about sound reforms in criminal law enforcement procedures.

Notwithstanding his dissenting view in *Miranda* and related cases that the Fifth Amendment privilege against self-incrimination should not be held to invalidate the confessions involved in such cases, Justice Harlan wrote or joined in several opinions expanding constitutional protections accorded to the accused. One of these was his opinion for the Court in *Marchetti v. United States*, 390 U. S. 39 (1968), which added a new dimension to the protections afforded by the Fifth Amendment. In that case, the federal wagering tax statute, requiring payment of an annual occupation tax and registration, was held invalid on the ground that the statute required, on pain of criminal prosecution, the providing of information which could be used to establish guilt in a subsequent prosecution. An unusual feature of this decision is that the Court expressly overruled two relatively recent prior decisions of the Court.

Whatever may be the ultimate verdict of history as to how Justice Harlan's judicial philosophy should be appraised, there can be no doubt that he will always be regarded as a Justice who possessed in the highest degree the qualities of character and dedication which are an essential component of a truly great judge. These qualities—his integrity, his fairness, his candor, his courtesy, his enjoyment of the spirit of professional comradeship, his gentle humor, his modesty, his intellectual and physical courage and his devotion to the Court and to the country—have won for him the admiration and affection

of his colleagues on the Court, of the succession of gifted young men who have served as his Law Clerks and of many other judges and lawyers who have been in a position to form reliable judgments.

The members of the Bar of the Supreme Court are most grateful that they have had the privilege of appearing before and knowing Justice Harlan and that the Court and the country have had the benefit of his extraordinarily productive and effective service on the Court. His death has left us with a deep sense of loss and we extend to his family our most sincere sympathy in their grief. We and our successors at the Bar will remember Justice Harlan with reverence and with great affection, and his noble example of selfless dedication to the law and to the Court will be a source of inspiration to all of us for many years to come.

It is accordingly

Resolved, That we, the Bar of the Supreme Court of the United States, express our profound sorrow at the death of Associate Justice John Marshall Harlan and our thankfulness for the great and enduring contributions made by him to the law, to the Court and to the Nation; and it is further

Resolved, That the Attorney General be asked to present these Resolutions to the Court and to request that they be inscribed upon its permanent records.¹⁴

¹⁴ The foregoing Resolutions are proposed by the Committee on Resolutions, which consisted of the following members: Professor Wayne G. Barnett, Professor Paul Bator, Hon. Dudley B. Bonsal, Bruce Bromley, Esq., Hon. Frederick van P. Bryan, Eli Whitney Debevoise, Esq., Professor Norman Dorsen, Harold J. Gallagher, Esq., Cloyd Laporte, Esq., Nathan Lewin, Esq., David H. McAlpin, Esq., Robert W. Meserve, Esq., Matthew Nimetz, Esq., John Lord O'Brian, Esq., William P. Palmer, Esq., David W. Peck, Esq., E. Barrett Prettyman, Jr., Esq., Hon. William P. Rogers, Henry Sailer, Esq., Philip C. Scott, Esq., Charles E. Stewart, Jr., Esq., Hon. William H. Timbers, Lawrence E. Walsh, Esq., Bethuel M. Webster, Esq., and Leo Gottlieb, Esq., *Chairman*.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. I recognize the Attorney General at this time.

Mr. Attorney General Kleindienst addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

The Bar of this Court met today to honor the memory of John Marshall Harlan, Associate Justice of the Supreme Court from 1955 to 1971.

"A lawyer's and a judge's judge," as he has been so aptly described, Justice Harlan was nominated by President Eisenhower in 1954 to fill the vacancy created by the death of Justice Robert H. Jackson. In announcing the appointment, the late President said: "Judge Harlan's qualifications are the highest. Certainly, they were the highest of any that I could find."

And, indeed they were. Born in Chicago, Illinois, in 1899 to a family whose dedication to public service dates back almost 300 years, John Marshall Harlan was admitted to the New York Bar in 1925, after distinguishing himself academically at Princeton University, as a Rhodes scholar at Oxford University, and at New York Law School.

