



1958

# The First Justice Harlan: A Self-Portrait From His Private Papers

Alan F. Westin  
*Cornell University*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Judges Commons](#), and the [Supreme Court of the United States Commons](#)  
**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Westin, Alan F. (1958) "The First Justice Harlan: A Self-Portrait From His Private Papers," *Kentucky Law Journal*: Vol. 46 : Iss. 3 , Article 1.  
Available at: <https://uknowledge.uky.edu/klj/vol46/iss3/1>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# The First Justice Harlan: A Self-Portrait From His Private Papers

By ALAN F. WESTIN\*

## INTRODUCTION

To open this commemorative issue and to provide a backdrop for the specialized articles which follow, the *Journal* asked me to contribute a general article on John Marshall Harlan as a man and a Supreme Court Justice. For any biographer caught in mid-stream, and aware how many inlets must still be explored before an accurate chart can be drawn, this is a difficult assignment. In dealing with Harlan, the problem is even greater, since most of the "portrait articles" written about him must be classed as non-objective art by anyone who has seen the Harlan Papers and studied the Kentucky political and social scene from 1830 to 1880. Rather than contribute too vague a sketch or too particular a discussion of one part of Harlan's career, I have chosen to sift through the Harlan collection and other sources and assemble a documentary self-portrait, to let the first Justice Harlan present his own image.<sup>1</sup>

Happily, the Harlan Papers are well suited to such an enterprise. In the year before he died, Harlan dictated a series of memoirs for his family covering his entire pre-Court career. Mrs. Harlan, after her husband's death, wrote a long autobiographical account which not only presents her picture of Kentucky life but also contributes several fine vignettes of Harlan after he joined the Court. In addition to these sources, selections have been made from Harlan's writings, his speeches, and his private letters, almost all of which are published here for the first time.

To make these materials most useful, the reader may require an outline summary of Harlan's life to put each document in its

\* Assistant Professor of Government, Cornell University; Member of the District of Columbia Bar. (Professor Westin is the official biographer of John Marshall Harlan, Ed.)

<sup>1</sup> For an extended biographical article see Alan F. Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," 66 *Yale L.J.* 637 (1957).

setting. John Harlan was born in 1833 in what is now Boyle County, Kentucky. He grew up in Harrodsburg and Frankfort while his father was successively a practicing lawyer, U.S. Congressman, Secretary of State of Kentucky and State Attorney General. After attending Centre College and Transylvania Law School, Harlan became a member of the Frankfort bar and joined his father and older brother in general practice. As a staunch young Whig, Harlan plunged into politics just in time to accompany the disintegrating Kentucky Whigs on their tortured march in search of a party: first into the Native American Party, then as Opposition members, and, just before the Civil War, as Unionists. During this period, Harlan found great success as a young politician, stumping the state as a Whig-American elector in 1856, becoming the successful candidate for Franklin County Judge in 1858, and being barely defeated as the Opposition Congressional nominee from the Ashland District in 1859. From Louisville, where he moved in 1861, Harlan entered the Federal Army as a Lieutenant Colonel and gathered a company of infantry volunteers committed to the same war perspectives as their Commander and most Kentucky Unionists: preservation of the Union with slavery rights untouched.

For two years, Harlan soldiered in the border state campaigns. He resigned in 1863 when his father died suddenly and the affairs of his extensive law practice had to be set straight. Almost as soon as he had hung up his blue coat, Harlan found himself caught up in the confused multiparty politics of Kentucky in the late 1860s. As a military hero because of his outflanking of the Morgan Raiders in 1862, Harlan was nominated and elected as State Attorney General on the Constitutional Union ticket in 1863. During the four years he spent in office, he tried to fashion the party into a middle group between the Confederate-oriented Democrats and the Radical-directed Republicans in Kentucky. This proved impossible. With the Confederates regaining control of the state by 1865, with the rise of Klan violence against former Union leaders and the newly freed Negroes, and with the narrow reactionary economic policy of the Democrats offensive to his progressive outlook, Harlan moved slowly but with a final decisiveness into the new Republican party formed in Kentucky after 1868 under the Grant banner.

From 1868 on, Harlan remained a staunch Republican and became the party's nominee for governor in 1871 and 1875, its candidate for U.S. Senator on many occasions, and its spokesman on behalf of civil rights, economic reform, and increased public education. By 1876, Harlan had built a large law practice, a firm national reputation as a fighting Southern Republican, and was in demand as a campaign orator from Maine to Mississippi. 1876 was also the year in which Harlan managed the presidential bid of his law partner and fellow Kentuckian, Secretary of the Treasury Benjamin Bristow. When it became clear at the Republican Convention of 1876 that Bristow could not be nominated and the effective choice lay between James G. Blaine and Rutherford B. Hayes, Harlan swung the Kentucky delegation to Hayes at exactly the critical moment and earned a top place in Hayes' esteem.

During the following year, Harlan served as one of President Hayes' chief Southern advisors and was named to the Louisiana Commission of 1877, a group assembled to determine which of two rival regimes in the state was the lawfully elected government. A short time later, with the resignation of Justice David Davis, Harlan was appointed to the Supreme Court. His tenure lasted from 1877 to 1911, 34 years in which Harlan came to be known as the "Great Dissenter" because of his frequent and vigorous disagreements with the Supreme Court of the Gilded Age in everything from anti-trust and tax cases to those involving civil rights, fair procedure, and labor organization. He died in harness in 1911, at the age of 78.

## PART I

### THE EARLY YEARS

*Harlan to his son Richard.*<sup>2</sup>

Pointe au Pic, Province of Quebec, Canada  
July 4th, 1911

Dear Richard:

I have promised many times to commit to paper, for preservation by my family, numerous things that have been told them by

<sup>2</sup> Harlan Papers, Author's Possession. I am grateful to the present Justice John M. Harlan, grandson of the first Justice, for entrusting the papers to me for the purpose of preparing a biography.

me as to the relations between my father and Henry Clay, prior to the Civil War . . .

My father was an ardent admirer of John Marshall, and held to the views of constitutional construction which that great jurist embodied in the opinions delivered by him as Chief Justice of the Supreme Court of the United States. He was equally ardent in his opposition to the views of constitutional law which were supposed to be, and doubtless were, entertained by Thomas Jefferson. Marshall, my father always contended, held to views which, all concede, would give to the country a government that would be supreme and paramount in respect to all matters entrusted to the General Government, its powers, however, to be so exerted as not to infringe upon the rights which remained with the People of the several States, which had never been surrendered or granted, expressly or impliedly, to the National Government. My father adhered firmly to these views and opposed those maintained by Jefferson, because he believed that Jefferson's views were based upon a narrow, literal construction of the words of the Federal Constitution which, in time, would so minimize the functions of the Government intended to be established by that instrument as to place the National Government so completely at the mercy of the States that it could not accomplish the objects of its creation. He regarded "Jeffersonianism," speaking generally, as an evil that needed to be watched and overcome. He so thought during his entire life, and hence he became a follower of Webster and Clay. He gloried, so to speak, in being a Whig, and an opponent of the Democratic Party . . .

[We] may take some pride in the fact that he was regarded by Mr. Clay as his warm personal and political friend. In 1846, Mr. Clay delivered in the Market Place at Lexington, Kentucky, what was called his Mexican War speech, in which he charged the Democratic Party with having unnecessarily and unjustly brought on that war. My father heard that speech, upon invitation from Mr. Clay, and he took me with him. I was a mere boy at that time and did not know what the occasion meant. But I remember that during the whole time of Clay's speech I sat at his foot, and was charmed with his magnificent, bugle voice. . . .

After the death of President Taylor, and the accession of Fillmore to the Presidency, Mr. Clay, who was close to Fillmore,

wrote to my father, expressing the belief that if he would accept the position of Land Commissioner of California (then deemed an important post) he, Clay, believed that [my father] would be appointed. [My father] informed Mr. Clay that he was unwilling to leave Kentucky on any account. . . . He determined to stay in Kentucky, let come what would, work hard there, and die poor, if need be, rather than take his family to distant California, among a strange people.

If he had accepted the offer of Land Commissioner of California the whole family would, of course, have become residents of that State. In that event, I would not, perhaps, have become a Justice of the Supreme Court the United States. . . .

*Essay on the American Revolution by John M. Harlan (16 years of age), written in Frankfort, July 30, 1849.*<sup>3</sup>

Nothing seems more remarkable to the superficial observer of the early days of our national history, than the seeming unpreparedness of our country for the war upon which it was about to enter, and out of which it issued so gloriously. As the sun of liberty arose to pour the light of his beams over the land, he shone slowly out from the clouds of doubt and confusion and discord which obscured the nation's destiny.

