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MR. JUSTICE HARLAN: REFLECTIONS OF A BIOGRAPHER*

TINSLEY E. YARBROUGH**

Like his illustrious grandfather, the second Justice John Marshall Harlan was one of the Supreme Court's great dissenters. The 613 opinions that John Harlan wrote during his sixteen years on the bench numbered more than any other Justice of his era and spanned a tenure less than half his grandfather's.[1] Of this total, 168 were opinions for the Court and 149 were concurrences; but nearly half, an impressive 296, were dissents.[2] From 1963 through 1967, the core period of Warren Court activism in civil liberties litigation, Harlan averaged 62.6 dissents per Term.[3] It is also fair to say that the second Harlan was one of the more thoughtful jurists ever to occupy a seat on the nation's highest tribunal. As Professor Paul Freund perceptively observed, Justice Harlan had a special gift for "conjoining the particular with the general, or rather of finding the general implanted within the particular. Thus one reads his opinions with the secure feeling that they will convey an understanding of the exact controversy to be resolved and will disclose the philosophical wellsprings of the Justice's position."[4]

That Justice Harlan has been the subject of relatively little scholarly attention to date is not, however, particularly surprising. Following his appointment to the Court, Harlan became a prominent member of the shifting restraintist bloc which Justice Felix Frankfurter had attempted to lead since his elevation to the bench in 1939. Harlan and Frankfurter were friends before Harlan's appointment and they were frequent allies during their years together on the Court. In addition, Harlan embraced the high regard for precedent, separation of powers, federalism, and deference to the judgments of elected policymakers which formed core elements of his senior colleague's thinking. It has been natural, therefore, for students of

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1. *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT viii (1992).

2. *Id.*

3. *Id.*; Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 388 (1971).

4. Paul A. Freund, *Foreword* to THE EVOLUTION OF A JUDICIAL PHILOSPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN xiii (David L. Shapiro ed., 1969).

the Court to view Harlan largely as Frankfurter's protege and Harlan's opinions as essentially extensions of Frankfurter's own views.

Harlan's personality may also help to explain the failure of scholars to give the Justice the attention he clearly deserves. Justice Black—one of Harlan's principal jurisprudential antagonists in many, though by no means all, areas—once remarked that Harlan was "one of the few people who convince me that there is such a thing as a good Republican."[5] But whoever first referred to Harlan as "Frankfurter without mustard" perhaps best captured the Justice's persona. Harlan was a gracious man, well regarded by jurisprudential allies and opponents alike, and was almost never drawn into Court intrigues. As his former clerk Norman Dorsen recalled, "[t]he entire year I was with Harlan I never heard him say a critical personal thing about another person."[6] In my own exhausting and, I hope, exhaustive examination of the Justice's papers, I was constantly struck and, I must confess, somewhat disappointed by Harlan's exceedingly discreet, impersonal way of dealing with issues, personalities, and frustrations. However commendable, such figures rarely whet a biographer's interest. Nor do self-effacing subjects who lack the certitude of their counterparts. As Nathan Lewin, another Harlan clerk, observed:

> [s]kepticism and open-mindedness were his characteristics, and they fit in well with his philosophy of the judiciary and with his own innate modesty. In this, he stood in sharp contrast to Justice Black, to whom right was right and wrong was wrong, and the Constitution could be counted on to mark the difference.[7]

Harlan no doubt respected his grandfather, the first Justice Harlan. His instructions that his gravestone read "John M. Harlan," carrying only his middle initial,[8] probably reflected that deference as much as any desire to preserve his own separate identity. But Harlan also believed that his grandfather was given to "overstatement,"[9] and he sought to tie his own judicial pronouncements closely to the facts of individual cases. The consequence of the Justice's lack of certitude led him to forge a complex judicial and constitutional philosophy which does not lend itself readily to extensive generalization or easy analysis.

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5. Nina Totenberg, *John Marshall Harlan: A Judge's Judge*, NAT'L OBSERVER, Jan. 8, 1972, at 5.

6. Interview with Norman Dorsen in New York, N.Y. (May 24, 1989).

7. Nathan Lewin, *Justice Harlan: The Full Measure of the Man*, 58 A.B.A. J. 579, 580 (1972).

8. The instructions, dated Oct. 22, 1971, are in the John Marshall Harlan Papers, Box 547, Seeley G. Mudd Library, Princeton University.

9. Lewin, *supra* note 7, at 580.

Whatever the reasons for scholarly neglect of Justice Harlan's career and jurisprudence, they are definitively deserving of extensive examination. When Harlan joined the Court, the outstanding reputation he had earned in more than thirty years with one of New York's most prestigious law firms prompted those most familiar with his career to term him a "lawyer's lawyer."[10] On his retirement and death in 1971, he was praised as a "judge's judge."[11] And it is not fair or accurate to dismiss Harlan as essentially Felix Frankfurter's shadow. It may be true, as Harlan's sister Edith once put it, that he "took many pages from Justice Frankfurter's book,"[12] but their jurisprudential positions were hardly identical.

Moreover, it is arguable that Harlan was a more eloquent, balanced, cautious, effective, and ultimately more significant defender of their mutual positions than Frankfurter himself. The most critical evidence of this, perhaps, is that Frankfurter left the bench in 1962, at the beginning of the most activist period in the modern Court's history. In fact, Frankfurter's retirement, and the appointment of Justice Arthur Goldberg to replace him, foreshadowed the rapid expansion of constitutional liberties by the Warren Court in the middle and late 1960s. Thus, it was John Harlan, not Felix Frankfurter, who was the principal critic of Warren Court trends; and the relative infrequency with which scholars have focused on his life and jurisprudence has left a significant gap in the literature on the Supreme Court and American constitutional law.

