

October 12, 1951

RECEIVED
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CHIEF JUSTICE
MEMORANDUM TO THE CONFERENCE

No. _____, 1951 Term. Whitehead v. Henry

A petition for extension of time to file certiorari addressed to me in the above case raises a question of interpretation of 28 USC §2101(c) which I desire to refer to the Conference.

Petitioner had judgment rendered against him by the Court of Appeals of Georgia on July 13, 1951; his petition for rehearing was denied on July 25, and his application for certiorari from the Supreme Court of Georgia was denied on September 12. He has asked for an extension on the theory that under §2101(c) the time limit to file certiorari here will run from July 13 or July 25.

I am of the opinion that under the proper interpretation of §2101(c) the time limit begins to run from the September 12 date. This seems to be supported by American Railway Express Co. v. Levee, 263 US 19 (1923), and certainly by better practice. If the members of the Conference agree, I will simply deny the application as unnecessary.

HUGO L. BLACK

C O P Y

November 6, 1934.

Major J. C. Fegan,
Headquarters, U. S. Marine Corps,
Washington, D. C.

My dear Major Fegan:

I am in receipt of your letter of October 24, 1934, in which you request information as to the inscription, "Equal Justice Under Law," which appears over the main entrance of the U. S. Supreme Court Building.

It is well recognized that while justice may be administered in exact compliance with all the requirements of established law, it is often impossible under law, due to lack of flexibility in the law itself, to render absolute or ideal justice. The recognition of this fact resulted in the establishment of courts in equity. In Webster's dictionary, the following distinction is drawn between justice and equity: "In ordinary usage, justice implies a strict and judicial rendering of what is due. Equity emphasizes rather the idea of fairness and even-handed impartiality." Equity is defined by Funk & Wagnalls' and also Bouvier's dictionary as "equal justice," and the Century Dictionary and Encyclopedia gives as a definition of equity "equal or impartial justice". The inscription may, therefore, be interpreted to mean equity (equal justice) under and by authority of law.

As further authority for the use of the term "equal justice," which at first glance may seem redundant, the first inaugural address of Thomas Jefferson at Washington makes reference to "equal and exact justice to all men," in the following passage:

"About to enter, fellow-citizens, on the exercise of duties which comprehend everything dear and valuable to you, it is proper you should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration. I will compress them within the narrowest compass they will bear, stating the general principle, but not all its limitations. Equal and exact justice to all men, of whatever state or persuasion, religious or political;"

Yours very truly,

(David Lynn),
Architect of the Capitol.

HDR:S

C O P Y

October 24, 1933.

PERSONAL.

My dear Dean Ackerman:

I have received your letter of October the twenty-third. The construction of the Supreme Court Building is in charge of the Supreme Court Building Commission of which, as Chief Justice, I am Chairman. The other member of the Court, who is also a member of the Commission, is Mr. Justice Van Devanter. The Architect of the Capitol is the Executive Officer of the Commission.

Inscriptions for the porticos were proposed by the architects of the building (Cass Gilbert's firm) and were submitted to me, as Chairman of the Commission, by the Architect of the Capitol. The inscription to which you refer is a modification of one of those thus submitted. It was put in its present form by me in consultation with Mr. Justice Van Devanter.

With kind regards, I am,

Sincerely yours,

Dean Carl W. Ackerman,
School of Journalism, Columbia University,
New York City, N.Y.

C O P Y

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C.

October 24, 1933.

My dear Justice Van Devanter:

I enclose a letter from Dean Ackerman of the School of Journalism of Columbia University, with a draft of my proposed reply, as to which I should like any suggestion you may care to make. I also enclose, to refresh your memory, the correspondence with Mr. Lynn and my memorandum, with your endorsement, relating to the matter.

I cannot gather from Dean Ackerman's letter whether or not he likes the inscription. I still think that it is most appropriate.

Faithfully yours,

S/ Charles E. Hughes

Mr. Justice Van Devanter.

Enclosures.

I still think the inscription appropriate,
and your draft of proposed reply is entirely
satisfactory to me.

S/ W.V.

C O P Y

October 24, 1933.

My dear Justice Van Devanter:

I enclose a letter from Dean Ackerman of the School of Journalism of Columbia University, with a draft of my proposed reply, as to which I should like any suggestion you may care to make. I also enclose, to refresh your memory, the correspondence with Mr. Lynn and my memorandum, with your endorsement, relating to the matter.

I cannot gather from Dean Ackerman's letter whether or not he likes the inscription. I still think that it is most appropriate.

Faithfully yours,

Mr. Justice Van Devanter.

Enclosures.

C O P Y

COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK
School of Journalism
Office of the Dean

October 23, 1933

Hon. Charles Evans Hughes
Chief Justice
United States Supreme Court
Washington
D.C.

My dear Mr. Chief Justice:

In the current number of "The Cathedral Age" I noticed a photograph of the new United States Supreme Court building in Washington, D. C. Across the portico is the inscription "Justice, the guardian of liberty."

If it is at all possible for me to obtain any information in regard to the origin of this phrase, who recommended it to the architects, how it was selected and who assumed the responsibility for the decision, I should appreciate it very highly.

Respectfully and faithfully yours,

S/ Carl W. Ackerman
Dean.

CWA/l

C O P Y

ARCHITECT OF THE CAPITOL

Washington, D.C.

May 2, 1932.

Honorable Charles Evans Hughes,
Chairman, U. S. Supreme Court Building Commission,
Washington, D. C.

My dear Mr. Chief Justice:

The architects for the U. S. Supreme Court Building have suggested inscriptions be placed in the main frieze, East and West Porticos, as follows:

For the West Portico -

"EQUAL JUSTICE UNDER LAW"

For the East Portico -

"EQUAL JUSTICE IS THE FOUNDATION OF LIBERTY"

These inscriptions are submitted for your comment and approval, if satisfactory; if not satisfactory, the architects state that they will be pleased to have suggestions from you.

Yours very truly,

S/ David Lynn

(David Lynn),
Architect of the Capitol.

HDR:S

C O P Y

May 21, 1932.

My dear Mr. Lynn:

In answer to your letter of May the second: I have consulted with Mr. Justice Van Devanter, and we approve the inscription for the West Portico, to wit:

"EQUAL JUSTICE UNDER LAW"

We think that the inscription for the East Portico can be improved, and we favor the following:

"JUSTICE THE GUARDIAN OF LIBERTY"

It seems from the designs that other inscriptions are to be placed in various parts of the interior of the building and perhaps there are to be others on the outside. We do not desire any arrangement to be made for any of the inscriptions until they have been submitted for approval.

Very sincerely yours,

Mr. David Lynn,
Architect of the Capitol,
Washington, D. C.

COPY

ARCHITECT OF THE CAPITOL

Washington, D.C.

May 10, 1932.

Honorable Charles Evans Hughes, Chairman,
U. S. Supreme Court Building Commission,
Washington, D. C.

My dear Mr. Chief Justice:

Referring to this office's letter of May 2, 1932, and to your letter of May 3, 1932, with regard to the proposed inscriptions for the U. S. Supreme Court Building, the following letter dated May 7, 1932, has been received from Mr. John R. Rockart, Architect:

"Receipt is acknowledged of your letter of May 4th, quoting a letter to you from Chief Justice Hughes referring to inscriptions to be cut in exterior marble, submitted to him for approval.

"Answering specifically Chief Justice Hughes' question as to 'when will it be necessary to pass upon the suggestions or to propose substitutes, in order not to delay the progress of the work?' we would state that the contractors have been repeatedly requesting information and instructions regarding the approval of these inscriptions, and, in view of this, action to that end should be taken as soon as possible."

Yours very truly,

S/ David Lynn

(David Lynn)
Architect of the Capitol.

LM

C O P Y

HERBERT BAYARD SWOPE
1270 Sixth Avenue
New York

January 25, 1935.

Dear Mr. Chief Justice:-

May I presume upon the admiration and friendship I have felt for many years, to attempt an indictment of you and your interesting associates? For my purpose, I shall assume the right of the Napoleonic Code, and, regarding you as guilty until you prove your innocence, I return the following presentment:

I accuse the Great Court, of which you are Chief, of having violated an important canon of English.

I accuse the said Court of having permitted tautology, verbosity and redundancy, each of which is an abomination in good usage.

Here is the gravamen of my charge:

On the lintel of the new Supreme Court building there is engraved:

EQUAL JUSTICE UNDER THE LAW"

(This is the inscription shown upon photographs, and I assume the photographic record is competent evidence).

I submit, Your Honor, that the adjective "equal" has no place in the sentence. It is a distorting qualification which robs the thought of its true meaning. At best, it is supererogatory. Its employment is proof per se of my complaint.

I ask for immediate judgment and the excision of the offending word, so that the house of the United States Supreme Court may continue to be the temple of Astraea, where there always shall be "a well of English undefiled."

With high regard,

Faithfully,

The Honorable
Charles Evans Hughes,
Chief Justice of the Supreme Court,
Washington, D.C.

S/ Herbert Bayard Swope

C O P Y

February 4, 1935.

PERSONAL

My dear Mr. Swope:

Immediate judgment. Indictment quashed.

The distress which led to your complaint may be somewhat alleviated if for a moment you free yourself from the tyranny of the blue pencil and consider the history of the law. "Equal justice" is a time-honored phrase placing a strong emphasis upon impartiality, - an emphasis which it is well to retain.

Dictionaries use the expression in defining "Equity": - "Standard" - "equal justice"; "Century" - "equal or impartial justice".

Glance at the first inaugural of Thomas Jefferson - is he not still your favorite author? - one who had much to say about "Justice". But he was not content to say simply "Justice". Even when he wished to bring his expression of political ideals within the "narrowest compass" he spoke of "equal and exact justice to all men",:

"About to enter, fellow-citizens, on the exercise of duties which comprehend everything dear and valuable to you, it is proper you should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration. I will compress them within the narrowest compass they will bear, stating the general principle, but not all its limitations. Equal and exact justice to all men, of whatever state or persuasion, religious or political;" (1 Messages and Papers of the Presidents, p. 323).

Probably no sentence in our reports is more frequently quoted than the one you will find in the opinion delivered for the Court by Justice Stanley Matthews in the famous case of Yick Wo v.

Hopkins, 118 U. S. pp. 373, 374:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution".

Our oath drives the point home. It was prescribed in the first Judiciary Act of 1789:

"I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

If I had time I could give you a host of illustrations of the use of the phrase "Equal Justice". There is a long history in that phrase. Try to bear with it.

Very sincerely yours,

Mr. Herbert Bayard Swope,
1270 Sixth Avenue,
New York City, N. Y.

C O P Y

HERBERT BAYARD SWOPE
1270 Sixth Avenue
New York

February 14, 1935.

My dear Mr. Chief Justice:-

I am flattered by the friendliness of your letter and impressed by its dialectical quality, but, if I may be pardoned, not completely convinced by it.

However, I do not intend to further trespass upon your good nature at this time. It was thoughtless of me to have written you when I did, with the world awaiting the Court's decision on the gold clause. Before resuming this colloquy, I shall await your pronouncement, assuring you in advance that I am ready to accept it as being cast in the mould of Justice - and I am impervious to the dictum of T. Jefferson, who would, as you point out, have asked for more than that.

So, I beg you to let me reenter the lists after the golden guerdons have been awarded - or withheld.

With warm regard,

Faithfully,

S/ Herbert Bayard Swope

Honorable Charles Evans Hughes,
Chief Justice of the Supreme Court,
Washington, D.C.

C O P Y

February 16, 1935.

My dear Mr. Swope:

I have received your letter of
February 14th. Please consider the matter
closed.

Very sincerely yours,

Mr. Herbert Bayard Swope,
1270 Sixth Avenue,
New York City, N. Y.

C O P Y

U.S. SUPREME COURT BUILDING
DESCRIPTION OF SCULPTURE
FIGURES, APPROACH, MAIN ENTRANCE

--oOo--

The two figures for the approach to the West facade of the Supreme Court were designed to be harmonious with the classic tradition of the building, and yet not copies of the antique. They are not perfunctory, but each has a meaning for the present.

Female Figure

Contemplation of Justice

The female figure depicts the contemplation of justice, the attitude is one of meditation. The right hand rests on a small model of a figure of Justice. Under the left hand is a book of laws. The expression is one of penetrating contemplation.

Male Figure

Executor of Law

The male figure is powerful, erect and vigilant. He waits with concentrated attention, holding in his left hand the tablet of laws, backed by the sheathed sword, symbolic of enforcement through law.

JAMES E. FRASER,
Sculptor,
New York City.

C O P Y

U. S. SUPREME COURT BUILDING

DESCRIPTION OF SCULPTURE

FLAGPOLE BASES

--oOo--

Identification of four figures on the base of the two flag-
poles, as follows:

Scales and Sword.....	Strength of justice
Book.....	Learning
Mask and Torch.....	Light removing mask of untruth
Pen and Mace.....	Legislation

Identification of four discs above the swag, as follows:

Eagles head.....	Air
Lions head.....	Earth
Tripod of flame.....	Fire
Fish head.....	Water

JOHN DONNELLY, INC.,
Modeler,
New York City.

C O P Y

U. S. SUPREME COURT BUILDING
DESCRIPTION OF SCULPTURE
COURT ROOM

EAST WALL FRIEZE

The dominant motif in this frieze shows two powerful seated male figures of heroic proportions, representing the "Majesty of the Law" and "The Power of Government." Flanking this group at either side are the genii of Wisdom and Justice.

To the right of this central motif is a group symbolic of the "Safeguard of the Liberties and Rights of the People in their pursuit of Happiness" and to the left "The Defense of Human Rights and Protection of Innocence."

WEST WALL FRIEZE

The dominant motif in this frieze shows a central group of "Justice" resting upon her sheathed sword with the winged figure of "Divine Inspiration" balancing the scales, the two flanked at either side by the seated figures of "Truth" and of "Wisdom."

At the right of this central group are "The Powers of Evil" as shown in the two figures struggling in the coils of a serpent, the figures of "Corruption and Slander, Deception and Despotism."

At the left of the central group are "The Powers of Good" as shown in the "Defense of Virtue" with "Charity, Peace, Harmony and Security."

NORTH AND SOUTH WALLS

Both the North and South Wall Frieze of the Supreme Court Room are composed as a procession of the Great Lawgivers of History, the procession terminating at both ends of each frieze in an allegorical group.

In the South Wall Frieze are represented Menes, Uniter and Ruler of Upper and Lower Egypt, about 4000 B.C. Hammurabi, King of Babylon, about 2500 B.C. Moses, Solomon, Lycurgus, Solon, Draco, Confucius and Octavian. The movement of these figures is toward the East Wall. The allegorical groups at either end of this frieze represent "History" and "Fame." The standing winged figure at left, with fasces, symbolizes "Authority." The standing winged figure at right, with lamp, is guarding the "Light of Wisdom."

In the North Wall Frieze are represented Justinian, Mohammed, Charlemagne, King John, St. Louis, Hugo Grotius, Blackstone, Marshall and Napoleon.

The movement of these figures is also toward the East Wall. The allegorical groups at either end of this frieze represent "Philosophy" and "Liberty and Peace."

The standing winged figure at left, with disc of the flaming sun, symbolizes "The Right of Man." The standing winged figure at right, with scales, is symbolic of "Equity."

A. A. WEINMAN,
Sculptor,
New York City.

C O P Y

U. S. SUPREME COURT BUILDING

DESCRIPTION OF SCULPTURE

EASTERN PEDIMENT

--oOo--

Law as an element of civilization was normally and naturally derived or inherited in this country from former civilizations.

The "Eastern Pediment" of the Supreme Court Building suggests therefore the treatment of such fundamental laws and precepts as are derived from the East.

Moses, Confucius and Solon are chosen as representing three great civilizations and form the central group of this Pediment.

Flanking this central group - left- is the symbolical figure bearing the means of enforcing the law.

On the right a group tempering justice with mercy, allegorically treated.

The "Youth" is brought into both these groups to suggest the "carrying on" of civilization through the knowledge imbibed of right and wrong.

The next two figures with shields; left - The settlement of disputes between states through enlightened judgment. Right - Maritime and other large functions of the Supreme Court in protection of the United States.

The last figures: Left - Study and pondering of judgments. Right - A tribute to the fundamental and supreme character of this Court. Finale - The fable of the Tortoise and the Hare.

HERMAN A. MacNEIL,
Sculptor,
New York City.

C O P Y

U. S. SUPREME COURT BUILDING

DESCRIPTION OF SCULPTURE

WESTERN PEDIMENT

---oOo---

In designing the Sculpture for the Western Pediment the aim has been toward simplicity with directness of motif - a composition rich in relief (light and shadow), and true in balance and scale to its architectural setting.

A simple Sculptural story is as follows:

"Liberty enthroned - looking confidently into the Future - across her lap the Scales of Justice - She is surrounded in the composition by two Guardian figures. On her right "Order" (the most active or alert of the two) scans the Future ready to detect any menace to Liberty. On her left "Authority" is shown in watchful restraint yet ready to enforce, if necessary, the dictates of Justice. Then to the right and left of the Guardian figures groups of two figures each represent "Council." Then right and left two recumbent figures represent "Research" Past and Present.

Liberty

	Authority	Order	
	Chain armor	Roman	
	Sword	Fasces	
Council			Council
Research			Research
Present			Past
English crown			Roman scrolls
Popes Miter			Mosaic tables
Bishops Crosier			

ROBERT AITKEN,
Sculptor,
New York City.

- 2 -

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Our oath drives the point home. It was prescribed in the first Judiciary Act of 1789:

"I _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

If I had time I would give you a host of illustrations of the use of the phrase "Equal Justice." There is a long history in that phrase. Try to bear with it.

Very sincerely yours,

[Charles E. Hughes]

Mr. Herbert Bayard Swope,
1270 Sixth Avenue,
New York City, N.Y.

C O P Y

U. S. SUPREME COURT BUILDING

DESCRIPTION OF SCULPTURE

MAIN ENTRANCE DOORS

--oOo--

SHIELD OF ACHILLES

SCENE IN SHIELD OF ACHILLES, THE MOST FAMOUS REPRESENTATION OF PRIMITIVE LAW, SIGNIFYING THE ORIGIN OF LAW AND CUSTOM. TWO MEN DEBATE AND TWO GOLD PIECES ON STONE TO BE GIVEN THE MAN WHO SPEAKS THE "STRAIGHTEST JUDGMENT."

PRAETOR'S EDICT

THE PRAETOR PUBLISHES HIS EDICT PROCLAIMING JUDGEMADE LAW IN ROME SIGNIFYING THE IMPORTANCE OF THE JUDGES WORK.

JULIAN AND SCHOLAR

JULIAN CONSULTS AND INSTRUCTS HIS PUPILS. THE DEVELOPMENT OF LAW BY THE SCHOLAR AND ADVOCATE.

JUSTINIAN CODE

JUSTINIAN PUBLISHES THE CORPUS JURIS FORMING THE FIRST CODE OF LAW.

MAGNA CARTA

KING JOHN IS FORCED TO SIGN THE MAGNA CARTA GIVING THE LEGAL RIGHTS TO ALL MEN.

CHANCELLOR AND EDWARD I.

THE CHANCELLOR PUBLISHES THE STATUTE OF WESTMINSTER IN THE PRESENCE OF KING EDWARD I. THE GREATEST SINGLE LEGAL REFORM IN OUR HISTORY.

COKE AND JAMES I.

COKE BARS KING JAMES I FROM SITTING AS A JUDGE IN THE "KINGS COURT" THEREBY MAKING THE COURT INDEPENDENT OF THE EXECUTIVE BY LAW.

JOHN MARSHALL

CHIEF JUSTICE MARSHALL (DELIVERING THE MARBURY VS. MADISON OPINION.)

JOHN DONNELLY, INC.,
Modeler,
New York City.

NOT SO - IT SHOWS

CHIEF JUSTICE MARSHALL AND JUSTICE STORY

(But Story joined the Court in 1811 and Marbury v Madison was decided in 1803)

August 8, 1950

Dear Harold:

Thank you for your letter of July 6th relative to the inscriptions on the Supreme Court building. I appreciate your calling this very interesting subject to my attention.

I think it is perfectly all right for you to send your friend, Senator Brewster, a copy of Chief Justice Hughes' letter of February 4, 1935.

Sincerely,

[Signed] Fred W. Vinson

Mr. Justice Burton.

6/6/51
To The Chief Justice
1953

February 4, 1935

PERSONAL

My dear Mr. Swope:

Immediate judgment. Indictment quashed.

The distress which led to your complaint may be somewhat alleviated if for a moment you free yourself from the tyranny of the blue pencil and consider the history of the law. "Equal justice" is a time-honored phrase placing a strong emphasis upon impartiality - an emphasis which it is well to retain.

Dictionaries use the expression in defining "Equity": -

"Standard" - "equal justice"; "Century" - "equal or impartial justice."

Glance at the first inaugural of Thomas Jefferson - is he not still your favorite author? - one who had much to say about "Justice." But he was not content to say simply "Justice." Even when he wished to bring his expression of political ideals within the "narrowest compass" he spoke of "equal and exact justice to all men":

"About to enter, fellow-citizens, on the exercise of duties which comprehend everything dear and valuable to you, it is proper you should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration. I will compress them within the narrowest compass they will bear, stating the general principle, but not all its limitations. Equal and exact justice to all men, of whatever state or persuasion, religious or political;" (1 Messages and Papers of the Presidents, p. 323.)

Probably no sentence in our reports is more frequently quoted than the one you will find in the opinion delivered for the Court by Justice Stanley Matthews in the famous case of Yick Wo v. Hopkins, 118 U.S. 373, 374:

Supreme Court of the United States

Memorandum

May 16

x 32

-----, 194---

I rather prefer

"Justice the Guardian
of Liberty"

C.E.H.

Good (W.V.)

Supreme Court of the United States

Memorandum

-----, 194---

See 103 U.S. XI

(W.V.)

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

July 6, 1950

Dear Chief:

Inscriptions on the Supreme Court Building

Recently there came to my attention, through the Marshal, an interesting file of correspondence relating to the inscriptions on the West and East Porticos of the Supreme Court Building: EQUAL JUSTICE UNDER LAW and JUSTICE THE GUARDIAN OF LIBERTY.

In this file Chief Justice Hughes shows that these inscriptions do not have a direct historical basis but were suggested by the architect and, in the second instance, modified by the Chief Justice in cooperation with Justice Van Devanter.

Of particular interest is the reply which Chief Justice Hughes made on February 4, 1935, to a critical letter addressed to him by Herbert Bayard Swope under date of January 25, 1935, relating to the inscription EQUAL JUSTICE UNDER LAW.

If this material has not already come to your attention, I believe you will be interested in it and, for that reason, I have had copies of the material in the file made for you as well as for me.

From time to time, Senator Brewster of Maine has raised a similar criticism of the inscription EQUAL JUSTICE UNDER LAW as that raised by Mr. Swope. Unless you see some objection, I would like to send him a copy of Chief Justice Hughes' letter of February 4, 1935. I do not propose to send him copies of the Swope correspondence which preceded and followed that letter. Such correspondence is a bit too colorful and makes too much of a story of the whole thing. Such a story probably would do more harm than good but the letter from Chief Justice Hughes itself might do some good without doing any harm.

Yours sincerely,

HHB

The Chief Justice

Original Filed in VIP Correspondence File

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

October 21, 1946

MEMORANDUM FOR THE CONFERENCE

In the Matter of Van Sweringen Corporation,
Debtor, and The Cleveland Terminals Building
Company, Subsidiary Debtor

On Saturday, October 19, I asked that consideration of the above case be delayed so that I might examine it further. I now find that, while the law firm with which my son is associated in Cleveland is not listed on the briefs, it is listed in the transcript of the record and that members of the firm, both as individuals on their own account, and as members of the firm, are representing parties to the case as presented here.

I regret, therefore, that I feel it necessary to disqualify myself and to leave the interesting intricacies of this case to the other members of the Court.

Harold H. Burton

HHB/thc

July 16, 1947

Dear Harold:

Just a word of regret at not seeing you before you hop off to Switzerland. Near lunchtime, I was advised that you were having some friends for lunch, and then I had no later information that you were available until I had to tear away about 4:25 for the ceremonies at the French Embassy when the French Medal was presented posthumously to Mrs. Roosevelt for her illustrious husband.

I had nothing on my mind except to thank you again for the year's association with you - for your carrying more than your part of the heavy load - and for your never failing loyalty to high purpose view of the law and your love of country.

Roberta joins me in the hope that Selma and you will have a most enjoyable summer.

Your friend,

(Signed) Fred

Honorable Harold H. Burton,
Dodge Hotel,
Washington, D.C.

FMV:McH



Z 465 Zürich. Qualbrücke, Utoqual

Berne, Switzerland.

Aug. 4. 1947.

Dear Chief.

Selma & I are enjoying
our trip here - the picture is
of Zurich - the largest city in
Switzerland (about 370,000),
where we were Aug. 2-3.

Our trip over on the
Dutch ship was excellent. We
sat with the Vice Pres. of the
High Court of the Netherlands
his wife, who had been visiting
a ~~new~~ ^{new} ~~son-in-law~~ ^{son-in-law} & granddaughter
in Canada. Later they invited us
to the Hague & we visited the
beautiful new (1938) High Court
Bldg. which corresponds to ours &
is not related to the International
Court of Justice. Best wishes to Robert &
you from Selma & me.



VERLAG BERINGER & PAMPALUCHI, ZÜRICH-BERNE



Hon.

Fred M. Vinson

Chief Justice, Supreme
Court of the United States,
Washington, D.C.

U.S.A.

1/11

Supreme Court of the United States
Washington, D. C.

July 20, 1947

Dear Ted -

It was more than
thoughtful of you to send me
your note of July 16th. I
appreciate it.

Selma and I are
sailing on July 23rd and we
expect to be back in Washington
in September 3rd.

We wish you and
Roberta the happiest kind of
a summer and see you are
making a good start at Newport.

Sincerely, Harold

P. Speeches - Misc.

"JUDGING IS ALSO ADMINISTRATION"

AN APPRECIATION OF CONSTRUCTIVE LEADERSHIP IN THE JUDICIAL ADMINISTRATION OF THE COURTS OF THE UNITED STATES

Address by HON. HAROLD H. BURTON, Associate Justice of the
Supreme Court of the United States, before the Section of
Judicial Administration, American Bar Association,
Cleveland, Ohio, September 24, 1947

On June 30, 1921, former President William Howard Taft was nominated Chief Justice of the United States. At the October Term he found the Supreme Court of the United States more than a year behind in its docket.¹ The Court was flooded not only with cases entitled to full consideration but with many not justifying further review. The Court sat in the much-liked original Senate Chamber in the Capitol but lacked adequate facilities for its library, its Clerk, its Marshal, the members of its Bar and the chambers of its Justices. The rules of procedure throughout the federal court system were antiquated and cumbersome. Many of the lower federal courts were behind in their dockets but there was little authoritative information by which to measure the need for additional permanent district or circuit judges. There was no coordination between the administrative offices of the federal courts, much less any businesslike control over their operations. There was no authorized procedure for mobilizing the experience of the courts to help Congress consider legislation dealing with judicial administration.

¹ "By 1921 it required between something more than a year to something less than two years for a case to be reached for argument after its docketing, and there was grave ground for apprehension that the calendar would soon become even more congested." Charles E. Hughes, Jr., in Proceedings in Memory of Mr. Justice Van Devanter, 316 U. S. V, XII.

On March 30, 1922, Chief Justice Taft estimated that it then took eighteen to twenty-four months to reach an ordinary case on the Docket. Hearing before Committee on the Judiciary, House of Representatives, on H. R. 10479, 67th Cong., 2d Sess. 7, 12.

Instead of translating the tremendous motive power of the people into efficient judicial action, the administration of our courts often handicapped the judges in dispensing justice. It was clear that not only wisdom and clarity but speed and efficiency were essential to the judicial process. "Judging is also administration";² and in the face of such conditions, Chief Justice Taft and his successors in office have demonstrated the value of competent judicial administration to the cause of justice.