Sad was the year, by proud oppression driven  
 When transatlantic liberty arose  
 Not in the sunshine and smile of heaven  
 But wrapt in whirlwinds and beset with woes.

Sad, indeed, was the year, and mournfully indeed, to the fallible eye of man, unskilled to pierce through the hidden mysteries of futurity, did our Independence begin. The power, which was arming to enslave us, was mighty, beyond all which it seemed without our ability to bring against it; and we had provoked the extremity of its wrath. We had dared England to the combat.—England, out of whose womb we sprang, whose inhabitants were not less brave than ourselves,—who had at her command all the treasures of the east and the west, who possessed disciplined armies, and whose navies crowded every sea. What had we to

<sup>3</sup> Harlan Papers, Author's Possession.

oppose to all this tremendous array of strength? Whence were to gather the riches and summon the armies and collect the fleets, which could withstand the potent armaments of Britain? We had a Washington to lead on our embattled hosts to the fight; but his followers were only the raw and undisciplined yeomanry of the country; and could they hope to vanquish the vanquisher of France and India? We had a Franklin, a Jefferson, and an Adams to guide our public councils and wield our national resources; but these resources consisted in nothing but the native energies of a people resolved to be free; and could they be deemed adequate to prevail over the most opulent and most powerful Kingdom of Europe?

. . . [W]e are tempted to pause a moment and advert to the consequences to ourselves, and the consequences to the world, of the noble and manly stand taken by our free spirited fathers in those trying days. As to the effects of it upon ourselves, we have only to cast our eyes over the green fields stretched around us, which are waving with the rich and verdant abundance of the promised harvest, under the tillage of a hardy yeomanry, protected by a system of equal laws, and flourishing in union with all the blessings which free institutions can impart to a happy people; and ask ourselves how much of all this would have been, had not our fathers drawn the sword in vindication of their insulted rights. Or look forth upon the broad and fathomless ocean, and as you behold the canvass of our ships whitening every sea, and the striped flag of our country floating in triumph over the remotest waters, and the thunder of her cannon resounding on every shore, do you not feel that none of this glorious display of naval strength would ever have met the eye, if our ancestors had not declared, as they saw the contest approaching, Give us freedom or give us death? Enter the populous cities, which are now scattered over the country, and as you hear the busy hum of active life, and see the stately palaces which arise on all sides, and note all the marks of splendor, opulence, and power, which abound in them, consider what portion of this would exist, had he continued to bow the neck to the yoke of transatlantic taskmasters. In fine, our ancestors were then feeble or oppressed colonists, they were, comparatively speaking, few in number and they were only sprinkled along the shores of the Atlantic or on the banks of our

majestic rivers on this side of the Allegheny; but since then and under heaven, because our sires resisted when they did, we are now wealthy, numerous, and powerful; we have taken our rank with the nations of the earth, and among the first in arts and arms—among the first in social improvement—and promising to continue among the first for ages yet to come. And we have now spread the empire of our civilization far into the interior regions of our country, where but a few years ago was but a wide and waste wilderness, and where are now the busy haunts of men, who, the same at the mouth of the Mississippi or the Merrimac, on the far off waters of the princely Missouri or on the surgent rocks of Massachusetts, are every where free born Americans.

And unless we greatly deceive ourselves, the consequences have not been less distinctly marked upon other nations. The inhabitants of Europe and of Spanish America had for centuries been groaning under the tyranny of the feudal institutions.—obliged to cower beneath the sceptors of military despots, or to kiss the foot of haughty temporal priests. The people had no rights—no liberties—no privileges, but such as the condescension of their kings saw fit, out of their most princely pleasure, to grant. But the example of our revolution went forth, and taught them that there was no mystic charm in royalty which brave men could not break. The name, the fame, the achievements of our heroes, were sounded abroad, and served as a watchword to the lovers of liberty all over the world. Our country was the birthplace of modern freedom; but no sooner had her pinions acquired strength and maturity, than she flew forth in other climes, to establish her temples on the ruins of baronial castles and feudal prison-houses.

The prophets of young freedom, summoned far,  
 From climes of Washington and Bolivar;  
 Henry, the forest-born Demosthenes,  
 Whose thunder shook the Phillip of the seas;  
 The stoic Franklin's energetic shade,  
 Robed in the lightnings which his hand allayed;  
 And Washington, the tyrant tamer:—

these are the names, which have imparted inspiration to all who spurn at slavery, wheresoever they wander, on the banks of the Po or Tagris, the Amazon or La Plata, and which will continue to



impart it, until Truth and Freedom and Justice shall cease to have a name among men.

*Harlan Autobiographical Memo: "My Appointment as Adjutant General of Kentucky . . ."*<sup>4</sup>

I graduated at Centre College, Kentucky, in June 1850, when just past seventeen years of age. In 1851 Gov. John L. Helm came into the office of the Second Auditor, in which I was a clerk, to see Mr. James Barbour, my chief. While there the Governor said to me (I thought at the time jocularly): "John, the office of Adjutant General is vacant, and I have a notion to appoint you." I replied: "Governor, you are jesting, I am only eighteen years of age." "No matter," he said, "you can fill the place." He went out after a while, and to my surprise there came to me a commission as Adjutant General on November 14th, 1851. The position was not one of any special consequence, for the State had no military organization to be controlled and I had nothing to do except keep some old military papers connected with the War of 1812, to draw quarterly a salary amounting annually to \$250, and to perform certain duties connected with two military institutes. I was immediately dubbed "General" by the boys, and that title stuck to me ever afterwards. . . .

At the time of my appointment, there were two military institutes in Kentucky, each holding charters from the State. They were private institutions, and the students were trained in military tactics and were miniature West Points. The charter of each contained a provision that the Governor should appoint a Board of Visitors, whose duty it was to visit the institute once a year and report to the Governor its condition and prospects. This was done in order to give the institute a quasi-state character. These visitors were, as a general rule, distinguished men in different walks of life. One of the institutes was the Kentucky Military Institute . . . the other was the Western Military Institute . . .

The charters of these two Institutes made the Adjutant General *ex officio* Chairman of the Board of Visitors, and it was his duty to attend each commencement occasion. Of the Visitors of the Western Military Institute, when I visited the institution in

<sup>4</sup> Harlan Papers, Author's Possession.

June 1852, I recall the names of Gen. William O. Butler, the Democratic candidate for Vice-President in 1848, Gen. Humphrey Marshall, Gen. William Preston and Hon. Thomas B. Monroe, United States District Judge for Kentucky. I presided over the meetings of the Board with all the dignity I could command, and it is interesting to remember that the great men who composed the Board recognized my authority and duty to do so. . . . While at Drennon Springs, there was a review of the cadets by me as Adjutant General of the State and as the President of the Board of Visitors.—Butler, Marshall and Preston, who had won distinction in the Mexican War, *standing behind me*, while the cadets marched by us. . . .

*Malvina Shanklin Harlan*, SOME MEMORIES OF A LONG LIFE, 1854-1911, Manuscript completed 1915.<sup>5</sup>

#### *Courtship and Marriage.*

One day during the late summer of 1853, in Evansville, Indiana, a small but growing town in the Southwestern part of the State, a young girl of fifteen, suffering from some slight affection of the eyes, had been confined by the physician's orders to a darkened room.

Happening at the moment to peep through a narrow crack of the almost closed window shutters, she saw a young man passing by. As she had lived all her life in that small town and was familiar with almost every face in it, she knew at once that he was a stranger.

That was sixty-one years ago; but, as clearly as it if were yesterday, she can still see him as he looked that day—his magnificent figure, his head erect, his broad shoulders well thrown back—walking as if the whole world belonged to him.

On the sixth of the following February, 1854, she was invited to take supper with the family of Dr. J. G. Hatchitt, a young physician living in the block beyond her father's residence. To her surprise, as she sat talking to her hostess, a young man—with a rope to each arm, as he "played horsey" for the little nephew that was the delighted and uproarious Jehu—suddenly pranced into the room. The young girl at once recognized him as the interest-

<sup>5</sup> Harlan Papers, Author's Possession.

ing stranger that had caught her eye six months before . . . and whom, after the romantic style of that period, she had (to herself) called "A Prince of the Blood."

Very much amused and yet covered with manly confusion at thus being caught by a strange young girl in the act of "playing the boy," the young man—who proved to be John Marshall Harlan, of Frankfort, Kentucky, and a brother of the hostess—was duly presented to "Miss Malvina Shanklin."

His conversation during that evening greatly interested the young girl, showing unusual thought and intelligence for a youth not yet twenty two. That night he escorted her home. As was her custom, being an only daughter, she went straight to her mother's room to tell her "all about" the very pleasant acquaintance she had just made. She showed so much enthusiasm in her description of him that her mother, after listening awhile to her girlish outburst, said, in a very dry, decided and matter-of-fact tone: "You have talked quite enough about a young man whom you have only seen for an hour or two; now, you can go up to your room. Good night."