Justice Harlan's significance as a jurist obviously influenced my decision to undertake a study of his life and jurisprudence. Quite frankly, however, I was also drawn to the Justice by elements of his personality and character that I found especially appealing. In this paper, I would like to share some of those impressions and also discuss some aspects of the Justice's background and makeup which, in my judgment, helped to shape his judicial and constitutional philosophy.

The element of Justice Harlan's character which emerges most clearly from his record as a lawyer and a judge was his insistence on a total mastery of facts and issues. Under the guiding hand of his mentor Emory Buckner, Harlan quickly became a true believer in the absolute necessity of meticulous trial preparation. And in his first major civil case—the defense of heirs to the fabulous Wendel estate against the assertions of more than two thousand claimants—he repeatedly pressed that basic principle of successful litigation on his assistants. One of those assistants,

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10. Lesley Oelsner, *Harlan Dies at 72; On Court 16 Years*, N.Y. TIMES, Dec. 30, 1971, at 1; David Rosenbaum, *A "Lawyer's Judge": John Marshall Harlan*, N.Y. TIMES, Sept. 24, 1971, at 20.

11. *The Judge's Judge*, TIME, Jan. 10, 1972, at 14; Totenberg, *supra* note 5.

12. Interview with Edith Harlan Powell in New York, N.Y. (May 12 & 15, 1989).

Judge Henry Friendly, recalled that when he proudly reported to Harlan that he had successfully repudiated twenty-one of one claimant's twenty-three assertions, the future Justice merely instructed his colleague to concentrate on the remaining two points.[13] For the meticulous Harlan, such suggestions were not exceptional. When another pretender to the Wendel fortune based her position on an obviously forged entry in a German church register, Harlan suggested that an associate investigating the claim engage a handwriting expert. When the associate responded that the forgery was so obvious no expert was needed, Harlan wired a prompt reply: "Get the handwriting expert."[14]

Harlan's thoroughgoing judicial opinions reflect his penchant for careful attention to every contingency. That trait may also account for a request he made of his Second Circuit clerk William Lifland during Senate proceedings in connection with his appointment to the Supreme Court. Fearful that a former Rhodes Scholar might sacrifice national sovereignty to "One Worldism," southern segregationists combined with conservative Republicans to delay Senate action on Harlan's nomination for several months.[15] While his ultimate confirmation was never in doubt, the nominee had found the process, as he wrote Justice Frankfurter shortly before a favorable Senate vote, a frustrating "experience—one that should never have [been] associated with a nomination to that great Court."[16] At one point, Harlan asked Lifland to compile research about Senate votes on previous Supreme Court nominations and about appointees who had declined to serve following confirmation. "Don't draw any alarming implications from this," he added; "I am just interested."[17] Harlan's request suggests that he may have considered withdrawing his nomination or declining the appointment if confirmed. In part, however, it may well have been simply another reflection of his compulsion to leave no contingency uncovered.

Both as lawyer and jurist, however, Harlan was more than simply a master of the subtleties of the issues before him; he was also a superb

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13. *See* Friendly, *supra* note 3, at 383 n.6.

14. Paul M. Bator's Interview with John E.F. Wood in New York, N.Y. (Dec. 17, 1979 & Jan. 28, 1980). The author is grateful to Professor Bator's widow for an opportunity to examine a transcript of this interview.

15. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 259-60 (1985); JOHN P. FRANK, THE WARREN COURT 104 (1964); *see also Nomination of John Marshall Harlan: Hearings Before the Comm. on the Judiciary, U.S. Senate*, 84th Cong., 1st Sess. 1112-13 (1955).

16. Letter from John M. Harlan to Felix Frankfurter (Mar. 5, 1955) (Felix Frankfurter Papers, Box 39, Library of Congress).

17. Letter from John M. Harlan to William T. Lifland (Mar. 8, 1955) (Harlan Papers, Box 547, Seeley G. Mudd Library, Princeton University).

manager of people. Justice Frankfurter frequently joked to Harlan's clerks that his colleague ran a "sweat shop." However, Harlan was so skillful in his relations with his clerks that they invariably left his service believing that they had played a significant role in the work which flowed from his chambers. They were invariably impressed, too, with the Justice's willingness to listen. One of his clerks remarked at

> how little he was given to pronouncements . . . or even to talking. He was unusual in the amount of listening he did. He struck me as someone so comfortable with himself and so confident that he found it easier than most people to listen. He was one of the relatively few people I've met who seemed to be completely comfortable, and in a way that relieved him of any obligation to always be explaining himself or proselytizing or pronouncing.[18]

Other clerks were struck by his tolerance of competing ideas and his willingness, on occasion, to change his mind. One clerk recalled that "[t]he wonderful thing about clerking for Justice Harlan was that he really believed in reasoned elaboration, all the stuff one was taught about how the judicial process ought to work."[19]

Harlan was also generally able to remain aloof from the personal squabbles in which his colleagues sometimes became embroiled. Whether out of a natural penchant for Court intrigue, or as part of a conscious effort to drive a wedge between Harlan and the Court's "liberal-activist" bloc, Justice Frankfurter regularly fed his jurisprudential protege with negative information and opinion about many of their brethren, especially Justice Black. For example, in early April of 1957, Justice Frankfurter passed Harlan a bench note indicating his intention to share with his colleague some of the Court's "inner history," including Black's differences with Justices Owen Roberts and Robert Jackson.[20] Frankfurter told Harlan that he did this

