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JUSTICE HARLAN*

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It was suggested that I talk about the second John Marshall Harlan. Nearly fifteen years have passed since he left the Supreme Court. As Earl Warren once said, Harlan's very name suggests a great legal pedigree, one that reaches back to our constitutional foundations.¹

John Harlan lived up to his great name, just as he lived up to the best traditions of his own family, of our profession, and of our nation. The lessons of his life can be educational, particularly for judges, and also for those who practice and teach law.

It was not my privilege to know Justice Harlan well, or to sit with him on the Court. But his presence was striking, and I admired him from the day in the late 1930's when we met at Root, Clark, Buckner & Ballantine.

In an after dinner talk, I can do little more than present a few vignettes of Harlan's remarkable career. I mention first some of the highlights of his career as a lawyer and soldier. Then, very briefly, I will identify his view of the Court's role in our federal structure of government. Finally, I will share with you glimpses of the admiration and affection for Harlan shared by his colleagues on the Court.

* This article is an expansion upon remarks made by Justice Powell at the American Law Institute Dinner, held at the Mayflower Hotel, Washington, D.C., on May 15, 1986.

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1. Warren, *Mr. Justice Harlan, As Seen By A Colleague*, 85 HARV. L. REV. 369, 369 (1971).

Pre-Judicial Career

Harlan's education as a lawyer was unique. After graduating from Princeton with honors in history and politics, where he also chaired the student council and was president of his class, Harlan studied jurisprudence at Oxford University as a Rhodes Scholar. In view of this impractical legal education, Root, Clark accepted him as an associate with some skepticism.

As Emory Buckner put it, John "worked very hard at Oxford . . . on everything except law."² Accordingly, Harlan was told to "go to law school,"³ and he obediently attended New York Law School—earning two years' credit in one year—while still working part time at Root, Clark.

John Harlan's early career was blessed with an extraordinary range of legal experience. Members and associates in law firms today usually become specialists. But Harlan, I think fortunately, practiced in a day of generalists.

Emory Buckner, the partner who took John under his wing, was then one of New York's top lawyers. Buckner also had a talent for identifying gifted young lawyers. George Cleary, Leo Gottlieb, and the late Henry Friendly are among his recruits who became famous lawyers.⁴ Buckner made Harlan his chief assistant on some of his most important cases. When Buckner was named United States Attorney, he took John Harlan with him. In that office, Harlan conducted a number of liquor prosecutions, giving him early exposure to criminal law and procedure.

The most famous of these—and a headline case at the time—was the Earl Carroll perjury prosecution. The defendant had thrown a theater party, at which guests were served from an enormous tub in which a nude chorus girl bathed. Today, perhaps the defense would claim a

2. M. MAYER, *EMORY BUCKNER* 143 (1968).

3. As quoted in Martin Mayer's biography of Buckner, John said of his introduction to practice:

"When Buckner saw me, his comment was, 'Well, you'd better go to law school.' I said, 'Well, if I've got to do that, I'll go into business. I've had enough of studying.' The upshot was that I got a job, time off in the afternoon for the New York Law School thing, where I was given two years' credit for one year's work."

Id. at 144.

Given the depth of his success in law, one wonders what economic miracles Harlan might have worked had he simply gone into business, as he threatened.

4. Buckner convinced Henry Friendly to come to Root, Clark to practice instead of returning to Cambridge for further study and teaching. This episode prompted a sharp exchange of letters between Buckner and his friend Felix Frankfurter, then on the Harvard faculty. Frankfurter correctly appreciated Henry Friendly's unique potential, and tried mightily to steer him into the academy. *See id.* at 149-52.

"First Amendment right" of expressive bathing. But during Prohibition, the critical issue at trial was whether the young lady had taken a bath in champagne or merely ginger ale, as the defendant claimed. Harlan established the alcohol content of the bath—of course in a most dignified manner. The defendant was convicted.

When Emory Buckner returned to private practice in 1927, John Harlan followed. Corporate matters then occupied a large portion of his time, but he helped Buckner investigate corruption in Queens, an investigation ordered by then-Governor Al Smith. This led to the conviction of Maurice Connolly, Borough President of Queens, on charges of graft.

In the early 1930's, Buckner suffered a stroke, and John Harlan took on primary responsibility for another of the leading cases of his day—the litigation over the estate of Ella Wendel.⁵ Miss Wendel was the wealthy heiress of a real estate fortune estimated from \$25 to \$75 million. Her will left all of this to charity.