During the next week, a daily call from this new friend gave me a new interest in life; and at the end of the week, before he left for his Kentucky home, to my great surprise he asked me to be his wife. . . .

In those days early marriages were quite common, and in my case the young man urged an immediate consummation of his wishes. But the wiser counsels of parents prevailed, and for two years—during which I was at school and he at the practice of law in his father's office in Frankfort—we corresponded, an occasional visit from him making the time seem shorter. . . .

### *The Harlan Slaves*

[After our marriage on December 23, 1856], I went from a home of Puritan New England and Scotch-Irish Presbyterian traditions and principles to the radically different environment that was found, during the ante-bellum days, in Frankfort, the Capital of "Old Kentucky."

All my kindred were strongly opposed to Slavery, the "peculiar institution" of the South. Indeed, an uncle on my mother's side, with whom I was a great favorite, was such an out-and-out Aboli-

tionist that I think that (before he came to know my husband) he would rather have seen me in my grave than have me marry a Southern man and go to live in the South. . . .

Following the patriarchal custom that was quite common in Kentucky at that period—in accordance with which a son brought his bride home to live under his ancestral roof—the first few years of my married life were spent in the family of my husband's parents. . . . The town house of my husband's family was an old-fashioned frame mansion, with spacious rooms, standing at one corner of an unusually wide and deep lot. . . . In the end of the long ell extending from one side of the town house, and in the cabins at the back of the lot, lived the slaves, who had been inherited from both sides of the Harlan family. There were almost as many slaves as there were members of "the Family" [about a dozen] . . . The close sympathy existing between the slaves and their Master or Mistress was a source of great wonder to me as a descendant of the Puritans, and I was often obliged to admit to myself that my former views of the "awful Institution of Slavery" would have to be somewhat modified . . .

There was another and darker side to the question of slavery, which was forcibly brought home to our minds, every now and then. Most of the property of my Father-in-law consisted in slaves, and he felt that there was nothing for him to do but to accept the responsibility for these human souls, doing for them as best he could. [Several slaves were educated and freed by James Harlan.]

I recall one incident, however, which showed his inborn hatred for the dreadful institution of human slavery.

One Sunday morning, on his way to church, he passed in the main street a company of slaves that were being driven to the "slave Market" in a neighboring town. The able-bodied men and women were chained together, four abreast, preceded by the old ones and the little "pickaninnies," who walked unbound.

This pitiful procession was in charge of a brutish white man, belonging to a class which in those days were called "Slave-Drivers," because their duty was to drive gangs of slaves, either to their work or to the place of auction. Their badge of office was a long, snake-like whip made of black leather, every blow from which drew blood.

The sight stirred my Father-in-law to the depths of his gentle nature. . . . [He] could do nothing to liberate the poor creatures then before him; but he was so filled with indignation that anyone calling himself a man should be engaged in such a cruel business that, walking out to the middle of the street and angrily shaking his long forefinger in the face of the "Slave-driver," he said to him, "You are a damned scoundrel. Good morning, sir. ". . . My husband, who was then very young and was with his father on that peaceful Sabbath morning, never forgot the impression that was made upon him by his father's sudden indignation at the brutal and typical incident. It was the nearest thing to "swearing" that he had ever heard from his father's lips. . . .

*Harlan Memo: "The Know-Nothing Organization.—My First Appearance as a Public Speaker and Participation in the Presidential Campaign of 1856 . . ."*<sup>6</sup>

The Know-Nothing Society was a secret organization, having for its object to restrict and destroy the influence of foreigners and Catholic priests in our political affairs. Its motto was, "*Put none but Americans on Guard.*" In 1854, just after reaching twenty-one years of age, I was asked by a friend to join the Know-Nothings, my friend observing that all the old Whigs in the city were members of it. Well, I agreed to join, and did join the society. I was initiated in the upper, or grand jury, room in the court house in Frankfort. On the evening of the initiation an oath (of course no statute authorized it or gave it legal sanction) was administered to me which bound me to vote only for native Americans, and, in effect, only for Protestants. I was very uncomfortable when the oath was administered to me. My conscience, for a time, rebelled against it. For a moment I had the thought of retiring; for while I was intense, as I still am, in my Protestantism, I did not relish the idea of proscribing anyone on account of his religion. But looking around the room in which the initiation occurred, I observed that the old Whig leaders of the city, including my father, were present, and I had not the boldness to repudiate the organization. So I remained in it, upon the idea that, *all things considered*, it was best for *any* organization to con-

<sup>6</sup> Harlan Papers, Author's Possession.

trol public affairs rather than to have the Democratic party in power. That was the kind of political meat upon which my father fed me as I grew up. He hated Democracy and its leaders, Jefferson, Jackson and Van Buren. Often I heard him say that John C. Calhoun ought to have been hung for treason. I quite agree, even now, that a man can say, if he can do so honestly, that notwithstanding the errors or misdoings of his party in reference to particular political questions, it is safest, on the whole, for the country, that his party should remain in power rather than that the other party should control. I knew at that time that the Democratic party in fact pandered to and courted foreign influence, in order to get the votes of foreigners, and that in many parts of the country the leaders of that party were in league with Catholic priests—the latter, by their machinations with Democratic leaders, obtaining favors for their church (as in New York City), which were not accorded to Protestant Churches. So I became reconciled to remaining in the Know-Nothing Society, notwithstanding its direct attack on the Catholic Church.

In 1855 the Know-Nothings of Kentucky nominated Charles S. Morehead for Governor. My father was on the ticket, as the candidate for Attorney General. During that campaign Thomas L. Crittenden spoke here and there for the Know-Nothing ticket. He had an appointment to speak at Bridgeport, near Frankfort, and asked me to ride out with him. I agreed to do so, and went with him. He spoke in a country school-house which would not hold more than an hundred people, and spoke only about three-quarters of an hour. He seemed to have run dry in that time. When he concluded, it was raining very hard, and the people could not go out. Immediately some one cried out, "Let's hear from John Harlan." This surprised me, but I said nothing. The demand for me to speak became general and persistent. I said that I was only twenty-two years of age and had never made a political speech of any kind. They replied, all over the house, "That don't matter; tell us what you think." "Well," I said, "If I must, I must, seeing that the rain keeps you fast in the house." So I commenced, and without notes or previous preparation, spoke for about three-quarters of an hour. The crowd seemed to be much interested in what I said, and applauded me generously. It seemed to me that a new career was then opened up before me,

and I felt that I had *some* gifts for talking to a miscellaneous crowd.

When I went home that afternoon (it was Saturday) and told my father what had taken place at the Bridgeport meeting, he seemed to be pleased, and said that I had acted rightly. Turning the matter over in my mind the next day, I concluded that as my profession would require me to talk, I must go farther, and speak in the city. So, on Monday morning, without consulting anyone, I went to a printing office and had handbills struck off, announcing that I would address the people of Frankfort at the court house that evening on the political subjects of the day. The handbills were stuck up all around the city, and when I saw one of them, fear came upon me for the consequences; but I could not well retreat. So when I went to the court house in the evening (Monday) and saw a crowd of men and women that filled every seat in the room, I "trembled in my knees." But I went ahead, and my success on that occasion was very flattering, in that I was able to talk for an hour and a half without notes, and never halted for a word, although the words chosen may not have been the best. When the meeting closed, I was congratulated on all hands, and I went to bed that night feeling that a "big thing" had been accomplished. The next morning's paper contained an account of the meeting, and some handsome things were said of me by the editors. There was at least one young man, of twenty-two years of age, who at that time thought himself "large" and began (to use a common phrase) to "feel his oats." I so felt, not because I imagined myself as possessing any particular power of oratory, in the true sense of that word, but because I had become conscious of a capacity to say what I desired to say, and to make myself understood by those who heard me. By the next morning I had become quite confident and said to my father that, as my living depended upon speaking, I would make a speaking tour of the State if he would provide me a horse and give me a silver watch. He said, "All right," and I ordered handbills to be printed announcing appointments for about twenty different counties in the mountainous parts of Kentucky. These handbills were sent to postmasters with requests to have them put up. I took it for granted that if the crowds came to hear me, it would be because they thought it was my father who was to speak.

In about ten days I left Frankfort on horseback, carrying no clothes except such as could be put in a pair of saddle bags thrown across my saddle. My first speech was at Danville, and from there I went into various counties, Pulaski, Lincoln, Laurel, Whitley, Knox, Clay, Owsley, and others. Large crowds came to hear me. It so happened that at every appointment some Democrat asked for a division of time—a debate—and I complied with the request. At some of the meetings my adversary would be a man of fifty years of age and a practiced debater. The result was many joint debates, in which I did not always suffer, in the estimation of my side. These debates were of great value to me as a speaker. They destroyed whatever bashfulness I had, and gave me readiness of speech and a steadiness of manner that served a good purpose when addressing juries. My father was evidently delighted, although he did not in words express his gratification.