> for two reasons: (1) out of regard for your personal well-being (this is due to my feeling for you and it is confirmed by my devoted memory of two very beloved friends, Owen Roberts and Bob Jackson) and, (2) out of regard for the work of the Court and our responsibility toward it. This is a matter that is more

18. Interview with Michael Boudin in Washington, D.C. (Feb. 1, 1990).

19. Interview with Robert H. Mnookin in Palo Alto, Cal. (Feb. 21, 1990).

20. Letter from Felix Frankfurter to John M. Harlan (Apr. 3, 1957) (Frankfurter Papers, Box 40, Library of Congress).

> important to me than the natural distaste of talking about colleagues.[21]

Harlan replied that he "would welcome" what Frankfurter "so generously offered."[22] But Harlan maintained genuinely warm relations with virtually all of his colleagues. Indeed, especially after Frankfurter's retirement from the bench, Harlan and Black grew particularly close. At one of the annual dinners with his clerks late in his tenure, Harlan praised Black as a Justice who truly cared about the Court as an institution.[23] Thus, one of Harlan's former clerks was probably correct when he speculated that his Justice would have won any popularity contest on the Court "hands down."[24]

The affection Harlan enjoyed among his peers on the Court extended, of course, to his clerks and staff as well. The Justice's daughter Eve has speculated that her father considered his clerks the sons he never had.[25] He displayed a sincere and abiding interest in them, their wives, and their children. On one occasion when he was giving a clerk's young daughter a tour of the Court, he placed the delighted child in the Chief Justice's seat and proceeded to "argue" a case before her at the counsel's lectern.[26]

Such affection was clearly mutual. The Justice's clerks and their spouses even found his patrician manner endearing. The Harlans would often invite a clerk and his wife to join them for concerts at the National Symphony, where the couple maintained box seats.[27] A clerk might be "more comfortable," the Justice invariably suggested, in black tie.[28] Each clerk naturally obliged, even renting or purchasing a tuxedo if necessary, to find, upon arriving at the concert, that only he and the Justice were dressed in formal attire![29]

John Harlan was an extraordinarily well-liked Justice who generally remained aloof from Court intrigue, even the vote-building tactics at which certain of his colleagues excelled. But this did not mean that he

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21. *Id.*

22. Letter from John M. Harlan to Felix Frankfurter (undated) (Frankfurter Papers, Box 40, Library of Congress).

23. Interview with Norman Dorsen, *supra* note 6.

24. Interview with Louis Cohen in Washington, D.C. (Feb. 4, 1990).

25. Interview with Eve Harlan Dillingham in Redding, Conn. (May 27, 1989).

26. Interview with Paul Brest in Palo Alto, Cal. (Jan. 28, 1990).

27. Interview with Stephen Shulman in Washington, D.C. (Jan. 20, 1990).

28. *Id.*

29. *Id.* Shulman was but one of several clerks who shared this remembrance of the Justice.

played only a minor role in the decision-making process. Consider, for example, the Court's disposition of *Williams v. Georgia*[30] just a few months after his appointment. In March of 1953, Aubrey Williams, a black man, was convicted of murder and sentenced to die in Georgia's electric chair. In an unrelated case decided two months later,[31] the Supreme Court overturned the system which had been used to select Williams's jury—a tidy scheme in which the names of prospective white jurors were placed on white cards, and those of black jurors on yellow cards. Notwithstanding the Supreme Court's rejection of the process as unconstitutional, Georgia's highest court dismissed a challenge to the defendant's jury because Williams's court-appointed lawyer had not challenged his client's jury at the time it was impaneled, as apparently required by state law.[32]

To encourage respect for state procedures, the Supreme Court normally refuses to decide the federal claims of petitioners who fail to heed such rules. Justice Harlan was to become a vigorous proponent of every variety of this abstention doctrine. In his brief to the Court, however, Williams's lawyer focused solely on his client's jury rights—rights conceded by the state—while devoting no attention to the critical abstention question at issue in the case. Moreover, when the attorney found that oral argument in the case would oblige him to miss a court appearance in a divorce case, he declined to participate, citing the "considerable sacrifice" he had already made on behalf of his client who, after all, as he put it in a letter to the Court's clerk, "has no money."[33]

In a memorandum to his fellow Justices, Harlan scorned the attorney's "gross negligence" and "miserable brief."[34] Research by Harlan's clerk had revealed that Georgia's courts had sometimes entertained jury challenges even when they were not made in a timely manner. Therefore, in light of those findings, as well as Georgia's admission of a clear violation of the petitioner's constitutional rights, Harlan recommended that the Court remand the case for further proceedings. The Court's failure to "find a way out of this smelly situation," he warned, "will be a blotch on this Court's ability to protect constitutional rights admittedly violated. And

30. 349 U.S. 375 (1955).

31. Avery v. Georgia, 345 U.S. 559 (1953).

32. *See* Williams v. State, 82 S.E. 2d 217 (Ga. 1954).

33. This discussion is drawn from a memorandum which Harlan circulated in the case. *See* Memorandum from John M. Harlan to the Court (Apr. 23, 1955) (Harlan Papers, Box 2, Seeley G. Mudd Library, Princeton University).

34. *Id.*

in this *sui generis* case I think we could take the course suggested without making bad law for the future."[35]

Speaking through Justice Frankfurter, the Court followed Harlan's suggestions.[36] However, the optimistic junior Justice's efforts were ultimately in vain. The Georgia Supreme Court rebuffed the brethren's attempt to balance respect for state procedures and regard for individual rights.[37] In March of 1956, Aubrey Williams died in the state's electric chair.[38] The *Williams* case was to be only the first of many, however, in which Justice Harlan had a significant behind-the-scenes impact.

