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Biographical Sketch: On John Marshall Harlan

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JOHN MARSHALL HARLAN

IN naming John Marshall Harlan to the Supreme Court of the United States, President Eisenhower has made an appointment which has received the widespread approval of the American bench and bar. The appointment cannot be noted without a word of congratulations—congratulations to the President, the Court and the American people, as well as congratulations to this distinguished lawyer and jurist.

The designation of the new Associate Justice has also been acclaimed by the press. The New York Times paid tribute to his "character, ability and legal experience,"[1] and called him "an outstanding selection for the post."[2] Other newspapers observed that while the loss to the Court in the death of Mr. Justice Jackson was great, it is indeed fortunate that his successor is a jurist of Judge Harlan's capacity.

I. ANCESTRY AND EDUCATION

THE new Justice comes from a family devoted to law and to public service. His grandfather was also a Mr. Justice John Marshall Harlan. The first Justice Harlan sat on the Court for thirty-four years, from 1877 to 1911, one of our longest periods of judicial service. The present Justice's father was also an attorney, and served as a member of the Interstate Commerce Commission.

John Marshall Harlan was born in Chicago on May 20, 1899. At fifty-five, he is the second youngest member of the present Court. Only Justice Clark is younger, by barely a few months.

After elementary schooling here and in Canada, John Harlan obtained his A.B. at Princeton. As a Rhodes Scholar, he then studied

[1] Editorial, New York Times, Nov. 10, 1954, p. 32, col. 3.
[2] Editorial, New York Times, Feb. 3, 1955, p. 22, col. 2.

in England at Balliol College, Oxford University, where he obtained his B.A. and M.A. degrees. Upon returning to the United States, he obtained his education in American law at the New York Law School where he received his LL.B. degree in 1924, being admitted to practice in New York in the same year.

II. CAREER AT THE BAR

FOR the next thirty years, Harlan was an active, busy practising lawyer. His work in the beginning fell exclusively within the field of litigation.

A. ASSOCIATED WITH ROOT, CLARK, BUCKNER & BALLANTINE. —Doubtless this was in part due to the fact that he began as an apprentice in the office of Root, Clark, Buckner and Ballantine, where he was thrown in close association with Emory R. Buckner. As Justice Harlan puts it, he began his law career carrying Mr. Buckner's bag to court. This was a fortunate development as Buckner was not only an outstanding trial lawyer and leader of the Bar, but a remarkable person as well, with a deep interest in the training of his young lawyers and furthering their careers.

B. CRIMINAL CASES.—In 1925, Buckner was appointed United States Attorney for the Southern District of New York, and Harlan became an Assistant United States Attorney. Here he tried the usual run of federal criminal cases, and also assisted Buckner in larger cases. Noteworthy among the latter was *Carroll* v. *United States*,[3] involving the well-known Broadway producer, Earl Carroll. After a week's trial, conducted by Harlan, the trial jury on May 27, 1926, convicted Carroll of perjury on his Grand Jury testimony. Harlan later argued an appeal by Carroll in the Circuit Court of Appeals,[4] and secured an affirmance.

Another noted case was known as the *Daugherty-Miller* case, brought against Harry M. Daugherty, former Attorney General, and Thomas W. Miller, former Alien Property Custodian, for fraudulent conspiracy. It was charged that Daugherty and Miller had received substantial fees to release to a Swiss claimant about seven million dollars worth of property which had been seized during the First World War as owned by Germans. At the trials, the prosecution's effort to trace part of the fees to Daugherty was considerably ham-

[3] 16 F. 2d 951 (2d Cir. 1927).
[4] *Ibid.*

pered by the fact that bank records had been destroyed. Although the first trial ended with the jury in disagreement, the jury in the second trial convicted Miller but disagreed on Daugherty.

C. CIVIL CASES.—Notable civil cases in which Harlan was concerned with Emory R. Buckner included the *Wendel* case,[5] in which a large number of claimants claimed the fortune of Miss Ella Wendel who died in 1931. The principal claimant contended that he was the only son of a brother of the decedent. To support his contention the alleged nephew introduced a 55 year old marriage certificate, a will and a letter by Miss Wendel's brother which, if genuine, would probably have established the validity of his claim. Although the deceased's brother had died 18 years before the trial, Harlan, through the help of a handwriting expert, established that the letter and will were forgeries. He also succeeded in proving at the trial that the marriage certificate had been printed more than 37 years after its purported date. Thus it was shown that the claim of this alleged nephew was completely spurious. Subsequently, this individual was tried and convicted for conspiracy to defraud and received an indeterminate jail sentence.