In 1856 the party in Kentucky which supported Fillmore and Donelson held a convention, and I was made Assistant Elector (or rather canvasser) for the State at large. So I made another canvass and appeared in about forty counties, having on every occasion a crowd of such size as to encourage me. If what the newspapers said was true, my speeches were well received, and I became generally known throughout the State. . . .

#### CIVIL WAR

*Harlan to his son Richard.*<sup>7</sup>

July 4th, 1911

Dear Richard:

. . . When the election of Lincoln was settled, by popular vote, the work of secession was begun. State after State "seceded," and those who were on that side organized the Southern Confederate Government and forbade the exercise within its limits of any authority not in harmony with the secession scheme. The country *literally* trembled at the possibility of war between the Unionists and Disunionists. Good men tried to keep the peace and forbore to say or do anything that would serve as an excuse to resist the authority of the Union. At last, the actual crisis came, when the Flag of the United States, floating over a Fort of the

<sup>7</sup> Harlan Papers, Author's Possession.



United States in the harbor of Charleston, was fired upon, without cause, and the authority of the Union defied. *Then* the people, in the non-slaveholding States and the Union men in the Border States felt that the time had come when further forbearance was out of the question. . . . The then Governor of Kentucky was an open, avowed sympathizer with the cause of the "South" and disapproved the raising or use of troops to suppress the rebellion. But the "Southern Sympathizers" were, in fact, in a minority in Kentucky. The majority of its people held always the same general views [in support of the Union] that my father expressed. I agreed with my father thoroughly, and although I did not vote for Lincoln, my position was well known. . . . I was regarded by the rebel leaders as a "traitor" . . . because of my opposition to secession, and because I had announced that the Government was under a solemn duty to save the Union, if need be, by armed force. Kentucky was at that time in a peculiarly embarrassing position. Her business interests were immediately with the South, and her people were widely connected with the people of the South by ties of kinship. Many families were divided on the Union question. . . . Many persons, for these reasons, hesitated as to what to do, and the number who thus felt and acted were so large that the country came to speak of Kentucky as "neutral" between its Government and those who sought to destroy it.

This was the situation in the spring of 1861. Some of us thought that positive action should be taken at Louisville, by those who were Union men. A private meeting was brought about at which James Speed, myself and others were present. We concluded that the people needed to be educated as to the value of the Union, in itself, as well as to the danger which would come to Kentucky, a Border State, from armed conflicts between armies occupying its territory. We raised a little money and with it hired a few bands of music. During the months of May, June and July, 1861, there was hardly an afternoon when I did not, while standing on a store box, on the pavement, address a public audience in the line just suggested. . . .

During that period an armed volunteer company was formed by Union men in Louisville mainly for our self-protection. We intended to let the violent men of the Confederate side know that we were not to be imposed upon or intimidated. The company

was named the Crittenden Union Zouaves and became a part of the Home Guard of Louisville. . . .

The time now came in my own life when I must determine finally whether I should join the volunteer Union forces and become something more than a speaker for the Union cause in public halls or on the stump. . . . I earnestly desired to go into the army and do my part in saving the Union, but I had a young wife and two small children . . . , and at times felt that I ought not, on any account, to leave my little family and join the army. But Mama came to my rescue and urged me "to go to the front," saying that she would care for the little ones. This relieved my anxiety somewhat, and I issued an address or proclamation, stating my purpose to raise and command a regiment of infantry, and inviting young men of the State to join me. . . . The regiment became a part of the original Division of Gen. George H. Thomas [and was known as the 10th Kentucky Volunteers.] I had been elected the Colonel . . . although I was but 28 years of age . . .

*Harlan Memo: "March From Mississippi Into Kentucky, As A Part of Buell's Army in Pursuit of Gen. Bragg, the Commander of the Rebel Forces."*<sup>8</sup>

In the latter part of the summer of 1862, or early in the fall of that year, the precise date not remembered, I was stationed with my regiment at Eastport, Mississippi. While there, an order came from Gen. Buell that I should march my regiment to Deckerd, Tennessee, on the line of the railroad from Nashville to Chattanooga and there await orders. . . .

We crossed the Tennessee River at Eastport and encamped for the night on some bottom land on the other side late in the day and took up our headquarters for the night. No Federal force being near us, and we being in a hostile country, there was some danger of being surprised by rebel bands. I had many men in my regiment who had been sick and had not fully recovered, and we were short means for their transportation. They were unwilling to be left behind, and I was unwilling to expose them to the danger of their lives in that part of the country. In order

<sup>8</sup> Harlan Papers, Author's Possession.

that the soldiers, both sick and well, might get a good night's rest, I arranged my picket force for the night so that no noise would be created while the men were asleep. Two pickets were placed on each post and in a semicircular line extending around the camp and striking the river above and below it. The pickets were directed to divide the time in the night to suit their convenience, so that one would be standing up and on the watch at all hours of the night. My direction to them was that if anyone approached the camp through the weeds or woods in the night time, the command "Halt" should be given, and if the person moving towards the camp did not halt, they were directed to fire; and all the pickets were directed that when any one of their number fired, the balance were to fire all around the line, so as to make as loud a noise as possible and arouse the soldiers to meet any attack. I slept with my clothes and uniform on and, as soldiers were in the habit of saying, with one eye open. About two o'clock at night I heard a gun on the picket line fired, and immediately there was firing all around the line. The men of my regiment, as they had been ordered to do, immediately turned out and formed in line ready to resist any attack; but nothing was heard indicating the approach of the enemy. Finally I sent my adjutant around the picket line to ascertain who had fired the first gun. It turned out to have been fired by an Irishman by the name of McNamara. He was asked why he had fired. He said he heard someone approaching in front of him and he ordered him to halt but he did not halt, and therefore he fired, and after that there was no further advance. When daylight came, someone went out in front of McNamara's post and there found a dead mule with a bullet through his forehead. He had gotten loose during the night from his wagon and was wandering through the weeds, when he was taken by McNamara to be an approaching rebel.

We then proceeded upon our march. . . . It thus continued for some days, until one Sunday morning, the sky being bright and the day beautiful, we got to a cross-roads within a short distance of Shelbyville, Tennessee, where we found a dead negro hung up at a tree and dressed in our uniform. I concluded that the country must be infested with roving bands of Confederates, and that they might molest some of my [sick] men following behind. Marching on, we discovered ahead some armed cavalrymen

or guerillas dressed in grey uniform, who immediately fled upon [the approach of] our advance troops.

We got to the main street at Shelbyville at ten or eleven o'clock in the day, and observed a crowd of well dressed men sitting under the trees near the court-house. I halted my command and sent one of my captains with a squad of men up to the place where these citizens were. I went with him and spoke to these people about the dead negro discovered on the public road as I approached the city. I said to them, in substance: "These roving bands could not be so near this city and on the public highways without your knowing who they were. If they are armed Confederates they should be at the front with their army. I do not intend to run the risk of their intercepting and killing my sick men who are coming along behind me. To guard against the possibility of that, I intend to take four or five of your number with me as hostages, and I wish to say to the balance of you that it behooves you to turn out and see that these roving bands do not annoy my sick soldiers. If any one of my soldiers should be missing from camp tonight, I shall assume that he has been murdered, and will order the execution of one or more of these citizens by way of punishment."

The countenances of these citizens betrayed some anxiety when this statement was made by me, and they said it was hard that they should be held responsible for the actions of these people. I replied that they could avoid any responsibility by turning out and keeping these men off from my command. So I took these citizens and put them between my soldiers on my further march. Upon reaching my next camping ground near a village, I discharged those who had been arrested, and took some more hostages from citizens, explaining why I did so. I ought here to say that I did not intend to carry out the threat that I made, but the people whom I addressed thought that I would do so. At any rate, the result was that I saw no more of these roving bands, and my sick men were saved from molestation.

The story has been told on me since the war closed, that the particular citizens [from Shelbyville] whom I picked out as hostages on that march happened to be the only men in that community who were known to be sympathizers with the Union cause. . . .