Justice Harlan's aloofness from Court politics and congenial personality by no means meant that he was mere putty in Felix Frankfurter's hands. The papers of both Justices are replete with evidence of Frankfurter's continuing campaign to influence not only the general tone of his colleague's judicial and constitutional philosophy, but the organization and language of his opinions as well. In fact, in the year following Frankfurter's retirement, he invited Harlan's two clerks to his home for lunch and a lesson in the reapportionment issue then raging on the Court.[39] Given his colleague's regard for precedent, Frankfurter may have been uncertain about Harlan's continued opposition to judicial intervention in the malapportionment thicket. Or perhaps he feared that his colleague's clerks might try to convert him to the position a majority of the Court had assumed the previous Term in *Baker v. Carr*.[40] Whatever the motivation, when the clerks arrived for lunch Frankfurter instructed them to take notes, then lectured them at length about *Gray v. Sanders*,[41] the Georgia county unit case the Court was soon to decide.[42]

Harlan apparently took such lobbying in stride. At the same time, his feelings about Frankfurter were, at the least, complex. As one of Harlan's early clerks observed:

> [H]e obviously had enormous respect for Frankfurter . . . [but] one also sensed some kind of tension in the relationship. I mean, here was Frankfurter, who . . . was frequently lecturing, with this enormous sense of superior knowledge. . . . I wouldn't doubt

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35. *Id.*

36. *See* Williams v. Georgia, 349 U.S. 375 (1955).

37. Williams v. State, 88 S.E.2d 376 (Ga. 1955).

38. WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 260 (1974).

39. Interview with Richard J. Hiegel in Cambridge, Mass. (Jan. 25, 1990).

40. 369 U.S. 186 (1962).

41. 372 U.S. 368 (1963).

42. Interview with Richard J. Hiegel, *supra* note 39.

> that the Justice [felt] some need to fight for his own independence, [especially early in his tenure].[43]

Whatever Harlan's feelings about his senior colleague were, he and Frankfurter parted company in a number of significant cases—most notably, perhaps, in *Poe v. Ullman*.[44] In *Poe* Harlan concluded, four years before a majority of his colleagues, that the Constitution embodies an implied right of marital privacy sufficiently broad in reach to condemn Connecticut's ban on the distribution of contraceptives to married couples.[45]

Characteristically, however, Harlan would remain solicitous of his colleague until the end. In 1963, Justice Frankfurter's former clerk Philip Kurland wrote Harlan about

> how grateful Mr. Justice Frankfurter's friends are for the very great kindness you have shown and are showing to him and to Mrs. F. In this most difficult of times for him, you give him the greatest consolation that he now has, not only by your attendance upon him, but because he regards you as the sole member of the Court dedicated by acts and not merely words to the proposition that the Supreme Court is a judicial body.[46]

Of course, Harlan's compassion was not limited to Justice Frankfurter. Some readers no doubt have been touched, as I was, by Hugo Black, Jr.'s moving account of Harlan's efforts to bolster Justice Black's spirits during his friend's final days at Bethesda Naval Hospital.[47] Moreover, Harlan's papers record numerous instances of the Justice's intervention on behalf of family servants. Most moving of all were the Justice's efforts to shield his beloved wife Ethel from the indignities of Alzheimer's disease. A former clerk recalled a conversation during coffee at the Harlans' Georgetown home one morning that had turned to talk of presidential wives, including Jacqueline Kennedy.[48] "And Mrs. Harlan asked, 'Who is that, dear?' It was a painfully embarrassing moment,"[49] the clerk remembers. "The Justice paused a minute, then said very gently,

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43. *Id.*

44. 367 U.S. 497 (1961).

45. *See id.* at 539 (Harlan, J., dissenting).

46. Letter from Philip B. Kurland to John M. Harlan (Mar. 6, 1963) (Harlan Papers, Box 534, Seeley G. Mudd Library, Princeton University).

47. *See* HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 257-66 (1975).

48. Interview with Louis Cohen, *supra* note 24.

49. *Id.*

'You remember, dear, Janet Auchincloss's daughter.' And Mrs. Harlan replied, 'Why yes, of course.' He should have been sent to Mars to show Martians what earthlings could be like."[50]

In my study of the Justice,[51] I sought to capture personality traits of the sort just outlined, as well as major episodes in his life and professional career, and the principal elements of his judicial and constitutional philosophy. In addition, I attempted to assess factors in Harlan's background which may have influenced his jurisprudence. Surveying a Supreme Court Justice's life and analyzing his jurisprudence are in themselves challenging tasks. Discovering the why underlying a judge's thinking is even more difficult. In truth, of course, an incalculable number of factors exert varying degrees of influence on every jurist. Isolating and assessing them with anything approaching precision is thus an impossible goal. At best, only crude and highly tentative conclusions can be attempted.

An explanation of Justice Harlan's judicial record is especially complicated. He was clearly devoted to the so-called "passive virtues" he found implicit in the principles of separation of powers, federalism, majoritarian democracy, and respect for precedent. Justice Harlan opposed the Court's extension of the Bill of Rights[52] and the exclusionary rule[53] to the states, as well as court-ordered reapportionment,[54] expansive notions of "state action,"[55] the *Miranda* warnings,[56] and other broad constructions of the Fifth Amendment's guarantee against compulsory self-incrimination,[57] and yielded to governmental authority over expression and association deemed to threaten the nation's security.[58] But the same judge also voted to extend the Fourth Amendment's coverage to eavesdropping,[59] joined decisions limiting the reach of warrantless searches,[60] embraced the principles, if not always the pace, of the

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50. *Id.*

51. *See* YARBROUGH, *supra* note 1.

52. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting).

53. *See* Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting).

54. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting).

55. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 387 (1967) (Harlan, J., dissenting).

56. *See* Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

57. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).

58. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 752 (1971) (Harlan, J., dissenting).

59. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

60. *See, e.g.*, Chimel v. California, 395 U.S. 752, 769 (1969) (Harlan, J., concurring).

Court's desegregation decisions,[61] rejected state-sponsored prayer and Bible reading in public schools,[62] recognized the right to private possession of obscenity in the home[63] and the public display of "one man's vulgarity,"[64] and publicly embraced a constitutional right of privacy before a majority of the Court did so.[65] Moreover, unlike Justice Black, Harlan believed that the most effective safeguard against the abuse of judicial power lay in the individual judge's own commitment to self-restraint rather than in what he considered to be the inherent ambiguities of constitutional text and history. Thus, Harlan's "liberal-activist" votes in certain cases, and "conservative-restraintist" leanings in others could not be attributed to the mixed signals which the Constitution's language and the history surrounding adoption of its provisions presented for Hugo Black.[66]

Several elements in the Justice's background, however, appear to be reflected in, and to some extent have helped to shape, his thinking in a variety of constitutional contexts. When viewed against the backdrop of his entire pre-Court career, Harlan's several years as a federal and state prosecutor appear as relatively brief episodes, yet his work there may have helped to strengthen his regard for the role of the states in the federal system, as well as his support for flexible constitutional standards conditioned by countervailing social imperatives. Following his undergraduate years at Princeton and his Rhodes Scholarship at Oxford, Harlan joined the prestigious New York law firm of Root, Clark, Buckner, and Howland. Two years later, in 1925, Emory Buckner, one of the firm's senior partners and the individual who was to have the profoundest impact on Harlan's professional life, became U.S. Attorney for New York's Southern District. Buckner staffed his office with talented young assistants—"Buckner's Boy Scouts,"[67] the press dubbed them—and Harlan became chief of his mentor's prohibition enforcement division.[68] Neither Buckner nor Harlan had any use for the Eighteenth

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61. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

62. *See* School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

63. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

64. Cohen v. California, 403 U.S. 15, 23 (1971).

65. *See* Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

66. *See generally* TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS (1988) (discussing Justice Black's judicial philosophy and assessing the arguments raised by his critics).

67. MARTIN MAYER, EMORY BUCKNER 182 (1968); Lyle Denniston, *Justice Harlan Dies; Noted Dissenter*, EVENING STAR, Dec. 30, 1971, at C4.

68. MAYER, *supra* note 67, at 144.

Amendment, but each was loyal to his oath of office. During Buckner's two years as U.S. Attorney, he and Harlan secured injunctions padlocking hundreds of establishments charged with violating the Volstead Act[69] and secured criminal convictions against major bootleggers and their confederates.[70]

Harlan's prohibition efforts involved frequent encounters with the then relatively new exclusionary rule and other procedural guarantees, including the right to trial by jury. For example, in a courtroom attempt to take advantage of the "silver platter" doctrine,[71] he sought to minimize his staff's contacts with the New York police. These contacts were a major source of important, if often illegally procured, evidence, although neither Harlan nor an assistant was able to cite a single instance when local police had not followed their "suggestions" in liquor investigations.[72] Moreover, Harlan was probably the author of a memorandum Buckner submitted to the Senate Committee on the Judiciary predicting the need for massive increases in the prohibition budget if jury trials were not suspended in such cases.[73] Harlan's experiences in this area may well have convinced him not only of the inherent futility of a national liquor policy, but also of the wisdom of diverse state regulations in such sensitive areas. They undoubtedly helped to nurture, as well, the sympathy for the special problems of law enforcement which became a common theme of his opinions. So too, no doubt, did his experiences as Buckner's top assistant in the Queens graft prosecutions of the late 1920s and as chief counsel to the New York Crime Commission in its

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69. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935).

70. *See* YARBROUGH, *supra* note 1, at 16-28.

71. Prior to the application of the exclusionary rule to the states, state authorities could obtain evidence using methods violative of the Fourth Amendment and could then hand over that information to federal agents who would in turn use it as evidence in a federal trial. Because of the ease with which federal authorities could circumvent the exclusionary rule by receiving this evidence from state authorities as if on a "silver platter," the practice became known by that name. *See* Lustig v. United States, 338 U.S. 74, 79 (1949) (holding that evidence seized without a search warrant by state authorities and given to federal authorities "on a silver platter" was admissible in federal trials). *See generally* Peter A. Grammas, *Constitutional Law—The Exclusionary Rule—When Should the Guilty Go to Jail? James v. Illinois, 110 S. Ct. 648 (1990)*, 21 CUMB. L. REV. 351, 359 n.59 (1991); Robert L. King, *The International Silver Platter and the "Shocks the Conscience" Test: U.S. Law Enforcement Overseas*, 67 WASH. U. L.Q. 489, 493 (1989).

72. *See Less Dry Aid Under Mc'Laughlin*, N.Y. TIMES, June 18, 1926, at 3.