Almost exactly twenty years later, when Chief Justice Charles Evans Hughes, on July 1, 1941, retired from his eleven years of arduous service which followed the equally arduous nine of his predecessor, the judicial administration of the Supreme Court of the United States had changed from a cause of national concern to one of national pride. The federal judiciary had been converted from an outstanding example of an unordered judiciary to an outstanding example of efficient judicial administration. Chief Justices Harlan Fiske Stone and Fred M. Vinson have maintained this high standard.

1921-1941 was a time when economic readjustments led to many fundamental changes in governmental structures and policies. Nevertheless, through the application of the wide executive experience of the two Chief Justices of the United States who served in that period, the courts of the United States not only preserved our judicial structure but strengthened it.

² Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 *Harv. L. Rev.* 579, 613. That article is the concluding one in the following series covering the Judicial Administration of the Supreme Court of the United States since 1789:

Frankfurter and Landis, *The Business of the Supreme Court (1789-O. T. 1926)*; Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925 (O. T. 1927)*, 42 *Harv. L. Rev.* 1; Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1928*, 43 *id.* 33; (O. T. 1929), 44 *id.* 1; (O. T. 1930), 45 *id.* 271; (O. T. 1931), 46 *id.* 226; Frankfurter and Hart (O. T. 1932), 47 *id.* 245; (O. T. 1933), 48 *id.* 238; (O. T. 1934), 49 *id.* 68; Frankfurter and Fisher (O. T. 1935 and 1936), 51 *id.* 577.

The technique of the judicial process is as properly the responsibility of the judges and lawyers as the technique of automobile production is the responsibility of mechanical, industrial and financial experts. Judicial administration is largely a technical matter dealing with the jurisdiction, structure, procedure, personnel and equipment of the courts and of their administrative agencies. Each of these subjects in our federal judicial system needed and received the personal attention of Chief Justices Taft and Hughes. They came to this task of judicial administration equipped with an extraordinary wealth of appropriate experience. In addition to several years of federal judicial experience, each had had long and practical experience in dealing with the executive and legislative procedure of a free and representative government. Each had an appreciation of the initiative, determination and patience required to secure the substantial improvements sought.³ Chief Justice Taft laid the essential foundations

³ Chief Justice Taft, in addition to many years spent in the general practice of his profession, in professional organizations, and in his service as Chief Justice of the United States, 1921-1930, served as: Assistant Prosecuting Attorney of Hamilton County, Ohio, 1881-1883; Assistant County Solicitor of Hamilton County, 1885-1887; Judge of the Superior Court in Cincinnati, Ohio, 1887-1890; Solicitor General of the United States, 1890-1892; U. S. Circuit Judge for the Sixth Circuit, 1892-1900; Professor and Dean of the Law Department, University of Cincinnati, 1896-1900; President of the U. S. Philippine Commission, and later the First Civil Governor of the Philippine Islands, 1900-1904; Secretary of War, 1904-1908; and President of the United States, 1909-1913. During his Presidency, Congress adopted the Judicial Code of March 3, 1911, and he appointed to the Supreme Court Associate Justices Lurton, Hughes, Van Devanter, J. R. Lamar and Pitney. He also appointed Associate Justice White as Chief Justice of the United States. From 1913-1921, he served as Kent Professor of Law at Yale University.

Chief Justice Hughes, in addition to his general practice of his profession, his activity in professional organizations and his service as Chief Justice of the United States, 1930-1941, served as: Professor of Law and Lecturer at Cornell and at the New York School of Law, 1891-1900; counsel for the Stevens Gas Commission (N. Y. Legis-

for the improved judicial administration of the federal courts. Chief Justice Hughes built important superstructures upon those foundations.

Of their contributions to the improvement of judicial administration five are emphasized here:

1. The Coordination of the Federal Judiciary.
2. The Enlargement of the Discretionary, and the Restriction of the Obligatory, Jurisdiction of the Supreme Court.
3. The Building and Equipment of the Supreme Court Building.
4. The Federal Rules of Civil Procedure.
5. The Administrative Office of the United States Courts.

1. *The Coordination of the Federal Judiciary.*

Traditionally, not only the Supreme Court but each court of the United States had been administratively independent of every other court and of every administrative control. While litigated cases moved from court to court, and orders issued by the several courts generally were obeyed by those to whom they were directed, there was little coordination of administrative service. There was no statistical information, authoritatively analyzed, as to the work of the courts. Statistical material presented to Congress as a basis for appropriations was collected largely by the Attorney General of the United States. This produced the inappropriate result that the federal courts, before which the Attorney General's staff constantly appeared, were dependent upon that same Attorney General for recommendations in support of appropriations for the courts.

lature), 1905; counsel for the Armstrong Insurance Commission (N. Y. Legislature), 1905-1906; Governor of New York, 1907-1910; Associate Justice of the Supreme Court of the United States, 1910-1916; Candidate for President of the United States, 1916; Secretary of State of the United States, 1921-1925; member of the Permanent Court of Arbitration, The Hague, 1926-1930; Judge of the Permanent Court of International Justice, 1928-1930.

In 1921, the most pressing need of the federal courts was for additional judges or for a reduction in pending cases. The absence of factual data as to the comparative needs of the different districts made it difficult for anyone to determine what relief might be secured by temporary reassignments of judges between districts and even between circuits. Furthermore, there was no judicial authority adequate to make such reassignments or even to bring judges together to prepare recommendations as to the relative needs of their respective districts.

As soon as William Howard Taft became Chief Justice, he brought to bear on this issue his unique combination of experience as a Circuit Judge and as President of the United States. He saw all sides of the question. As President he had devoted much attention to the appointments he made to the federal judiciary and he had approved the creation of two new courts, namely, the United States Court of Customs Appeals⁴ and the United States Commerce Court.⁵ Since 1909, the American Bar Association had advocated judicial reform pointing toward a unified judiciary and a judicial council.⁶ In 1914, after leaving the Presidency, Mr. Taft had urged the establishment of a council of federal judges "to consider each year the pending Federal judicial business of the country and to distribute [the] Federal judicial force of the country through the various districts and intermediate appellate courts, so that the existing arrears may be attacked and disposed of."⁷

⁴ Act of August 5, 1909, 36 Stat. 105. It is now the United States Court of Customs and Patent Appeals, Act of March 2, 1929, 45 Stat. 1475.

⁵ Act of June 18, 1910, 36 Stat. 539. Abolished by Act of October 22, 1913, 38 Stat. 219.

⁶ Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 34 Am. Bar Assn. Rep. 578.

⁷ William H. Taft, The Attacks on the Courts and Legal Procedure, Address at Cincinnati Law School Commencement, May 23, 1914, 5 Ky. L. J. 1, 15.

As Chief Justice, he gave his vigorous support⁸ to a proposed amendment to the Judicial Code providing for the summoning annually by the Chief Justice of the United States of a Conference of the Senior Circuit Judges to meet in Washington on the last Monday in September. The amendment proposed, among other things, that—

“Said conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business.”⁹

⁸ His support included, among other efforts, his testimony of October 5, 1921, in the Hearings on S. 2432, 2433 and 2523, before the Senate Committee on the Judiciary, 67th Cong., 1st Sess., 11. During the pendency of the Bill in Congress, he spoke on this subject before the American Bar Association at Cincinnati, August 10, 1921, 46 Am. Bar Assn. Rep. 561, and at San Francisco, August 10, 1922, 8 Am. Bar Assn. J. 601, 47 Am. Bar Assn. Rep. 250, 6 J. Am. Jud. Soc. 36, 57 Am. L. Rev. 2 and the Chicago Bar Assn., December 27, 1921, 8 Am. Bar Assn. J. 34.

⁹ Act of September 14, 1932, 42 Stat. 838-839. That Act provided also that—

“The senior district judge of each United States district court, on or before the first day of August in each year, shall prepare and submit to the senior circuit judge of the judicial circuit in which said district is situated, a report setting forth the condition of business in said district court, including the number and character of cases on the docket, the business in arrears, and cases disposed of, and such other facts pertinent to the business dispatched and pending as said district judge may deem proper, together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing. Said reports shall be laid before the conference [of senior circuit judges] . . . , by said senior circuit judge, . . . , together with such recommendations as he may deem proper.” *Id.* 838.

The Conference of Senior Circuit Judges now includes also the Chief Justice of the United States Court of Appeals for the District of Columbia. 50 Stat. 473.

The Bill authorized a senior circuit judge to reassign district judges of his circuit temporarily to where they might be most needed in that circuit. Under certain limitations, the Chief Justice of the United States, likewise, was authorized to assign to such duty a district judge or a circuit judge from outside the circuit where the need existed.¹⁰ He said of this proposal:

"These provisions allow team work. They throw upon the council of judges, which is to meet annually, the responsibility of making the judicial force in the courts of first instance as effective as may be. They make possible the executive application of an available force to do a work which is distributed unevenly throughout the entire country. It ends the absurd condition, which has heretofore prevailed, under which each district judge has had to paddle his own canoe and has done as much business as he thought proper."¹¹

As finally adopted, September 14, 1922, the Act also authorized the appointment of twenty-four additional district judges.¹²

This application of administrative common sense to an uncoordinated judicial system provided a permanent mechanism for securing factual appraisals of the requirements of the respective districts for adjustments in judicial manpower. It established a natural agency for the coordination of policies and for the consideration, and even initiation, of legislative proposals affecting the judiciary. For example, the regular session of this Conference, held October 1-4, 1946, dealt with twenty-two administrative and legislative problems none of which otherwise could have received comparable attention and as to which

¹⁰ 42 Stat. 839. The Act of August 27, 1937, 50 Stat. 753, has strengthened the authorization.

¹¹ Address to American Bar Association at San Francisco, August 10, 1922, 6 J. Am. Jud. Soc. 37; 57 Am. L. Rev. 3, and see 8 Am. Bar Assn. J. 601, 47 Am. Bar Assn. Rep. 252.

¹² 42 Stat. 837.

the executive and legislative branches of the Government otherwise could not have received as competent an opinion.¹³

¹³ At the 1946 Conference, the Chief Justice of the United States presided. The ten circuits, plus the District of Columbia, were represented. Five other federal judges reported on special committee assignments. Addresses were made by the Chairman of the Judiciary Committee of the House of Representatives and by the Attorney General. The latter dealt with the Administrative Procedure Act, the Federal Tort Claims Act, the new Federal Rules of Criminal Procedure, the Federal Jury Bills, Youth Offenders' Bill, Public Defenders' Bill, Habeas Corpus Procedural and Jurisdictional Bills and Bills as to reviews of orders of certain administrative agencies. He requested appointment of a committee to consider procedure in cases of juvenile delinquency.

The Seventh Annual Report of the Director of the Administrative Office of the United States Courts was received. It included a Report of the Division of Procedural Studies and Statistics and is printed with the Report of the Conference.

The state of the Dockets of Circuit Courts of Appeals, District Courts and Special Courts was reviewed.

Other matters reviewed, and generally made the subjects of specific recommendations, were those of: Additional Judges; Court Reporters (including changes in basic salaries, description of positions and operating arrangements, and recommendations as to provisions on court reporters in proposed revision of the Judicial Code); Budget Estimates; Bankruptcy Administration, including recommendations as to proposed amendments to the Bankruptcy Act and as to action to be taken at a special meeting of the Conference to be called to deal with the new Referees' Salary Act (This special meeting was held April 21-22, 1947, and final action was taken in time to go into effect July 1, 1947); Review of Orders of Interstate Commerce Commission, other Administrative Agencies and of Three-Judge Courts; Treatment of Insane Persons Charged with Crime in the Federal Courts; Sentencing and Parole of Federal Offenders; Removal of Civil Disabilities of Probationers Under Certain Conditions; Trial of Minor Offenders by Commissioners; Transfer of Jurisdiction for Supervision of Probationers from Court of Original Jurisdiction to the District of Supervision; Use of Trial Memoranda in Criminal Cases; Habeas Corpus Procedure; Jury System; Representation of Indigent Litigants; Judicial Statistics; Assignments of Judges Outside of their Circuits; Amendments to Admiralty Rules; Disposition of Old Records; Postwar Building Plans for Quarters of the U. S. Courts; Salaries in the

2. *The Enlargement of the Discretionary, and the Restriction of the Obligatory, Jurisdiction of the Supreme Court.*

In 1924, without an order for advancement, it still required a year to reach a case on the Docket of the Supreme Court.¹⁴ In the years immediately preceding the October Term, 1925, the obligatory jurisdiction of the Court accounted for over eighty percent of the cases on its appellate docket, or about two hundred and fifty cases a year. The remaining twenty percent consisted of sixty to seventy cases in which petitions for certiorari had been granted, out of about five hundred such petitions directed to the discretionary jurisdiction of the Court.¹⁵ As long as the obligatory jurisdiction thus applied to so much of the Docket, there was little hope of limiting hearings to cases of public significance or of relieving the Court from hearing cases which presented no substantial reason for a further review. With an approaching increase of federal litigation, the Court foresaw that its Docket would be so filled with cases under its obligatory jurisdiction that it would not be able to give to issues of public concern the attention they deserved. On the other hand, the establishment of the Circuit Courts of Appeals,¹⁶ and the aboli-

Administrative Office of the U. S. Courts; Procedure in Circuit Conferences as to Legislation Affecting District Courts and District Judges; and Keeping of Certain Court Offices Open on Saturday Forenoons. A Conference Committee on Probation with Special Reference to Juvenile Delinquency was added to the existing committees. Two Conference Committees were discharged and all others continued.

¹⁴ Mr. Justice Van Devanter estimated that the Court then was "hearing cases on the regular call that have been on the docket about 12 or 13 months." Hearing before a Subcommittee of the Committee on the Judiciary of the Senate on S. 2060 and 2061, 68th Cong., 1st Sess., 42 (1924). Chief Justice Taft, two years before, had estimated it at eighteen to twenty-four months. See note 1, *supra*.

¹⁵ These approximations are based upon the tables as to the Docket of the Supreme Court in Frankfurter and Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 Harv. L. Rev. 1, 10, 13.

¹⁶ Act of March 3, 1891, § 2, 26 Stat. 826.

tion of the Circuit Courts,¹⁷ together with the authorization of a partially discretionary control by the Supreme Court over the cases to be reviewed from those courts,¹⁸ were providing a satisfactory solution within the limited class of cases thus affected. The mechanism controlling this discretionary jurisdiction was proving to be one of the best devices for governmental control of discretionary procedure yet developed in any part of this nation's broad experience with checks and balances.

Thus fortified by thirty years of experience with petitions for certiorari, the Court, even before Chief Justice Taft joined it, had appointed a Committee of Justices to prepare legislation which would further restrict the obligatory jurisdiction of the Court and would substitute for it the Court's discretionary jurisdiction.¹⁹ The plan proposed by the Justices was to increase materially the scope of review by petition for certiorari and the Bill became known as the Judges' Bill. Due largely to the active

¹⁷ Act of March 3, 1911, § 289, 36 Stat. 1167.

¹⁸ Act of March 3, 1891, § 6, 26 Stat. 828.

¹⁹ This Committee consisted of Justices Day and McReynolds, with Chief Justice White as a member *ex officio*. Chief Justice Taft added Mr. Justice Van Devanter to the Committee, and himself pressed the matter vigorously. Upon the retirement of Mr. Justice Day, Mr. Justice Van Devanter became the Committee Chairman and the principal draftsman of the Bill. (Chief Justice Taft, 35 Yale L. J. 2.) Mr. Justice Sutherland, a former member of the Senate Committee on the Judiciary, was added to the Committee and the Bill was thoroughly explained in Committee Hearings. *E. g.*, Chief Justice Taft, in Hearing before Committee on the Judiciary, House of Representatives, on H. R. 10479, 67th Cong., 2d Sess. 1 (1922); Justices Van Devanter, McReynolds and Sutherland, in Hearing before Subcommittee of Committee on the Judiciary of the Senate, on S. 2060 and 2061, 68th Cong., 1st Sess. 25-62 (1924). Justices Van Devanter, McReynolds and Sutherland, with Chief Justice Taft, in Hearing before Committee on the Judiciary, House of Representatives, on H. R. 8206, 68th Cong., 2d Sess. 6-30 (1924).

For a summary of the nature and effect of this Bill and of the service rendered by this Committee, see statement by Charles E. Hughes, Jr., in Proceedings in Memory of Mr. Justice Van Devanter, March 16, 1942, 316 U. S. V, XII-XIV.

sponsorship of it by the Chief Justice and the Court's Committee of Justices, it was approved February 13, 1925.²⁰ It has been eminently successful and has become the basic mechanism in maintaining a flexible, but firm, control over the volume of the Supreme Court's work.

The granting or denial of a petition for certiorari is not a decision on the merits of the case. The petitions relate, almost exclusively, to cases which previously have been heard by a federal or state court of three or more judges. In most of them, a separate trial court also has passed upon the issues. The character of the reasons guiding the Supreme Court's discretion in acting on petitions for certiorari are stated in its Rules.²¹ Accordingly, nearly all of the cases decided in the Circuit Courts of Appeals no longer are reviewable in the Supreme Court except upon a writ of certiorari, which is granted only in the discretion of the Supreme Court. This has enabled the Supreme Court to protect itself against such abuse of its jurisdiction by litigants as previously had occurred and again was being threatened. The danger of an overloaded docket, without such a check, is evident from the fact that, from 1925 to the present, the denial of these petitions at each Term has averaged about eighty percent of those filed.²²

²⁰ 43 Stat. 936.

²¹ Revised Rules of the Supreme Court of the United States, Rule 38 (5), 306 U. S. 718-719. See also, Rule 12 as to Jurisdictional Statements Required in Appeal Cases, 306 U. S. 694, amended 316 U. S. 715.

²² "At the 1937 term 701 petitions [for certiorari] were denied on the merits; at the 1938 term, 666. The 155 petitions granted at the 1937 term were 17.7% of the total filed; the 130 at the 1938 term, 16%. Like percentages have maintained themselves with singular consistency since prior to the enlargement of discretionary jurisdiction under the Act of 1925. The percentage of petitions granted during the sixteen terms since that of 1923 is 18.1%; the term-by-term figures disclose no sustained trend either upward or downward." Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*. 53 Harv. L. Rev. 579, 585.

The Docket of the Supreme Court for its October 1946 Term shows: petitions for certiorari acted upon (exclusive of those filed *In Forma*

Without further explanation, such a high percentage might suggest a possible abuse of its own discretion, by the Court, in unduly restricting access to it. However, a unique practice of the Court, fully explained to Congress, has provided an excellent safeguard against such a possibility. This safeguard is the practice of the Court to grant any such petition upon the favorable vote of a substantial minority—that is, four out of nine—of the members of the Court rather than to require the favorable vote of a majority. Unless at least a substantial minority of the Court believes that the case should be heard, it seems clear that it should not be. On the other hand, if a substantial minority of the members of the Court feels that

Pauperis) 733; of which 148, or about 20.2% were granted. The 529 additional cases, treated as petitions for certiorari, but filed *In Forma Pauperis* included the many requests for review received from penitentiary inmates. Only 8, of these 529 “petitions,” were found to justify the granting of them. To include these “petitions” would produce a misleading total of 1,262 petitions for certiorari acted upon of which 156, or only 12.4% were granted. To avoid this confusion, a change in practice is being put into effect whereby these informal requests will be placed on the Miscellaneous Docket and will be transferred to the General Docket only when and if granted.

“The jurisdiction [of the Supreme Court to review cases by granting a writ of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ.” Taft, C. J., in *Magnum Co. v. Coty*, 262 U. S. 159, 163.

“I think that it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility, but which fail to survive a critical examination. The remainder, falling short, I believe, of 20 percent, show substantial grounds and are granted. I think that [it] is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality.” Hughes, C. J., in a letter to Senator Burton K. Wheeler, March 23, 1937, reprinted in 81 Cong. Rec. 2814-2815 (1937).

it should be heard, the Court, as a whole, hears it and passes upon the issue it presents.²³

The Act of 1925 had the hoped-for results. From the time its full effect was felt, the Court has been current with its business. At the close of the October Term, 1929, which was presided over in turn by Chief Justice Taft, Mr. Justice Holmes and Chief Justice Hughes, the Court made the official entry that it had disposed of all cases submitted to it and all business before the Court at that

²³ "For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered." Mr. Justice Van Devanter testifying before a Subcommittee of the Committee on the Judiciary of the Senate on S. 2060 and 2061, 68th Cong., 1st Sess. 29 (1924).

See also, statements by Justices Van Devanter and Brandeis on Hearings before Senate Committee on the Judiciary on S. 2176, 74th Cong., 1st Sess. 9-10 (1935).

"In all matters before the Court, except in the mere routine of administration, all the Justices—unless for some reason a Justice is disqualified or unable to act in a particular case—participate in the decision. This applies to the grant or refusal of petitions for certiorari, which are granted if four Justices think they should be. A vote by a majority is not required in such cases. Even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote." Hughes, C. J., in a letter to Senator Burton K. Wheeler, March 23, 1937, reprinted in 81 Cong. Rec. 2814 (1937).

"But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided." Stone, C. J., in *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 359.

That three votes were not sufficient to grant, see *Scarborough v. Pennsylvania R. Co.*, 326 U. S. 755; *Helvering v. Sprouse*, 315 U. S. 810; and *Simmons v. Peavy-Welsh Lumber Co.*, 311 U. S. 685. And see Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 Col. L. Rev. 255, 257.

Term.²⁴ Of its October Term, 1930, it has been stated that "on any basis of comparison the Court cleared its docket more than at any time during the last hundred years."²⁵ Of its October Term, 1932, it is said:

"In effect, for the first time since the early years of its institution, the Court is hearing and disposing of all litigation brought before it without delay and without sacrifice of any of the guarantees of ample argument and due deliberation which the effective exercise of its functions demand. In so doing, it sets a standard for state courts of last resort throughout the country."²⁶

²⁴ "All cases submitted, and all business before the Court, at this term, having been disposed of,

"It is now here ordered by this Court that all cases on the docket be, and they are hereby, continued to the next term." (1929) Sup. Ct. J. 311.

"At the last term the Court disposed of every case that was ripe for decision. For the first time in many years no case that had been submitted was allowed to go over." Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 2.

"The Supreme Court is fully abreast of its work. . . .

". . . We shall be able to hear all these cases [twenty-eight awaiting argument March 23, 1937], and such others as may come up for argument, before our adjournment for the term. There is no congestion of cases upon our calendar.

"This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard." Hughes, C. J., in a letter to Senator Burton K. Wheeler, March 23, 1937, reprinted in 81 Cong. Rec. 2814 (1937). This letter also tabulates the case load for O. T. 1930-O. T. 1935.

²⁵ Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1930*, 45 Harv. L. Rev. 271, 274.

²⁶ Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1932*, 47 Harv. L. Rev. 245, 249.

In the proceedings held in the Supreme Court in memory of Chief Justice Taft, on June 1, 1931, Chief Justice Hughes said:

"Deeply concerned with improvements in administration, the Chief Justice gave special attention to his own duty as administrator. Even

That Act was born of judicial experience. It was written into law and put into operation under the leadership of Chief Justice Taft. The high standards of judicial administration which it made possible have been maintained to this day.

3. *The Building and Equipment of the Supreme Court Building.*

From its earliest days, the Supreme Court, its library and its staff were handicapped by lack of adequate space

the distinction of his contribution to the jurisprudence of the Court does not obscure, but throws into a stronger light, by reason of his versatility, his preëminence in the executive department of its work. In the successful endeavor to end the delays which bring such a deserved reproach upon judicial procedure, he was ever a leader, and he would have been the first to recognize the able support which he received from his colleagues in this effort. It was not a vain attempt to bring the Court up to its work by a spasmodic activity, but the intelligent formulation of a plan which, receiving the sanction of Congress, has put the Court, we trust permanently, upon a basis by which it can keep abreast of the demands upon it. So long as we follow the example which he has set and avail ourselves of the opportunity which his leadership provided, the delays of justice will have no countenance or illustration here.

"But the Chief Justice was not content with expediting the work of this Court. He felt a special responsibility with respect to the entire Federal judicial system. Many years before he came to this bench, he had suggested that either the Supreme Court or the Chief Justice should have an adequate executive force to keep current watch upon the business awaiting dispatch in all the districts and circuits of the United States and to make a periodical estimate of the number of judges needed in the various districts and to make the requisite assignments. In a different manner, it was sought to attain the object he had in view by the establishment, in 1922, through his persistence, of the Judicial Conference of the Senior Circuit Judges, held annually, at which the Chief Justice of this Court presides, and which considers the needs of judicial service in the different districts and makes recommendations accordingly. This is an instrumentality of great value, and what it has accomplished and the promise of what it may achieve are due in the largest measure to the foresight and intelligent guidance of Chief Justice Taft." 285 U. S. XXXIV-XXXV.

and facilities. A "building for the Judiciary" was among the recommendations of a Committee of the House of Representatives in 1796 and the original plans for the Capitol included no room for the Court. However, no "building for the Judiciary" was built and, for 135 years, the Court was housed in surplus space temporarily assigned to it in the Capitol. During its first eight years, it met in a small room, 24 feet wide by 30 feet long, which was then known as the Senate Clerk's office. Later, during most of Chief Justice Marshall's service, the Court met in a room in the basement beneath the then Senate Chamber. The space for its library and its Clerk was inadequate and the Justices maintained their chambers in their respective homes. In 1860, when the Senate moved into its new Wing of the Capitol, the Court was moved upstairs to the original Senate Chamber.²⁷ This provided a hearing room to which the Court became greatly attached and it then used its former courtroom as a law library. As time went on, the increasing business of the Court outgrew the space allotted to its Clerk, its Marshal, its Justices and the members of its Bar.

Again Chief Justice Taft took the lead. This time he induced Congress to see the appropriateness of providing the Supreme Court with facilities comparable to those of the legislative and executive branches of the Government and reasonably adapted to the needs of the future. The purchase of a site opposite the Capitol was authorized in 1926.²⁸ The United States Supreme Court Building Com-

²⁷ I Warren, *The Supreme Court in United States History* (1935) 169-171; II Warren (1937) 362.

²⁸ Acquisition of site authorized, Act of May 25, 1926, 44 Stat. 630; appropriation of \$1,500,000 approved, Act of February 28, 1927, 44 Stat. 1254; increased by \$268,741, Act of March 4, 1929, 45 Stat. 1614. The acquisition of land was completed November 25, 1929, the largest parcel being that purchased from the National Woman's Party, often referred to as the Little Brick Capitol, which had been used for meetings of Congress after the British had burned the Capitol in 1814. Final Report of the United States Supreme Court Building Commission, Sen. Doc. No. 88, 76th Cong., 1st Sess. 1-2 (1939).

mission was created in 1928.²⁹ Chief Justice Hughes, as Chairman of the Building Commission, was able not only to secure completion of the building in time to use it throughout the October Term, 1935, but to do so for nearly ten percent less than the sum appropriated.³⁰

Today not only does the simple majesty of the Supreme Court Building inspire the members of the Court and the public, but its facilities have increased the efficiency of the Court. The building houses not only the courtroom, the law library, the Clerk's office and the Marshal's office, but also the Justices' chambers, the Justices' library, conference rooms for the Judicial Conference of Senior Circuit Court Judges and other appropriate bodies, rooms for the

²⁹ The United States Supreme Court Building Commission originally consisted of: Chairman: Hon. William Howard Taft, Chief Justice of the United States. Members: Hon. Willis Van Devanter, Associate Justice of the Supreme Court of the United States; Hon. Henry W. Keyes, chairman of the Senate Committee on Public Buildings and Grounds; Hon. James A. Reed, ranking minority member of the Senate Committee on Public Buildings and Grounds; Hon. Richard N. Elliott, chairman of the House Committee on Public Buildings and Grounds; Hon. Fritz G. Lanham, ranking minority member of the House Committee on Public Buildings and Grounds; Hon. David Lynn, Architect of the Capitol.