## THE POLITICAL ARENA

*Harlan to Benjamin Bristow.*<sup>9</sup>

Louisville, Ky.  
November 16, 1870

Dear Bristow:

. . . Your description of the Judges of the Supreme Court accords with my estimate of them, based upon newspaper accounts, except that I had no opinion of Bradley and do not suppose that Field could improve upon acquaintance. His opinions certainly do not indicate a high order of legal ability. If Chase should resign or should die during the present Administration, the Contest for his place will, I suppose, be between Justices Miller and Swayne—and then I trust the President will put on the bench some lawyer in the late slave-holding states. It may be that you will be the man for the vacancy. I know of no more desirable position than that of a Judge of the Supreme Court especially if the salary should be increased to \$10,000.—It lifts a man high above the atmosphere on which most public men move, and enables him to become in every sense, an independent man, with an opportunity to make a *record* that will be remembered long after he is gone. Crittenden, great as he was, will be known fifty years hence only in Kentucky, while the name of a Judge of the Supreme Court, who has proven himself to be an able upright man will be familiar to every lawyer in the land. . . .

[Political] matters seem to be at loose ends, and the signs indicate demoralization in our [Republican] ranks, and Democratic triumph in 1872. I have sometimes thought that, if I could, I would leave this rebel state but if the Democrats succeed in 1872, our place will suit a loyal man as well as another. The probability is that I will plug away here at the law for the balance of my days, and every year that I live increases my comfort in the reflection that I must, of necessity, stick to my profession. It is a hard master, but I love it better than any other except that, if a wealthy man, I would enjoy public life. . . .

<sup>9</sup> Bristow Papers, Library of Congress.

*Harlan Speech at the G.O.P. Rally on November 4th, 1876,*<sup>10</sup>  
*Louisville Commercial*, November 5, 1876.

It is quite certain, fellow citizens, that Tilden and Hendricks have very few friends in this crowd. It is equally certain that you are all for Hayes and Wheeler, the noble candidates of the Republican Party. . . . When we shall meet again in a week from this time to congratulate each other upon the nation's being again saved from Democratic rule, it will not be with any feelings of resentment towards those who may have differed with us. We will rather invite our opponents to join their hearts and hands with ours in sustaining the policy which the people will approve by the election of Rutherford B. Hayes to the Presidency. Some will not join us. Some will stand back, and persist in growling, after the Democratic fashion, when that party is out of power. There will be some who will still dream of the possibility of the Virginia and Kentucky resolutions of 1798 being accepted as the fundamental law of the land, instead of the Constitution of the United States. Some will still cling to the old Democratic idea that a Republican, particularly if he be black, has no rights which a Southern KuKlux and White Leaguer is bound to respect. Some will still proclaim as did the Democratic Party in their platform of 1868, that, upon the triumph of the Republican party, "we will meet as a subject and conquered people, amid the ruins of liberty and the scattered fragments of the Constitution." Some of them will announce in mournful accents that the Government is gone, and that free institutions have perished from the earth. We will, however, waste no time with gloomy fellows of that class. We will give no heed to such dismal forebodings. We will go forward in the great work of giving peace to the country, and reuniting the whole people in the bonds of brotherhood.

We will throw the doors of the Republican church wide open, and invite all to join us who are willing under Hayes, as President, to build up the waste places, and bring about an era of universal good will. We would this day, fellow citizens, have been in the midst of such an era of good feeling, but for the mischievous teachings of the Democratic politicians of the country. But for that party the tide of emigration would ere this have swept over

<sup>10</sup> *Louisville Commercial*, November 5, 1876, Louisville Free Public Library collection.

the entire South, and instead of talking in this centennial year about a Solid South and a Solid North, we would have made this great contest upon issues which have no reference whatever to the civil war through which the nation passed . . .

. . . When the war closed the great question of the hour was the future of a race made free by the war. The people determined that the freedom of that race should be secured by an amendment to the Federal Constitution. But the Democratic leaders in the South, not content with opposition to the policy of that amendment, taught their followers that the adoption of such an amendment was the destruction of the Constitution. When the nation determined by another constitutional amendment, to give citizenship to that race, the same leaders told their followers that such an amendment would be the very essence of despotism. When the nation determined, by still another amendment, to give the colored race the right to vote, the same Democratic leaders told the South, that such an innovation upon the old order of things was a less grievance than our fathers had when they threw off the British yoke, and appealed to arms for protection against British tyranny. . . . Whatever was done by Congress toward the restoration of government in the rebel states, the Democratic leaders denounced as despotism, to which no free people should submit. What wonder, therefore, that there arose all through the South murderous gangs of KuKlux, who spared neither race, age nor sex in the prosecution of their diabolical scheme against the lives and liberties of citizens?

In 1868 the Democratic leaders made the issue upon the reconstruction acts, and failed. In 1872 they endeavored to deceive the people by putting forward as their candidate the man who denounced the Democratic party more bitterly than any public man who ever lived in this country. [Horace Greeley] They again failed. And now, with the same feelings of hatred toward the policy of the Government, they come to you under the banner of "reform," borne aloft by the head and front of Tammany Hall, the political school in which has been educated the most skillful, unscrupulous, daring, and corrupt tricksters ever known in American history. . . . They denounce all as traitors to the South who, living upon Southern soil, dare advocate the principles of the party which saved the country from destruction. Many of them

still hold to the doctrine of the divine right of Southern Democrats to rule the South. They are still engaged in the Cotton States in the work of making it hot for every man who does not bow the knee to Southern Democracy. If the Southern Republican happens to have been born in the North, and settles in the Cotton States, he is denounced as a carpet-bagger, if he dares to speak out boldly and defiantly the political principles which he holds.

Southern Democracy is the enemy of free speech. It is the friend and apologist of KuKlux and White Leaguers. It is the enemy of emigration and education. It is the enemy of nationality. It loves a State more than it does the country. It loves the flag only when it is borne aloft by Democratic hands. . . . Its success now will be a notice to quit to every white Republican in most of the lower Southern States, and it will result in the subjugation of the entire colored race of the South to the domination and will of the Democratic leaders. It will be the triumph of the shot-gun policy. . . .

When we talk of these matters—when reference is made to the past conduct of Democratic leaders—they say we are waving the bloody shirt. If we refer to the treachery of a Democratic President and a Democratic Cabinet in the memorable year of 1861, it is said that we are waving a bloody shirt. If we refer to the heroic patience and sublime courage of the American people in sustaining the brave soldiers of the Union, it is said we are waving the bloody shirt. . . . If we refer to the seditious conduct of Democratic leaders in opposing every effort of Congress to restore governments to the States lately in rebellion, it is said we are waving the bloody shirt. If we refer to lawless combinations of KuKlux and White Leaguers, it is said we are waving the bloody shirt. . . .

Fellow citizens, when it comes to pass in this land, that a public speaker can not refer to the trials and struggles of the loyal people of this country, North and South, without giving offense to those who hear such sentiments, and without being charged with “waving the bloody shirt,” then let us cease decorating the graves of the dead soldiers of the Union, and like men admit that those who desired the dissolution of the Union were [not] wrong. (Cries: No, no!) If fidelity to the principles of the



Republican party be treason to the South, we glory in such treason.

We of the Republican party are the true friends of the South. We do not seek to oppress any of the people of the South. We maintain the rights of all, of every race. . . . We are for protection to all in every right secured by law. . . . We believe this to be a nation, and we insist upon the right and duty of this nation to protect all the people against lawless combinations, when they are too powerful to be suppressed in any other way than by the strong arm of the nation. When the nation becomes unwilling and unable to do that, then will the American people deserve the execration of the civilized world. . . .

## PART II

THE LETTERS AND MATERIALS WHICH FOLLOW  
ARE DURING HARLAN'S PERIOD OF SERVICE ON THE  
UNITED STATES SUPREME COURT.

*Harlan to his son James.*<sup>11</sup>

Near Princeton Mass.  
Sept. 15/80

My dear James—

I observe, from your letter to Mama, that your mind is being occupied, at odd times, with the question of *eternal* punishment. It seems to me that this is not a question which need concern us very much in this life. At any rate there is no ground to think ill of any one who happens to think that punishment, in another life, for the short-comings in this life, will be *eternal*.

The important question is whether there will be *any* punishment whatever. If you and Dave are agreed on that proposition, I don't think it material for you to inquire as to the degree or extent of the punishment which will be inflicted. Whatever may be the punishment it is certain to be more than you or Dave will like, and more than you will, even in that supreme moment, admit that you ought to have. You will remember—of course you do for Mama fancies that you continually read the bible—the occasion when the rich man woke up in hell, and saw Lazarus, the beggar,

<sup>11</sup> Harlan Papers, Author's Possession.

in Abraham's bosom. The first named individual, who had been "clothed in purple and fine linen, and fared sumptuously every day," was anxious to change his base of operations. But Abraham said: "Son, remember that thou in thy lifetime receivest thy good things, and likewise Lazarus evil things; but now he is comforted, and thou art tormented."