John Harlan, with Henry Friendly, led the team of lawyers who defended the charities' claims to Miss Wendel's millions. This work was not easy. As more recently occurred following Howard Hughes' death, persons claiming to be "relatives" came out of the woodwork. The most "potentially dangerous" of these was one Thomas Patrick Morris, who claimed to be Miss Wendel's nephew.⁶ If Morris had established his claim, he stood to inherit the entire estate.

Harlan's handling of the Morris claim says a great deal about his own professionalism, and his conviction that a trial lawyer must master the facts. He went to Scotland to check out various pieces of Morris' claim. He left Henry Friendly in charge of investigating twenty-three additional points on which the claim rested.

When Harlan returned to New York, Friendly reported that Morris was lying on twenty-one of the twenty-three allegations. Harlan inquired about the other two. Friendly thought it was enough that Morris had lied twenty-one times. But typically thorough, John Harlan insisted that the other two points be checked.⁷ Although this may have

5. Henry Friendly described the source of the Wendel fortune as follows: "Grandfather Wendel, an immigrant, had made his money, like John Jacob Astor, in the fur trade and then, again like Astor, vastly augmented it by investing in New York City real estate. The cardinal principle followed by him and his son, John, was never to sell." Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 382 n.1 (1971).

6. *Id.* at 383. The story of the Wendel litigation, and John Harlan's role in it, is told at greater length in Henry Friendly's tribute to the late Justice on his retirement, *id.* at 382-84, and in David Shapiro's perceptive introduction to *THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN* xxi-xxii (D. Shapiro ed. 1969) (hereinafter D. Shapiro).

7. D. Shapiro, *supra* note 6, at xxi.

frustrated his brilliant young associate, Harlan's devotion to the need for complete mastery of the facts paid off. At trial Morris' claim was destroyed, and the charities prevailed.

Judge Friendly, speaking of John Harlan's work in the Wendel litigation, described it as a source both of great learning and great fun. "Our pleasure," he said, "came from . . . the joy of battle, and from pride in a task well done. Today's young lawyers are missing something if they have lost this."⁸ I echo his sentiment. I hope our profession never loses that spirit of pride in craftsmanship, and in thorough, aggressive advocacy, that characterized Harlan's defense of Ella Wendel's will.

Harlan also successfully defended former heavyweight champion Gene Tunney in a breach-of-contract case. But he did not always win. He lost the case in which he asserted the right of City College to hire Bertrand Russell to teach mathematics after an errant state judge had ordered Russell terminated for immorality. Harlan's argument in that case was typically brilliant, and his efforts helped lead to a broader understanding of academic freedom in universities.

In all of his cases, Harlan maintained standards that won the respect of clients, and the loyalty and admiration of all who worked with him.⁹ His reputation as a lawyer of exceptional ability grew steadily.

World War II Service

Though by this time he was no longer a young man, John Harlan took three years out of his successful legal career to serve in the Air Force during the Second World War. Early in 1942, he was requested by then Colonel W. Barton Leach, known to many of you, to organize and head an Operation Research Section for the Air Force, modeled after its British counterpart.

By the summer of 1944, this section included forty-nine civilian

8. Friendly, *supra* note 5, at 384. It is fitting that Henry Friendly should have paid tribute to Justice Harlan on the latter's retirement from the bench, for the two men shared far more than their early experiences at Root, Clark. As is true of Harlan, Judge Friendly's scholarship and devotion to principle set an example for the bench and bar of our country for generations to come.

9. Leo Gottlieb, a leading member of the New York bar, writes of Harlan's "undeviating adherence to the highest standards of candor, integrity, consideration for the views and welfare of other individuals, and loyalty to, and pride in, his country and its institutions." Letter from Leo Gottlieb (Feb. 20, 1986). This is typical of the praise that Harlan's name prompts among his friends and colleagues. I have been fortunate to receive a wealth of information from Leo Gottlieb, Leslie H. Arps, Professor Louis Lusky, C. C. MacLean, Judge Edward Weinfeld, Frank L. Dewey, Judge Charles E. Stewart, Judge J. Edward Lumbard, Leonard Joseph, and General Harris B. Hull. I am indebted to these fine lawyers and judges, and to General Hull, for their assistance. The quality and devotion of John Harlan's friends does him honor.