At the conclusion of its service, it consisted of: Chairman: Hon. Charles Evans Hughes, Chief Justice of the United States. Members: Hon. Willis Van Devanter, Associate Justice (retired); Hon. Tom Connally, Senator from Texas; Hon. James A. Reed, former Senator from Missouri; Hon. Richard N. Elliott, former Representative from Indiana; Hon. Fritz G. Lanham, Representative from Texas. Member and executive officer: Hon. David Lynn, Architect of the Capitol. Final Report of the United States Supreme Court Building Commission, Sen. Doc. No. 88, 76th Cong., 1st Sess. 4 (1939).

³⁰ Appropriation for building and grounds, including
furniture, furnishings and equipment..... \$9,740,000.00
Expended for building, treatment of grounds, furni-
ture, furnishings and equipment..... 9,646,467.98

Unexpended and unobligated balance June 6, 1939... \$93,532.02

Final Report of the United States Supreme Court Building Commission, Sen. Doc. No. 88, 76th Cong., 1st Sess. 21 (1939).

Attorney General, the Solicitor General and members of the Bar, rooms for the Court Reporter and his staff, a print shop for the printing of opinions, the Administrative Office of the United States Courts, and a cafeteria for the visiting public as well as the employees. The Court has substantially adequate physical facilities and seeks to render services worthy of them.

4. *The Federal Rules of Civil Procedure.*

Having thus put its own house in order, the Supreme Court, under the leadership of Chief Justice Hughes and of the Judicial Conference of Senior Circuit Judges, undertook to meet the long-felt need for generally simplified federal court procedure. In 1914, seven years before William Howard Taft became Chief Justice, he had coupled his advocacy of simplified procedure with his advocacy of a Judicial Conference.³¹ Chief Justice Hughes had a like interest in this subject. With the support of the American Bar Association, legislation was secured which authorized the Supreme Court "to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." It expressly provided also that "The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: . . ."³² Under this authority, an outstanding Advisory Committee was appointed by the Supreme Court.³³ Its service was competent and dili-

³¹ Address at Cincinnati Law School Commencement, May 23, 1911, 5 Ky. L. J. 1, 14. See also, his recommendation of uniform federal rules of practice, both in law and equity, made as Chief Justice, in the Hearings before the Senate Committee on the Judiciary on S. 2432, 2433 and 2523, 67th Cong., 1st Sess. 16-17 (1921).

³² Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. §§ 723b, 723c.

³³ The Advisory Committee appointed by the Supreme Court to assist it in drafting a unified system of Equity and Law Rules and

gent. Through several publications of its preliminary drafts and comments, it forestalled as many errors and ambiguities as it could. Following the Committee's Final Report, the Supreme Court adopted the new Federal Rules of Civil Procedure December 20, 1937, and these became effective September 16, 1938.³⁴ This procedure led to similar action which produced the new Federal Rules of Criminal Procedure, effective March 21, 1946.³⁵

to serve without compensation consisted of: William D. Mitchell, of New York City, Chairman; Scott M. Loftin of Jacksonville, Florida, President of the American Bar Association; George W. Wickersham, of New York City, President of the American Law Institute; Wilbur H. Cherry, of Minneapolis, Minnesota, Professor of Law at the University of Minnesota; Charles E. Clark, of New Haven, Connecticut, Dean of the Law School of Yale University; Armistead M. Dobie, of University, Virginia, Dean of the Law School of the University of Virginia; Robert G. Dodge, of Boston, Massachusetts; George Donworth, of Seattle, Washington; Joseph G. Gamble, of Des Moines, Iowa; Monte M. Lemann, of New Orleans, Louisiana; Edmund M. Morgan, of Cambridge, Massachusetts, Professor of Law at Harvard University; Warren Olney, Jr., of San Francisco, California; Edson R. Sunderland, of Ann Arbor, Michigan, Professor of Law at the University of Michigan; and Edgar B. Tolman, of Chicago, Illinois. Charles E. Clark was appointed Reporter to the Advisory Committee. 295 U. S. 774-775.

³⁴ Notes were published with the Committee's Preliminary Draft of May, 1936. They were revised and published with the Committee's Report of April, 1937, and revised again to conform to the Committee's Final Report of November, 1937, and to the Rules as approved by the Supreme Court, December 20, 1937. Federal Rules of Civil Procedure 215. These Rules were reported to Congress by the Attorney General, January 3, 1938, and took effect on September 16, 1938, three months after adjournment of the second regular session of the 75th Congress on June 16, 1938. See Rule 86 and 52 Stat. 1454. 308 U. S. 645-788, 28 U. S. C. fol. § 723c.

Rule 81 (a) (6) was amended December 28, 1939, 308 U. S. 642, 28 U. S. C. fol. § 723c. See also, amendments adopted by the Supreme Court December 27, 1946, and reported to Congress by the Attorney General January 2, 1947, 16 ~~Federal~~ Digest (1947 Cum.).

³⁵ The Supreme Court was authorized by the Act of June 29, 1940, 54 Stat. 688, 18 U. S. C. § 687, to prescribe new Federal Rules of Criminal Procedure for the District Courts of the United States. On

S.C.E.

51

5. *The Administrative Office of the United States Courts.*

There still remained to be taken the unprecedented but essential step of providing the federal courts with a business administration of their affairs without undue interference with their independence.

Without the Judicial Conference of Senior Circuit Judges and the coordination of the administration of the federal courts resulting from it, this step would have been inconceivable. However, when the members of the Conference became convinced of the desirability of a coordinated federal judiciary, the Administrative Office of the United States Courts was but a natural implementation of the idea.

By the Act of August 7, 1939, Congress gave the necessary authority.³⁶ The Supreme Court appointed Henry

February 3, 1941, the Court appointed the following Advisory Committee on Rules in Criminal Cases to serve without compensation: Arthur T. Vanderbilt, Newark, New Jersey, Chairman; James J. Robinson, Professor of Law at the Indiana University Law School, Reporter; Alexander Holtzoff, Washington, D. C., Secretary; Newman F. Baker, Professor of Law at the Northwestern University Law School; George James Burke, Ann Arbor, Michigan; John J. Burns, Boston, Massachusetts; Frederick E. Crane, New York City; Gordon Dean, Washington, D. C.; George H. Dession, Professor of Law at the Yale Law School; Sheldon Glueck, Professor of Law at the Harvard Law School; George Z. Medalie, New York City; Lester B. Orfield, Professor of Law at the University of Nebraska Law School; Murray Seasingood, Cincinnati, Ohio; J. O. Seth, Santa Fe, New Mexico; John B. Waite, Professor of Law at the University of Michigan Law School; Herbert Wechsler, Professor of Law at the Columbia Law School; and G. Aaron Youngquist, Minneapolis, Minnesota. 312 U. S. 717-718.

After the consideration of several drafts, the Supreme Court, on December 26, 1944, prescribed the new Rules. 323 U. S. 821. These were filed with Congress January 3, 1945, and took effect March 21, 1946, three months after the adjournment of the first regular session of the 79th Congress on December 21, 1945. See Rule 59 and 59 Stat. 849. 327 U. S. 821, 18 U. S. C. A. fol. § 687, 1946 Pocket Part 205.

³⁶ Chapter XV, entitled "The Administration of the United States Courts," was added to the Judicial Code by the Act of August 7, 1939, effective November 6, 1939, 53 Stat. 1223, 28 U. S. C. §§ 444-450.

P. Chandler Director and Elmore Whitehurst Assistant Director.³⁷ The Administrative Office has proved its value many times over—not only to the Chief Justice of the United States, the Supreme Court and the Judicial Conference of Senior Circuit Judges but to the Circuit Courts of Appeals, the District Courts, the Special Courts, the Department of Justice and to Congress. For the first time, authoritative judicial statistics are available, supervision is given to every financial responsibility of the federal courts, efficiency is gained in securing quarters and equipment, technical assistance is available for the supervision of developments in administrative activities such as those of official reporters, bankruptcy referees, U. S. Commissioners and probation officers. The Administrative Office is now an integral part of the federal judicial system and it has a flexibility that will permit it to meet the demands of the future.

As a result of the constructive leadership in judicial administration that has been described, our federal courts today are coordinated, the Supreme Court Docket is current, the Supreme Court is adequately housed and equipped, simplified Federal Rules of Civil and Criminal Procedure are in effect and a permanent Administrative Office for the Courts of the United States is in operation.

The eyes of the world watch each test of the constitutional structure of the United States. The keystone of that structure is its independent judiciary. It remains for that judiciary to fit its actions so perfectly to the needs of each opportunity that they will strengthen the case for a government of laws as the best guaranty of human liberty.

³⁷ 308 U. S. 642, 641.



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July 28, 1949

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CHAMBERS OF THE

TO

CHIEF JUSTICE M. Vinson.

Supreme Court of the U.S.

Washington 13,

D.C.

U.S.A.

All is cool and comfortable here. We are on schedule after a perfect trip, and due to land at Rotterdam July 30. Among those on board is Judge Feinberg of the Illinois Appellate Court who says he wrote the opinion in the Terminiello case and thinks our minority was OK. Selma + I hope that Robertz and you have found some equivalent for our sea breezes.

Shown leaving from homeport Rotterdam, the 36,667 gross ton HOLLAND-AMERICA LINE flagship NIEUW AMSTERDAM links the U.S.A. with England, France, Holland and all of Europe.

Printed in the Netherlands

File
conference

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

October 16, 1947

MEMORANDUM TO THE CONFERENCE

Re: No. 171. King v. United Commercial Travelers

When this petition for certiorari was before the Conference, there were but three votes to grant it. At that time I indicated that I joined in denying the petition but stated that, if the petition were granted, I felt that the parties should be asked to include in their presentation a matter which had been omitted in the briefs submitted to us. I understand that another vote was added to the three originally in favor of the grant and an order has been entered granting the certiorari. Accordingly, I wish to present the suggestion previously mentioned.

The decision below was based upon the assumed applicability of the South Carolina law to the interpretation of the constitution of the United Commercial Travelers of America. This applicability apparently depended primarily, if not wholly, upon a South Carolina statute. If that statute is applicable, I believe the decision below probably is correct. The statute, however, relates only to foreign corporations in general and, therefore, I doubt its applicability to this corporation in the face of another statute relating specially to foreign fraternal benefit associations. If the latter statute is applicable, then there are grounds for contending that the law of Ohio, rather than the law of South Carolina, should govern the interpretation of the constitution of the United Commercial Travelers of America in this case. If the law of Ohio is to govern the interpretation, we will need an exposition of that law.

I suggest, therefore, that there be communicated to the parties some such request as the following:

"In addition to such other questions as the parties may wish to present, they are requested to discuss the applicability, if any, of §§ 7773, 7774 and 7776 of the Code of Laws of South Carolina, 1932, to the United Commercial Travelers of America, especially in view of §§ 8055, 8064 and 8080 of the same Code dealing specially with fraternal benefit associations; and also the possible application of the law of Ohio to the interpretation of the constitution of the United Commercial Travelers of America due to its incorporation as a fraternal benefit society under the law of that State.

Harold H. Burton

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

October 28, 1947

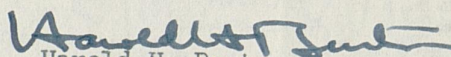
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OCT 28 1947

C. M. V.

MEMORANDUM FOR THE CHIEF JUSTICE

No. 300. Hood v. The Texas Co.

In the above case I wish to record my vote as one for denial of the petition for certiorari. I understand that the final vote has not been taken in this case but, as there was a tentative vote, I am sending this memorandum to avoid misunderstanding.


Harold H. Burton

cc: Mr. Justice Frankfurter

[1948]

Supreme Court of the United States

Memorandum

_____, 194____

2/26

Chief -

In the Marzani case -

Justice Murphy will be absent.
I believe
He was present on 1st argt -
when Justice Jackson was not.

The Petitioner asked for this
reargument because of

Justice Jackson's absence.

What do you think?

"vouching in" Justice Murphy
to make sure that this ^{one} will be
O.K.?

WAB

(1948)

Supreme Court of the United States

Memorandum

_____, 194____

3/3

Chief

Assuming that we
adjourn at 4:30, can not
the Deputy Justices give
assurance that Ludecke
will be here to-morrow?

WAB

Original Filed in VIP Correspondence File

[No date]

Mr. Justice Black is of the
opinion that this petition
raises grave questions
concerning the liberty and
freedom of thought of all
government employees. For
this reason he thought the
petition should have been
originally granted & also
believes that the rehearing
should be granted

File

Original Filed in VIP Correspondence File

To the Chief Justice
as a souvenir of the occasion

11/27/48

Harold H. Burton

STATEMENT AS TO CHIEF JUSTICE
WILLIAM HOWARD TAFT

BY

ASSOCIATE JUSTICE HAROLD H. BURTON

OF THE

SUPREME COURT OF THE UNITED STATES

Washington, D. C., November 22, 1948

On the occasion of the unveiling of Bronze Plaques in commemoration of Chief Justices Melville W. Fuller, Edward Douglass White, William Howard Taft, Charles Evans Hughes, Harlan Fiske Stone and Joseph Meredith Toner, M. D., Litt. D., by The Columbia Historical Society and the Bar Association of the District of Columbia.

William Howard Taft is the only person who has served as President of the United States and also as Chief Justice of the United States. Significant as that unique distinction is as a mark of capacity for official service, it is almost equally significant that no appraisal of William Howard Taft ever permits his official service to exclude reference to the simplicity, warmth and kindness of his personal character.

He was a large man in height, in bulk, in mind and in heart. His horizon and his interests were as broad as all humanity. It was inevitable that his life be dedicated to the service of his fellow men. He was a public servant by nature and, for that matter, public service is a family characteristic. His father, Alphonso Taft, was Attorney General under President Grant. His older son, Robert Alphonso Taft, is a Senator of the United States. His younger son, Charles P. Taft, has long been a leader in the local government of Cincinnati and in national civic and religious enterprises.

Out of William Howard Taft's 72 years of life, more than 50 were devoted to public service in governmental or educational capacities. Each experience increased his competency for what came later. Shortly after graduating from law school and entering the private practice of law in his home city of Cincinnati, Ohio, he served for two years as Assistant Prosecuting Attorney of his county. Soon thereafter, he served for two years as Assistant County Solicitor of that county. He thus was grounded early in both criminal and civil practice from the public's point of view. Next he served three years as Judge of the Superior Court in Cincinnati, where he learned about general trial practice as seen from the bench of a state court. In 1890, when only about 33 years old, he began his service of two years as Solicitor General of the United States. This was while Benjamin Harrison was President, and William H. Miller was Attorney General. He thus had charge of the litigation of the United States before the Supreme Court of the United States at a time when Chief Justice Fuller was presiding. In 1892, he was appointed by President Harrison as U. S. Circuit Judge for his home Circuit, the Sixth. He served on this federal bench for eight years, presiding over many cases as a trial judge, as well as reviewing others as an Appellate Judge. He learned much also about the administrative problems of our federal courts because, during most of his service in the Sixth Circuit, he was the Senior Circuit Judge in his Circuit. In those days Judge Taft served also on the faculty and later as the Dean of the Law Department of the University of Cincinnati.

In 1900, at the request of President McKinley, Judge Taft undertook the pioneering and constructive responsibility of establishing appropriate governmental agencies in the Philippine Islands and appropriate governmental relations between the Philippines and the United States. This meant his resignation from the bench and, for four years, he served either as President of the U. S. Philippine

Commission or as the Civil Governor of the Philippine Islands. From 1904 to 1908 he served as Secretary of War under President Theodore Roosevelt. From 1909 to 1913, he was President of the United States. During those four years he appointed five new members of the Supreme Court—Associate Justices Horace H. Lurton, who had been his junior associate on the Circuit Court, Charles Evans Hughes, Willis Van Devanter, Joseph R. Lamar, and Mahlon Pitney. In addition, he advanced Justice Edward D. White to the Chief Justiceship. President Taft gave careful attention to each appointment he made to any federal judgeship. He thus made a major contribution to the competency of our judiciary. Upon his defeat for re-election to the Presidency in the three-cornered race between Woodrow Wilson, Theodore Roosevelt and himself, William Howard Taft retained the affection of his fellow citizens by his characteristically frank and good humored statement that he was retiring from the Presidency "with the full consent of the American People." His defeat merely changed the direction of his public service.

From 1913 to 1921 he served as Kent Professor of Law at Yale University, lecturing especially on constitutional law. During World War I he rendered a major service to his country as Co-chairman of the War Labor Board. He served as Chief Justice of the United States from 1921 until his resignation February 3, 1930. He died March 8, 1930.

His life was filled with major constructive contributions to the public welfare. It was an exemplification of justice applied to humanity. He was interested not so much in abstract justice as in justice as a vital agency. I shall confine my comments to a few of his services to the law. On the bench, his votes and his opinions reflected a wisdom that came from long personal experience in discharging public responsibilities under our great experiment in constitutional self-government. While a Circuit Judge he wrote 200 opinions for his court. As

Chief Justice of the United States he wrote 253. Beginning with his opinions on the Circuit Court he made major contributions to the law affecting the use of injunctions in meeting industrial and business issues. One of the best known of his opinions from the Circuit Bench is that which he rendered in 1898 in the case of *United States v. Addyston Pipe & Steel Co.*¹ That decision carried with it the first effective application of the Sherman Antitrust law to prevent, by injunction, combinations in restraint of trade. This procedure has since become a commonplace of the law. Among his decisions rendered as Chief Justice at least a few should be mentioned. That in *American Steel Foundries v. Tri-City Trades Council*² upheld the Clayton Act's prohibition of injunctions against peaceful picketing but held that picketing which created intimidation was not peaceful; *Ex Parte Grossman*³ upheld the President's power to pardon criminal contempts as well as other federal crimes; the *Second Child Labor Tax* case⁴ and the *Future Trading Act* case⁵ held that Congress could not, under the guise of its taxing power, regulate a purely local subject; and *Myers v. United States*⁶ sustained the President's power to remove executive officials without the Senate's consent.

To be ranked equally with Chief Justice Taft's contributions to the decisions of the Supreme Court are his contributions to the administration of the federal court system. Qualified by his incomparably broad experience in governmental administration he not only saw the administrative inadequacies of the existing judicial system but he discovered and put into effect constructive measures to improve that system. At least three outstanding contributions in this field may be attributed largely to him:

¹ 85 F. 271.

² 257 U. S. 184.

³ 267 U. S. 87.

⁴ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20.

⁵ *Hill v. Wallace*, 259 U. S. 44.

⁶ 272 U. S. 52.

1. The improved coordination of the federal judiciary through the creation of the Conference of Senior Circuit Judges—now known as the Judicial Conference of the United States.

2. The enlargement of the discretionary jurisdiction of the Supreme Court through increased use of the petition for certiorari. This change has enabled the Court to catch up and keep up with its docket which Chief Justice Taft had found to be nearly two years behind.

3. The authorization and planning of the Supreme Court Building. This building has helped to emphasize the separate and coordinate place of the Judicial branch of our Government in relation to its Legislative and Executive branches.

Turning to the attractive personality of William Howard Taft, I present two minor but illustrative incidents and I quote from a thoughtful tribute paid to him by his Associates on the Supreme Court. The first incident is typical of that cordiality and kindliness of spirit which made all the world his friend. In the discharge of his earlier public responsibilities, Mr. Taft often had found himself on the opposite side of controversies with Samuel Gompers, the pioneer labor leader. That Chief Justice Taft, however, regarded Mr. Gompers only with the utmost good will is typified by Mr. Gompers' story that the Chief Justice, on meeting him casually on a train, at once advanced toward him, smiled cordially, grasped his hand and exclaimed, "How are you, my dear old enemy?" Samuel Gompers came to be a staunch admirer and friend of the Chief Justice.

Another incident that Chief Justice Taft enjoyed retelling occurred while he was alone on a morning walk, near his home in Washington. Suddenly he found himself confronted by a little girl about six years old who planted herself across his path and announced to him, "I know who you are!" He chuckled and said, "Well now, who am I?" and it is easy to imagine his enjoyment of her answer when she called up to him, "Why you are Chief Justice Taft and you used to be President Coolidge."

Finally, one of the most expressive and simple tributes paid to Chief Justice Taft was on the occasion of his resignation from the Supreme Court after a lifetime of unparalleled public service. On that occasion, his fellow members of the Court joined in a letter which is printed in 280 U. S., at page v. It reads as follows:

"SUPREME COURT OF THE UNITED STATES.

Washington, D. C., February 10, 1930.

DEAR CHIEF JUSTICE: We call you Chief Justice still, for we can not quickly give up the title by which we have known you for all these later years and which you have made so dear to us. We can not let you leave us without trying to tell you how dear you have made it. You came to us from achievements in other fields, and with the prestige of the illustrious place that you lately had held, and you showed in a new form your voluminous capacity for work and for getting work done, your humor that smoothed the rough places, your golden heart that has brought you love from every side, and, most of all, from your brethren whose tasks you have made happy and light. We grieve at your illness, but your spirit has given life an impulse that will abide whether you are with us or are away.

Affectionately yours,

(Signed) OLIVER WENDELL HOLMES.
WILLIS VAN DEVANTER.
J. C. McREYNOLDS.
LOUIS D. BRANDEIS.
GEO. SUTHERLAND.
PIERCE BUTLER.
EDWARD T. SANFORD.
HARLAN F. STONE."

[July 28, 1949]

December 1, 1949

Dear Harold:

Roberta and I were grieved to hear of the death of your brother. We extend to you our deepest sympathy.

Sincerely,

[Signed] Fred M. Vinson

Honorable Harold H. Burton,
Associate Justice,
Supreme Court of the United States,
Washington, D.C.

Supreme Court of the United States.
Justice's Chambers.

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DEC 22 9 55 AM '49

CHAMBERS OF THE
CHIEF JUSTICE

Washington.

Dec. 21, 1949

NOTED

DEC 22 1949

F.M.V.

Dear Chief -

Thanks for the

"unwieldy" - It came this
P.M. -- I did not recognize
Sargun by such a fancy name
when Stanley spoke of it today.

It will be put to good
use and I thank you and the

makers. Merry Christmas
to Wendell & Burt

Supreme Court of the United States.
Justice's Chambers.

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DEC 2 9 45 AM '49

December 2, 1949

CHAMBERS OF THE
CHIEF JUSTICE

Dear Chief -

It was thoughtful of you
to send me Roberts's and your
message of sympathy. I appreciate
your doing so.

Sincerely,

Harold H. Burton

Chief Justice Fred M. Vinson
Washington



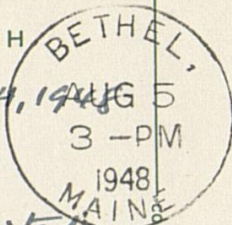
Old Man of the Mountains

©1934 C.T.B.

OLD MAN OF THE MOUNTAINS
FRANCONIA NOTCH, WHITE MTS., N. H.

GENUINE PHOTOGRAPH

Aug. 4, 1948



Dear Chief -

Mrs. B and I visited
the top of Mt. Washington
and this Old Man of the
Mountains to-day. He lived
up to all advance notices.

We visited Mrs. Stone
at Peckett's-on-Sugar Hill,
Franconia N.H. yesterday, & we
plan to attend the ceremony
at Chesterfield N.H. August 25 -
honoring Chief Justice Stone at
his birthplace. With regards
to Robert & you Harold & Burt



POST CARD

Hon. Fred M. Vinson.

Chief Justice of the United States.

Washington 13.

D.C.

Supreme Court of the United States,
Justice's Chambers.

Cleveland Hotel,
Cleveland, Ohio.
Aug. 6, 1950

Dear Chief -

Congratulations on getting a
quorum for the September 20th session.
I plan to be in Washington all of
September.

In the meantime I find
Cleveland a first class vacation spot -
and its ball team is worth many a
visit.

With best wishes

Harold H. Burton

Our eighth grandchild - Wendy Adler born here
July 18 - is doing nicely as is her mother.

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CHAMBERS OF THE
CHIEF JUSTICE

Cleveland Hotel,
Cleveland, Ohio.
August 6, 1950

NOTED
AUG 8 1950
F.M.V.

Dear Chief:

Congratulations on getting a quorum for the
September 20th session. I plan to be in Washing-
ton all of September.

In the meantime I find Cleveland a first
class vacation spot - and its ball team is worth
many a visit.

With best wishes

Harold H. Burton

Our eighth grandchild - Lindy Adler born here
July 18 - is doing nicely as is her mother.

6 View from Terminal Tower, Looking Toward Lake Erie, Cleveland, Ohio



(C)

66427

This is one of the many fine views from the observation room of the Terminal Tower. Shown in this view are the Municipal Stadium, Court House, City Hall, Public Auditorium and Cleveland College. With the aid of binoculars, localities 25 miles distant from Cleveland can be brought into view on clear days.

Aug. 14 1900

Dear Chief-

This is a corner of cool Cleveland on the lake.

I have been spending some time at the baseball stadium you see here, trying to help our Indians. In the picture, as you may recall, our County Court House is in front of the Stadium & the City Hall, is a similar building at the right.

Best wishes for the summer

Wendell Burt

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POST CARD

Chief Justice
Fred M. Vinson,

Supreme Court of the U.S.

Washington 13,

D.C.

Supreme Court of the United States
Washington, D. C.

Oct. 17, 1950

Dear Chief.

The Sorghum "Moon Gold"
is received with thanks and will be
put to good use this winter.

W. L. R. 3

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

October 10, 1950

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CHAMBERS OF THE
CHIEF JUSTICE

Dear Chief:

No. 271, Pennsylvania, ex rel. Master
v. Baldi

Unless there is some special reason for taking up No. 271, Pennsylvania, ex rel. Master v. Baldi, on October 14, please take it off the conference list and circulate the typewritten record. It seems to me that the petition cannot well be considered without an opportunity to examine the record.

H.H.B. ✓

The Chief Justice

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

October 16, 1950

Dear Chief:

No. 71 Misc. Phyle v. California

I have examined the record in this
case and concur in the denial of certiorari.

H.H.B. ✓

The Chief Justice

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OCT 16 9 27 AM '50
CHAMBERS OF THE
CHIEF JUSTICE

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

February 7, 1951

*autographed & returned to
Mr. Burton - 2/7/51.*

Dear Chief:

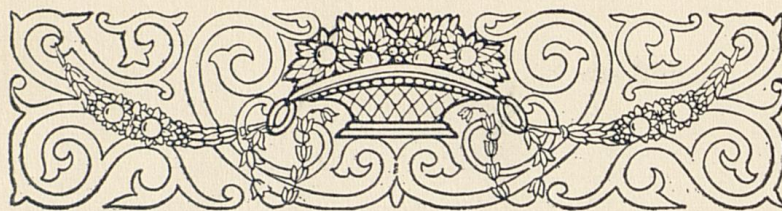
In Cleveland there has been for 50 years a lawyers club known as "The Court of Nisi Prius" which puts on a high caliber gridiron show. A history of the club appears in the attached book.

In connection with the show there always have been some cartoons -- usually drawn by John A. Duncan, one of the members. About two years ago, he attended a session of our Court and later drew some cartoons of the brethren. He now has asked that the subjects of the cartoons -- solely for the archives of the club -- identify the cartoons with their respective autograph. Bill and I have done so -- would you be willing to do likewise and return the set to me for further circulation?

The Chief Justice

W.A.B.

RECEIVED
FEB 7 11 08 AM '51
CHAMBERS OF THE
CHIEF JUSTICE



STATE OF MAINE

Lobster Dinner

FOR

United States Supreme Court

AT

SUPREME COURT BUILDING

Washington, D. C.

MARCH 12, 1951

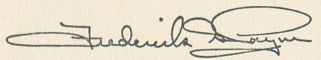
State of Maine
OFFICE OF THE GOVERNOR
Augusta

It is my official privilege to convey the warm greetings of the State of Maine to you. Though circumstances regrettably deprive me of the pleasure that would have been mine if extending this welcome personally, its deep good will exists just as strongly in *absentia*.