"And besides all this," continued Abraham, "*between us and you there is a great gulf fixed*: so that they which *would* pass from hence to you *cannot*; neither can they pass to us, that *would come* from thence." (Luke Ch. 16: 19 to 31.)

Now, it is certain that there are two distinct places or localities in the next life, between which there is an unpassable gulf. The inhabitants of neither can pass to the other—One is peopled by those who are "comforted," the other by those who are "tormented." There is nothing in the Bible of which I am cognizant, which justifies the belief that the line is *ever* passed, so that the man who commenced the other life in the torment may join those who are "comforted" from the outset. The thing is not to get into the torment at all. . . .

In other words, we shall have, in some form or way, we know not of, *after this life*, the capacity to discern the difference between *comfort* and *torment*. It is certain that if we are comforted, as the beggar was, we will not know what torment is, will have no occasion to bother our brains with determining the question . . . as to how long the "tormented" will be punished.

I do not bother my brain with these subtle inquiries—If we could solve them all we should know as much as God does, and would claim ourselves to have had some hand in creating the Universe.

Do not fall into the habit too common among young collegians of calling into question the fundamental ideas upon which all religion rests. You are not bound to accept blindly what the fathers have taught but you ought to be slow in striking down the old landmarks, or ploughing up the old ways. . . .

*Harlan to Mrs. Harlan.*<sup>12</sup>

Chicago, Illinois  
Friday, June 9/82

Dear Mallie.

The gentleman now speaking thinks I am taking notes of his argument—But as his argument is printed I take no notes and while listening to him I drop you a few lines, to tell you that I had a pleasant journey and am well—feel splendidly. The business here [Federal Circuit Court] will keep me two days. So that I will go to Springfield Saturday night and commence work there on Monday. . . .

I don't know that you should feel that I have been particularly attentive during your sickness. Certainly all that I have done and all the solicitude I have felt has been due to the best of wives. No man ever had such a wife as I have—that I would submit to the candid judgment of "the world and the rest of mankind." I shall be very happy when you are again restored to health. . . .

Aside from a sense of duty, I have some *ambition* to do my work here *well*. If our boys should settle here I wish them to be able to point with pride to my record as a Judge in this Circuit.

. . .

*Mrs. Harlan: SOME MEMORIES.* . . .<sup>13</sup>

"An Inspiring Inkstand."

Vividly associated in my mind with our Massachusetts Avenue home is an interesting episode that formed the closing chapter in the story of a certain historic inkstand, which played an unexpected, dramatic and inspiring part in one of the most important of my husband's numerous "dissenting opinions."

My husband was always profoundly interested in places and objects connected with the history of the country; and for that purpose, during his first years in Washington, he made numerous visits of discovery to the different portions of the beautiful Capitol building that for more than a century had housed the Congress and the Supreme Court of the United States. He found much to interest him, not only in the hall (now known as Statuary Hall) where the House of Representatives sat . . . and in the old Senate

<sup>12</sup> Harlan Papers, Author's Possession.

<sup>13</sup> Harlan Papers, Author's Possession.

Chamber (now the Supreme Court Room) that had resounded to the eloquence of Calhoun, Clay and Webster, but in the numerous small objects that were associated with the great men of the past.

One day, during (I think) his second or third year in Washington, in the office of the Marshall of the Supreme Court he espied a very old-fashioned and antique inkstand. At each end of the little wooden inkstand (which rested on four small balls, one at each corner, answering as feet) was a small ink-well, covered with metal top. Between the two wells was a small glass jar or box, with a perforated top, that contained the sand which in the early days did the work of our "blotters." Across the front of the stand, the wood was hollowed out into a little groove for the pen-holders.

The quaint little inkstand had about it such an air of mystery and history, that my husband asked the Marshall for its story. He learned that it had belonged to Chief Justice Taney and that it was the one constantly used by him in his judicial work. Those innocent wells had furnished the ink with which he penned the famous Dred Scott decision, which, more than any single event during the agitation over the Slavery Question in the ante-bellum days, had served to crystallize the anti-slavery feelings in the Northern States.

My husband's interest in Taney's inkstand was so marked, that the Marshall asked him if he would like to have it. My husband answering most eagerly in the affirmative, the Marshall at once wrapped up the historic little inkstand and gave it to my husband, who put it in his coat pocket and brought it home as a great treasure.

One evening, shortly after we had moved into our Massachusetts Avenue home, we were present at a large evening reception. My husband was engaged in conversation with a very charming woman, the wife of Senator George H. Pendleton of Ohio. Though I took no part in the conversation, I was near enough to hear it. They had been exchanging views about the many interesting things that were often found in most unexpected places about the Capitol, and my husband was telling her about the treasure-trove upon which he had once stumbled in the Marshall's office.

Mrs. Pendleton's interest was most marked, and, after hearing

a minute description of the inkstand and the part it played in the epoch-making decision in the Dred Scott case, she exclaimed,

“Mr. Justice, I would so love to have that little inkstand. Chief Justice Taney was a kinsman of my family”. . . .

My husband’s feeling for women was so chivalric that without hesitation he promised to send her the little inkstand the very next day.

At that time his invariable rule was to work very late at night. Even after a reception he generally went into his study for an hour or more of work before going to bed.

After he left me that night for his study, I began to think of the promise he had so rashly made to Mrs. Pendleton. Knowing as I did how much he prized that historic inkstand, a strong impulse took possession of me. . . . Next day, his much-enjoyed morning nap . . . gave me my opportunity. . . . Going that morning to my husband’s study on the third floor, while he slept, I found the treasured inkstand hidden away under an accumulation of law papers, briefs and opinions, and I carried it away to my room and hid it among my own treasures.

In due time his nap was over and the day’s work begun. Among the first things he thought of was the promise he had made the night before to Mrs. Pendleton. A search for the little inkstand proved unavailing and all his questions to me were met with an “evasive answer” which headed off suspicion. He wrote a note to Mrs. Pendleton telling her of the inexplicable loss of the inkstand, but that, as soon as he could find it, he would keep his promise. As time went on he forgot all about it and I took good care that the inkstand should remain hidden. . . .

[In 1883] the Court decided the famous “Civil Rights” case, involving the constitutionality of the Act of 187[5], which was introduced by Charles Sumner for the purpose of assuring civil rights to the negroes throughout the Union. As all lawyers know, the Court declared the Sumner Act unconstitutional, my husband alone dissenting.

His dissent (which many lawyers consider to have been one of his greatest opinions) cost him several months of absorbing labor—his interest and anxiety often disturbing his sleep. Many times he would get up in the middle of the night, in order to jot down some thought or paragraph which he feared might elude

him. In point of years, he was much the youngest man on the Bench; and standing alone, as he did in regard to a decision which the whole country was anxiously awaiting, he felt that, on a question of such far-reaching importance, he must speak, not only forcibly but wisely.

In the preparation of his dissenting opinion, he had reached a stage when his thoughts refused to flow easily. He seemed to be in a quagmire of logic, precedent and law. Sunday morning came, and as the plan which had occurred to me, in my wakeful hours of the night before, had to be put into action during his absence from the house, I told him that I would not go to church with him that day. Nothing ever kept *him* from church.

As soon as he had left the house, I found the long-hidden Taney inkstand, gave it a good cleaning and polishing, and filled it with ink. Then, taking all the other ink-wells from his study table, I put that historic and inspiring inkstand directly before his pad of paper; and, as I looked at it, Taney's inkstand seemed to say to me, "I will help him."

I was on the look-out for his return, and met him at the front door. In as cheery a voice as I could muster (for I was beginning to feel somewhat conscience-stricken as I recalled those "evasive answers" . . .), I said to him:—

"I have put a bit of inspiration on your study table. I believe it is just what you need and I am sure it will help you."

He was full of curiosity, which I refused to gratify. As soon as possible he went to his study. His eye lighting upon the little inkstand, he came running down to my room to ask where in the world I had found it. With mingled shame and joy I then "fessed up". . . . He laughed over my naughty act and freely forgave it.

The memory of the historic part that Taney's inkstand had played in the Dred Scott decision, in temporarily tightening the shackles of slavery upon the negro race in the ante-bellum days, seemed, that morning, to act like magic in clarifying my husband's thoughts in regard to the [Sumner] law. . . . His pen fairly flew on that day and, with the running start he then got, he soon finished his dissent. . . .

*Harlan to Chief Justice Morrison Waite.*<sup>14</sup>

East Clouster, Mass.

July 31, 1883.

Dear Chief Justice:

. . . My time has been passed here very comfortably and quietly. Such circuit work as I brought with me has been sufficient to prevent me from getting rusty and has not annoyed me. . . . Where is Brother Miller? I wrote to him at Block Island some time since, but as I have received no answer I infer that he is not at that place.