The future Justice's training as a lawyer began under the tutelage of Emory Buckner, then one of the Nation's ablest and most highly regarded trial lawyers. Almost immediately after entering the practice of law, Justice Harlan accompanied Buckner into public service when the latter was appointed United States Attorney for the Southern District of New York. There the Justice not only assisted Buckner in the trial of many major prosecutions, but also tried a number of criminal cases.

Upon leaving the United States Attorney's Office, Justice Harlan returned to private practice where he became

one of the leading members of the New York Bar, specializing in highly complex civil and criminal litigation which brought him before this Court in the role of an advocate. He twice interrupted his private practice to enter public service, once as a Special Assistant to the Attorney General of New York and later as Chief Counsel to the New York State Crime Commission. During World War II he was decorated by three nations for his services as head of the Operations Analysis Section of the Eighth Army.

Some years ago, writing of his association with his mentor, Emory Buckner, Justice Harlan said: "The Cornerstone of . . . [his] litigation method was objective and relentless preparation. . . . [He] was never content to do the best he could with cases as put to him by his clients, but insisted upon making his own investigation of every fact and circumstance before rendering his estimate of the situation."

The young apprentice had apparently learned his lesson well. "Objective and relentless preparation" and "exhaustive investigation" of cases not only marked Justice Harlan's career at the Bar; these traits were also clearly reflected in the objectivity with which he approached cases, in the probing questions he asked of counsel during oral argument, and in the brilliantly analytical and exhaustively researched opinions he wrote during his tenure on this Court and the United States Court of Appeals for the Second Circuit.

While his opinions, which were the work product of a judicial craftsman, won him the admiration of students of the Court, and while his courtesy, objectivity, and general willingness to listen won him the special affection of the Bar of the Court, it was his profound belief in the American Federal System as a bulwark of freedom, and his devotion to those basic liberties essential to a free society, so brilliantly expounded upon in his opinions, which can safely be said to have won him his place in the history of the Court. Justice Harlan deeply

believed that the diffusion of governmental function between federal and state authority, and between the coordinate branches of the Federal Government, afforded safeguards to our free society of comparable importance to the Bill of Rights and the Fourteenth Amendment. Apart from its significance as an instrument of freedom, he viewed the manner in which our political system was structured as a catalyst, fostering diversity, innovation, and experimentation.

With this guiding belief and his refusal to accept the view that the Fourteenth Amendment incorporated the provisions of the Bill of Rights in their entirety, he frequently dissented from opinions of the Court which he regarded as unnecessarily imposing on the States restrictions and procedures which were not essential to a system of ordered liberty and which stifled diversity and experimentation. But, while he would not acquiesce in interfering with state actions which fell short of infringing on fundamental rights, he had no hesitation in meeting the responsibility of the Court to strike down any action which endangered those liberties essential to a free society.

In cases involving free speech and association, the rights which have been described as "the matrix, the indispensable condition of nearly every other form of freedom," Justice Harlan led the Court in reminding us that "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." (*Cohen v. California*, 403 U. S. 15, 24.)

And in another opinion he spoke of the "constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order.'" (*Street v. New York*, 394 U. S. 576, 593, citing *Board of Education v. Barnette*, 319 U. S. 624, 641-642.)

In *NAACP v. Alabama*, 357 U. S. 449, 462, he stressed "the vital relationship between freedom to associate and privacy in one's associations," in an opinion which held that the State could not compel the disclosure of the membership lists of a group that had demonstrated that each time its membership lists were disclosed, its members had been exposed "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."

In *Poe v. Ullman*, 367 U. S. 497, 522, his dissenting opinion turned to the essential values reflected by the Fourth and Fourteenth Amendments.

Voting then to strike down Connecticut's ban on the use of contraceptive devices, as a majority of the Court later did, he noted that while the statute was not offensive under the traditional view of these constitutional provisions because it involved not an "intrusion into the home so much as on the life which characteristically has its place in the home," he nevertheless found the distinction to be insubstantial. "[I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home draws its pre-eminence as the seat of family life. And the integrity of that life is . . . fundamental . . ." (367 U. S., at 551). This concern for the sanctity and privacy of the home marked all of Justice Harlan's opinions in Fourth Amendment cases, although he often found it delicate to balance these values with his continuing concern that state criminal proceedings not be unduly shackled.