scientists and eighty-five officers and enlisted personnel. It was an independent staff section of the 8th Air Force headquartered at High Wycombe, England. Harlan became a colonel, and his top staff included his deputy Leslie Arps, and Professor Louis Lusky, both of Root, Clark.¹⁰

Scientific research was conducted for the benefit of our Air Force on such subjects as navigation systems, effectiveness of particular types of bombs and fuses, accuracy in bombing and aerial gunnery, and the perfection of radar counter measures. Directing the work of this talented—and often temperamental—group of scientists, required Harlan's patience and diplomacy. Both Leslie Arps and Louis Lusky also have expressed admiration of Harlan's ability to grasp the technical essentials of each of these projects. For his distinguished wartime service, he was awarded the Legion of Merit and Croix de Guerre by Belgium and France.¹¹

Post War Practice

After the war, further legal distinction followed. Harlan's argument in *Cohen v. Beneficial Industrial Loan Corp.*,¹² spawned the collateral-order doctrine that stands essentially unchanged today. His service on Governor Dewey's Crime Commission led to important reforms in the administration of New York's crime-ridden harbor. These and other achievements prompted the broadest enthusiasm among lawyers when John Harlan was nominated to the Second Circuit Court of Appeals, and then to the Supreme Court on November 8, 1954.¹³

Though Harlan modestly called his pre-judicial career "tame,"¹⁴ it prepared him well for life on the bench. I have mentioned only a few of his better known cases as a lawyer. By the time Harlan became a judge, his extensive practice had ranged from the prosecution of rum-runners to the defense of academic freedom. His career also had in-

10. I also am indebted to Leslie Arps, Louis Lusky and General Hull for information on Harlan's war service.

11. Following their active duty overseas, both Harlan and Arps undertook—at the request of Generals Arnold and Spaatz—to study how the separation of the British Air Force from the British Army had been accomplished. The resulting study was of material assistance in the creation of the United States Air Force as an independent branch of the United States military service.

12. 337 U.S. 541 (1949).

13. The acclaim was not unanimous. A number of southern Senators combined with a scattering of isolationists repelled by Harlan's British education to hold up the nomination for several months. Incredibly, the nomination was reported out of the Judiciary Committee by only a 10-4 vote. When the nomination reached the Senate floor, Harlan was confirmed by the appropriate margin of 71-11.

14. D. Shapiro, *supra* note 6, at xxiii (quoting an interview in the *NEW YORKER*, Dec. 4, 1954, at 40-41).

cluded periods of public service in important executive and investigative roles. This breadth of experience, together with high intelligence and innate good judgment, made Harlan an ideal choice for the bench.

As a Supreme Court Justice

When appointed to the Supreme Court in March 1955, after service on the Court of Appeals, Harlan had a perspective on the Court's relationship to other branches of the federal government, and to the states. That perspective was neither "liberal" nor "conservative" as those labels are commonly used. Justice Marshall, who admired Harlan, agreed, stating that "these labels do not apply to John. He followed the law." Perhaps the best word to describe Harlan's perspective is "judicial." His brilliant opinions, in some fifty-five volumes of the United States Reports, reflect a clear vision of a Justice's role in our system of government.

That vision was both broad and narrow. In such cases as *NAACP v. Alabama*¹⁵ and *Cohen v. California*,¹⁶ he powerfully defended the responsibility of the Supreme Court to guard against official racial discrimination and the suppression of political dissent.

Yet in other respects, he took a more limited view of the Court's role. A unifying theme of many of his finest opinions—often written in dissent—was that individual liberties are safest when the authority of the states is respected. Justice Harlan captured the thought well in an address delivered to the bar in 1963, at a time when the idea of federalism was not universally popular:

We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the Founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the Executive, Legislative, and Judicial branches. The diffusion of power between federal and state authority serves the same ends, and takes on added significance as the size of the federal bureaucracy continues to grow.¹⁷

15. 357 U.S. 449 (1958).

16. 403 U.S. 15 (1971).

17. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943-44 (1963).