The last I heard from Bro. Woods he was at Newark. Bros. Matthews and Blatchford will, I fear, get such *lofty* ideas on the Mountains that there will be no holding them down to Mother Earth when they return to Washington. Bro. Bradley, I take it, is somewhere studying the philosophy of the Northern Lights, while Gray is, at this time, examining into the Precedents on British Columbia. Field, I suppose has his face towards the setting sun, wondering, perhaps, whether the Munn case or the eternal principles of right and justice will ultimately prevail! . . .

If you want any novels to read I can send you some. Or if you prefer History, I can send you some of Prescott's works, including, to borrow the spelling of an Ohio friend of mine, "Ferdinand and *Isybelly*." Perhaps you would prefer "Horse-Shoe Robinson" by John P. Kennedy—or a few volumes of the Sup. Ct. decisions as published by the Lawyers Co-operative Association. I think that among the books which my sons and I brought here we can suit most any mood in which you happen to be. . . .

In looking over this letter I fear you may come to the conclusion that my mind has become confused by reading the decisions of our Court on bond cases—municipal, not *state* bond cases—or that I have seen Ben Butler on his yacht and tasted some of his New England Rum. But I assure you neither supposition would be true. I am entirely at myself, and have written this letter in a *suit* of blue flannel, that cost me, all told, \$9. If you could see me in that suit, with my grey chin whiskers, I am sure you would doubt whether I was the same Judge who last term stood, with

<sup>14</sup> Waite Papers, Cincinnati, Ohio. I am grateful to Morrison R. Waite, Esq., grandson of the Chief Justice, for access to this important collection.

Bro. Field, as a sentinel on the watch towers, warning unborn millions against the dangers of state repudiation.

Well, good bye—but with this injunction—put this letter into the fire, for when your biographer shall come to look into your correspondence to find letters to be published, I do not wish him to know that you correspond with any man who would write a letter so wanting in dignity as this one. . . .

*Harlan to Justice Joseph P. Bradley.*<sup>15</sup>

Washington, D.C.

February 23/89

Dear Justice Bradley:

You know that I greatly rely upon you, while you are on the Bench (and I hope your departure from it is far in the future), to keep me *straight*. But it is important that you be kept straight—and to that end I send you an article from Kentucky—"straight"—It is 21 years old. A small quantity of it will produce delightful sensations, and make you wonder why every sensible man is not an adherent of the Presbyterian or the Dutch Reformed Church. Too much of it, *at one sitting*, may do harm.

This is preliminary to my apologizing for sending you, also, my opinion in the Utah murder case. Knowing your opposition to this way of sending around opinions to be read, I should not send this one, except that others are being handed about. But I really want your guidance in this Utah case. . . .

*Harlan to William Howard Taft.*<sup>16</sup>

Washington, D.C.

November 13, 1892

Dear Taft:

. . . I met in Switzerland last summer a Scottish preacher of the Presbyterian faith and told him of my purpose to visit his country in the summer of '93 in order to hear preached what I have not heard for a long while, a little "Hell-fire and Damnation." Recent events in this country serve to convince me of the value of such a doctrine. When Wayne McVeagh, Carl Shurz and men like those fight under the banner of Tammany to effect reform and

<sup>15</sup> Copy in Harlan Papers, Author's Possession.

<sup>16</sup> William Howard Taft Papers, Library of Congress.



purity it is high time that the pulpit recurred to fundamental principles. This leads me to say that you are quite wise in not attempting an explanation of the causes of the recent disaster to the Republican party. [Grover Cleveland's election as a Democratic President] It is difficult for any one to tell what was the chief cause of the defeat. It is a mistake, I think, to lay it all, or for that matter any of it, to the doctrine of protection. My own judgment is that the Homestead affair had more to do with the result than any single cause. Our speakers were saying everywhere that the inevitable result of protective tariff was to raise the laborer's wage. Some of them put it too strongly. Right in the midst of an educational campaign of that sort it occurred to that eminent Republican, Mr. Frick, that it would be wise to reduce the wages in the Carnegie concerns, and add to his reputation as a man who had nerve and genius enough to tame any combination of workmen. So while Mr. Carnegie was in Europe amusing himself in various ways, his man Friday entered upon the work of disuniting the labor element of the country from the party of protection. There was such preparation on the part of Mr. Frick for his campaign against organized labor, that the great mass of laborers in the country felt that Frick's success was the triumph of Pinkertonism and the destruction of the rights of labor. As it all occurred while the Republican party had control at Washington, it was easy for the labor element of the country to reach the conclusion that the change of administration could not make matters any worse, and might make them better.

Then, the party had to deal with a great mass of men in the West whose lands were under mortgage to "bloated bondholders" at large rates of interest, and who thought that the free coinage of silver would give every man his "sheer" of this world's goods and thereby enable him to get even again. To all this I would add the foreign element of the country, the great body of which in this election was with the Democrats. Some of them were started in that direction by the [Catholic parochial] school question in Wisconsin and Illinois; some by the relations which leading Prohibitionists hold to the Republican party. Independent of these considerations, men born abroad who are not themselves engaged in protected industries, will not sympathize with a policy which

looks to the protection of American homes and American industries against foreign competition. . . .

With respect to Judge Field, it is difficult to say what his purposes are. My belief is that he has no idea of retiring. There is great force in what you say might be the result of his retiring now [and giving Cleveland a chance to nominate his successor] upon the future of the Court. I think you can rely upon it that he will not retire until he makes a permanent removal to the Field cemetery at Stockbridge, Mass. I cannot understand how anybody would wish to retire from his regular work after he has become too old to pursue any other course of life with comfort. My own conclusion, long ago formed, is to stay at my post on the Bench, until I die.

I do not believe that any movement to increase the number of our Court will meet with the approval of Congress; though it may be that the Democratic leaders will come to the conclusion that it is best for them to have full possession of the government, and to that end adopt the Edmund-Evarts plan of making the Supreme Court so large as that it might well be called a town meeting. . . .

*Harlan to Eli P. Murray.*<sup>17</sup>

Paris, Hotel Lafond, 14 Rue de la Tremoille  
February 15, 1893.

Dear Murray:

. . . I need scarcely say that my stay in Europe last summer was a new and valuable experience to me in every way. Of course I labored under the difficulty of not understanding the languages of the countries through which I passed. But I got on reasonably well. I came over here in advance of the meeting of the Behring Sea Arbitrators in order to have full time to examine all the documents which have been submitted in that case. The whole of January was given to that work, and I feel reasonably well prepared for the duties that belong to me as one of the arbitrators appointed by the United States. You will remember that my colleague from America is Senator Morgan of Alabama, who is well

<sup>17</sup> Copy in Harlan Papers, University of Louisville Law School, Louisville, Kentucky, a smaller collection of Harlan Mss. deposited by one part of the Harlan family.

up in all the questions that will be submitted to us. There are two Arbitrators on the part of England, the principal one being Lord Hannen, a Law Lord of high reputation in Great Britain. There are three other Arbitrators, appointed respectively by the French, Italian, and Sweden-Norway Governments. . . .

I may say to you that the work which I have in hand is the most serious that has ever been committed to me. The average American will assume that the Arbitrators designated by our country will decide every question submitted to them in favor of our Government, overlooking the fact that we sit as Judges obliged by the highest principles of honor to determine the case in all its aspects according to the principles of law and justice. At any rate I take this view of my position, and do not permit myself to doubt that the other Arbitrators will look at the matter in the same way. . . .

The only recreation I have had since coming here has been during the past ten days in London. I went there for the purpose of hearing Mr. Gladstone when he presented his Home Rule Bill. Although I had heard many great orators I felt that I ought not to miss the opportunity of hearing so great a man upon so momentous an occasion. I was able to obtain a most excellent seat in the gallery of the House of Commons and heard every word of Mr. Gladstone's speech. I will not say that it was the greatest speech I ever heard but it certainly was a very remarkable display by a man eighty-four years of age. He occupies in Great Britain as high a position as Clay and Webster held in our own country. In his control of a deliberative body he is quite as remarkable as either of the American statesmen just named. From his display on the 15th, and from all I heard of him in London I am prepared to think that no political leader ever exercised over his followers more absolute control than Mr. Gladstone. . . . His appearance was very fine indeed, and his voice very sweet and persuasive, though not equal to Mr. Clay's in volume and power. While in London I heard quite a number of speeches in the House of Commons. They were all characterized by hard sense as contrasted with mere oratory. Indeed, the English, above all others, are the matter of fact people, their speakers rarely ever attempting oratory in the sense that we use that word. My belief is that Mr. Gladstone's bill will be passed by the House of Commons but will

be rejected by the House of Lords. After a while Parliament it is believed will be dissolved, and the two parties will go before the country again some time this year for a final struggle on the question of Home Rule for Ireland. Along with the Irish Bill will be presented other bills extending the principle of Home Rule throughout England and Scotland in mere County matters. England is on the road to the establishment of substantially the same principles which underlie our Government. In time its people will dispense with the House of Lords and have a Senate composed of untitled persons. They will also in time have a Supreme Court with power to pass upon the validity of Acts of legislation with reference to the fundamental principles which make up what we call "Anglo-Saxon liberty." All this may be far in the future, but that the final result will be an enlargement of the principles of popular government I do not doubt. . . .