Another civil case was that of *Mara* v. *Tunney*.[6] This action was brought against Gene Tunney, whom Buckner and Harlan represented, to recover under an alleged agreement with Tunney hiring the plaintiff to bring about a Tunney-Dempsey boxing match in 1926. The defense was a difficult one because the defendant had written a letter and signed another document which on their face supported the plaintiff's claim. The jury rendered a verdict for the defendant who had contended that these documents were subject to a condition not specified therein and also that the alleged agreement would have been illegal. On appeal, the Appellate Division, one judge dissenting, reversed the judgment, and thereafter, the action was settled.

III. SERVICE TO THE STATE OF NEW YORK

HARLAN's first service to the State of New York was as Chief Assistant to Emory R. Buckner in 1928 on appointment from Governor Alfred E. Smith, as special prosecutor in connection with sewer graft scandals in Queens County, New York.

[5] In re Wendel's Estate, 146 Misc. 260, 262 N. Y. Supp. 41 (Surr. Ct. 1933).
[6] 236 App. Div. 82, 258 N. Y. Supp. 191 (1st Dept. 1932).

The investigation resulted in the conviction of Maurice E. Connolly, the Borough President of Queens, and others, of conspiracy to defraud.[7] The case was noteworthy in several respects. No graft was traced directly to Connolly; but the prosecution did show that he had used large amounts of cash in excess of his salary and apart from any bank account. He attempted no explanation of the source of any of this cash. It was held that this evidence, plus other evidence tying him to the conspiracy, could be found by the jury to show improper motive on his part. This was one of the first successful prosecutions upon this type of circumstantial evidence.[8] The prosecution also broke new grounds in its methods of proof of complicated financial data, particularly in the use of simplified charts which were available for the study of the jury.

Upon Mr. Buckner's untimely disability and death, Harlan became the leading trial lawyer of Root, Clark, Buckner & Ballantine. In the years preceding the war he was in charge of many litigations, only three of which will be mentioned here. He represented the New York City Board of Higher Education in the litigation following Bertrand Russell's appointment to teach in the College of the City of New York.[9] In *Randall* v. *Bailey*,[10] after he had returned to private practice, he unsuccessfully argued that corporate directors should not be permitted to declare dividends out of surplus created from unrealized appreciation of fixed assets.[11] He also represented American Optical Company in a prolonged anti-trust trial. (The case was suspended during the war and finally settled.)

From 1951 to 1953, just prior to his appointment to the bench,

[7] People v. Connolly, 253 N. Y. 330, 171 N. E. 393 (1930), aff'g, 227 App. Div. 167, 237 N. Y. Supp. 303 (2d Dept. 1929).

[8] Cf. Holland v. United States, 348 U. S. 121, 75 S. Ct. 127, 99 L. Ed. 127 (1954); United States v. Calderon, 348 U. S. 160, 75 S. Ct. 188, 99 L. Ed. 152 (1954).

[9] Matter of Kay v. Board of Higher Education, N. Y. City, 260 App. Div. 9, 20 N. Y. S. 2d 898 (1st Dept. 1940), leave to appeal denied, 260 App. Div. 849, 23 N. Y. S. 2d 479 (1st Dept. 1940).

[10] 288 N. Y. 280, 43 N. E. 2d 43 (1942).

[11] Harlan's view as to the correct rule of law in the Randall v. Bailey situation did not change upon his becoming judge. In Commissioner of Internal Rev. v. Hirshon Trust, 213 F. 2d 523, 527 (2d Cir. 1954), he said:

". . . The 'capital impairment' statutes of some states permit unrealized appreciation to be calculated in determining corporate surplus available for dividends. E.g., § 58, N. Y. Stock Corporation Law, McKinney's Consol. Laws, c. 59; Randall v. Bailey, 1942, 288 N. Y. 280, 43 N. E. 2d 43. Other states, perhaps more in keeping with sound accounting and business practice, do not permit unrealized appreciation to be counted in computing corporate surplus, in determining which [of] the corporate assets are to be reckoned at their historical cost. E.g., Ill. Rev. Stats. 1951, c. 32,

Mr. Justice Harlan served the State of New York as a special appointee of Governor Thomas E. Dewey and Attorney General Nathaniel L. Goldstein. Designated as Special Assistant Attorney General and Chief Counsel to the New York State Crime Commission, Justice Harlan served without compensation under former Supreme Court Justice Joseph M. Proskauer, Chairman of the Commission.