Time does not permit an exhaustive review of Justice Harlan's work, which included some 600 opinions. But what emerges even from a cursory examination is the image of a man of great intellectual and moral integrity, dedicated to the Constitution and committed to the role of the Court as the protector of the fundamental liberties essential to a free people.

To stop at this point, Mr. Chief Justice, without taking note of Justice Harlan's character and courage would "miss the full measure of the man." None of us will forget his example of courage and fortitude as he worked without diminution in quantity or quality despite the illness which virtually blinded him in the last few years of his life. And all who knew and worked closely with him will never forget his kindness, warmth and concern for others. As his close friend and colleague, Justice Stewart, has said, "What truly set him apart was his character . . . his generous and gallant spirit, his selfless courage, his freedom from all guile, his total decency He was a great human being of great worth."

May it please this honorable Court:

In the name of the lawyers of this Nation, and particularly the Bar of this Court, I respectfully request that the Resolutions presented to you in memory of the late Justice John Marshall Harlan be accepted by you, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

The CHIEF JUSTICE said:

Your motion is granted, Mr. Attorney General, and we thank you for your statement and tributes of the Supreme Court Bar to our late Brother, John Marshall Harlan.

In responding, on behalf of the Court, to the very appropriate tributes to John Harlan, presented by the

Attorney General and the Solicitor General, I would like to provide a brief glimpse of him as we saw him within the Court on a day-to-day basis. His great powers as an advocate and his superb qualities as a judge have been eloquently expressed and we, his colleagues, not only accept but fully endorse what has been said.

No single Memorial ceremony, of course, can ever encompass the range of qualities and facets of a man of the qualities of John Harlan. At best we can touch on only a few aspects that stand out most clearly. The tributes to him in the various Resolutions give a variety of appraisals and they are of special value because they are expressions of close observers going back over nearly 50 years of his life in the law.

These Resolutions have noted his quiet, but very important public service. His public service was episodic in the sense that whenever he was called he dropped his private concerns and turned all his great talents to the public task at hand. His performance of duty was unspectacular, if that word is used in a careful sense, and I use it to emphasize that John Harlan always concentrated on the objectives and never dramatized himself—a trait not always found in great advocates. His selfless approach that placed public service ahead of private gain or advantage is shown time and again in his life. His service in World War II is a good example. At the peak of his career as an advocate he laid aside all his opportunities and private interests and devoted the war years to the high level military intelligence work that has been described in the Resolutions, and which, for all its crucial importance was necessarily behind the scenes. And he did this at an age well beyond the realistic demands of civilians for active military service.

Low key would be one description that we who worked with him day in and day out would accept even when the task he was performing was far from low key. This

quality was, of course, ideal in a judge from whom all people expect detachment and objectivity.

The colleagues of his early years saw one period of his career when his skills were being formed. Others who knew him at the peak of his career as an advocate saw the intensity of his concentration on the detailed facts which he saw as the foundation of all cases, the bedrock on which legal principles must rest.

John Harlan was essentially a very private person and a man of the present and the future but occasionally he would turn to reminiscences about cases he had tried or which he helped prepare in his earliest days with Emory Buckner. On the rare occasions he did this, what emerged was his passion for facts. He pursued the facts of his cases with the single-minded concentration of a scientist engaged in research. That same concern for the facts of a case persisted throughout his judicial work.

His movements, like his thought processes, were always deliberate and unhurried. His only haste was that of the efficient human machine whose orderly habits always brought him to where he was expected in ample time to be prompt in the most casual way.

We who were his colleagues will always be able to picture him sauntering into the Conference Room, one hand fingering the heavy gold watch chain of his grandfather, the elder Justice Harlan, the other often holding a cigarette.

His head and face had a sculptured aspect, the eyes deep set but very alert even in the years that his sight was failing. Invariably, his countenance had a quiz-zical half-smiling look, attentive and receptive to any comment of a colleague. He carried himself unself-consciously with great dignity but it was the simple dignity of a man who had long since come to terms with life and with himself.