My pride is not unmixed with humility that Maine should be thus signally esteemed by having, as our revered guests, the world's most deservedly honored tribunal. To free peoples everywhere—and, probably, too, if we could but pierce the veil of tyranny, to all peoples in all lands—those of you who comprise the membership of the Supreme Court are more than mortal men. You are living symbols of the greatest governmental ideal in recorded history: The United States of America!

That is why I use humble words to bring you the profound sense of honor Maine feels by your presence here today.

Sincerely,



Governor of Maine

“MAINE - U”

BERRY'S MAINE APPLE JUICE

SNOW'S MAINE CLAM CHOWDER

BOILED MAINE LOBSTER

MAINE KENNEBEC FRENCH FRIED POTATOES

STATE OF MAINE HARDTACK

BAXTER'S GOLDEN BANTAM CORN ON THE COB

ONE PIE MAINE BLUEBERRY PIE

OXFORD SWEET PICKLES

MAINE McINTOSH APPLES

POLAND SPRING WATER

This Dinner Is Sponsored By
The
Maine Development Commission
State House
Augusta, Maine

Chief Justice: Fred M. Vinson

On the plate before you regally reposes a State of Maine lobster.

Accompanying it, as expressed in these lines, are the good wishes of the citizens of Maine. To paraphrase a well-known saying, these lobsters — which have so often been acclaimed 'fit for a king,' — are respectfully offered to yourself, and your honorable colleagues, who indeed represent judicial royalty. We hope your verdict will be that these luscious, erstwhile denizens of the clear, cold North Atlantic waters bring you a memorable gustatory adventure.

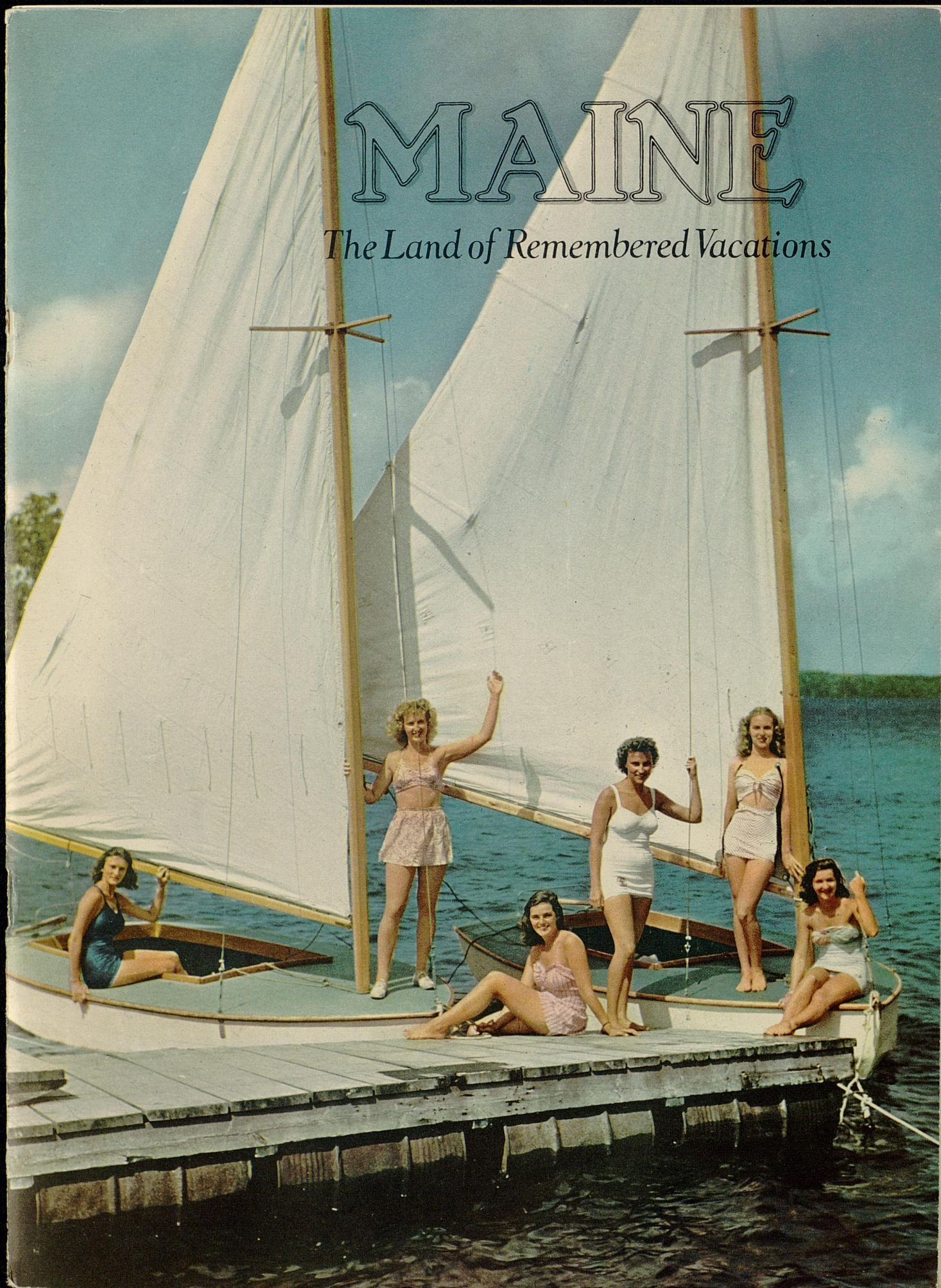
Inside the folder are your complete directions. Necessary 'tools,' and ceremonial garments, are arrayed in order.

Your Honor, on behalf of this incomparable delicacy of the sea, which has — truly — given its all to this occasion, and which now awaits you . . .

. . . We Rest Our Case.

MAINE

The Land of Remembered Vacations





MAINE . . . The Land of Remembered Vacations

A NEWSPAPER EDITOR upon returning home after a visit to the state of Maine wrote an editorial commenting on his visit. The editorial read as follows: "As we entered the state of Maine we were impressed by the beautiful pine trees that we saw everywhere. Well may the state of Maine be called 'The Pine Tree State'. We were impressed also by the hospitality of the Maine people. Our trip took us through many miles of typical Maine woods, fragrant, dark green and dense in the valleys, with the white birch standing as groups of sentinels on the hills. We will never forget the Maine coast as we journeyed along, sometimes in sight of beautiful ocean beaches, other times the rocky headlands were in view with wooded islands in the distance and in the bays near shore. The fishing villages and the harbors were everything that we had expected, and more too. Maine has preserved the natural beauty of its countryside, eliminating all need for roadside beautification. Some day we are going back to the state of 2,500 lakes, and 5,147 rivers and streams; the state where the clouds sleep amid the spruce on the hill-tops; the state where the mountains meet the sea; where artists and authors capture the inspiration of the magnificent scenery and thrill the world. Maine, what a priceless collection of memories of fine people and scenic beauty we took with us as we left the state!"

May we extend to all readers of this book a cordial invitation to visit the state of Maine. "We want you to feel that you belong in Maine."



COMPILED AND ISSUED BY THE
MAINE DEVELOPMENT COMMISSION
AUGUSTA, MAINE



As one rides through peaceful Maine villages any number of unusual buildings are seen, whose interesting history can be learned locally. Today some of them serve as museums, libraries and such, with iron hinges testifying to their ancient, sturdy construction.

Once, the quiet by-ways of Maine were liberally laced with covered wooden bridges. Across these familiar landmarks Old Dobbin, hitched to his shay, plodded to market place on weekdays and to meeting-house on Sundays. When frosty winter mornings arrived, the shay would be replaced by a pung.





Flanked by stately shade trees, here proudly stands an old-time mansion rich in historical significance. Such a house, rugged and solid, personifies a typical Maine country home.

MAINE'S INTERESTING HISTORICAL BACKGROUND

THE STRATEGIC ADVANTAGE of Maine's location played a prominent part in America's development. Jutting out into the restless Atlantic, her headlands and promontories saw beacons blaze on their commanding heights, a thousand years ago.

Five centuries before Columbus' prow touched San Salvador, hardy Vikings trod Maine's soil. Eminent authorities aver incontrovertible evidence places these Norsemen here in 999-1,000 A.D., and, doubtlessly, earlier. Though records of their settlements are crude and sparse, it is safe to predict that some day researchers will unlock the mysteries veiling these by-gone voyagers.

From the time the Pilgrims landed, Maine kept pace with other states in rapid advancement. To be true, she was then part of Massachusetts,—formal ratification of her statehood occurring in 1820—but in the two centuries that intervened, her progress had been steady, and sustained.

Again, her favorable location contributed greatly to this growth. Her coastal towns were world-renowned; commerce and immigration, radiating from those lanes, fanned their way to the State's interior. As a result, she became the embodiment of agriculture, industry, and recreation. Thus, she truly personifies diversification, in its most modern sense, while still keeping faith with her hallowed past. Storied sites, where blockhouses and forts forged America's early greatness, stand side by side with stately structures, dating back to Colonial days. Above roads where Yesterday's stagecoaches lumbered, Today's aeroplanes gaze down upon one of Nature's most superb creations: The well-loved State of Maine.



Above: crested breakers batter ceaselessly against ledges where guardian lighthouse charts safe course for mariner. Below: sleek yachts ride restfully in an unrippled calm that rivals the proverbial mill pond.

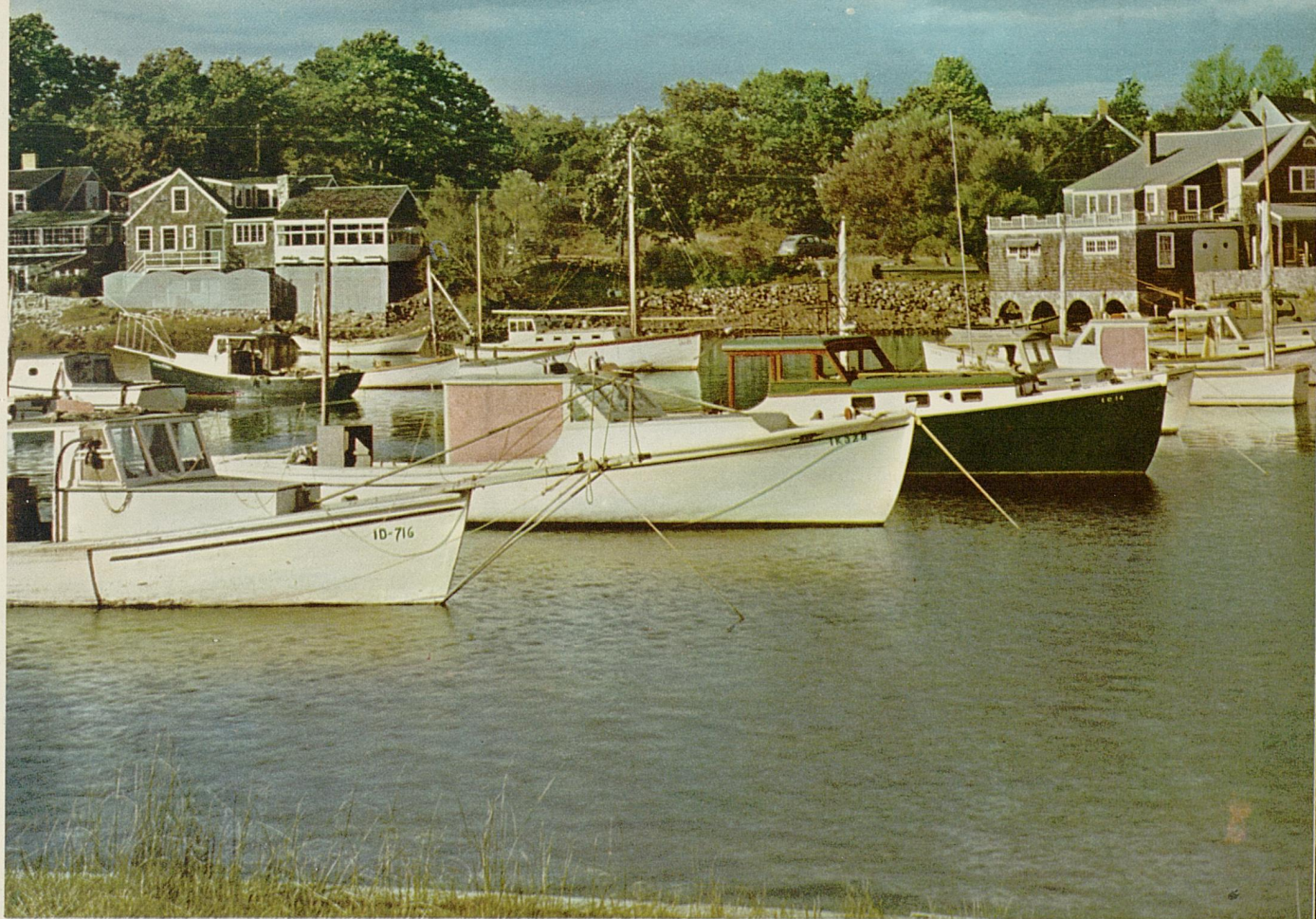


COASTAL MAINE

THAT ABUSED WORD, "unique," best describes the coast of Maine. Our coastline is unique, because there is not another one like it in America.

The vacationist, entering from the southern tip, finds himself traveling by beaches whose beauty cannot be surpassed. Progressing northward, this picturesque panorama blends into a sublime succession of islands, headlands, harbors, coves, estuaries, fishing villages. Maine's 250-mile direct line of coast would be nearer 2,500 miles, if straightened out.

Aptly termed America's Vacationland, here, indeed, is a perfect playground. Sailboats, power boats, yachts ply these teeming waters; summer residents enliven islands and mainland alike. Artist and photographer, either novice or professional, behold a myriad of treasures. While those who love Nature for herself alone can bask anywhere along the coast, conscious of a closeness to The Infinite.



Cabin cruisers and motor boats stand in sparkling array where one of Maine's numerous harbors provides shelter. Towering trees look down on attractive homes along the waterfront. Informal dances and jolly social gatherings are frequent throughout the long vacation season.



Often the visitor here turns a corner of the road and is suddenly transported into what might be termed 'a piece of the past,' such as this tiny fishing settlement, unchanged through the years.

Safe ocean beaches abound in Maine, where young and old may bask in the friendly sunshine after bathing. Our beaches are not surpassed anywhere in the world, either in this country or abroad.





Among all the distinctive dishes that delight the epicure, certainly a Maine lobster occupies an honored niche of its own. Fresh from the deep, they are brought daily to lobster houses like the above.



Right smack out of the trap, these lobsters, iced and delivered by air express, will still retain all their unequalled succulent flavor, even though flown a thousand miles from Maine waters.



Few people associate the everyday, prosaic potato with 'eye appeal.' Nevertheless, potato blossom time in the heart of Maine's potato empire turns the land into a veritable bower of beauty.



Such scenes as this gladden the hearts of people who pass. Motorists and bicyclists traveling by these lakes have a picture of happy canoeists on the water, white birches in foreground, green mountains in background.



INLAND MAINE

THE FARTHER INLAND one journeys into Maine, the more picturesque a panorama awaits one. Dotted across the verdant countryside, emerald lakes smile their cool welcome. Over twenty-five hundred such lakes offer angler, canoeist, and wayfarer a host of matchless delights. Then, add five major rivers, ten smaller rivers, plus uncounted thousands of brooks, streams, waterways, and some idea of Maine's aquatic advantages can be gleaned.

Majestic mountains seemingly brush their snowy peaks against the stars, while broad, rolling farm-lands symbolize sylvan serenity. Whether amid bustling streets of urban centers, or tranquil paths of an ancient town's village green, a distinctive, indefinable charm sets Maine off apart, by herself. One senses something akin to the ageless calm of her forests primeval, and the graceful simplicity of her sturdy homes. Neither imaginary delusion, nor sorcerer's spell, this, instead, is the magic that makes up Maine.



In Maine it doesn't matter a whit whether one has a definite destination in mind, or is merely driving around for the fun of it. Either way, vistas of loveliness greet one from every point of the compass.



As the miles are left behind and the open countryside beckons alluringly, Maine's highways fulfill their important function of making the state's scenic splendors easily accessible, particularly in sections once considered off the beaten path.

HIGHWAYS

IN ALL DIRECTIONS Maine boasts a highway system of which she is justly proud. Except during World War 2, we have rated highway construction a high priority "must".

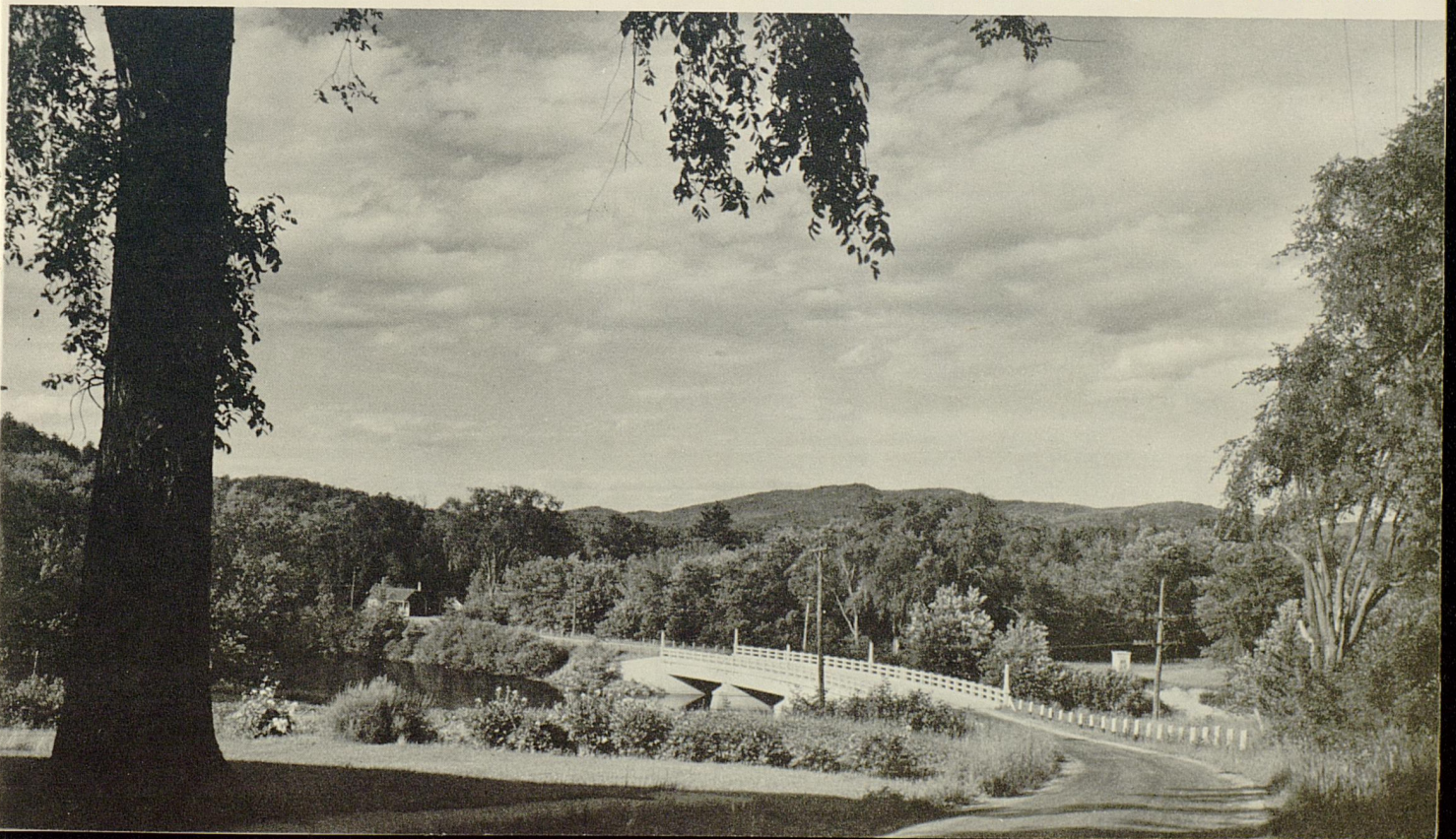
Merging of modern engineering triumph and cherished natural beauty is our reward. Frequently, the onward march of highway progress elsewhere has been accompanied by the obliteration of fondly-remembered landmarks. *Our* State happily achieved modernity without sacrificing the unmistakable ties that linked her to a storied past.

Both inland and along the coast you traverse miles of entrancing beauty. Wherever your destination, Maine highways play their sturdy part in bringing our unrivaled resources within easy range. Massive bridges span rivers whose currents coursed seaward centuries ago; roads have been carved where impenetrable wilderness once barred the way. Yet, throughout this Aladdin-like transformation, Maine remains unspoiled, unchanged, and Eternal.



Roads like this are familiar tributes to Maine's engineering prowess.

While safety is naturally of paramount importance in our highways, careful attention is also paid to retaining a locale's natural charm.





FISHING AND SPORTING CAMPS

MAINE has always been famous for fishing and sporting activities of the great outdoors. Her capital city, Augusta, formerly named Cushnoc, was a tiny trading center serving white settlers and Indians, in 1628. Long before that, the red men ranged these waters and woods.

Our brooks, lakes, ponds, rivers, and streams yield a fighting fish that attracts anglers from all over the globe. Trout, salmon, black bass are mighty gamesters, while each August we hold an annual Tuna Tournament.

A fact not generally known is that the sporting camps, widely seen nowadays, virtually originated in Maine. Whole families vacation here at such camps that combine rustic ruggedness with modern appointments. Many resorts feature these camps, with their large central dining rooms as focal gathering points. Friendships forged here among people of kindred taste mellow happily all through life.

Wherever true disciples of Izaak Walton gather they pay their sincerest homage to, and reserve their fullest reverence for, the fighting fish found in Maine. Blissful mortals like these live in their own special Utopia, where Fishermen alone may dwell.



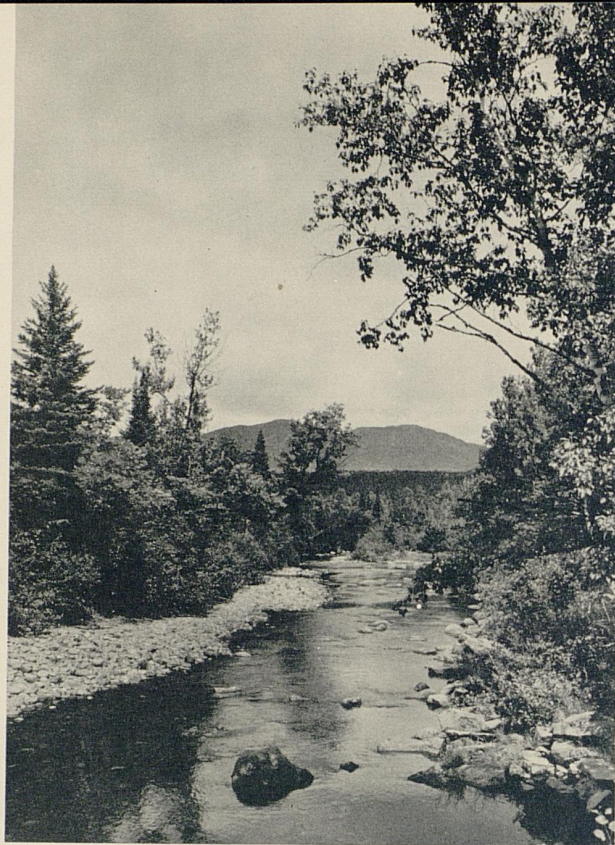


Above: on the porch of a sporting camp is a study in calm repose, a personification of 'all's well with the world.' Below: a trio versed in outdoor lore starts preparations for cooking the morning catch of trout over their improvised stone oven.





Spic and span, this white house with attached white barn looks up to the huge spreading elm on a rural road.



Once a freckle-faced, barefoot boy sagely said: 'Fish is where you find 'em.' Streams like this prove he was SO right.



A setting of natural scenic beauty frames this Maine country home. Surrounded by trees and separated from the road by a pleasant pond, there is also the usual highly practical garden of fresh vegetables in the rear.

Rarely does the camera capture a more majestic silhouette than this. In a single inspiring sweep we view the thrilling trinity of lake, forest and distant mountain.





Man's faithful friend, the horse, will be your companion through a network of country roads ideal for horseback riding.

HOTELS

Golfing & Horseback Riding

MILE FOR MILE, probably no part of the entire globe is more renowned for summer resort hotels than Maine. Broad though it sound, this statement, on mature reflection, is readily verified. Both coastal and inland, our hostelries are known and lauded everywhere. The year-round institutions reflect the comfort and hospitality of our section, while the famed summer resort establishments have long since become veritable institutions. Maine food, and Maine cooking, are synonymous with epicurean perfection; the piquancy and tang of faithfully tended native recipes bring new delights to eating.

Velvety-green golf courses are found in profusion, both 9-and-18 holers. Some nestle inland, flanked by lush valleys; some perch atop cliff-bordered terrain, with the whole Atlantic Ocean forming a natural water hazard. Many summer resort hotels feature horseback riding, with varied facilities for those who relish brisk canters over safe bridle paths.



The grandeur of the mighty State of Maine itself is mystically present here. Maine summer resort hotels have a variety of locations to suit all tastes. Some hotels are right on the ocean front; others, alongside fabled lakes, others, by mountain gorges; still others on inland highways. Picturesque golf courses that are well kept-up find favor with every class of golfer.



Parents all over America are more and more aware of the tremendous benefits Maine summer camps hold in store for their youngsters. Boys and girls from practically the whole 48 states register here each summer.



Under the expert supervision of capable camp counsellors these fortunate boys and girls receive a careful schooling in different phases of healthy outdoor activities that stands them in good stead all through life.

BOYS' AND GIRLS' CAMPS ...CANOEING

SUMMER CAMPS really started in Maine. When children grew up on farms and in villages they had ample chance to romp around outdoors. Their exercise, play, even juvenile work were performed close to nature. This environment automatically encouraged them to build and create for themselves whatever they lacked.

Consequently, summer camps were first conceived largely to bring Young America back to nature, away from confines of cities. The idea spread rapidly, as these boys' and girls' camps are operated under very strict supervision of the Health Department. Canoeing is a favorite sport, enjoyable canoe trips being seasonal highlights. At summer's end, bronzed, built-up bodies are testimonials to the incomparable benefits of Maine's camps.