Of course, Harlan recognized that the Court must hold the states to their constitutional obligations. But in carrying out this responsibility, he bore in mind the virtues of reform brought about by legislators rather than by judges. Once again, his own words capture the point best. Dissenting in *Reynolds v. Sims*,¹⁸ he said: "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; in time a complacent body politic may result."¹⁹

To those who think courts should act on occasion as super-legislatures, Harlan responded that "[a] function more ill-suited to judges can hardly be imagined, situated as they are . . . aloof from the political arena and beholden to no one."²⁰ As I think these views show, Harlan's range of experience and his wisdom gave him a sound sense of his own place in our system of government.

*Admiration of His Colleagues*²¹

Finally, in closing, I cite the views of current Justices who were privileged to sit with Justice Harlan. All of them considered this a special honor.

Justice Brennan, who joined the Court only a year and a half after Harlan, had the longest relationship. These were years of personal as well as professional friendship. The Brennans and the Harlans often dined together. I learned for the first time that Justices Reed, Clark, Harlan, and Brennan played golf together at Burning Tree: What a foursome!

In describing Harlan as a judicial scholar, Bill Brennan noted that "all of us profess to engage in disinterested decision-making." But John Harlan succeeded "beyond the capacity of most of us. It was his hallmark as a Justice." Contrary to some who have thought that Harlan was influenced by Frankfurter's views on federalism, Bill Brennan disagrees: "John's views, constitutional and otherwise, were uniquely his own. It was Harlan, not Frankfurter who suggested the inclusion of the language in *Cooper v. Aaron* . . . that emphasizes the continued unanimity of the Court in adhering to *Brown v. Board of Education*, despite the presence of three new Justices." That language, I might add, played a significant part in quelling legal obstruction to desegregation.

And Justice Brennan, like others who served with him, does not

18. 377 U.S. 533 (1964).

19. *Id.* at 624 (Harlan, J., dissenting).

20. Harlan, *supra* note 17, at 944.

21. I am indebted to Chief Justice Burger and Justices Brennan, White, Blackmun and Stewart for sharing their sentiments regarding Justice Harlan.

understand why there has never been "the full recognition of [Harlan's] massive scholarship."

I quote only briefly the view of other Justices. Byron White spoke of Harlan's "impressive presence in Conference, his persuasive writing, and his great integrity." Byron noted particularly "the mutual affection and respect between John and Hugo Black"—a relationship similar to that between Harlan and Brennan, in that it flourished despite their frequent differences on major constitutional issues.

Harry Blackmun, who served with Harlan only for a year and a half, also has a special feeling of respect and affection for John Harlan. Harry describes him as "the personification of a New York patrician. He looked and acted like one, was at once soft and polite, but with steel beneath it."

Perhaps Potter Stewart was Harlan's closest personal friend. He was given the sad duty of delivering Harlan's letter of retirement to the President on September 23, 1971. After Harlan's death, Potter wrote: "[W]hat truly set [Justice Harlan] apart was his character . . . his generous and gallant spirit, his selfless courage . . . his total decency."²²

As you know, during his last few years on the Court, Justice Harlan's deteriorating eye sight reached the point of functional blindness. At Conference his vote books were written in letters almost an inch square, and he had great difficulty reading even these. His Chambers were specially lighted, yet he declined to have extra law clerks, and developed a remarkable talent for memorizing essential matters. He would announce important portions of opinions from the bench, almost verbatim without a note. He never complained or sought sympathy for this severe handicap.

Although Chief Justice Burger and Harlan had been friends for many years, they served together on the Court for only two years. The Chief marveled at Harlan's uncomplaining ability, in spite of blindness, to carry his full share of the Court's work. Speaking eloquently at the memorial proceedings on October 24, 1972, the Chief Justice described John Harlan's legacy to the law, and emphasized the "riches of memory each of his former colleagues will carry so long as we have the power of memory."²³

In summary and conclusion, I quote a brief excerpt from the Resolutions adopted at the Court's memorial service:

[Justice Harlan] possessed in the highest degree the qualities of character and dedication which are an essential component

22. Statement to the press by Associate Justice Potter Stewart (Dec. 29, 1971).

23. Proceedings in the Supreme Court of the United States, in Memory of Mr. Justice Harlan, 409 U.S. v, xxx (1972).

of a truly great judge These qualities [that included integrity, fairness, courtesy, intellectual and physical courage, and his devotion to the Court and to his country] won for him the admiration and affection of his colleagues²⁴

I can only add that fifteen years after John Harlan's passing, these same qualities merit the admiration of our shared profession.

24. *Id.* at xix-xx.