As an experienced, talented and accomplished advocate he knew that facts are usually the stuff that makes or breaks a case, and in Conference or on the Bench he knew the facts of the cases. All of us can recall his contribution to the Conference process. He never talked at great length but always to the point. In his quietly resonant voice that commanded attention he might open his discussion saying,

“I would like to back up and link up some facts that, with all deference, seem to have been treated more lightly than I would think they deserve.”

Then he would perform the skilled advocate's task of focusing on the facts he thought controlling in the case.

Or he might begin by saying:

“Now that we have the whole case before us it is clear this is a ‘pewee’ but it is here and we should deal with it.”

For John Harlan the “pewee” case received the same in-depth concentration as every other case. Having mentioned his deep concern with the facts of every case, I hasten to say that his legal research was of the highest order and his long experience and fine scholarship enabled him to carry an enormous number of the Court's opinions in the forefront of his mind.

In this day of labels for public figures, commentators tended to label John Harlan, but the only shorthand that for me comes near the mark is that he was a practitioner of “judicial restraint.” This was not something that developed when he became a judge on the Second Circuit or a Justice here. He was by nature a restrained person who never plunged into unexplored doctrinal thickets without the most careful advance patrolling of the area. If he could not reasonably predict the consequences of a holding, he would likely not join it. With Justice Holmes, it was his view that if a legal principle or concept had been accepted for generations past, the burden to abandon it was a heavy one for him.

One of his most profound convictions that has already been alluded to was that all good things are not mandated by the Constitution and all undesirable things are not proscribed. He was willing to let some problems remain for future generations to solve rather than take great leaps to seductively appealing results. I am not sure whether he was acquainted with the writings of Rabbi Louis Finkelstein of the Jewish Theological Seminary of America, but his philosophy seemed to accept that great theologian's admonition that we should be content "to leave a little to the Lord" and to the future.

When the suggestion was made to me in 1954 that I accept a judicial appointment soon expected to develop, I concluded that I would find out how John Harlan as an active practicing lawyer felt about leaving the practice for the Bench. Our backgrounds had some slight similarity. I had practiced privately for 21 years and he for nearly 30 years. I visited him in his chambers at Foley Square in New York and we talked of practice and of government work and he finally said he suspected I would go on the Bench. I told him I was not at all sure and I asked how he liked the life of a Circuit Judge after years of active practice. He smiled and said essentially this:

"It's not nearly as much fun as law practice but after 20 or 30 years at it I think possibly there is a greater opportunity to grow on the Bench than in the daily grind of a big firm practice."

John Harlan exhibited great growth capacity all his life but no one would deny his growth after he became a judge.

As the date of this Memorial to John Harlan approached I recalled the visits to him in his last illness in which he bore his misfortune as he had always faced every crisis in his life, with fortitude and grace, without complaint, still receiving a friend as though he had asked him to his home or his chambers for tea. It was

in the fall months that the severity of his condition became clear. Last week as I took a final look at my garden beds I reflected on this Memorial and looked back on my association with him. The fallen leaves reminded me that the end of summer was upon us but the beds were still brilliant with masses of scarlet, coral and white petals of the last of the summer flowers. Yet I knew that the frost would soon be on us and the flowers would be gone, and of course the frost came—indeed it came that very night. But just as we can carry the memory and the image of past beauty and color, so do we carry the memory of the beauty of the spirit, the personality, the integrity and character of a friend. John Harlan left a rich legacy of this kind for his friends and loved ones.

His bequest to the Law is recorded so that we can consult him at will in the volumes of the U. S. Reports. But for the warmth of the man as a cherished friend we need no research. To turn the mind to his name brings a flood of images and events of the Conferences, of his resonant voice and patient searching questions from the Bench, of his extraordinary capacity to announce the reasoning of a complex case in simple terms, from memory and without the help of notes or text. Lawyers will remember his genuine understanding of problems of the lawyer at the lectern. And we can recall our luncheon table talk and private discourse in which his warmth and wit and grace came out uninhibited by the diffidence that strangers saw. These are the riches of memory each of his former colleagues will carry as long as we have the power of memory.

Mr. Attorney General, Mr. Solicitor General, on behalf of the Court I thank you for your presentations here today in memory of John Harlan. We ask you to convey to the Chairman and the Committee on Resolutions our appreciation for their efforts. The Resolutions will be made part of the permanent records of this Court.