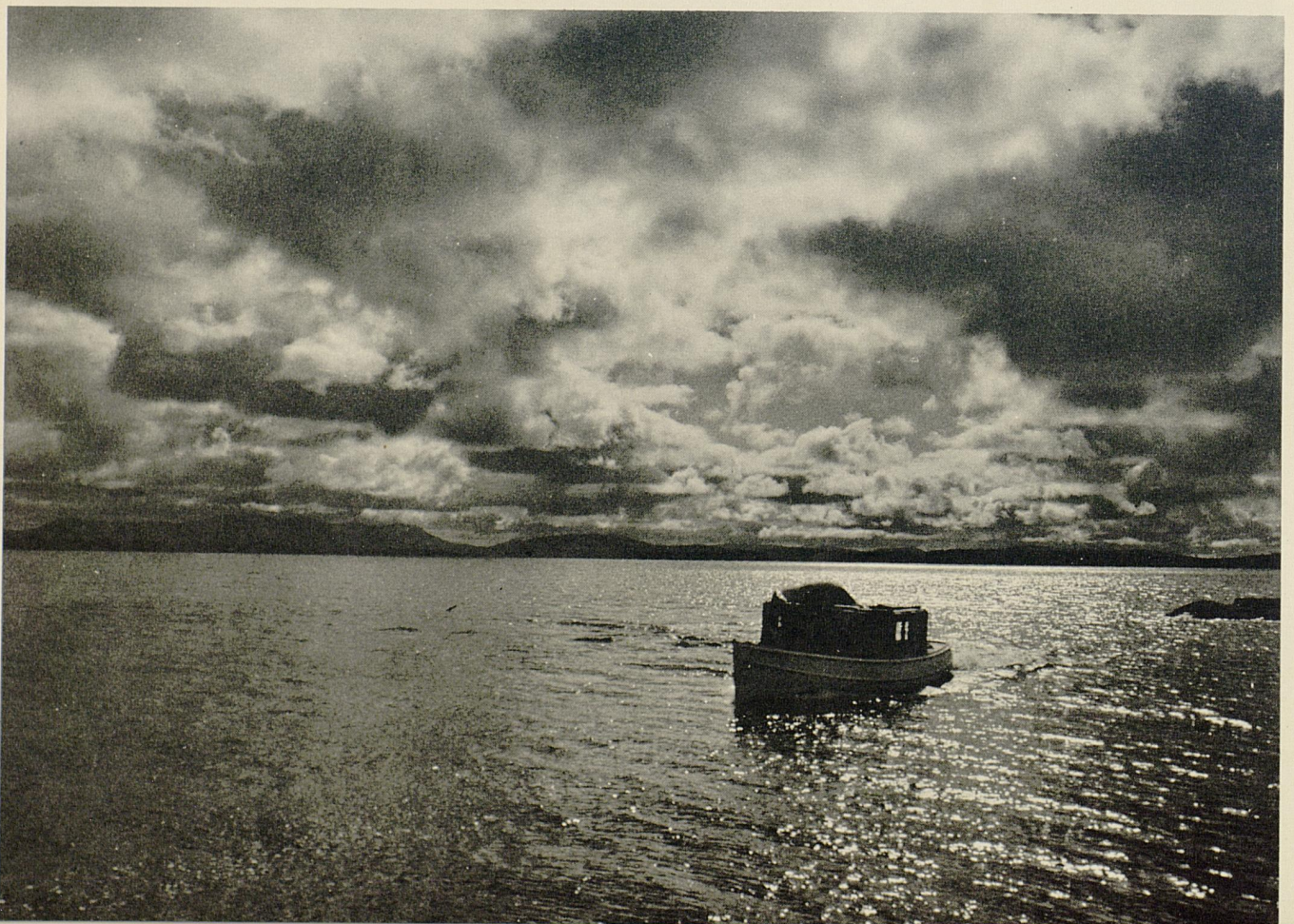
Long before the season has ended most older campers have become adept at wielding a paddle on canoe trips, or handling a sailboat.



CULTURAL ADVANTAGES

ANY STATE whose advantages are diverse and well balanced must provide an appropriate background of culture. In this respect, Maine is richly endowed.

Educational institutions of enviable standards flourish here today, as for generations past. Though the Little Red Schoolhouse of yesteryear is gone, the irrefutable precepts of the "3 R's" still reign. Hamlets and small towns pay the same close attention to their school systems as our largest cities. All schools, primary, grade, grammar, high, and pre-



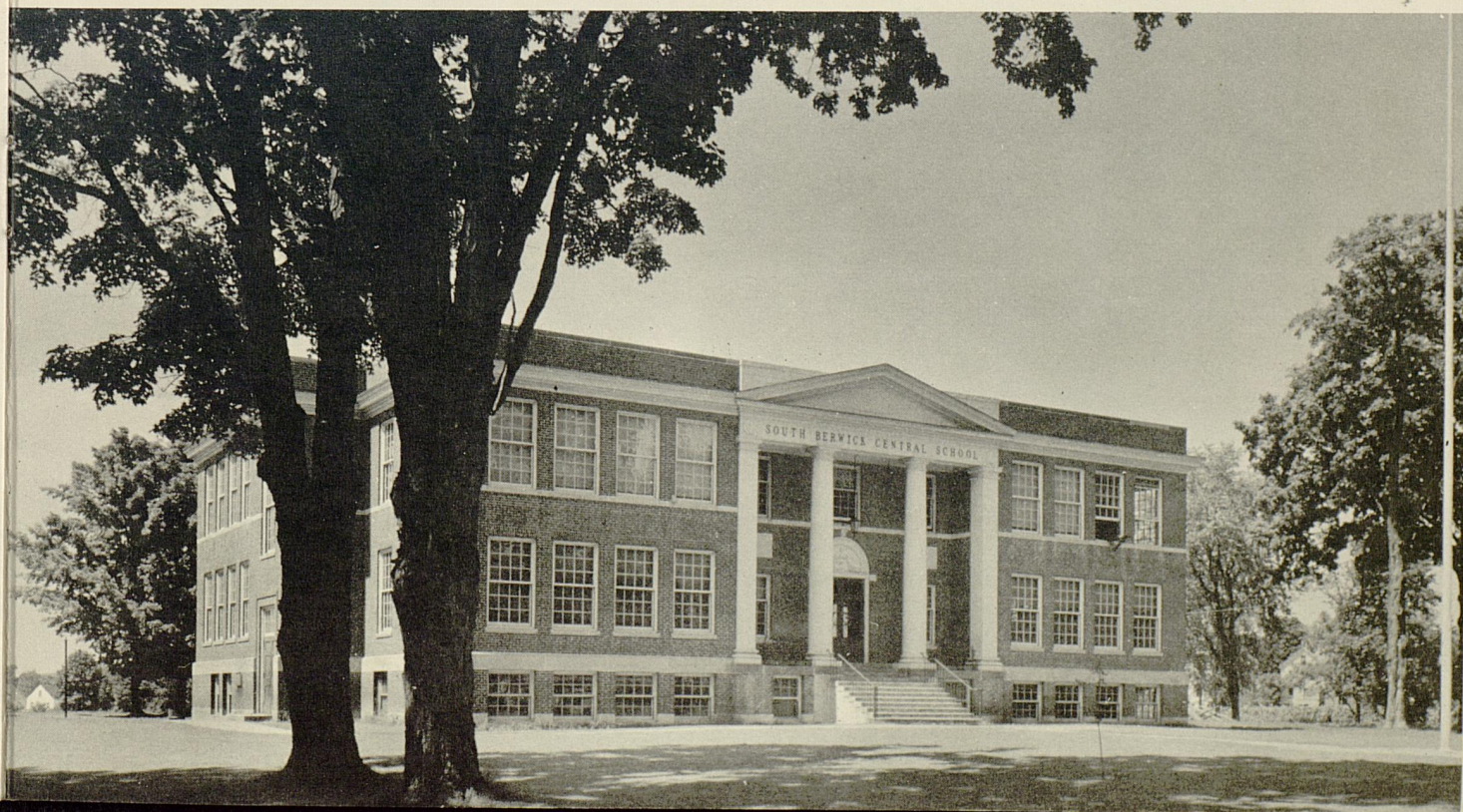
paratory lead upward to the State's four colleges: University of Maine, Bates, Bowdoin, and Colby. Religious structures, embracing practically all denominations, add their own majestic dignity to this impressive repository of culture.

During vacation months, several notable summer theatres operate, bringing contemporary Broadway and Hollywood stars in reigning hit productions. Musical camps, where music lovers congregate, are becoming more numerous; art colonies and art schools increase annually. Among the artists themselves, it is conceded that no coastline in the world compares with the natural beauty of the coast of Maine.



Graceful columns adorn the entrance of a Maine college.

Numerous new schools, modern in every respect, have been construed throughout the state in recent years.





HIKING AND MOUNTAIN CLIMBING

HIKING is everybody's exercise, rich or poor, young or old. Mountain climbing has become a decidedly popular form of hiking. The mountains of Maine, green verdant, thickly covered by vegetation, allow both novice and veteran to indulge his hobby amid well-nigh perfect settings.

Most of our mountains have clearly-defined trails leading straight to the top. Climbing them also furnishes chances galore for photography, nature study, mineral research, and just about everything else an ardent outdoorsman desires. The Maine Development Commission, (which prepared and distributed this booklet) also issues among its other publications a free guide on Maine mountains and mountain climbing, which is yours for the asking.



Challenging the ingenuity and stamina of those who would climb it, this Maine mountain has several counterparts here. Participants in mountain climbing have increased decidedly during the past decade. Extraordinary photographic effects reward the patient climber as he ascends to its lofty summit.



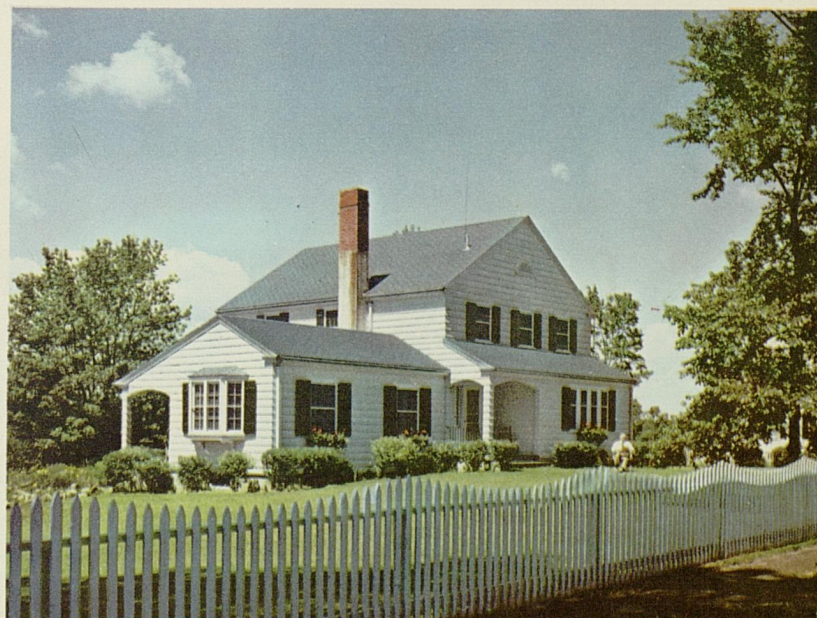
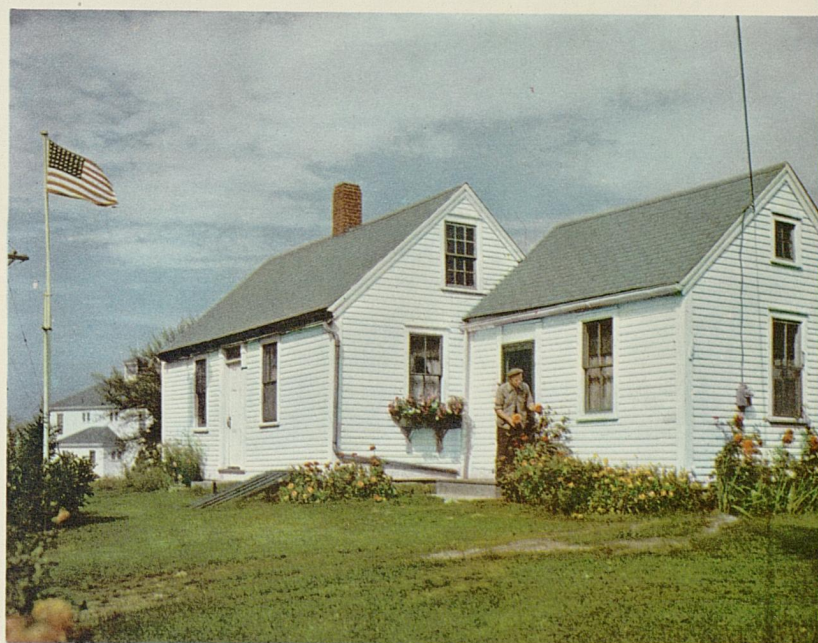
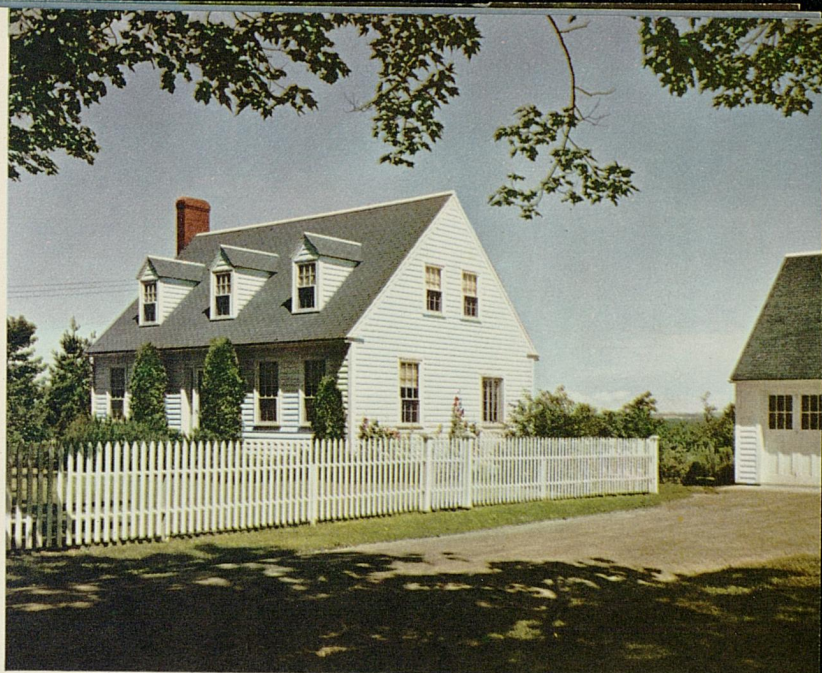
Living in Maine is an unending pleasure, regardless whether one is here the year 'round, or part-time only. Those who seek to sniff the salt spray have the seashore; lovers of lakes, mountains and valleys are equally blessed. Even the climate cooperates by ideal seasonal distribution of the right kind of weather.

MAINE . . . A Good Place to Live

FEW ARE THE WORDS in any tongue more hallowed than "Home". We like to think that folks in Maine have always kept faith with what our forefathers conceived Home to be. A dwelling where family and loved ones gathered, where friends and neighbors assembled — this same concept that has come to us down the years remains unchanged today. While we hasten to make it clear we imply no disparagement to crowded cities or their inhabitants, we respectfully submit, nevertheless, that children born and brought up in the so-called "country" know what "Home" means in perhaps its deepest, truest sense.

Visualize any Maine village, for example. Rows of modest, trimly-neat houses, where well-kept gardens scatter flowered fragrance on the clean air. Where runaway brooks gurgle their greetings up to golden-throated orioles, nesting snugly in some staunch oak. Where friendliness, and neighborliness, prevail on all sides. Where the "playgrounds" were fashioned by wise Mother Nature herself, be they "playgrounds" of meadow or seashore, of mountain or vale. Where the softness of a Sabbath eventide merges gently into an old church bell's beckoning chimes. Where the tall, white spire above that bell welcomes you to enter, and find peace.

This is a glimpse into the Maine that we ourselves know, and love; another reason why we proudly call it the best place in the world to live.





Our wise forebears were quick to recognize Maine's vast water power resources when locating their industrial sites.

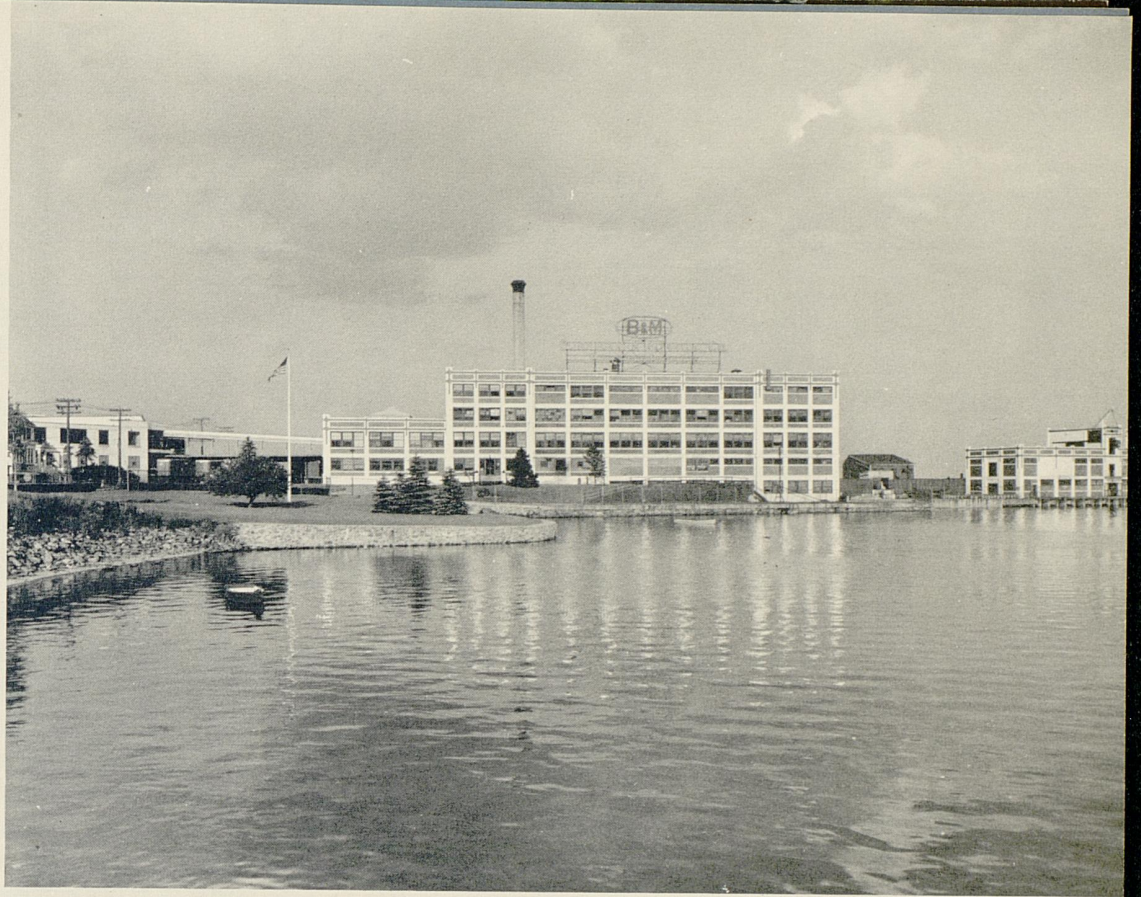
Well-built shops and factories with wheels
whirring busily are situated all around the state.



INDUSTRY

SOME PEOPLE THINK of Maine only in the twin terms of agriculture and recreation. Nevertheless, to stop with these two, when assaying our advantages, is incomplete, incorrect. Because, there remains a third equally important factor on which the State's claim to fame is secure: Industry.

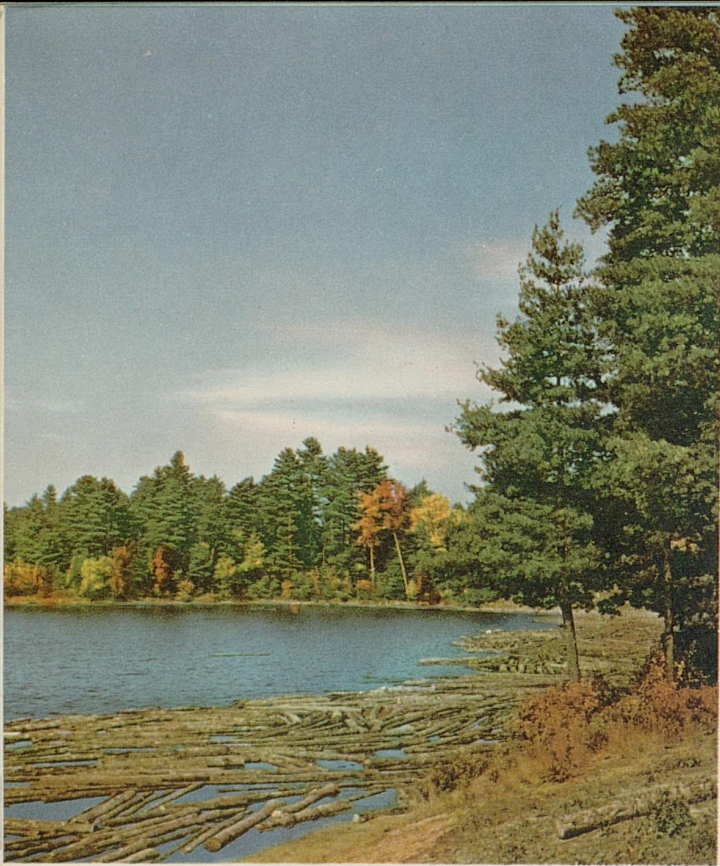
Generations of capable, industrious workers have transformed the Maine craftsman into a living symbol of "Yankee ingenuity". Both men and women take a genuine interest in their tasks, and turn out acknowledgedly top-notch product. Firms, old and young, unite in praising the State's industrial climate. Room for healthy expansion still remains, however, as is strikingly demonstrated by the many new businesses constantly being established here.



Maine today constantly keeps abreast of the newest developments in industrial expansion trends. The modern factory building depicted above furnishes a graphic example of this progressive spirit.

One of the most important businesses in Maine's overall economic picture is the pulp and paper industry. Many different types of paper are made here, including the paper on which these lines are printed.





Reflected in the waters of this lake are the bright, warm colors of maples mingling with pines, and presenting an indescribably beautiful effect.

AUTUMN

EACH OF THE FOUR SEASONS in Maine is bountifully sprinkled with pure, unalloyed delights. Choosing one above the others depends wholly on individual tastes. Certainly, however, an autumn day here is a masterpiece of Nature.

When the first nippy evenings summon Jack Frost with his magical paint brush, an orgy of colors unfolds that no mortal may match. Brilliance and hues that range through shimmering pastels to solids of browns and scarlets fleck the forests with fairy-like flames. It matters little whether a man is accompanied by his faithful dog and successfully brings out his bird, or whether one strolls for the sheer joy of reveling in such a scene. Suffice that a day in the fall, either in the woods, or merely marveling at the enchanting Maine countryside, is like entering a realm far removed from our own.





During the latter days of September and first few days of October every hillside and mountain becomes a riotous splash of vivid color.



Autumn tours are rapidly taking rank among the most popular tours of the entire year. When turning foliage reaches its gorgeous peak, the display is indeed sublime.



Every sloping pasture can be transformed into an exciting ski trail, every erst-while closed cottage becomes a restful chalet when King Winter reigns in Maine.



WINTER

ONE MYTH about Maine that has long since been happily dispelled concerns our winters. An altogether wrong impression once prevailed that winters here were arduous and severe. As a matter-of-fact, the contrary is true. They are exhilarating; vibrant; zestful.

Now and then, especially in the smaller communities, nostalgic memories are awakened. It may be the tinkle of old-fashioned sleigh bells, a form of music rarely heard nowadays. Or, perhaps, visible through wide, latticed windows, a huge log crackles merrily on the hearth, while around it joyous children are busy re-creating a cherished American pastime: Popping corn. Indoors, or outdoors—whatever the diversion be—winter in Maine diffuses its own beauty and charm. A fact, incidentally, that more and more people are learning with delight.



Out for a cross-country skiing jaunt, these woodland belles will scorn artificial make-up aids when they return. Instead, cheeks aglow and eyes a-sparkle, they will be radiant testimonials to Maine's wonderful winter weather.

◀ Singing 'Jingle Bells,' this frolicking group rides a 'two hoss hitch' as their grandmothers and grand-daddies did 50 years before them.

TO OUR VISITORS

IT IS WITH a great deal of pleasure that we present you with this pictorial booklet of Maine. Realizing that people today are extremely busy and do not want to devote too much time to reading text, we have tried to give you a general idea of Maine and some of the vacation pleasures that you may enjoy while visiting here.

It is impossible in a booklet of this kind to deal individually with any particular vacation activity. We have prepared separate booklets dealing in detail with most of our recreational facilities.

You also may be interested in coming to Maine to live. If so, you will want a home in one of Maine's coastal villages, in one of Maine's smaller cities or in a country community. You may be one of those who are looking for an industrial location. The Maine Development Commission will be very glad to assist you in any of these problems.

Below you will find listed the many booklets published by the state. They may be obtained merely by addressing the Maine Development Commission, State House, Augusta, Maine.

MAINE, THE LAND OF REMEMBERED VACATIONS

FISHING

HUNTING

CANOEING

HOTELS, CAMPS AND TOURIST HOMES

MAINE SALT WATER SPORT FISHING

FACTS ABOUT MAINE

STATE HIGHWAY MAP

121 CANNED FOOD RECIPES

MOUNTAIN CLIMBING IN MAINE

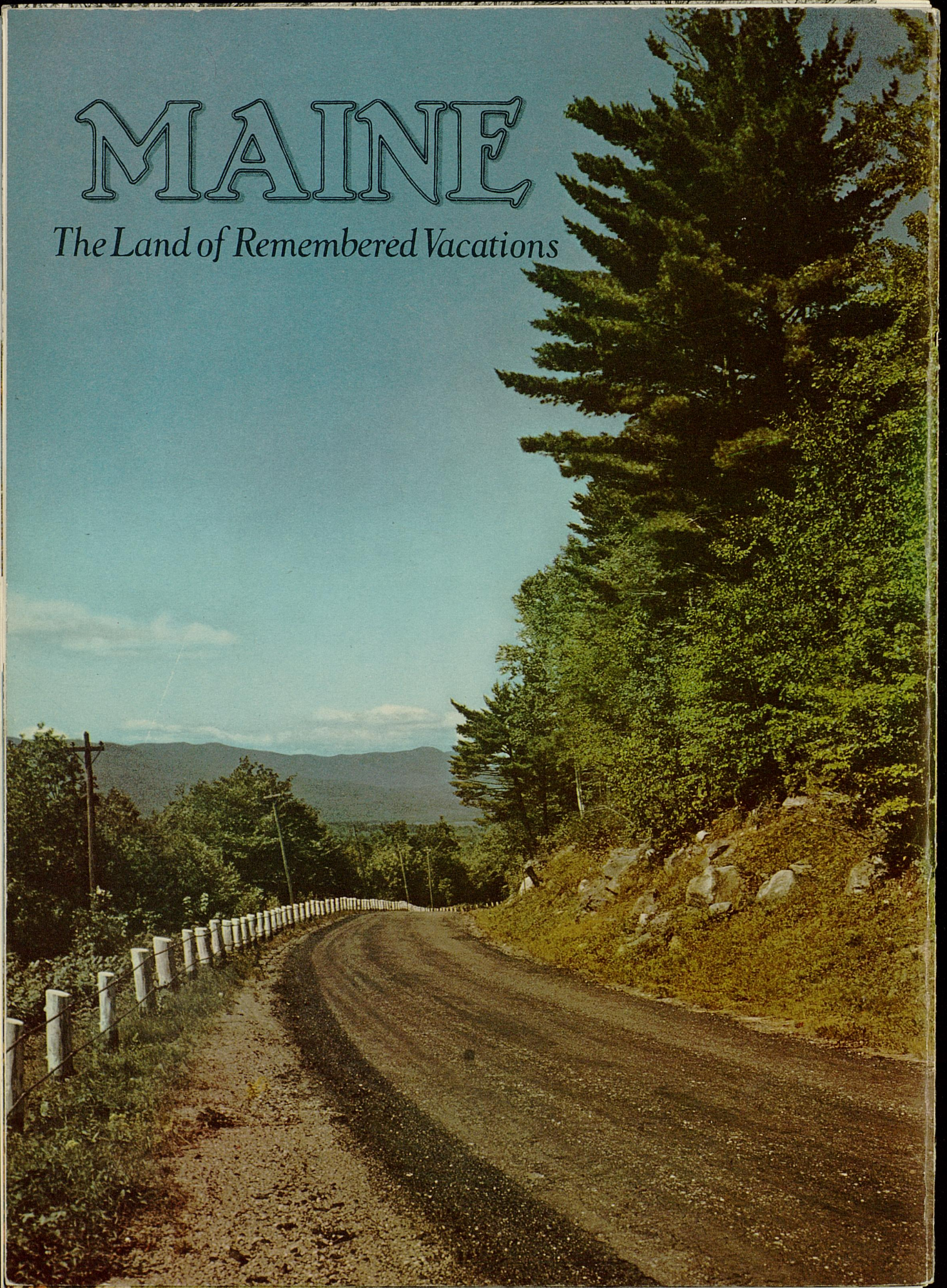
MAINE CAMP FOR BOYS AND GIRLS

PUBLIC PARKS IN MAINE

INDUSTRIAL MAINE

MAINE

The Land of Remembered Vacations



To the Chief -

with personal regards

Harold H. Burton

JOHN MARSHALL AT THE TRIAL OF
AARON BURR

STATEMENT BY ASSOCIATE JUSTICE HAROLD H. BURTON
OF THE SUPREME COURT OF THE UNITED STATES

TO THE
JUDICIAL CONFERENCE OF THE THIRD JUDICIAL CIRCUIT
OF THE UNITED STATES

July 17, 1951

Sharing significance with his rulings was the demeanor of Chief Justice John Marshall throughout the fabulous trial of Aaron Burr in the Circuit Court of the United States in the District of Virginia, March 30-August 31, 1807.