73. *See $70,076,125 a Year Would Make State Dry, Says Buckner*, N.Y. TIMES, Apr. 26, 1926, at 1 (reporting on the memorandum that became part of the record of the Senate Judiciary Committee's prohibition investigation).

investigations of ties between organized crime and local government shortly before his appointment to the Second Circuit Court of Appeals.[74]

The Justice's World War II experiences, which he considered among the most significant and interesting episodes of his life, are also of relevance. The highly secret nature of his work as head of the Eighth Bomber Command's Operations Analysis Section probably contributed to the latitude he was later to accord the government in civil liberties cases tinged with national security concerns. His suspicions of the Soviet Union and his concern, as he expressed it in his wartime diary, over "the tendency of higher [military] circles to play ball with the Russians"[75] rather than his beloved Britain in the planning of Germany's post-war occupation appear undoubtedly to have had an impact as well. The Justice had serious misgivings about the anti-Communist prosecutions of the Cold War era, and one former clerk was probably correct when he recalled that Harlan considered the subversive advocacy and membership legislation of that era "McCarthyite garbage."[76] Moreover, his refusal during the 1952 presidential campaign to sign a lawyer's statement deploring the attempt of the Eisenhower forces to exploit his Princeton contemporary Adlai Stevenson's deposition in the Alger Hiss case was probably simply the act of a prudent Republican unwilling to be drawn into a controversial issue, as one of the Justice's closest friends has suggested, rather than a reflection of his own Cold War views.[77] Even so, Harlan's wartime activities, and his disdain for the Soviets that those experiences either generated or intensified, may well have contributed to his reluctance as a Justice to second-guess the judgments of government officials regarding national security matters.

Harlan's affinity for the British is perhaps equally relevant to an understanding of his jurisprudence. When John Maynard Harlan enrolled his eight-year-old son in boarding school, he selected a Canadian school in part because the strict regimen and curriculum there closely approximated the English pattern.[78] The younger Harlan thrived in that environment and during his years at Oxford's Balliol College became a confirmed Anglophile. On one occasion late in his life, Chief Justice Burger shared with his colleague a draft of a speech he was preparing to deliver in London: "You are expert on all things British. Do you have any comments?"[79]

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74. *See* YARBROUGH, *supra* note 1, at 28-32, 74-78.

75. Diary of John M. Harlan. The author is grateful to Justice Harlan's daughter, Eve Harlan Dillingham, for the opportunity to examine her father's diary.

76. Interview with Charles Fried in Cambridge, Mass. (May 26, 1989).

77. Interview with J. Edward Lumbard in New York, N.Y. (May 17, 1989).

78. *See* YARBROUGH, *supra* note 1, at 10-11.

79. Letter from Warren E. Burger to John M. Harlan (undated) (Harlan Papers, Box

Harlan's opinions even adopted British spellings, and his appreciation for the English clearly extended to their legal traditions, especially their flexible, essentially common-law approach to legal issues. In a 1958 piece for the *American Oxonian*, for example, he suggested that study at Oxford instilled in a person "respect for tradition" and "a lively and abiding appreciation of the importance of the Rule of Law in the workings of a democratic society," as well as a "broad-minded, but hard-headed, tolerance [and] . . . . an attitude of mind which tackles a problem with due account for differing views, which is free from the shackles of limiting preconceptions"[80]—in short, the sorts of elements which appeared to permeate the Justice's jurisprudence. Moreover, throughout his adult life Harlan maintained close ties with British lawyers, jurists, and legal scholars, as well as English conceptions of law and the judge's function. For example, the Oxford scholar Sir Arthur L. Goodhart once wrote to the Justice that "[t]he main point in my pamphlets is that I believe that the whole spirit of the common law is dead against 'absolute' rights. Its hero is the reasonable man."[81]

Other strong influences on Harlan's jurisprudence were his social background and the corporate focus of his law practice, however difficult pinpointing their impact may be. Harlan's father was frequently in financial difficulty. When his son's law firm prepared his will in 1925, he had an estate of only a thousand dollars.[82] At his death less than ten years later, he had no real estate holdings and left only a gold watch, a pair of pearl studs and a scarf pin, and office and household furnishings totaling less than five hundred dollars, plus nearly six thousand shares of stock in a company whose charter had been suspended years earlier.[83] At the time of Justice Harlan's appointment to the federal bench, the annual income from his law practice had reached an impressive $150,000.[84] At his death, however, his wealth, excluding his two homes, was only in the low six figures.[85]

However, Harlan and his family enjoyed impeccable social credentials; and his Princeton classmates, like many of his later social acquaintances, came from some of the nation's leading industrial and commercial

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490, Seeley G. Mudd Library, Princeton University).

80. John M. Harlan, *Commentary*, 46 AM. OXONIAN 18, 18-19 (1958).

81. Letter from Arthur L. Goodhart to John M. Harlan (June 2, 1966) (Harlan Papers, Box 596, Seeley G. Mudd Library, Princeton University).

82. A copy of the will is in the Harlan Family Papers, now in possession of the Justice's nephew, Roger A. Derby, in Warrenton, Va.

83. A summary of the estate is in the Harlan Family Papers. *See supra* note 82.

84. Interview with Edith Harlan Powell, *supra* note 12.

85. *Id.*

families. His clients were drawn largely from the same backgrounds. From his defense of the Wendel estate to his representation of the duPont brothers in the gigantic GM-duPont antitrust litigation[86] shortly before his appointment to the Second Circuit Court of Appeals, his superlative legal skills were dedicated primarily to the protection of property from private and governmental interference.