IV. SERVICE TO THE FEDERAL GOVERNMENT

DURING World War II, Harlan served for two years as a Colonel with the Eighth Air Force in England, in charge of its Operations Analysis Section. This comprised a group of engineers, physicists, mathematicians and others with technical training (with a sprinkling of very capable attorneys), about one hundred men at a maximum. The Section had no operating duties or responsibilities. It was free on a roving basis to investigate and give detached study to any aspect of operations and to devote its specialized skills to their improvement.

Colonel Harlan organized and supervised this Section, which pioneered the idea in the Air Force. The success of the Section led to the formation of similar groups with other components of the American Air Force. Colonel Harlan was decorated with the Legion of Merit, and with the French and Belgian Croix de Guerre.

V. POST-WAR RECORD

MR. HARLAN'S first case upon his return to civilian life in 1945 was also his first opportunity to argue before the United States Supreme Court.

A. IN PRACTICE BEFORE THE SUPREME COURT.—The United States filed an anti-trust suit against foreign diamond mining companies, and promptly obtained a preliminary injunction tying up all of the property of the defendants in this country. The injunction was justified as insuring the appearance of the defendants at the trial. The defendants could not appeal from this injunction, since the anti-trust laws allowed appeals only from final judgments. The Supreme Court, however, by a 5-4 vote, agreed with Harlan's argument that it had jurisdiction to issue an extraordinary writ of certiorari. On the merits, the injunction was reversed as beyond the power of the District Court.[12]

§ 41 (c), S. H. A. Ill. ch. 32, § 15.41 (c); Penn. Stats., Tit. 15, §§ 2852-701, subdiv. A (1), 702 (Purdon 1936). . . ."

[12] De Beers Mines v. United States, 325 U. S. 212, 65 S. Ct. 1130, 89 L. Ed. 1566

Harlan also was successful in his argument of the *Beneficial* case before the Supreme Court.[13] This has become the leading case in the federal courts on the appealability of intermediate orders which display some elements of finality. The Court also upheld the constitutionality of a state statute making unsuccessful plaintiffs in stockholder's suits liable for the reasonable expenses and attorney's fees of the defendants and entitling the corporation, at an early stage of the suit, to require security for their payment. The Court, held, finally, by a 6-3 vote, that the statute had to be applied in the federal courts where jurisdiction depended on diversity of citizenship.

The greatest portion of Harlan's time in this post-war period was spent in two anti-trust cases against E. I. duPont de Nemours & Company. The first involved what was found by the District Judge to be an international cartel, covering substantially the entire chemical field.[14] In the second, the United States charged a gigantic conspiracy among duPont, General Motors and United States Rubber. The purpose of this alleged conspiracy was to require each company to purchase from the others, and to avoid competing with the others. The District Court has completely rejected these charges,[15] and the case has been appealed to the Supreme Court, apparently on a somewhat different theory.

The *General Motors* case in particular raised important issues, not only to the companies involved but to the country generally. Both cases involved protracted periods of preparation and long and arduous trials. Each was decided ultimately on the facts. The victory in the District Court in the *General Motors* case was due in major part to Mr. Harlan's work in the case, his marshalling of the facts and his development of theories of defense.

It is, of course, impossible within reasonable compass to review each of the innumerable cases in which Mr. Harlan has participated in his busy career; the above are certain of the highlights. His practice was naturally weighted in the direction of the corporate and com-

(1945). The jurisdictional question was discussed at greater length in United States Alkali Ass'n v. United States, 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554 (1945).

[13] Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), aff'g Beneficial Industrial Loan Corp. v. Smith, 170 F. 2d 44 (3d Cir. 1948), rev'g, 7 F.R.D. 352 (D. N. J. 1947).

[14] United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S. D. N. Y. 1951); on decree, 105 F. Supp. 215 (S. D. N. Y. 1952).

[15] United States v. E. I. duPont de Nemours and Company, 126 F. Supp. 235 (N. D. Ill., 1954).

mercial litigation most prevalent in downtown New York law firms, but it was not so limited. Harlan, for instance, is unusually experienced in criminal litigation, not only as a prosecutor but also as attorney for the defendant. Also uncommon in such a practice is the fact that in the stockholder type of litigation, he has on occasion represented plaintiffs as well as defendants.[16] As a result of the trial of these civil and criminal cases, Harlan established a general reputation as being one of New York's leading trial and appellate practitioners. Perhaps the climax of his career as a practicing lawyer came when he represented certain defendants in the famous anti-trust proceedings against the duPonts, General Motors Corporation and the United States Rubber Company.[17] In any event his broad experience in private practise will undoubtedly be of great value in his further judicial career.