As the presiding trial Justice he exemplified what he meant when he had said for the Supreme Court—

“As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.” *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125.

If ever there was a trial to “excite and agitate the passions of men” it was that of Aaron Burr for high treason. The penalty was death by hanging. The accused was a brilliant lawyer who had served as a Colonel in the Revolutionary Army, United States Senator from New York and Vice President of the United States.¹ Though

¹ He had presided in the Senate, with marked fairness and competency, over the impeachment trial of Associate Justice Chase of the Supreme Court which had resulted in an acquittal of the Justice. January 2-March 1, 1805. See *Annals*, 8th Cong., 2d Sess. 80-675,

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an Anti-Federalist, he had antagonized the idolized leader of his party, President Jefferson. While Vice President, he had killed, in a duel, the outstanding young leader of the Federalists, Alexander Hamilton. Leaving office in 1805, he was a widely known, ambitious, fearless soldier-statesman to whom fables readily attached themselves. It was rumored that he proposed not only to invade Spanish-held Mexico but to seize New Orleans and sever the Southwest Territories from the United States at the Alleghany Mountains. On January 22, 1807, President Jefferson announced to Congress that on these charges Burr's "guilt is placed beyond question."² That was enough for the people at large. They denounced Burr as a traitor. They demanded his prompt execution.

The Government, however, faced a new definition of treason in the Constitution of the United States. To convict Burr of treason against the United States in this instance, he must be found guilty of "levying War" against them, and this must be on the testimony of two witnesses to the same overt act. Also, he must be tried by an impartial jury of the state and district wherein the crime was committed. The Government selected as the situs of the crime Blennerhassett's Island in the Ohio River, in Wood County, Virginia, about two miles below the present city of Parkersburg, West Virginia. This brought the trial into the Circuit Court in the District where Chief Justice Marshall would preside as Circuit Justice. The hostility of President Jefferson towards the Chief Justice was well known. That John Marshall did not avoid his responsibility as presiding Justice but discharged it in the deliberate and temperate manner that this cause célèbre demanded was in the best tradition of the federal bench.

726-763. On leaving the Vice Presidency, he had delivered to the Senate, in executive session, March 2, 1805, an affecting farewell address marked with expressions of strong devotion to his country and its Constitution. *Annals*, 8th Cong., 2d Sess. 71-72.

² President's Message to Congress, *Annals*, 9th Cong., 2d Sess. 39-43.

Today the case is sometimes misconceived. Chief Justice Marshall did not sit alone as presiding Justice. Joining in his rulings and sometimes making comments from the bench was United States District Judge Cyrus Griffin. The rulings of the Circuit Court as to the meaning and required proof of treason were not decisions of first impression in the trial court. In large part they were explanations by the Chief Justice of his own opinion, written for the Supreme Court, February 21, 1807, in *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125. The opinions supporting the principal rulings of the Circuit Court can be found elsewhere than in the often unavailable lower court reports. They were reprinted by Cranch as Appendix B to the Supreme Court opinion just mentioned, at page 470.

The significance of the trial, however, can be fully appreciated only when seen against the background of its time and read in connection with the related litigation.

I. BACKGROUND

On leaving the Vice Presidency Colonel Burr turned to the beckoning fields of adventure in the Southwest. He announced a plan to settle lands he had purchased on the Washita River, in what is now southern Arkansas or northern Louisiana. If the momentarily expected war with Spain developed, he proposed also to lead the first expedition into Mexico. In the event of war, such a procedure on Burr's part apparently would have been welcomed by the United States. In the interest of this project, he visited the Ohio River settlements in 1805 and made plans to meet with his fellow adventurers at or near Blennerhassett's Island in 1806.

Colorful and wild rumors quickly spread about these plans. Over Burr's denials, the rumors included a story that he had conceived a treasonable plan for severing some of the Southwestern Territories from the United States and joining them to a Mexican Empire of his own. General James Wilkinson, who commanded the United

States Army in the Southwest, but who was at the same time a pensioner of Spain, at first cooperated with Burr. Late in 1806, however, he suddenly reported to President Jefferson that Burr planned to attack New Orleans, seize it and lead a revolt against the United States, all of which Wilkinson proposed to resist by force of arms. It is for historians and not for us to say what degree of truth there was, or that Wilkinson believed there was, in that report.³

³ Andrew Jackson supported Burr's settlement program and refused to believe the charges of treason. He helped Burr outfit his river boats and entertained him at his home. When ordered to mobilize his militia in defense against Burr's supposedly revolutionary movements, he did so. After reinvestigating the facts, he promptly disbanded his militia. In McCaleb's "The Aaron Burr Conspiracy" he is quoted as writing the following confidential letter, January 15, 1807:

"The late denunciation of Aaron Burr as a traitor has excited great surprise and general indignation against Burr. Still, from the opinion possessed of the accuser (Wilkinson) many there are who wait for the proof before they will pronounce him guilty of the charge. . . . And if Burr had any treasonable intentions in view, he is the basest of all human beings. I will tell you why. He always held out the idea of settling Washita, unless a war with Spain; in that event he held out the idea that from his intimacy with the Secretary of War, he would obtain an appointment; and if he did he would revolutionize Mexico. . . . If he is a traitor, he is the basest that ever did commit treason, and being tore to pieces and scattered to the four winds of heaven would be too good for him." At p. 218.

During Burr's trial, Jackson was summoned to Richmond as a State witness but he so vigorously denounced Wilkinson and supported Burr that he was not put on the stand. He wrote from Richmond before the trial was well begun: "I am more convinced than ever that treason was never intended by Burr; but if it was, you know my wishes—that he may be hung. I am still more convinced that whatever may have been the project of Burr, James Wilkinson has gone hand and hand with him." *Id.* at p. 219.

McCaleb quotes, as "the most explicit enunciation we have of his [Burr's] concerning the nature of the project," the following language apparently used in a communication from Burr to Senator John Smith of Ohio:

"Mr. Smith, my object in a few months will be disclosed; you will not find it dishonorable or inimical to this Government. I feel

Burr's alleged treason had remained largely in the realm of rumor until General Wilkinson wrote to the President. Relying on Wilkinson, the President submitted the issue to his Cabinet and, on November 27, 1806, sent Congress a proclamation that startled the nation. It reported receipt of information that a military expedition was being organized by private persons within the United States to move against the dominions of Spain, and that such persons were collecting arms and seducing well-meaning citizens "to engage in their criminal enterprises." The President warned faithful citizens to withdraw from the enterprise or "incur prosecution with all the rigors of the law." He enjoined civil and military officers to seize the boats, arms, etc., so provided. He required good and faithful citizens to aid in "bringing to justice" all such offenders and in "giving information against them to the

superior to the mean artifices which are ascribed to me. Calumniators I do not notice, for as fast as you put one down another will rise up. This much I will tell you: if there should be a war between the United States and Spain, I shall head a corps of volunteers and be the first to march into the Mexican provinces. If peace should be proffered, which I do not expect, I shall settle my Washita lands, and make society as pleasant as possible. In this Government I have been persecuted, shamefully persecuted; and I am sorry to say, that in it, all private confidence is destroyed." *Id.* at p. 156, citing Liberty Hall (a Cincinnati newspaper), February 24, 1807.

Similarly, when Henry Clay was representing Burr before the Federal Circuit Court in Kentucky, Burr, on December 1, 1806, categorically denied to Clay the rumors then in circulation saying:

"I have no design, nor have I taken any measure, to promote a dissolution of the Union or a separation of any one or more States from the residue. . . . I do not own a musket nor a bayonet, nor any single article of military stores, nor does any person for me, by my authority or with my knowledge. . . . Considering the high station you now fill in our national councils [U. S. Senator from Kentucky], I have thought these explanations proper, as well to counteract the chimerical tales, which malevolent persons have so industriously circulated, as to satisfy you that you have not espoused the cause of a man in any way unfriendly to the laws, the government, or the interests of his country." *Id.* at p. 157.

proper authorities.”⁴ The proclamation did not name anyone as the offender nor specifically charge anyone with treason against the United States. The public, however, knew that Burr was the alleged offender and jumped to the conclusion that he must be guilty of high treason or the President would not have taken such extraordinary steps to thwart his preparations. The proclamation apparently had two effects. As the President later claimed, it probably destroyed all likelihood of the success of any such treasonable plans against the United States as were reported by Wilkinson. It also convinced the public that Burr had undertaken such plans as were described. Throughout his life Burr suffered the consequences of that popular belief.

December 2, 1806, the President, in his annual message, reminded Congress of the reported expedition of private individuals against the territories of Spain. Annals, 9th Cong., 2d Sess. 11, 12. Congress demanded that the President disclose his information concerning such a conspiracy and report the measures he had taken to suppress it. He replied that his information was voluminous but that there was little in it to constitute legal evidence. He, however, detailed General Wilkinson's report of Burr's alleged treason and misdemeanor, referred to his own proclamation of November 27, 1806, identified Burr as the principal actor, and assured Congress that Burr's "*guilt is placed beyond question.*"⁵ The die was cast. The prosecution of Burr for treason became politically necessary. The unflinching adherence of the courts to their impartial duties under these circumstances deserves recognition. As the Chief Justice later said of his Circuit Court: "That

⁴ Proclamation Against Burr's Plot, 10 Ford, The Works of Thomas Jefferson, 301-302.

⁵ "In this state of the evidence, delivered sometimes too under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor [Burr], whose guilt is placed beyond question." Jefferson's Message to Congress, January 22, 1807, Annals, 9th Cong., 2d Sess. 39, 40.

this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true." *United States v. Burr*, 25 Fed. Cas., No. 14,693, p. 179, also in App. B, 4 Cranch at p. 506.

A summary of the related litigation will outline the ensuing drama.⁶

II. PROCEEDINGS BEFORE THOSE IN RICHMOND

A. *November, 1806*—*In the Circuit Court of the United States in the District of Kentucky* (Innis, J.). A federal indictment was sought in Kentucky against Burr for the misdemeanor of preparing a military expedition within the United States against Spain. He appeared voluntarily and the investigation collapsed. *United States v. Burr*, 25 Fed. Cas., No. 14,692, pp. 1-2.

⁶ The record of the proceedings is largely available in:

(1). Robertson's Reports of the Trials of Colonel Aaron Burr (1808), cited by McCaleb as Burr's Trials. This is a two-volume publication containing, in 1135 pages, a substantially complete transcript of the record in the prosecutions, both for treason and misdemeanors in the Circuit Court of the United States, at Richmond, Virginia, taken in shorthand by David Robertson. See also, Coombs, *The Trial of Aaron Burr for High Treason*, condensed to 390 pages, largely omitting arguments of counsel.

(2). *United States v. Burr*, 25 Fed. Cas., Nos. 14,692, 14,692a, 14,692b, 14,692c, 14,692d, 14,692e, 14,692f, 14,692g, 14,692h, 14,693, 14,694, 14,694a, at pp. 1-207. These contain the opinions in the several related cases. Those in the principal proceeding are in No. 14,693 and Marshall's major opinion of August, 31 1807, is at pp. 159-181.

(3). *Ex parte Bollman and Swartwout*, 4 Cranch 75. This contains the opinions delivered in the Supreme Court in February, 1807, on several of the underlying issues which arose again in Burr's trial. As Appendix A, at pp. 455-470, there are reprinted the documents which accompanied the President's message of January 22, 1807. As Appendix B, at pp. 471-507, there is reprinted the opinion rendered by Chief Justice Marshall, as Circuit Justice for the Circuit Court in the District of Virginia, August 31, 1807. The reporter states, at p. 125 note, that the opinion in the Circuit Court "elucidates and explains some passages in this opinion [of the Supreme Court in the *Bollman* case] which were supposed to be in some degree doubtful."

B. *December, 1806—In the same court.* Similar indictments were sought against Burr and Adair. Burr appeared voluntarily and was represented by Henry Clay. The grand jury, after hearing the evidence, not only refused to indict Burr but rendered a special report, finding that they could not "discover that anything improper or injurious to the interest of the Government of the United States, or contrary to the laws thereof, is designed or contemplated by either of them [Burr or Adair]." McCaleb, *The Aaron Burr Conspiracy*, p. 163, citing *Palladium*, December 11, 1806.

C. *December, 1806—January, 1807. In New Orleans.* This constituted most of General Wilkinson's "reign of terror." When the Governor refused the General's request to suspend the writ of habeas corpus or to declare martial law, the General seized local military control in the name of national security. He arrested and shipped to Baltimore Bollman, Swartwout, Alexander and later Adair. He also seized others. Writs of habeas corpus were issued by local judges. To these the General made returns that he took full responsibility for the arrests and stated that the men sought were no longer in his possession. Judge Workman appealed to the Governor for help. Receiving none, he adjourned his court and shortly thereafter resigned his office.⁷ At the request of the General, the Governor asked the Territorial Legislature to suspend the writ of habeas corpus. The Legislature not only refused but forwarded to Congress a memorial of protest.⁸

D. *December, 1806—January, 1807. Progress of Burr's expedition.* The immediate prospect of war with Spain having been dissipated, Burr, Blennerhassett, Tyler and

⁷ The General soon seized this judge and another man, charging both with planning or participating in expeditions against Spanish possessions. Each was found not guilty when tried in March, 1808.

⁸ ". . . no foreign enemy or open domestic foe was then, or has yet been proved to have been within any perilous distance of this city The acts of high-handed military power to whom we have been exposed [are] too notorious to be denied, too illegal to be justified, too wanton to be excused." McCaleb, *The Aaron Burr Conspiracy*, p. 198, citing *Orleans Gazette, Extra*, March 20, 1807.

Smith floated down the Mississippi River with nine flat-boats, manned by about six men each. They proposed to settle on the Washita. At the same time the rumor spread that Burr was coming to attack New Orleans with hundreds or thousands of men, and General Wilkinson mobilized his forces to intercept them.

December 2, Governor Tiffin of Ohio, aroused by a representative from the President, sent a warning message to the Ohio Legislature. This led to the seizure, on December 9, of some of Blennerhassett's unmanned flat boats on the Muskingum River in Ohio. On December 10 the Virginia militia announced that it would investigate Blennerhassett's Island on the following day. The expedition, being substantially ready to leave, created further excitement by leaving during the night. The next day the militia ransacked the island, consumed the liquid spirits available, and seized a flat boat with 14 boys from Pittsburgh aboard. The prisoners were released after brief questioning and, taking Mrs. Blennerhasset with them, proceeded down the river.

December 22 Colonel Burr joined the party at the mouth of the Cumberland with two boats which had been prepared for him by General Andrew Jackson. Passing down the Mississippi on Christmas Day, he dispatched a friendly note to the Commander at Fort Massac. On December 29 Burr declined an equally friendly invitation to dine at the Fort. There was nothing about Burr's little flotilla to cause alarm to those who saw it. Nevertheless, intense excitement had been aroused in the Mississippi Territory by exaggerated warnings of its approach. A detachment of 375 militiamen was sent up the river to intercept it. Other troops marched by land. On their contact with Burr, he ridiculed the idea of his hostility and volunteered to submit to the civil authorities. The inflated monster of impending military invasion collapsed.⁹ At

⁹ Cowles Meade, the acting Governor of the Mississippi Territory, reported to the Government as follows:

"... this mighty alarm, with all its exaggeration, has eventuated in nine boats and one hundred men, and the major part of these are

the town of Washington in the Territory of Mississippi, Burr was bound over to await action of the grand jury. General Wilkinson boasted that he had dissipated the conspiracy and had saved New Orleans.

E. February, 1807. In the Supreme Court of the Mississippi Territory. Burr volunteered to answer any bill of indictment. After examination of the depositions submitted to him the District Attorney asked the court to discharge the grand jury. The court refused, whereupon the grand jury filed a report favorable to Burr and condemnatory of his accusers. The forthrightness of this frontier document is refreshing.¹⁰ Although no indictment was found against Burr, he was bound over to appear from day to day. At the same time a military patrol was on its way from General Wilkinson who had pledged \$5,000 to cover the expenses of Burr's capture. Fearing

boys, or young men just from school. Many of their depositions have been taken before Judge Rodney, but they bespeak ignorance of the views or designs of the Colonel. I believe them really ignorant and deluded. I believe that they are really the dupes of stratagem, if the assertions of Generals Eaton and Wilkinson are to be accredited." McCaleb, *The Aaron Burr Conspiracy*, p. 225.

¹⁰ "The grand jury of the Mississippi Territory, on a due investigation of the evidence brought before them, are of the opinion that Aaron Burr has not been guilty of any crime or misdemeanor against the laws of the United States or of this Territory, or given any just occasion for alarm or inquietude to the good people of this Territory. The grand jury present as a grievance, the late military expedition unnecessarily as they conceive, fitted out against the person and property of said Aaron Burr, where no resistance has been made to the ordinary civil authorities. The grand jury also present as highly derogatory to the dignity of this Government, the armistice (so-called) concluded between the Secretary, acting as Governor, and the said Aaron Burr. The grand jury also present as a grievance, destructive of personal liberty, the late military arrests made without warrant, and as they conceive, without other lawful authority: and they do seriously regret that so much cause should be given to the enemies of our glorious Constitution, to rejoice in such measures being adopted in a neighboring Territory, and if sanctioned by the Executive of our country, must sap the vitals of our political existence, and crumble this glorious fabric into the dust." McCaleb, *The Aaron Burr Conspiracy*, p. 228, citing *Orleans Gazette*, February 20, 1807.

for his life, Burr went into hiding and notified the Governor that he would submit to civil law when assured of the rights of a citizen. Attempting to flee the Territory, Burr was recognized by one Perkins and was reported to a lieutenant who arrested him. Perkins received \$3,331.

F. *January–February, 1807. In Washington.* In Jefferson's response to the House of Representatives of January 22 he had stated that Burr's conspiracy contemplated two objects—the severance of the Union and an attack on Mexico. The next day the Senate, in closed session, on motion of Senator Giles of Virginia, passed a bill to suspend the writ of habeas corpus. In contrast, the House, in open session, rejected the bill 113 to 19. Going further the House almost passed, 58 to 60, what would have amounted to a vote of censure of the Administration.

At this moment, Wilkinson's military prisoners began to arrive in Washington from New Orleans. Jefferson ordered them delivered to the civil authorities and General Wilkinson's evidence presented to the courts. Alexander was promptly released by Judge Duchet for lack of competent evidence against him. Bollman and Swartwout, having been committed to jail by the Circuit Court for the District of Columbia, sought, on February 13, a writ of habeas corpus directly from the Supreme Court of the United States which was then in session. Bollman and Swartwout also sought a writ of certiorari to bring up the record of their commitment. Both writs were allowed and motions to discharge the prisoners were argued February 16, 17 and 18. Counsel appearing for the prisoners included former U. S. Attorney General Charles Lee, Francis Scott Key, later to become the author of our national anthem, and Luther Martin, a leader of the Maryland and American Bars. Of the Court there were present Chief Justice Marshall and Justices Chase, Washington and William Johnson. Justices Cushing and Livingston were absent.¹¹ The evidence presented by the

¹¹ Justices Cushing and Chase were appointees of President Washington, Justice Bushrod Washington and Chief Justice Marshall of President John Adams, and Justices William Johnson and Brockholst

prosecution was reviewed in detail by the Court. See 4 Cranch, App. A, pp. 455-469. February 21, Chief Justice Marshall announced the opinion of the Court, discharging the prisoners for lack of the proof necessary to constitute treason by levying war against the United States. *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125.

General Adair and Ogden were landed in Baltimore where Judge Nicholson released them, reporting to the President that "Very much to my surprise and mortification . . . there was no proof of any nature whatsoever with them." McCaleb, *The Aaron Burr Conspiracy*, p. 249, citing Nicholson to Jefferson, February 18, 1807. Adair later sued General Wilkinson, in Natchez, for false imprisonment. After eight years, he recovered \$2,500 damages, which the Government paid.

III. PRELIMINARY PROCEEDINGS IN RICHMOND

The Government concentrated upon the prosecution of Burr for treason. A determined effort was made to gather evidence by widespread use of printed questionnaires. The Circuit Court in the District of Virginia having been selected for the trial, it was necessary to find accommodations for the public at the hearings. As a result the court sat in the hall of the House of Delegates of the Commonwealth of Virginia from March into September, 1807.

A. *Counsel*. Government counsel were led by District Attorney *George Hay*, son-in-law of the future President, James Monroe. Hay was in personal correspondence with President Jefferson on every important point of

Livingston of President Jefferson. Justice Todd was added to the Court March 3, 1807, by President Jefferson. It appears that the Chief Justice later communicated individually with the members of the Supreme Court at some time before his Circuit Court's hearing of the *Burr* case, beginning August 3, 1807. 3 Beveridge, *The Life of John Marshall*, 480-481, and references made by the Chief Justice to the individual views of some of the Justices, expressed subsequent to the decision in the *Bollman* case. See *United States v. Burr*, 25 Fed. Cas., No. 14,693, at p. 161, s. c., App. B, 4 Cranch at pp. 474-475.

policy. With Hay was *William Wirt*, then 35. He was destined to become a distinguished author and Attorney General for Presidents Monroe and John Quincy Adams. Supplementing these was *Alexander MacRae*, Lieutenant Governor of Virginia. Counsel for the accused served without compensation. They included *Edmund Randolph*, former Attorney General under President Washington; *John Wickham*, a leader of the Virginia Bar; *Luther Martin*, for many years Attorney General of Maryland, and recognized nationally as a learned and effective trial lawyer; *Charles Lee*, former Attorney General under Presidents Washington and John Adams; and as junior counsel *Benjamin Botts* and *John Baker*. Burr himself often took part in the examinations of witnesses and in arguments to the court. Unlike most lawyers, he was his own best advocate.

B. *March 30, 1807*. Shortly after Burr's arrival in Richmond under military guard, Chief Justice Marshall himself wrote out, signed and issued the warrant by virtue of which Burr was surrendered to the civil authorities.

C. *March 30–April 1, 1807*. *Commitment*. Relying on the record in the *Bollman* and *Swartwout* cases, the prosecution asked the Chief Justice to commit Burr to jail on two charges: treason against the United States and misdemeanor in preparing and setting on foot within the United States a military expedition against Spain. After reviewing the evidence, the Chief Justice held it not sufficient to sustain commitment for treason but sufficient to sustain commitment for the misdemeanor. *United States v. Burr*, 25 Fed. Cas., No. 14,692a, pp. 2–25. He ordered Burr committed on that charge, but released him on \$10,000 bail, conditioned on his appearance at the next term of court, May 22.

D. *May 22, 1807*. *The grand jury*. The required 16, out of a panel of 24, were present and available for service on the grand jury. Burr, however, personally challenged "for favour" U. S. Senator Giles of Virginia, and Colonel Nicholas, a candidate for Congress, both of

whom were strong partisans of Jefferson. Burr's objection to Senator Giles included the latter's recent effort in the Senate to suspend the writ of habeas corpus, indicating substantial belief in the reports to Congress on Burr's expedition. Burr offered to prove that the Senator had confirmed such beliefs by public declarations. Burr objected to Colonel Nicholas on the ground that the latter entertained a bitter personal animosity towards him. Both of those challenged withdrew from the panel. The 16 finally accepted included some of the foremost citizens of Virginia. Two were Federalists, 14 were Anti-Federalists. The Chief Justice named as foreman John Randolph, an Anti-Jeffersonian. In instructing the grand jury, Chief Justice Marshall followed the opinion he had written for the Supreme Court in *Ex parte Bollman and Swartwout*, *supra*. See 3 Beveridge, *The Life of John Marshall*, 350, 414 n., 466, 484, 506; 1 Robertson's *Reports of the Trials of Colonel Aaron Burr*, pp. 31-46.

E. May 22-28, 1807. *Second motion to commit Burr for treason*. The District Attorney announced in open court that he would again move to commit Burr to jail on the charge of treason, arguing that, with the approach of General Wilkinson and the Government's principal witnesses, there was increased danger that Burr might not remain available. This motion had the earmarks of propaganda but the court ruled that if the District Attorney had something to present in support of such a motion, he had a right to do so. 25 Fed. Cas., No. 14,692b, pp. 25-27. Witnesses were called as to the activities of Burr and his associates at Blennerhassett's Island. Collateral issues arose as to the admissibility of certain affidavits and as to their certification. The court ruled against their admissibility. 25 Fed. Cas., No. 14,692c, pp. 27-30. The Chief Justice indicated that he hoped that no opinion would be required of him on this motion to commit for treason, prior to some action by the grand jury. When Burr agreed to double his bond, the motion was abandoned.

F. *June 9-13, 1807. The subpoena to the President.* Burr moved for issuance of a subpoena *duces tecum* directed to President Jefferson personally, calling upon him to produce a certain letter from General Wilkinson deemed material to the defense. After bitter argument, the court ordered the subpoena to be issued. The Chief Justice stated that, while this was his inescapable duty, it remained for the President to decide whether his executive duties would constitute a sufficient reason for not obeying it. 25 Fed. Cas., No. 14,692d, pp. 30-38. This issue never reached its climax. The District Attorney later announced that he had the requested letter in his possession and was ready to produce it.

G. *June 15-18, 1807. Immunity of witnesses on ground of self incrimination.* An issue arose as to the extent to which the court could go in requiring the secretary to Colonel Burr to state whether he, the secretary, understood the cipher letter which he had written for Colonel Burr. He declined to answer on the ground that his answer might tend to incriminate him. This resulted in a ruling that the witness could answer whether he *presently* understood the cipher, without its tending to incriminate him. The opinion states the views of the Chief Justice on the rules applicable to such cases. 25 Fed. Cas., No. 14,692e, pp. 38-41.¹²

H. *June 19-27, 1807. Attachment of General Wilkinson was sought* by Burr's counsel for Wilkinson's alleged contempt of court and abuse of power in his efforts to

¹² "The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer." 25 Fed. Cas., No. 14,692e, pp. 40-41.

induce witnesses to testify for the Government. The argument on this motion was interrupted by the grand jury's return of the indictments. The following day, the motion was denied. 25 Fed. Cas., No. 14,692f, pp. 41-49.

I. *June 26, 1807. The indictments.* After extended hearings, the grand jury indicted both Burr and Blennerhassett not only for the misdemeanor charged, but also for treason. The indictments for treason charged that on December 10, 1806, at Blennerhassett's Island, the accused had levied war against the United States by the assembly there of a "multitude" of 30 or more people, armed and arrayed in a warlike and hostile manner.¹³ The other indictments alleged that at the same place the accused had set on foot an armed expedition against territory of the King of Spain. Two days later the grand jury returned similar indictments against U. S. Senator Smith of Ohio, former U. S. Senator Dayton of New Jersey, Tyler, Israel Smith and Floyd. Seven jurors

¹³ "The grand inquest of the United States of America, for the Virginia district, upon their oath, do present, that Aaron Burr . . . owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquillity of the said United States to disturb; and to stir, move and excite insurrection, rebellion and war against the said United States; on the tenth day of December, in the year of Christ one thousand eight hundred and six, at a certain place called and known by the name of Blannerhassett's (*sic*) island . . . did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr . . . with a great multitude of persons, whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit, to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and dirks, and other warlike weapons as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States; . . ." 1 Robertson's Reports of the Trials of Colonel Aaron Burr, pp. 430-431.

voted to indict General Wilkinson but nine voted not to do so. Bollman, Swartwout, Adair and Brown were not indicted.