Moreover, there is evidence that Harlan personally sympathized with the interests he was retained to represent. For example, in his final argument to the district court in the GM-duPont case he scorned the government for suggesting that huge holdings alone were illegal or socially undesirable and insisted that he had "been proud to represent [the duPonts,] these two distinguished men to whom the Government [had] so often turned in times when our country has been in peril."[87] Following his elevation to the Supreme Court, when his brethren overturned the trial court's rejection of the government's case,[88] Harlan vehemently complained to Justice Frankfurter about the majority's "superficial understanding of a really impressive record."[89]

Of course, one could hardly suggest that Justice Harlan was at all inclined to resurrect the economic activism of the pre-1937 Court. He did vote rather regularly to limit the impact of antitrust legislation and related regulatory statutes.[90] Moreover, when Justice Black attempted to deal economic due process a final fatal blow in *Ferguson v. Skrupa*,[91] Harlan joined only the Court's ruling, not his colleague's rationale,[92] even after the tone of Black's opinion had been substantially moderated.[93] However, Harlan so routinely rejected substantive due process attacks on business regulations that his clerks rarely prepared certiorari or bench memoranda in such cases. And he dissented from the Court's only post-1937 decision overturning a state economic control on equal protection grounds, even

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86. *See* United States v. E.I. duPont de Nemours & Co., 126 F. Supp. 235 (N.D. Ill. 1954), *rev'd*, 353 U.S. 586 (1957).

87. A transcript of the argument is in the Harlan Papers, Box 516, Seeley G. Mudd Library, Princeton University.

88. *See duPont*, 353 U.S. at 607.

89. Note from John M. Harlan to Felix Frankfurter (June 3, 1957) (Frankfurter Papers, Box 39, Library of Congress).

90. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Continental Can Co., 378 U.S. 441, 467 (1964) (Harlan, J., dissenting).

91. 372 U.S. 726 (1963).

92. *See id.* at 735 (Harlan, J., concurring).

93. Letter from John M. Harlan to Hugo L. Black (Apr. 11, 1963) (Hugo L. Black Papers, Box 372, Library of Congress).

though the discriminatory features of the statute at issue appeared largely indefensible.[94]

What is evident, though, is that Justice Harlan's close ties to corporate America may have made him somewhat more deferential to the government in civil liberties cases than he might otherwise have been. When Harlan's father considered bringing Felix Frankfurter into some venture of his in 1929, his son warned him that the Harvard professor was "identified with the radical point of view."[95] Harlan's advice to his father was probably evidence of his customary caution in dealing with potentially controversial issues rather than of his distaste for "radical" politics. However, a Harlan clerk remarked that:

> Harlan was part of the establishment, as close to an upper-class Justice we've had since [Charles Evans] Hughes. The thing that people from Wall Street, from that world, care about most is national security. That's at the core of their senses. They don't want to rock the boat. . . . Harlan was a true conservative. He was not a right-winger, certainly not a redneck in any way; he was an educated, upper-class internationalist with corporate clients that transcended the country. His main concern, his lodestar, was to keep things on an "even keel." He used that phrase many times to me in conversation. And one way to do that is to make sure that government has the authority to protect itself. . . . I don't think he believed there was a threat to the free enterprise, capitalist system in this country, but I also think he was not prepared to intervene when the government was taking steps to assure that there was no threat.[96]

These observations may have captured a central element of Harlan's thinking—a mind-set which may have affected the Justice's reaction not only to government assertions of national security, but to criminal procedure issues and other civil liberties claims as well.

If Harlan's aristocratic background, the associations it fostered, and the overwhelmingly corporate thrust of his law practice helped to shape his reaction to constitutional issues, so too did his judicial ties. Justice Frankfurter had begun campaigning for Harlan's jurisprudential soul even before his Senate confirmation. Eve Harlan's first husband has recalled but a few occasions when dinner at his in-law's was not interrupted by

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94. *See* Morey v. Doud, 354 U.S. 439, 457 (1957) (Harlan, J., dissenting).

95. Letter from John M. Harlan to John Maynard Harlan (Apr. 27, 1929) (Harlan Papers, Box 547, Seeley G. Mudd Library, Princeton University).

96. Interview with Norman Dorsen, *supra* note 6.

Frankfurter's telephone calls—calls the gracious Justice invariably took.[97] And while by this point in Harlan's career it was doubted that the senior Justice could have pushed his colleague in directions he did not wish to go, Frankfurter may have helped to shape refinements in Harlan's thinking. Judges J. Edward Lumbard, Henry Friendly, Harold Medina,[98] and other lower court jurists with whom Harlan was closely associated also embraced the Frankfurtian tradition of self-restraint. Moreover, earlier in his career Harlan's friends had included elder jurists of the same persuasion—most notably Learned Hand, who warned Harlan shortly after his elevation to the Supreme Court against "making the Bill of Rights in the form of LAW, instead of, like the British, thinking about it as 'cricket.' As a prelate of Balliol, you will know what I mean better than I do."[99]

His clerks' memories of a Justice willing to listen to their arguments and give them due weight suggests another factor which may have influenced Harlan's willingness, despite the generally conservative pattern of his decisions, to oppose a broad federal censorship power,[100] to extend constitutional protection to the public display of profanity,[101] and to embrace the Warren Court's privacy decisions.[102] Harlan was not only open-minded; the Justice and his wife Ethel were cosmopolitan in taste and outlook. Mrs. Harlan, especially, had a deep and enduring interest in art, music, and the theater. The couple's circle of friends included many from those backgrounds, among them the distinguished actor Raymond Massey, one of Harlan's Princeton contemporaries, the novelist Rumer Godden, and Cornelia Otis Skinner, who was Ethel Harlan's childhood playmate. Given their interests, neither the Justice nor his wife was probably very comfortable with government-imposed censorship or intrusions into personal privacy. It was thus hardly surprising that he offered his services free to New York's Board of Higher Education in the early 1940s when a state judge, convinced that the British

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97. Interview with Wellington Newcomb in New York, N.Y. (July 9, 1990).