B. As an Advocate.—It seems appropriate, before turning to Mr. Harlan's public career, to discuss one other matter. As an advocate, and particularly as an appellate advocate, John Harlan was superb. His principal asset was his ability to make sense to the court, no matter how complex the issue. He talked in simple terms, and got across his ideas and arguments with the utmost lucidity. Back of this, of course, was hard work. Even as a senior partner in Root, Ballantine, Harlan, Bushby and Palmer (as his firm was called when he left it),[18] he worked longer and harder than even the most junior associate. But it also involved the ability to analyze the problems involved in his cases, particularly in developing theories of the facts and law to advance his cause. He was especially skillful in interviewing and preparing his witnesses and at organizing and supervising the work of his staff, both legal and non-legal. In view of the importance of his cases, his staff was frequently quite large.

VI. JUDICIAL CAREER

In a sense, Mr. Harlan's judicial career is an extension of his life-long devotion, in the best tradition of the Bar, to public service. We have already referred to his work in the United States Attorney's

[16] Ewen v. Peoria & E. Ry., 34 F. Supp. 312 (S. D. N. Y. 1948), cert. denied sub nom, Income Bondholders v. New York Central R. R., 336 U. S. 919, 69 S. Ct. 641, 93 L. Ed. 1081 (1949); Wood v. New York Ceintral R. R., 286 I. C. C. 373 (1952).

[17] See p. 6, *supra*.

[18] The firm is now Dewey, Ballantine, Bushby, Palmer & Wood.

office and in the Connolly investigations. Harlan also served as counsel to the New York Crime Commission from 1951 to 1953. This investigation uncovered several unsavory instances of local corruption in New York State. It also looked into racketeering and crime on the waterfront in and around New York City, leading to the establishment of a Waterfront Commission of New York Harbor.[19] Mr. Harlan was always active in bar associations, serving for several years as Chairman of the Committees on Professional Ethics of the Association of the Bar of the City of New York and later as Chairman of its Committee on the Judiciary and as Vice President of the Association. He was also a director of the Legal Aid Society.

In January 1954, the President nominated Harlan for the Post of United States Circuit Judge for the Second Circuit. Judge Harlan took his seat on March 6, 1954, and accordingly served for approximately one year on the Federal Court of Appeals. This is, of course, insufficient to permit of more than tentative conclusions with respect to his judicial career.

At the arguments, Judge Harlan has been rather free with his questioning of attorneys (perhaps, an extension of his own feeling, while practising, that he preferred judges who asked questions). However, he is careful not to take the argument away from counsel, and his questions are usually very pertinent. They frequently indicate that the Judge has prepared himself to some extent before the argument, which also is frequently of assistance to counsel.

Up to the end of January 1955, Judge Harlan had sat on approximately 80 decided cases. Of these, approximately 25 were disposed of in per curiam opinions. Of the 55 cases in which opinions were written, Judge Harlan wrote 20; he dissented only twice. Oddly enough, each dissent was in a case requiring the interpretation of the Supreme Court's mandate on a prior appeal.[20]

Judge Harlan's opinions are written clearly and carefully, and indicate that a great deal of work, including some original research, has gone into them. Most public attention has been given to his opinion affirming the conviction under the Smith Act of the so-called

[19] N. Y. Laws 1953, cc. 882, 883; N. J. Laws 1953, cc. 202, 203; Pub. L. No. 252, 83d Cong., 1st Sess. (1953), 67 Stat. 541 (1953).

[20] United States v. Chiarella, 214 F. 2d 838 (2d Cir. 1954), cert. denied, 348 U. S. 902, 75 S. Ct. 226, 99 L. Ed. 168 (1954); United States ex rel. Accardi v. Shaughnessy, — F. 2d — (2d Cir., Jan. 7, 1955).

second string communists.[21] A number of others are worthy of mention.