III. THE TRIAL

A. *June 26-27, 1807. Burr pleaded not guilty to the indictment for treason.* The court ordered that, inasmuch as the trial could not, without great inconvenience, be held in Wood County where the offense was alleged to have been committed, the marshal should summon 48 "fit persons," 12 of whom should be from Wood County, to appear in Richmond August 3, 1807, as a jury panel. From this time until the end of the trial, Burr remained committed in specially provided quarters.

B. *August 3-17, 1807. Impaneling the jury.* Out of the 48 persons summoned, only four were accepted as petit jurors and only one of those expressed himself as being entirely unprejudiced. After making a careful statement as to the proper qualification of jurors, the court ordered another panel of 48. 25 Fed. Cas., No. 14,692g, pp. 49-52. The result of their examination was no better. Finally, the accused suggested that he select jurors from those who had expressed hostility to him but to whom nevertheless he would be willing to submit his case. This implied strong faith by the accused, both in his innocence and in the fairness of the jury. It was a bold step in a capital case where there was such a popular demand for conviction. Among the jurors so chosen was one who testified that he had said that Burr should be hanged and another who had said "in the utmost spirit of levity" that he had come to Richmond with the hope of being chosen on the jury where, if accepted, he would vote to hang the defendant at once without further inquiry.¹⁴

¹⁴ "Miles Bott. From the affidavits of generals Wilkinson and Eaton, my opinion has been completely made up for several months past.

"Mr. Martin.—I suppose you have only taken up a prejudice on

C. *August 17-18, 1807. Order of proof.* Upon the appearance of General Eaton as the prosecution's first witness, proof of Burr's hostile intentions in performing the particular overt acts charged in the indictment was objected to by Burr's counsel unless preceded by proof of the overt acts themselves. The court overruled the objection. It indicated that both the overt act and the hostile intent accompanying it were material to the proof of levying war, and that the court should not prescribe which of the two material elements the prosecution must present first. The court added, however, that testimony relating to any plans of Burr's which, for example, were to be executed in Washington or elsewhere than in the District of Virginia, would not be an element of the particular treason charged in the indictment. While such testimony might later become admissible as corroborative of Burr's general evil intentions and thus "render it more probable that the intention in the particular case was evil," it would become admissible only "after hearing that which it is to confirm." The testimony of General Eaton thus was permitted to be given insofar as it related directly to the overt acts charged and the hostile intent

the supposition, that the facts stated were true.

"Mr. Bott. I have gone so far as to declare, that colonel Burr ought to be hanged.

"Mr. Burr.—Do you think that such declarations would now influence your judgment? Would not the evidence alter your opinion?

"Answer. Human nature is very frail; I know that the evidence ought, but it might or might not influence me. I have expressed myself in this manner, perhaps, within a fortnight; and I do not consider myself a proper jurymen.

"Mr. Burr.—It will be seen, either that I am under the necessity of taking men in some degree, prejudiced against me, or of having another venire. I am unwilling to submit to the further delay of other '*tales*,' and I must therefore encounter the consequences. I will take Mr. Bott, under the belief that he will do me justice." 1 Robertson's Reports of the Trials of Colonel Aaron Burr, p. 426.

See also, examination of Christopher Anthony at pp. 423-425.

of the accused accompanying them. 25 Fed. Cas., No. 14,692h, pp. 52-54.

D. *August 18-31, 1807. The crucial lack of proof.* By August 20 the Government had not presented testimony of the presence or other actual participation of Burr in the assemblage at Blennerhassett's Island. On the contrary the evidence showed Burr's absence and his failure to participate in the assemblage. The defense accordingly objected to the introduction of any further evidence. In the absence of the constitutionally required testimony of the overt act of treason charged in the indictment, they contended that all other evidence would be immaterial. The Government recognized the propriety of the procedure. It argued, however, for permission to show that the accused had advised and procured the assemblage and that the assemblage constituted levying war against the United States.

After ten days of able argument,¹⁵ the Chief Justice, on August 31, delivered the final opinion in the case. 25 Fed. Cas., No. 14,693, pp. 55-186, at pp. 159-181. He took occasion to explain and amplify the opinion he had written for the Supreme Court in *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125. While it was not essential

¹⁵ The Chief Justice paid tribute to this argument as follows:

"The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them. A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver." 25 Fed. Cas., No. 14,693, at p. 159, s. c., 4 Cranch at p. 470.

One eloquent passage from the argument of William Wirt on August 25, against treating Blennerhassett as the principal and Burr as an accessory, was printed for many years thereafter in school books for use as a declamation. 25 Fed. Cas., No. 14,693, at pp. 131-132. It is quoted, in part, in 3 Beveridge, *The Life of John Marshall*, 616-618, and, together with Benjamin Bott's deflating response, is discussed at pp. 495-500.

to the decision here, he indicated it to be his personal view that the constitutional requirement of levying war against the United States would be satisfied by finding the fact to be that there had been gathered at Blennerhassett's Island a military assemblage in force, with a warlike intent towards the United States and in condition to make such war. He indicated further that the evidence already before the court would justify its submission to the jury on that point, provided there were also before the court the required testimony as to the accused's participation in the assemblage.

He discussed the alleged activity of the accused in advising and procuring the assemblage. He pointed out that there had not yet been presented two witnesses to overt acts showing such advice or procurement. While not passing finally upon the point, he indicated that, to be admissible as overt acts of treason, such acts of advice or procurement should be charged in an indictment laid in the state and district where the trial would be held. No such acts of advice or procurement having been charged in the instant case, they could not be substituted for those which had been charged. Their admissibility as mere corroboration of other testimony was impossible in the absence of testimony to be corroborated.

In short, the prosecution had failed to meet the constitutional requirement that the guilt of the accused be established by the testimony of two witnesses to the same overt act of the accused in levying war at a specified time and place within the jurisdiction of the trial court. The Chief Justice concluded:

"No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's Island, can be admitted; because such testimony, being in its nature merely corroborative and incompetent to prove the overt act in itself, is irrelevant until there be proof of the overt act by two witnesses. This opinion does

not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was procured by the prisoner. On that point the court for the present withholds its opinion for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution that no such testimony exists, if there be such let it be offered, and the court will decide upon it.

"The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct." 25 Fed. Cas., No. 14,693, p. 180.

The court granted the prosecution's request to consider the court's opinion overnight. The next morning the prosecutor informed the court that he had nothing to offer to the jury, either in the way of evidence or argument. The jury retired and in a short time returned with the following verdict, prepared in a form of their origination: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."¹⁶ *Ibid.*

¹⁶ Burr at once objected to the form of this "not-proven" or "Scotch Verdict" in place of a simple one of "not guilty." The Chief Justice replied that the verdict was, in effect, the same as a verdict of acquittal, that it should remain as found by the jury, and that an entry be made on the record of "not guilty." Hill, *Decisive Battles of the Law*, 62.

As in each of the related proceedings, the necessary proof to sustain the charges had been found lacking when put to the final test. Thus acquitted of treason, Burr was then tried on the indictment for the misdemeanor. He was acquitted September 14, 1807. 25 Fed. Cas., No. 14,694, pp. 187-201. The Government dropped its prosecutions of most of his associates. The District Attorney, however, sought further commitments of Burr and Blennerhassett for trial in the Mississippi Territory and in Ohio. Commitments for treason were denied. Commitments for misdemeanors in Ohio were ordered and bail was posted, but the accused apparently were never indicted.

The trial was over. The nation had reason to feel that, when administered after the manner of Marshall, Justice is the Guardian of Liberty.¹⁷

¹⁷ "JUSTICE THE GUARDIAN OF LIBERTY" is the inscription on the East Portico of the Supreme Court Building in Washington. It is a modification of one proposed by the architect. It was put in its present form by Chief Justice Hughes in consultation with Justice Van Devanter, Chairman and member, respectively, of the Supreme Court Building Commission. It is less well known than that on the West Portico, over the entrance to the building—"EQUAL JUSTICE UNDER LAW." The latter was approved by Chief Justice Hughes and Justice Van Devanter in precisely the form in which it was submitted to them. Neither inscription is a direct quotation from any identified source.

PRINCIPAL REFERENCES

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 3 Beveridge, The Life of John Marshall, 274-545 (1919).
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Klosters - Aeuja - Monbiel und Silvretta gruppe.

Klosters
Switzerland,
Aug. 6. 1951

Dear Chief -

Selma & I are enjoying
a week here - where part of
my ancestors (Hitzes) lived
for many years (before 1831).
We walked part way up this
valley which leads to a
glacier above Klosters - in
the Silvretta schum here at
the end of the valley. This is
good preparation for a tough term
Best wishes to Handledist 3000



Chief Justice Fred M. Vinson,

Supreme Court of the U.S.,

Washington,

D.C.,

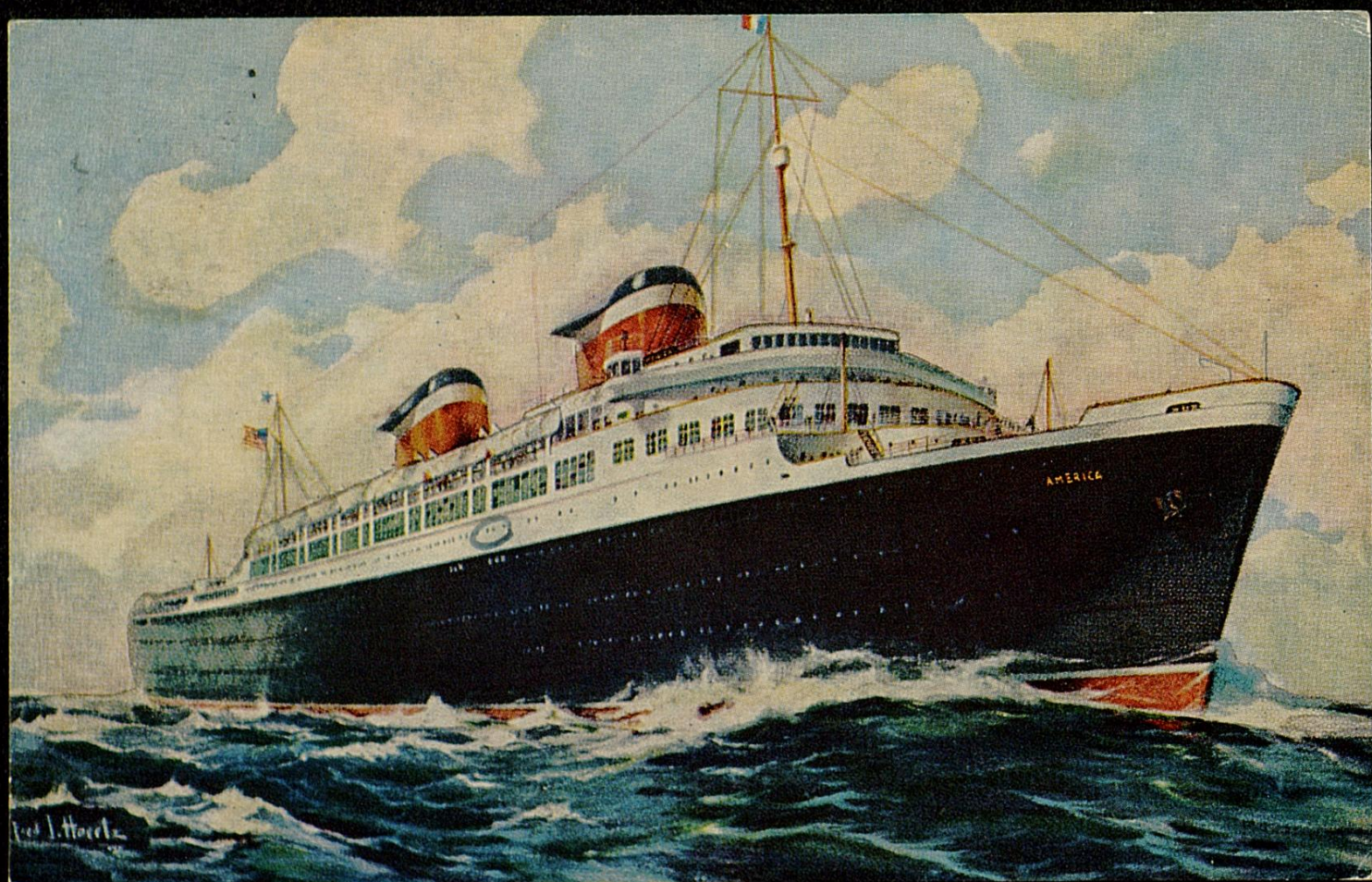
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POST CARD

The United States Lines S. S. AMERICA largest, fastest and most luxurious ship ever built in the United States. The AMERICA is the Queen of the American Merchant Marine and flagship of the United States Lines fleet.

7/23

Dear Chief Roberts -

We are off to a good start with clear, crisp weather and a beautiful ship. Among others on board is Admiral Halsey. We hope to mail this from Cobh (formerly Queenstown) Eire (formerly Ireland).
Between
Salmon, Howard.



Chief Justice Fred M. Vinson,
Supreme Court of the U.S.

Washington, 13
D.C.

U.S.A.

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Aug. 23, 1951

AIR
MAIL



Chief Justice Fred M. Vinson.

Supreme Court of the U.S.

Washington.

D.C.

U.S.A.

PRINTED IN ITALY

Dear Chief-

We will stop at Gibraltar
for 24 hour to-morrow evening
and this will bring you notice that
Selma and I are on schedule -
due in Washington Sept. 2d - after a
delightful trip. We have been
vacating most of the time but I
have also done some interesting
reading, and will be ready for more
when we get back. Selma & I
send our best ^{wishes} to Roberta & you
and hope your summer has been
a good one. - I see that my
Cleveland Indians have had a
good summer. With highest regards

Motonave "SATURNIA" (24,350 tonn. s. l.)

Selma & Harold Burton

File

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE HAROLD H. BURTON

October 25, 1951

*Dear Chief
This is the published
edition of the case of
the one of the
1951*

My dear Chief:

The attached is a reprint of a statement I made last July to the Third Judicial Circuit Conference. It appears in the October, 1951, issue of the American Bar Association Journal under the title "Justice the Guardian of Liberty: John Marshall at the Trial of Aaron Burr." I transmit it for such historical or recreational value as it may have.

You may find an element of timeliness in it insofar as it touches upon: the need for judicial equanimity in the face of popular and official pressure for conviction, the granting by this Court of habeas corpus and certiorari (to Bollman and Swartout), the power and duty of this Court to issue a subpoena duces tecum to the President and the extent to which a trial court may require a witness to testify when that witness declines to answer on the ground that to do so might tend to incriminate him.

H.H.B.

The Chief Justice

To my Chief —
with personal regards to
October 25, 1951
Harold H. Burton

[Published in 37 American Bar Association Journal 735 (Oct. 1951)]

JOHN MARSHALL AT THE TRIAL OF AARON BURR

STATEMENT BY ASSOCIATE JUSTICE HAROLD H. BURTON
OF THE SUPREME COURT OF THE UNITED STATES

TO THE
JUDICIAL CONFERENCE OF THE THIRD JUDICIAL CIRCUIT
OF THE UNITED STATES

July 17, 1951

Sharing significance with his rulings was the demeanor of Chief Justice John Marshall throughout the fabulous trial of Aaron Burr in the Circuit Court of the United States in the District of Virginia, March 30–August 31, 1807.

As the presiding trial Justice he exemplified what he meant when he had said for the Supreme Court—

“As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.” *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125.

If ever there was a trial to “excite and agitate the passions of men” it was that of Aaron Burr for high treason. The penalty was death by hanging. The accused was a brilliant lawyer who had served as a Colonel in the Revolutionary Army, United States Senator from New York and Vice President of the United States.¹ Though

¹ He had presided in the Senate, with marked fairness and competency, over the impeachment trial of Associate Justice Chase of the Supreme Court which had resulted in an acquittal of the Justice. January 2–March 1, 1805. See *Annals*, 8th Cong., 2d Sess. 80–675,

an Anti-Federalist, he had antagonized the idolized leader of his party, President Jefferson. While Vice President, he had killed, in a duel, the outstanding young leader of the Federalists, Alexander Hamilton. Leaving office in 1805, he was a widely known, ambitious, fearless soldier-statesman to whom fables readily attached themselves. It was rumored that he proposed not only to invade Spanish-held Mexico but to seize New Orleans and sever the Southwest Territories from the United States at the Allegheny Mountains. On January 22, 1807, President Jefferson announced to Congress that on these charges Burr's "guilt is placed beyond question."² That was enough for the people at large. They denounced Burr as a traitor. They demanded his prompt execution.

The Government, however, faced a new definition of treason in the Constitution of the United States. To convict Burr of treason against the United States in this instance, he must be found guilty of "levying War" against them, and this must be on the testimony of two witnesses to the same overt act. Also, he must be tried by an impartial jury of the state and district wherein the crime was committed. The Government selected as the situs of the crime Blennerhassett's Island in the Ohio River, in Wood County, Virginia, about two miles below the present city of Parkersburg, West Virginia. This brought the trial into the Circuit Court in the District where Chief Justice Marshall would preside as Circuit Justice. The hostility of President Jefferson towards the Chief Justice was well known. That John Marshall did not avoid his responsibility as presiding Justice but discharged it in the deliberate and temperate manner that this *cause célèbre* demanded was in the best tradition of the federal bench.

726-763. On leaving the Vice Presidency, he had delivered to the Senate, in executive session, March 2, 1805, an affecting farewell address marked with expressions of strong devotion to his country and its Constitution. *Annals*, 8th Cong., 2d Sess. 71-72.

² President's Message to Congress, *Annals*, 9th Cong., 2d Sess. 39-43.

Today the case is sometimes misconceived. Chief Justice Marshall did not sit alone as presiding Justice. Joining in his rulings and sometimes making comments from the bench was United States District Judge Cyrus Griffin. The rulings of the Circuit Court as to the meaning and required proof of treason were not decisions of first impression in the trial court. In large part they were explanations by the Chief Justice of his own opinion, written for the Supreme Court, February 21, 1807, in *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125. The opinions supporting the principal rulings of the Circuit Court can be found elsewhere than in the often unavailable lower court reports. They were reprinted by Cranch as Appendix B to the Supreme Court opinion just mentioned, at page 470.

The significance of the trial, however, can be fully appreciated only when seen against the background of its time and read in connection with the related litigation.

I. BACKGROUND

On leaving the Vice Presidency Colonel Burr turned to the beckoning fields of adventure in the Southwest. He announced a plan to settle lands he had purchased on the Washita River, in what is now southern Arkansas or northern Louisiana. If the momentarily expected war with Spain developed, he proposed also to lead the first expedition into Mexico. In the event of war, such a procedure on Burr's part apparently would have been welcomed by the United States. In the interest of this project, he visited the Ohio River settlements in 1805 and made plans to meet with his fellow adventurers at or near Blennerhassett's Island in 1806.

Colorful and wild rumors quickly spread about these plans. Over Burr's denials, the rumors included a story that he had conceived a treasonable plan for severing some of the Southwestern Territories from the United States and joining them to a Mexican empire of his own. General James Wilkinson, who commanded the United

States Army in the Southwest, but who was at the same time a pensioner of Spain, at first cooperated with Burr. Late in 1806, however, he suddenly reported to President Jefferson that Burr planned to attack New Orleans, seize it and lead a revolt against the United States, all of which Wilkinson proposed to resist by force of arms. It is for historians and not for us to say what degree of truth there was, or that Wilkinson believed there was, in that report.³

³ Andrew Jackson supported Burr's settlement program and refused to believe the charges of treason. He helped Burr outfit his river boats and entertained him at his home. When ordered to mobilize his militia in defense against Burr's supposedly revolutionary movements, he did so. After reinvestigating the facts, he promptly disbanded his militia. In McCaleb's "The Aaron Burr Conspiracy" he is quoted as writing the following confidential letter, January 15, 1807:

"The late denunciation of Aaron Burr as a traitor has excited great surprise and general indignation against Burr. Still, from the opinion possessed of the accuser (Wilkinson) many there are who wait for the proof before they will pronounce him guilty of the charge. . . . And if Burr had any treasonable intentions in view, he is the basest of all human beings. I will tell you why. He always held out the idea of settling Washita, unless a war with Spain; in that event he held out the idea that from his intimacy with the Secretary of War, he would obtain an appointment; and if he did he would revolutionize Mexico. . . . If he is a traitor, he is the basest that ever did commit treason, and being tore to pieces and scattered to the four winds of heaven would be too good for him." At p. 218.

During Burr's trial, Jackson was summoned to Richmond as a State witness but he so vigorously denounced Wilkinson and supported Burr that he was not put on the stand. He wrote from Richmond before the trial was well begun: "I am more convinced than ever that treason was never intended by Burr; but if it was, you know my wishes—that he may be hung. I am still more convinced that whatever may have been the project of Burr, James Wilkinson has gone hand and hand with him." *Id.* at p. 219.

McCaleb quotes, as "the most explicit enunciation we have of his [Burr's] concerning the nature of the project," the following language apparently used in a communication from Burr to Senator John Smith of Ohio:

"Mr. Smith, my object in a few months will be disclosed; you will not find it dishonorable or inimical to this Government. I feel

Burr's alleged treason had remained largely in the realm of rumor until General Wilkinson wrote to the President. Relying on Wilkinson, the President submitted the issue to his Cabinet and, on November 27, 1806, sent Congress a proclamation that startled the nation. It reported receipt of information that a military expedition was being organized by private persons within the United States to move against the dominions of Spain, and that such persons were collecting arms and seducing well-meaning citizens "to engage in their criminal enterprises." The President warned faithful citizens to withdraw from the enterprise or "incur prosecution with all the rigors of the law." He enjoined civil and military officers to seize the boats, arms, etc., so provided. He required good and faithful citizens to aid in "bringing to justice" all such offenders and in "giving information against them to the

superior to the mean artifices which are ascribed to me. Calumniators I do not notice, for as fast as you put one down another will rise up. This much I will tell you: if there should be a war between the United States and Spain, I shall head a corps of volunteers and be the first to march into the Mexican provinces. If peace should be proffered, which I do not expect, I shall settle my Washita lands, and make society as pleasant as possible. In this Government I have been persecuted, shamefully persecuted; and I am sorry to say, that in it, all private confidence is destroyed." *Id.* at p. 156, citing Liberty Hall (a Cincinnati newspaper), February 24, 1807.

Similarly, when Henry Clay was representing Burr before the Federal Circuit Court in Kentucky, Burr, on December 1, 1806, categorically denied to Clay the rumors then in circulation saying:

"I have no design, nor have I taken any measure, to promote a dissolution of the Union or a separation of any one or more States from the residue. . . . I do not own a musket nor a bayonet, nor any single article of military stores, nor does any person for me, by my authority or with my knowledge. . . . Considering the high station you now fill in our national councils [United States Senator from Kentucky], I have thought these explanations proper, as well to counteract the chimerical tales, which malevolent persons have so industriously circulated, as to satisfy you that you have not espoused the cause of a man in any way unfriendly to the laws, the government, or the interests of his country." *Id.* at p. 157.

proper authorities.”⁴ The proclamation did not name anyone as the offender nor specifically charge anyone with treason against the United States. The public, however, knew that Burr was the alleged offender and jumped to the conclusion that he must be guilty of high treason or the President would not have taken such extraordinary steps to thwart his preparations. The proclamation apparently had two effects. As the President later claimed, it probably destroyed all likelihood of the success of any such treasonable plans against the United States as were reported by Wilkinson. It also convinced the public that Burr had undertaken such plans as were described. Throughout his life Burr suffered the consequences of that popular belief.

December 2, 1806, the President, in his annual message, reminded Congress of the reported expedition of private individuals against the territories of Spain. Annals, 9th Cong., 2d Sess. 11, 12. Congress demanded that the President disclose his information concerning such a conspiracy and report the measures he had taken to suppress it. He replied that his information was voluminous but that there was little in it to constitute legal evidence. He, however, detailed General Wilkinson's report of Burr's alleged treason and misdemeanor, referred to his own proclamation of November 27, 1806, identified Burr as the principal actor, and assured Congress that *Burr's "guilt is placed beyond question."*⁵ The die was cast. The prosecution of Burr for treason became politically necessary. The unflinching adherence of the courts to their impartial duties under these circumstances deserves recognition. As the Chief Justice later said of his Circuit Court: "That

⁴ Proclamation Against Burr's Plot, 10 Ford, The Works of Thomas Jefferson, 301-302.

⁵ "In this state of the evidence, delivered sometimes too under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor [Burr], whose guilt is placed beyond question." Jefferson's Message to Congress, January 22, 1807, Annals, 9th Cong., 2d Sess. 39, 40.

this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true." *United States v. Burr*, 25 Fed. Cas., No. 14,693, p. 179, also in App. B, 4 Cranch at p. 506.

A summary of the related litigation will outline the ensuing drama.⁶

II. PROCEEDINGS BEFORE THOSE IN RICHMOND

A. *November, 1806*—*In the Circuit Court of the United States in the District of Kentucky* (Innis, J.). A federal indictment was sought in Kentucky against Burr for the misdemeanor of preparing a military expedition within the United States against Spain. He appeared voluntarily and the investigation collapsed. *United States v. Burr*, 25 Fed. Cas., No. 14,692, pp. 1-2.

⁶ The record of the proceedings is largely available in:

(1). Robertson's Reports of the Trials of Colonel Aaron Burr (1808), cited by McCaleb as Burr's Trials. This is a two-volume publication containing, in 1135 pages, a substantially complete transcript of the record in the prosecutions, both for treason and misdemeanors in the Circuit Court of the United States, at Richmond, Virginia, taken in shorthand by David Robertson. See also, Coombs, The Trial of Aaron Burr for High Treason, condensed to 390 pages, largely omitting arguments of counsel.

(2). *United States v. Burr*, 25 Fed. Cas., Nos. 14,692, 14,692a, 14,692b, 14,692c, 14,692d, 14,692e, 14,692f, 14,692g, 14,692h, 14,693, 14,694, 14,694a, at pp. 1-207. These contain the opinions in the several related cases. Those in the principal proceeding are in No. 14,693 and Marshall's major opinion of August, 31 1807, is at pp. 159-181.

(3). *Ex parte Bollman and Swartwout*, 4 Cranch 75. This contains the opinions delivered in the Supreme Court in February, 1807, on several of the underlying issues which arose again in Burr's trial. As Appendix A, at pp. 455-470, there are reprinted the documents which accompanied the President's message of January 22, 1807. As Appendix B, at pp. 471-507, there is reprinted the opinion rendered by Chief Justice Marshall, as Circuit Justice for the Circuit Court in the District of Virginia, August 31, 1807. The reporter states, at p. 125 note, that the opinion in the Circuit Court "elucidates and explains some passages in this opinion [of the Supreme Court in the *Bollman* case] which were supposed to be in some degree doubtful."

B. *December, 1806—In the same court.* Similar indictments were sought against Burr and Adair. Burr appeared voluntarily and was represented by Henry Clay. The grand jury, after hearing the evidence, not only refused to indict Burr but rendered a special report, finding that they could not "discover that anything improper or injurious to the interest of the Government of the United States, or contrary to the laws thereof, is designed or contemplated by either of them [Burr or Adair]." McCaleb, *The Aaron Burr Conspiracy*, p. 163, citing *Palladium*, December 11, 1806.