98. Harlan had taken a review course taught by Harold Medina while preparing for the bar years earlier.

99. Letter from Learned Hand to John M. Harlan (Dec. 26, 1955) (Harlan Papers, Box 539, Seeley G. Mudd Library, Princeton University).

100. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 493 (1966) (Harlan, J., dissenting); Roth v. United States, 354 U.S. 476, 505-06 (1957) (Harlan, J., concurring in part and dissenting in part).

101. *See* Cohen v. California, 403 U.S. 15 (1971).

102. *See, e.g.*, Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring); *see also* Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) (discovering a constitutional right of marital privacy four years before a majority of the Court).

philosopher and mathematician Bertrand Russell was bent on making "strumpets out of all our girls,"[103] barred the Board's appointment of the renowned scholar to the faculty of City College.[104] Or that Harlan's failure to win a reversal of the judge's remarkable order on appeal would prompt a rare display of anger from this gentle man for whom the charge that an adversary was "pontificating" was considered a harsh rebuke.[105]

The impatience with provincialism and intolerance which Harlan's stance in the Bertrand Russell affair reflected would persist throughout his life. One of his last clerks remarked:

> Although a patrician, he was not a snob at all and enjoyed all sorts of colorful people. I remember specifically his saying when the subject of homosexuality came up once, . . . that he'd have no difficulty whatever having a clerk who was homosexual, which surely would not have been the case with certain of his 'liberal' colleagues. And I'm sure he had friends who were homosexual. . . . I remember thinking at the time that part of that no doubt reflected the Oxford upper-class experience, where it may have been more common and less stigmatized. He was very tolerant, quite cosmopolitan.[106]

That attitude perhaps in part explains his stance in privacy cases and a number of First Amendment contexts as well.

Whatever the underlying keys to an understanding of his jurisprudence are, Harlan's judicial record, the care with which he developed it, and the grace he invariably displayed in an era in which he, like his grandfather before him, often wrote in dissent, impressed jurisprudential friends and foes alike. When Chief Justice Burger first informed President Nixon of Harlan's hospitalization, the President sent the Justice a handwritten note of encouragement and praise.[107] Harlan's continued decline and retirement prompted similar messages from the President and others. At the Justice's death, Nixon wrote Mrs. Harlan that her husband had "brought to our highest Court a measure of integrity, wisdom, compassion and sober good judgment that added luster to its record and provided a

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103. BARRY FEINBERG & RONALD KARSILS, BERTRAND RUSSELL'S AMERICA, 1896-1945, at 156 (1973).

104. *See* Kay v. Board of Higher Educ., 18 N.Y.S.2d 821 (Sup. Ct. N.Y. County), *aff'd*, 20 N.Y.S.2d 1016 (App. Div. 1940).

105. Interview with Louis Lusky in New York, N.Y. (June 19, 1989); Interview with Wellington Newcomb, *supra* note 97.

106. Interview with Robert H. Mnookin, *supra* note 19.

107. Letter from Richard M. Nixon to John M. Harlan (Sept. 16, 1971) (Harlan Papers, Box 583, Seeley G. Mudd Library, Princeton University).

lasting source of strength to our society."[108] In a statement to the press, he called the Justice "one of the 20th century's . . . giants,"[109] while Chief Justice Burger praised Harlan's "careful, thoughtful opinions,"[110] Potter Stewart termed him "a human being of great worth,"[111] and journalists lamented the loss of a "lawyer's judge"[112] and "judge's judge."[113]

An editor for the *Washington Post*, a frequent Harlan critic and one of the newspapers the Justice would have denied the right to publish the "Pentagon Papers,"[114] suggested that the Justice's own words furnished his best epitaph.[115] When Justice Whittaker resigned from the Court a decade earlier, Justice Harlan said of his colleague:

> Justice Whittaker was a prodigious worker who was satisfied with nothing less than full mastery of every record and brief. . . . While a man of intense convictions, he was always open minded, and in close cases one could never feel that he was beyond persuasion until the last word had been spoken or written on the issues. He had an innate sense of fairness but always strove against yielding up a sound legal conclusion to the compassionate circumstances of a particular case or to his personal ideologies—temptations which make the art of judging the more exacting, and sometimes interrupt the even-handed application of the law.[116]

To the editor, and to many others as well, the Justice's description was less accurate of Whittaker than of Harlan himself—the man whom Hugo Black's clerk John Frank once characterized as an exemplar of "[d]isembodied, impersonal justice."[117]

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108. Letter from Richard M. Nixon to Ethel Harlan (Jan. 3, 1972) (Harlan Papers, Box 583, Seeley G. Mudd Library, Princeton University).

109. *Nixon Praises Harlan As a Giant of the Court*, N.Y. TIMES, Dec. 30, 1971, at 29.

110. *Id.*

111. Denniston, *supra* note 67, at C4.

112. Oelsner, *supra* note 10, at 29; Rosenbaum, *supra* note 10, at 20.

113. Totenberg, *supra* note 5, at 5.

114. *See* New York Times Co. v. United States, 403 U.S. 713, 752 (1971) (Harlan, J., dissenting).

115. *See John Marshall Harlan*, WASH. POST, Jan. 1, 1972, at A8.

116. *Id.*

117. *Id.*