In the tax field, Judge Harlan's opinions seem aimed at a practical rather than a literal interpretation of the tax laws. Thus, he gave a broad interpretation as to whether alimony payments are "incident to divorce" within the alimony provisions of the Internal Revenue Code.[22] Another opinion involved the close distinction between "corporate securities" subject to the stamp tax, and obligations which are not, the Court holding 2-1, that a bank loan upon notes was not taxable.[23] In *Commissioner* v. *Hirshon Trust*,[24] the Court held that a dividend in kind was taxable as ordinary income to the stockholder, where its basis to the corporation was less than the corporation's earnings and profits, even though its market value was greater. Refusing to follow another Circuit, the Court held that the statute forgiving taxes of servicemen dying in service applied to a full tax year, not merely to the portion of the year ending with the date of death.[25] And in *Commissioner* v. *Estate of Watson*,[26] the Court gave a remedial interpretation in another matrimonial situation.

In the bankruptcy field, Judge Harlan has indicated that state recordation statutes should not be used "needlessly to destroy conditional sales contracts."[27] He also held that the bankruptcy court has exclusive jurisdiction to award attorney's fees and expenses, authorized by a state statute, to persons sued by the trustee in another federal court.[28]

In the administrative field, Judge Harlan upheld certain regulations of the Civil Aeronautics Board as to hours of service of pilots.[29] Another opinion refused to set aside an order for deportation of an alien to Communist China, but the Court gave the alien another

[21] United States v. Flynn, 216 F. 2d 354 (2d Cir. 1954), cert. denied, 23 L. Wk. 3174 (U. S. Sup. Ct., Jan. 10, 1955). Unreported.

[22] Newton v. Pedrick, 212 F. 2d 357 (2d Cir. 1954); See also Commissioner of Internal Rev. v. Moses, 214 F. 2d 912 (2d Cir. 1954), cert. denied, 23 L. Wk. 3174 (U. S. Sup. Ct., Jan. 10, 1955).

[23] Niles-Bement-Pond Co. v. Fitzpatrick, 213 F. 2d 305 (2d Cir. 1954).

[24] 213 F. 2d 523 (2d Cir. 1954), cert. denied, 348 U. S. 861, 75 S. Ct. 84, 99 L. Ed. 46 (1954).

[25] Lupia's Estate v. Marcelle, 214 F. 2d 942 (2d Cir. 1954), cert. granted, 348 U. S. 882, 75 S. Ct. 123, 99 L. Ed. 77 (1954).

[26] 216 F. 2d 941 (2d Cir. 1954).

[27] Cummings-Landau Laundry Machinery Co. v. Alderman, 212 F. 2d 342, 346 (2d Cir. 1954).

[28] Harrison v. Williams, 216 F. 2d 278 (2d Cir. 1954).

[29] Air Lines Pilots Ass'n v. Civil Aeronautic Board, 215 F. 2d 122 (2d Cir. 1954).

chance to choose deportation to Formosa.[30] Judge Harlan wrote one patent opinion,[31] and one opinion involving the Tort Claims Act.[32]

Judge Harlan has also indicated that procedural rules should not be applied inflexibly, but with common sense. Thus it was in error to require a plaintiff to come here from India for a deposition, and upon his failure to do so, to dismiss the suit.[33] And in the wrongful death action arising out of a collision of trucks, the Court held, 2-1, that it was error to admit evidence of previous propensities of the plaintiff's decedent to drive recklessly, even though the evidence was admitted only on the question of damages (that is, to show that the decedent would not have been able to earn much as a truck driver in view of his history of lack of care); admission of such evidence could have a devastating effect on the question whether in this instance the decedent had been negligent.[34]

VII. CONCLUSION

JUSTICE Harlan has the ability and the experience to become a valuable member of the Supreme Court. His lifetime of active practise is one asset in which the present Court is not particularly strong, since many of the Justices came to the Court from political or academic life. His habits of hard work and clear thinking should also serve him in good stead. As the President said, "Judge Harlan's qualifications for [the post of Justice] are of the highest. Certainly, they were the highest of any that I could find."[35]

[30] United States ex rel. Leong Choy Moon v. Shaughnessy, 218 F. 2d 316 (2d Cir., Dec. 23, 1954).

[31] Perma-Fit Shoulder Pad Co., Inc. v. Best Made Shoulder Pad Corp., — F. 2d — (2d Cir., Jan. 20, 1955).

[32] Panella v. United States, 216 F. 2d 622 (2d Cir. 1954).

[33] Hyam v. American Export Lines, 213 F. 2d 221 (2d Cir. 1954).

[34] Perkins v. United Transportation Co., — F. 2d — (2d Cir., Jan. 24, 1955).

[35] New York Times, Feb. 3, 1955, p. 12, col. 5.