C. *December, 1806—January, 1807. In New Orleans.* This constituted most of General Wilkinson's "reign of terror." When the Governor refused the General's request to suspend the writ of habeas corpus or to declare martial law, the General seized local military control in the name of national security. He arrested and shipped to Baltimore Bollman, Swartwout, Alexander and later Adair. He also seized others. Writs of habeas corpus were issued by local judges. To these the General made returns that he took full responsibility for the arrests and stated that the men sought were no longer in his possession. Judge Workman appealed to the Governor for help. Receiving none, he adjourned his court and shortly thereafter resigned his office.⁷ At the request of the General, the Governor asked the Territorial Legislature to suspend the writ of habeas corpus. The Legislature not only refused but forwarded to Congress a memorial of protest.⁸

D. *December, 1806—January, 1807. Progress of Burr's expedition.* The immediate prospect of war with Spain having been dissipated, Burr, Blennerhassett, Tyler and

⁷ The General soon seized this judge and another man, charging both with planning or participating in expeditions against Spanish possessions. Each was found not guilty when tried in March, 1808.

⁸ "... no foreign enemy or open domestic foe was then, or has yet been proved to have been within any perilous distance of this city The acts of high-handed military power to which we have been exposed [are] too notorious to be denied, too illegal to be justified, too wanton to be excused." McCaleb, *The Aaron Burr Conspiracy*, p. 198, citing *Orleans Gazette, Extra*, March 20, 1807.

Smith floated down the Mississippi River with nine flatboats, manned by about six men each. They proposed to settle on the Washita. At the same time the rumor spread that Burr was coming to attack New Orleans with hundreds or thousands of men, and General Wilkinson mobilized his forces to intercept them.

December 2, Governor Tiffin of Ohio, aroused by a representative from the President, sent a warning message to the Ohio Legislature. This led to the seizure, on December 9, of some of Blennerhassett's unmanned flatboats on the Muskingum River in Ohio. On December 10 the Virginia militia announced that it would investigate Blennerhassett's Island on the following day. The expedition, being substantially ready to leave, created further excitement by leaving during the night. The next day the militia ransacked the island, consumed the liquid spirits available, and seized a flatboat with 14 boys from Pittsburgh aboard. The prisoners were released after brief questioning and, taking Mrs. Blennerhasset with them, proceeded down the river.

December 22 Colonel Burr joined the party at the mouth of the Cumberland with two boats which had been prepared for him by General Andrew Jackson. Passing down the Mississippi on Christmas Day, he dispatched a friendly note to the Commander at Fort Massac. On December 29 Burr declined an equally friendly invitation to dine at the Fort. There was nothing about Burr's little flotilla to cause alarm to those who saw it. Nevertheless, intense excitement had been aroused in the Mississippi Territory by exaggerated warnings of its approach. A detachment of 375 militiamen was sent up the river to intercept it. Other troops marched by land. On their contact with Burr, he ridiculed the idea of his hostility and volunteered to submit to the civil authorities. The inflated monster of impending military invasion collapsed.⁹ At

⁹ Cowles Meade, the acting Governor of the Mississippi Territory, reported to the Government as follows:

"... this mighty alarm, with all its exaggeration, has eventuated in nine boats and one hundred men, and the major part of these are

the town of Washington in the Territory of Mississippi, Burr was bound over to await action of the grand jury. General Wilkinson boasted that he had dissipated the conspiracy and had saved New Orleans.

E. *February, 1807. In the Supreme Court of the Mississippi Territory.* Burr volunteered to answer any bill of indictment. The District Attorney, after examination of the depositions submitted to him, asked the court to discharge the grand jury. The court refused, whereupon the grand jury filed a report favorable to Burr and condemnatory of his accusers. The forthrightness of this frontier document is refreshing.¹⁰ Although no indictment was found against Burr, he was bound over to appear from day to day. At the same time a military patrol was on its way from General Wilkinson who had pledged \$5,000 to cover the expenses of Burr's capture. Fearing

boys, or young men just from school. Many of their depositions have been taken before Judge Rodney, but they bespeak ignorance of the views or designs of the Colonel. I believe them really ignorant and deluded. I believe that they are really the dupes of stratagem, if the assertions of Generals Eaton and Wilkinson are to be accredited." McCaleb, *The Aaron Burr Conspiracy*, p. 225.

¹⁰ "The grand jury of the Mississippi Territory, on a due investigation of the evidence brought before them, are of the opinion that Aaron Burr has not been guilty of any crime or misdemeanor against the laws of the United States or of this Territory, or given any just occasion for alarm or inquietude to the good people of this Territory. The grand jury present as a grievance, the late military expedition unnecessarily as they conceive, fitted out against the person and property of said Aaron Burr, where no resistance has been made to the ordinary civil authorities. The grand jury also present as highly derogatory to the dignity of this Government, the armistice (so-called) concluded between the Secretary, acting as Governor, and the said Aaron Burr. The grand jury also present as a grievance, destructive of personal liberty, the late military arrests made without warrant, and as they conceive, without other lawful authority: and they do seriously regret that so much cause should be given to the enemies of our glorious Constitution, to rejoice in such measures being adopted in a neighboring Territory, and if sanctioned by the Executive of our country, must sap the vitals of our political existence, and crumble this glorious fabric into the dust." McCaleb, *The Aaron Burr Conspiracy*, p. 228, citing *Orleans Gazette*, February 20, 1807.

for his life, Burr went into hiding and notified the Governor that he would submit to civil law when assured of the rights of a citizen. Attempting to flee the Territory, Burr was recognized by one Perkins and was reported to a lieutenant who arrested him. Perkins received \$3,331.

F. *January-February, 1807. In Washington.* In Jefferson's response to the House of Representatives of January 22 he had stated that Burr's conspiracy contemplated two objects—the severance of the Union and an attack on Mexico. The next day the Senate, in closed session, on motion of Senator Giles of Virginia, passed a bill to suspend the writ of habeas corpus. In contrast, the House, in open session, rejected the bill 113 to 19. Going further the House almost passed, 58 to 60, what would have amounted to a vote of censure of the Administration.

At this moment, Wilkinson's military prisoners began to arrive in Washington from New Orleans. Jefferson ordered them delivered to the civil authorities and General Wilkinson's evidence presented to the courts. Alexander was promptly released by Judge Duchet for lack of competent evidence against him. Bollman and Swartwout, having been committed to jail by the Circuit Court for the District of Columbia, sought, on February 13, a writ of habeas corpus directly from the Supreme Court of the United States which was then in session. Bollman and Swartwout also sought a writ of certiorari to bring up the record of their commitment. Both writs were allowed and motions to discharge the prisoners were argued February 16, 17 and 18. Counsel appearing for the prisoners included former United States Attorney General Charles Lee, Francis Scott Key, later to become the author of our national anthem, and Luther Martin, a leader of the Maryland and American Bars. Of the Court there were present Chief Justice Marshall and Justices Chase, Washington and William Johnson. Justices Cushing and Livingston were absent.¹¹ The evidence pre-

¹¹ Justices Cushing and Chase were appointees of President Washington, Justice Bushrod Washington and Chief Justice Marshall of President John Adams, and Justices William Johnson and Brockholst

sented by the prosecution was reviewed in detail by the Court. See 4 Cranch, App. A, pp. 455-469. February 21, Chief Justice Marshall announced the opinion of the Court, discharging the prisoners for lack of the proof necessary to constitute treason by levying war against the United States. *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125.

General Adair and Ogden were landed in Baltimore where Judge Nicholson released them, reporting to the President that "Very much to my surprise and mortification . . . there was no proof of any nature whatsoever with them." McCaleb, *The Aaron Burr Conspiracy*, p. 249, citing Nicholson to Jefferson, February 18, 1807. Adair later sued General Wilkinson, in Natchez, for false imprisonment. After eight years, he recovered \$2,500 damages, which the Government paid.

III. PRELIMINARY PROCEEDINGS IN RICHMOND

The Government next concentrated upon the prosecution of Burr for treason. A determined effort was made to gather evidence by widespread use of printed questionnaires. The Circuit Court in the District of Virginia having been selected for the trial, it was necessary to find accommodations for the public at the hearings. As a result the court sat in the hall of the House of Delegates of the Commonwealth of Virginia from March into September, 1807.

A. *Counsel*. Government counsel were led by District Attorney *George Hay*, son-in-law of the future President, James Monroe. Hay was in personal correspondence with President Jefferson on every important point of

Livingston of President Jefferson. Justice Todd was added to the Court March 3, 1807, by President Jefferson. It appears that the Chief Justice later communicated individually with the members of the Supreme Court at some time before his Circuit Court's hearing of the *Burr* case, beginning August 3, 1807. 3 Beveridge, *The Life of John Marshall*, 480-481, and references made by the Chief Justice to the individual views of some of the Justices, expressed subsequent to the decision in the *Bollman* case. See *United States v. Burr*, 25 Fed. Cas., No. 14,693, at p. 161, s. c., App. B, 4 Cranch at pp. 474-475.

policy. With Hay was *William Wirt*, then 35. He was destined to become a distinguished author and to serve as Attorney General under Presidents Monroe and John Quincy Adams. Supplementing these was *Alexander MacRae*, Lieutenant Governor of Virginia. Counsel for the accused served without compensation. They included *Edmund Randolph*, former Attorney General under President Washington; *John Wickham*, a leader of the Virginia Bar; *Luther Martin*, for many years Attorney General of Maryland, and recognized nationally as a learned and effective trial lawyer; *Charles Lee*, former Attorney General under Presidents Washington and John Adams; and as junior counsel *Benjamin Botts* and *John Baker*. Burr himself often took part in the examinations of witnesses and in arguments to the court. Unlike most lawyers, he was his own best advocate.

B. *March 30, 1807*. Shortly after Burr's arrival in Richmond under military guard, Chief Justice Marshall himself wrote out, signed and issued the warrant by virtue of which Burr was surrendered to the civil authorities.

C. *March 30–April 1, 1807*. *Commitment*. Relying on the record in the *Bollman* and *Swartwout* cases, the prosecution asked the Chief Justice to commit Burr to jail on two charges: treason against the United States and misdemeanor in preparing and setting on foot within the United States a military expedition against Spain. After reviewing the evidence, the Chief Justice held it not sufficient to sustain commitment for treason but sufficient to sustain commitment for the misdemeanor. *United States v. Burr*, 25 Fed. Cas., No. 14,692a, pp. 2–25. He ordered Burr committed on that charge, but released him on \$10,000 bail, conditioned on his appearance at the next term of court, May 22.

D. *May 22, 1807*. *The grand jury*. The required 16, out of a panel of 24, were present and available for service on the grand jury. Burr, however, personally challenged "for favour" U. S. Senator Giles of Virginia, and Colonel Nicholas, a candidate for Congress, both of

whom were strong partisans of Jefferson. Burr's objection to Senator Giles included the latter's recent effort in the Senate to suspend the writ of habeas corpus, indicating substantial belief in the reports to Congress on Burr's expedition. Burr offered to prove that the Senator had confirmed such beliefs by public declarations. Burr objected to Colonel Nicholas on the ground that the latter entertained a bitter personal animosity towards him. Both of those challenged withdrew from the panel. The 16 finally accepted included some of the foremost citizens of Virginia. Two were Federalists, 14 were Anti-Federalists. The Chief Justice named as foreman John Randolph, an Anti-Jeffersonian. In instructing the grand jury, Chief Justice Marshall followed the opinion he had written for the Supreme Court in *Ex parte Bollman and Swartwout*, *supra*. See 3 Beveridge, *The Life of John Marshall*, 350, 414 n., 466, 484, 506; 1 Robertson's *Reports of the Trials of Colonel Aaron Burr*, pp. 31-46.

E. May 22-28, 1807. *Second motion to commit Burr for treason*. The District Attorney announced in open court that he would again move to commit Burr to jail on the charge of treason, arguing that, with the approach of General Wilkinson and the Government's principal witnesses, there was increased danger that Burr might not remain available. This motion had the earmarks of propaganda but the court ruled that if the District Attorney had something to present in support of such a motion, he had a right to do so. 25 Fed. Cas., No. 14,692b, pp. 25-27. Witnesses were called as to the activities of Burr and his associates at Blennerhassett's Island. Collateral issues arose as to the admissibility of certain affidavits and as to their certification. The court ruled against their admissibility. 25 Fed. Cas., No. 14,692c, pp. 27-30. The Chief Justice indicated that he hoped that no opinion would be required of him on this motion to commit for treason, prior to some action by the grand jury. When Burr agreed to double his bond, the motion was abandoned.

F. *June 9-13, 1807. The subpoena to the President.* Burr moved for issuance of a subpoena *duces tecum* directed to President Jefferson personally, calling upon him to produce a certain letter from General Wilkinson deemed material to the defense. After bitter argument, the court ordered the subpoena to be issued. The Chief Justice stated that, while this was the court's inescapable duty, it remained for the President to indicate in the return whether his executive duties would constitute a sufficient reason for not obeying it. 25 Fed. Cas., No. 14,692d, pp. 30-38. This issue never reached its climax. The District Attorney later announced that he had the requested letter in his possession and was ready to produce it.

G. *June 15-18, 1807. Immunity of witnesses on ground of self incrimination.* An issue arose as to the extent to which the court could go in requiring the secretary to Colonel Burr to state whether he, the secretary, understood the cipher letter which he had written for Colonel Burr. He declined to answer on the ground that his answer might tend to incriminate him. This resulted in a ruling that the witness could answer whether he *presently* understood the cipher, without its tending to incriminate him. The opinion states the views of the Chief Justice on the rules applicable to such cases. 25 Fed. Cas., No. 14,692e, pp. 38-41.¹²

H. *June 19-27, 1807. Attachment of General Wilkinson was sought* by Burr's counsel for Wilkinson's alleged contempt of court and abuse of power in his efforts to

¹² "The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer." 25 Fed. Cas., No. 14,692e, pp. 40-41.

induce witnesses to testify for the Government. The argument on this motion was interrupted by the grand jury's return of the indictments. The following day, the motion was denied. 25 Fed. Cas., No. 14,692f, pp. 41-49.

I. *June 26, 1807. The indictments.* After extended hearings, the grand jury indicted both Burr and Blennerhassett not only for the misdemeanor charged, but also for treason. The indictments for treason charged that on December 10, 1806, at Blennerhassett's Island, the accused had levied war against the United States by the assembly there of a "multitude" of 30 or more people, armed and arrayed in a warlike and hostile manner.¹³ The other indictments alleged that at the same place the accused had set on foot an armed expedition against territory of the King of Spain. Two days later the grand jury returned similar indictments against United States Senator Smith of Ohio, former United States Senator Dayton of New Jersey, Tyler, Israel Smith and Floyd.

¹³ "The grand inquest of the United States of America, for the Virginia district, upon their oath, do present, that Aaron Burr . . . owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquillity of the said United States to disturb; and to stir, move and excite insurrection, rebellion and war against the said United States; on the tenth day of December, in the year of Christ one thousand eight hundred and six, at a certain place called and known by the name of Blannerhassett's (*sic*) island . . . did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr . . . with a great multitude of persons, whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit, to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and dirks, and other warlike weapons as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States; . . ." 1 Robertson's Reports of the Trials of Colonel Aaron Burr, pp. 430-431.

Seven jurors voted to indict General Wilkinson but nine voted not to do so. Bollman, Swartwout and Adair were not indicted.

III. THE TRIAL

A. *June 26-27, 1807. Burr pleaded not guilty to the indictment for treason.* The court ordered that, inasmuch as the trial could not, without great inconvenience, be held in Wood County where the offense was alleged to have been committed, the marshal should summon 48 "fit persons," 12 of whom should be from Wood County, to appear in Richmond August 3, 1807, as a jury panel. From this time until the end of the trial, Burr remained committed in specially provided quarters.

B. *August 3-17, 1807. Impaneling the jury.* Out of the 48 persons summoned, only four were accepted as petit jurors and only one of those expressed himself as being entirely unprejudiced. After making a careful statement as to the proper qualification of jurors, the court ordered another panel of 48. 25 Fed. Cas., No. 14,692g, pp. 49-52. The result of their examination was no better. Finally, the accused suggested that he select jurors from those who had expressed hostility to him but to whom nevertheless he would be willing to submit his case. This implied strong faith by the accused, both in his innocence and in the fairness of the jury. It was a bold step in a capital case where there was such a popular demand for conviction. Among the jurors so chosen was one who testified that he had said that Burr should be hanged and another who had said "in the utmost spirit of levity" that he had come to Richmond with the hope of being chosen on the jury where, if accepted, he would vote to hang the defendant at once without further inquiry.¹⁴

¹⁴ "Miles Bott. From the affidavits of generals Wilkinson and Eaton, my opinion has been completely made up for several months past.

"Mr. Martin.—I suppose you have only taken up a prejudice on

C. August 17-18, 1807. Order of proof. Upon the appearance of General Eaton as the prosecution's first witness, proof of Burr's hostile intentions in performing the particular overt acts charged in the indictment was objected to by Burr's counsel unless preceded by proof of the overt acts themselves. The court overruled the objection. It indicated that both the overt act and the hostile intent accompanying it were material to the proof of levying war, and that the court should not prescribe which of the two material elements the prosecution must present first. The court added, however, that testimony relating to any plans of Burr's which, for example, were to be executed in Washington or elsewhere than in the District of Virginia, would not be an element of the particular treason charged in the indictment. While such testimony might later become admissible as corroborative of Burr's general evil intentions and thus "render it more probable that the intention in the particular case was evil," it would become admissible only "after hearing that which it is to confirm." The testimony of General Eaton thus was permitted to be given insofar as it related directly to the overt acts charged and the hostile intent

the supposition, that the facts stated were true.

"Mr. Bott. I have gone so far as to declare, that colonel Burr ought to be hanged.

"Mr. Burr.—Do you think that such declarations would now influence your judgment? Would not the evidence alter your opinion?

"Answer. Human nature is very frail; I know that the evidence ought, but it might or might not influence me. I have expressed myself in this manner, perhaps, within a fortnight; and I do not consider myself a proper jurymen.

"Mr. Burr.—It will be seen, either that I am under the necessity of taking men in some degree, prejudiced against me, or of having another venire. I am unwilling to submit to the further delay of other '*tales*,' and I must therefore encounter the consequences. I will take Mr. Bott, under the belief that he will do me justice." 1 Robertson's Reports of the Trials of Colonel Aaron Burr, p. 426.

See also, examination of Christopher Anthony at pp. 423-425.

of the accused accompanying them. 25 Fed. Cas., No. 14,692h, pp. 52-54.

D. *August 18-31, 1807. The crucial lack of proof.* By August 20 the Government had not presented testimony of the presence or other actual participation of Burr in the assemblage at Blennerhassett's Island. On the contrary the evidence showed Burr's absence and his failure to participate in the assemblage. The defense accordingly objected to the introduction of any further evidence. In the absence of the constitutionally required testimony of the overt act of treason charged in the indictment, they contended that all other evidence would be immaterial. The Government recognized the propriety of the procedure. It argued, however, for permission to show that the accused had advised and procured the assemblage and that the assemblage constituted levying war against the United States.

After ten days of able argument,¹⁵ the Chief Justice, on August 31, delivered the final opinion in the case. 25 Fed. Cas., No. 14,693, pp. 55-186, at pp. 159-181. He took occasion to explain and amplify the opinion he had written for the Supreme Court in *Ex parte Bollman and Swartwout*, 4 Cranch 75, 125. While it was not essential

¹⁵ The Chief Justice paid tribute to this argument as follows:

"The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them. A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver." 25 Fed. Cas., No. 14,693, at p. 159, s. c., 4 Cranch at p. 470.

One eloquent passage from the argument of William Wirt on August 25, against treating Blennerhassett as the principal and Burr as an accessory, was printed for many years thereafter in school books for use as a declamation. 25 Fed. Cas., No. 14,693, at pp. 131-132. It is quoted, in part, in 3 Beveridge, *The Life of John Marshall*, 616-618, and, together with Benjamin Bott's deflating response, is discussed at pp. 495-500.

to the decision here, he indicated it to be his personal view that the constitutional requirement of levying war against the United States would be satisfied by finding the fact to be that there had been gathered at Blennerhassett's Island a military assemblage in force, with a warlike intent towards the United States and in condition to make such war. He indicated further that the evidence already before the court would justify its submission to the jury on that point, provided there were also before the court the required testimony as to the accused's participation in the assemblage.

He discussed the alleged activity of the accused in advising and procuring the assemblage. He pointed out that there had not yet been presented two witnesses to overt acts showing such advice or procurement. While not passing finally upon the point, he indicated that, to be admissible as overt acts of treason, such acts of advice or procurement should be charged in an indictment laid in the state and district where the trial would be held. No such acts of advice or procurement having been charged in the instant case, they could not be substituted for those which had been charged. Their admissibility as mere corroboration of other testimony was impossible in the absence of testimony to be corroborated.

In short, the prosecution had failed to meet the constitutional requirement that the guilt of the accused be established by the testimony of two witnesses to the same overt act of the accused in levying war at a specified time and place within the jurisdiction of the trial court. The Chief Justice concluded:

"No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's Island, can be admitted; because such testimony, being in its nature merely corroborative and incompetent to prove the overt act in itself, is irrelevant until there be proof of the overt act by two witnesses. This opinion does

not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was procured by the prisoner. On that point the court for the present withholds its opinion for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution that no such testimony exists, if there be such let it be offered, and the court will decide upon it.

"The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct." 25 Fed. Cas., No. 14,693, p. 180.

The court granted the prosecution's request to consider the court's opinion overnight. The next morning the prosecutor informed the court that he had nothing to offer to the jury, either in the way of evidence or argument. The jury retired and in a short time returned with the following verdict, prepared in a form of their origination: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."¹⁶ *Ibid.*

¹⁶ Burr at once objected to the form of this "not-proven" or "Scotch Verdict" in place of a simple one of "not guilty." The Chief Justice replied that the verdict was, in effect, the same as a verdict of acquittal, that it should remain as found by the jury, and that an entry be made on the record of "not guilty." Hill, *Decisive Battles of the Law*, 62.

As in each of the related proceedings, the necessary proof to sustain the charges had been found lacking when put to the final test. Thus acquitted of treason, Burr was then tried on the indictment for the misdemeanor. He was acquitted September 14, 1807. 25 Fed. Cas., No. 14,694, pp. 187-201. The Government dropped its prosecutions of most of his associates. A district attorney, however, sought further commitments of Burr and Blennerhassett for trial in the Mississippi Territory and in Ohio. Commitments for treason were denied. Commitments for misdemeanors in Ohio were ordered and bail was posted, but the accused apparently were never indicted.

The trial was over. The nation had reason to feel that, when administered after the manner of Marshall, Justice is the Guardian of Liberty.¹⁷

¹⁷ "JUSTICE THE GUARDIAN OF LIBERTY" is the inscription on the East Portico of the Supreme Court Building in Washington. It is a modification of one proposed by the architect. It was put in its present form by Chief Justice Hughes in consultation with Justice Van Devanter, Chairman and member, respectively, of the Supreme Court Building Commission. It is less well known than that on the West Portico, over the entrance to the building—"EQUAL JUSTICE UNDER LAW." The latter was approved by Chief Justice Hughes and Justice Van Devanter in precisely the form in which it was submitted to them. Neither inscription is a direct quotation from any identified source.

PRINCIPAL REFERENCES

- Ex parte Bollman and Swartwout*, 4 Cranch 75-137, 455-507.
Cramer v. United States, 325 U. S. 1.
Haupt v. United States, 330 U. S. 631.
United States v. Burr, 25 Fed. Cas., Nos. 14,692-14,694a, pp. 1-207.
 1 and 2 Robertson, Reports of the Trials of Colonel Aaron Burr (1808).
 Hurst, Treason in the United States, 58 Harv. L. Rev. 226-272, 395-444, 806-846 (1944-1945).
 McCaleb, The Aaron Burr Conspiracy (1936).
 3 Beveridge, The Life of John Marshall, 274-545 (1919).
 Jenkinson, Aaron Burr (1902).
 Hill, Decisive Battles of the Law, 27-64 (1907).
 Cabell, The Trial of Aaron Burr, 23 Proceedings N. Y. State Bar Assn. 56-86 (1900).

Itinerary of
Mr. Justice Harold H. Burton and Mrs. Harold H. Burton
July 20 - September 2, 1951

July 20	New York	Hotel Statler
" 21	Sail at noon from New York	S.S. America, U.S. Lines
" 22-27	At sea	
" 28	To Le Havre, France	
" 28	To Paris	Hotel Claridge
" 29	To Zurich, Switzerland	Hotel Baur au Lac
" 30	1:19 p.m. to Berne, ar. 2:47 p.m.	Hotel Bellevue Palace
" 31	9:45 a.m. to Leysin, ar. 1:41 p.m.	Hotel La Mesange
Aug. 1	9:58 a.m. to Grimentz, ar. 3:49 p.m.	Hotel des Beccs de Bosson
" 2	Grimentz	" " " " "
" 3	6:15 a.m. to Pontresina, ar. 5:40 p.m.	Grand Hotel Kronenhof-Bellavista
" 4	Pontresina	" " " "
" 5	10:15 a.m. to Klosters, ar. 2:31 p.m.	Grand Hotel Vereina
" 6-11	Klosters	" " "
" 12	10:56 a.m. to Lugano, ar. 6:24 p.m.	Hotel Splendide
" 13	11:09 a.m. to Venice, Italy, ar. 6:15 p.m.	Hotel Danieli
" 14	Venice	" "
" 15	To Florence	Hotel Excelsior
" 16	Florence	" "
" 17	To Rome	Hotel Excelsior
" 18-19	Rome	" "
" 20	To Naples	Hotel Excelsior
" 21	Naples	" "
" 22	Sail from Naples	S.S. Saturnia - Italian Line
" 23-31	At sea	
Sept. 1	To New York	Hotel Statler
" 2	To Washington	Dodge Hotel

In Italy in care of Pierre Bussetti World Travel Service

June 12, 1951

Dear Harold:

This is just a note to thank you for your thoughtfulness in giving me your itinerary for the summer, and for your expression of availability during the recess.

I hope that it will not be necessary to convene the Court, but you can never tell what may happen. However, I know that I can always count on your doing more than your share in our important task.

Roberta joins me in wishing for Selma and you a pleasant and restful time.

Sincerely,

(Signed) Fred M. Vinson

Honorable Harold H. Burton,
Associate Justice of the Supreme Court,
c/o Mrs. Edward Birch,
5 Longfellow Avenue,
Brunswick, Maine.

FMV:McH

To the Chief -
 for such need & interest as it may be
 I will be available 247 except for any emergency in so far as making facilities possible
 6/7/51

Itinerary
Mr. Justice Harold H. Burton and Mrs. Harold H. Burton
June 8 - July 21, 1951

June 8	To Great Barrington, Mass.	% Mrs. Francis A. Smith
" 9	To Waban, Mass.	% Mrs. Felix A. Burton 64 Collins Road (Lasell 7-2018)
" 9-13	Waban	"
" 14	To Brunswick, Maine	% Mrs. Edward Birch 5 Longfellow Ave.
" 15	Brunswick	"
" 16	To Waban, Massachusetts	% Mrs. Felix A. Burton
" 17	Waban	"
" 18	To Washington, D.C.	Dodge Hotel
" 19-21(?)	Washington	" "
" 22	To Cleveland, Ohio	% Mrs. R. Wallace Adler 3397 Daleford Road Shaker Heights (Wyoming 1-2750)
" 23-26	Cleveland	"
" 27 (?)	To Washington, D.C.	Dodge Hotel
" 28	Washington, D.C.	" "
" 29	To Miami Beach, Fla.	Sans Souci Hotel
" 30	Miami Beach	" "
July 1	To Washington, D.C.	Dodge Hotel
" 2-16	Washington	" "
" 17	To Atlantic City, New Jersey	Haddon Hall
" 18	Atlantic City	" "
" 19	To Washington, D.C.	Dodge Hotel
" 20	To New York, N.Y.	Statler Hotel
" 21	Sail (noon)	S.S. America - U.S. Lines

Write H H B
 Thank him for
 his thoughtful
 in giving me the
 itinerary & for
 his appreciation of
 availability during
 recess.

Hope that it will
 not be necessary to
 consult the Court
 but you can
 never tell
 what may happen

But I can always
 count on you
 in doing me
 important task
 to do more
 things for you
 than for me
 sincerely

Time
 & effort