*Harlan to W. A. Maury*<sup>18</sup>

Paris, France, June 18, 1893.

Dear Maury:

. . . While no one ever suspected me of being a particularly pious man, I have always regarded any public, official desecration of the Sabbath Day as a thing not to be tolerated in our country. This thought is suggested by the trick played at Chicago, whereby the World's Fair is to [be] regularly opened on Sunday. What has occurred would never have occurred if all the officials representing the *nation* at the Fair had been willing to keep faith with Congress. Some of them were in the scheme to get up a suit in the State Court, so as to give them an excuse to say, when called into the Federal Court, that they were enjoined by the State Court from closing the Fair on Sunday. The plan was to tangle the matter in the courts so that the World's Fair would be over when the questions were decided. It is a shame that the United States should stand before the world as aiding a Fair which desecrates a day regarded by the great body of Christian people the world over as sacred to rest and religious contemplation. If Chicago is willing to have a local Fair let her have it. But it ought not to be tolerated that the Fair be regarded as a national concern, if the scheme to open it on Sunday is adhered to.

<sup>18</sup> Harlan Papers, Louisville.

There is one way in which this scheme, offensive to the conscience of the vast body of Americans, in and out of the churches, can be defeated. It can be defeated by the President, if he be so minded. If he will notify the World's Fair Commission that he will order the withdrawal of the U.S. exhibits, and recommend that Congress sue for and recover the money obtained from it, under false pretenses, the schemers will be foiled. . . . No civilization can be healthy and sound where there is a general disregard of the Sabbath by the people. The most hopeful sign in *our* civilization is the general respect for the Sabbath throughout all our borders, even in the large cities. The assumption that the laboring man demands the opening of the Fair on Sunday is a fraudulent pretense. The rich lounge, who does not earn his own salt, and the fellows who sit around saloons, are usually very loud in the expression that the laboring man be allowed to desecrate the Sabbath under the public sanction. The fact is, the genuine laboring man does not, as a rule, sympathize with any movement that contemplates the desecration of the Sabbath. . . .

*"Justice Harlan's Democratic Ways"*<sup>19</sup>

Most of the members of the Supreme Court are great epicures, and while the Court is in session they lunch at the Capitol in a room set apart for that purpose. Nearly all the Justices are particular as to what they eat and how it is cooked. Harlan however, is the exception, and one of the attendants once remarked: "I believe he would be satisfied with plain bread and butter." A few days ago, when the Court was not in session, he was seen at noon-time in one of the cheap lunchrooms for which Washington is famous. In one hand the Justice held a stone mug full of milk, and on the arm of the chair by his side reposed a piece of apple pie. That was his lunch for the day. He was surrounded by Treasury clerks of high and low degree, business men and others, but he went along munching his pie and drinking his milk just as unconcerned as if it was the proper thing for a \$10,000-a-year Justice of the Supreme Court to make his noonday meal off pie and milk like a \$600-a-year messenger. . . .

<sup>19</sup> New York Tribune, May 27, p. 4, col. 5 (1895).

*Harlan to his son Richard.*<sup>20</sup>

Washington, D.C.  
May 21, 1895.

Dear Richard:

The Rev. Dr. Young preached here Sunday but I did not hear him. The fact was that I had several income-tax oxen in the ditch. . . .

You would have been much interested if you had been in the Supreme Court on yesterday during the delivery of opinions in the income tax cases. There was a great crowd present. My dissenting opinion followed immediately after that of the Chief Justice for the majority. According to the account in the papers I was more demonstrative in manner than I supposed, but I do not regret that I am reported as being very earnest and much aroused. That characterization of manner in connection with my opinion, if the latter is much read, will serve to attract the attention of the country to the enormous blunder as I conceive it which has been committed by the court. The correspondents from here to the New York capitalistic papers report me as shaking my fist in the face of the Chief Justice and glaring at Judge Field. I did make a few gestures as I read my dissenting opinion, but none of them were directed to the Chief Justice or any other member of the court. Justice Field as I proceeded now and then engaged in conversation which annoyed me for a moment and I did turn and look at him as I read, but not in any way that should have attracted attention, nor was my manner at all such as described by some of the papers. . . .

What the court has done is to put us practically where we were before the time of the adoption of the Constitution, when Congress found it practically impossible to raise any money because it had to rely upon the States fulfilling their requisitions.

The present case will, in the end, be put by the side of the Dred Scott case. It cannot stand without putting in peril the existence of the nation. . . .

<sup>20</sup> Harlan Papers, Author's Possession.

*Harlan to Augustus Willson*<sup>21</sup>

Undated, probably early  
summer, 1895.

Dear Willson:

. . . It is a curious fact in my experience that I never knew a *very* rich man who was not astute in attempting to evade the payment of his proper share of taxes. Those whose *business* in life is to clip coupons from bonds as a general rule are indignant at the thought of being required to pay taxes. The fury of socialism is equalled by the fury with which *mere* millionaires, taking them as a class, and corporations, resent any attempt to make them pay their share. . . .

Many millionaires as they walk the streets, complain in their own minds that Tom, Dick and Harry whom they meet as they pass along, contribute nothing in the way of taxes to the Government. But those fellows forget that the men who are not able to pay taxes are those who, in time of trouble, give their lives to maintain their government and thereby protect the property of the well-to-do people of the country.

You know that I am a firm believer in the principle of protection, and I want such duties imposed as are essential to build up and sustain our industries of every kind and make us wholly independent of the world. But the friends of protection in the East, where immense aggregated wealth is found as *one* of the results of the tariff laws of the Government, are in danger of uniting against them all of those parts of the United States that are not specially concerned in the preservation of the protection system.

I feel more strongly about this recent decision [the Income Tax case] than any which ever emanated from this court. I have not heard a lawyer as yet who approved the court's decision except one, and *his* whole business consists in handling bonds and stocks of other people and earning in that way for his clients and himself an income that would have been reached under the recent law if it had not been stricken down.

My whole nature responds to the principle of equality of all men before the law, as well as to the principle of the equal protection by the laws for everyone in his personal and property rights. . . .

<sup>21</sup> Harlan Papers, Louisville.

*Harlan to Judge W. A. Woods.*<sup>22</sup>

Washington, D.C.  
May 28, 1895

Dear Judge:

As soon as the opinion in the *Debs* case is printed I will send you a copy. The authority of the Circuit Court to do what it did in the contempt case is fully sustained. The opinion does not discuss the facts, but finds that there was jurisdiction, and jurisdiction existing, the action of the Circuit Court could not, in the matter of contempt, be reviewed on *Habeas Corpus*.

Now, a thought has come into my mind to-day which I deem important. It is this: The main suit by the Govt. in which the injunction issued was new in all its aspects. Many lawyers, I take it, doubted whether the Govt. had any standing in such a suit to invoke the authority of a court of equity. The jurisdiction of the court has been sustained, and the authority of the U.S. in such matters is hereafter to be recognized as equal to any emergency, involving the freedom of interstate commerce or the unobstructed transportation of the mails. No such disturbance as that raised by *Debs* is likely to arise again in this country. If *Debs* and his companions remain in jail during the summer, are they not likely to be regarded as martyrs by a large number of people? Cannot the U.S. afford to say—cannot the U.S. court afford to say—as the authority of the Govt. and the courts is fully sustained . . . [and] everybody [will know] in advance the peril they will incur, by disobeying the order of court,—that the pending prosecutions may be stopped, and the proceedings for contempt dismissed or set aside. I take it that you could, if you saw proper, set aside the order fining and imprisoning and discharge the parties in contempt. I assume that the attorneys of *Debs* could so arrange the matter as to justify the court in being liberal. Recent events, as it seems to me, suggest that there may be wisdom in such a course. A construction of the Constitution which so narrows the power of the Genl. Government that, practically, it cannot compel rich landlords and the owners of *invested* personal property, to contribute to the support of the nation, and a construction so broad as that given in the *Debs* case, will not be understood by vast masses of people. The situation is one that is well calculated to

<sup>22</sup> Harlan Papers, Louisville.



increase the spirit of unrest and discontent in many parts, indeed, throughout all, of the country. I believe the generous action upon the part of the Govt. and the courts, at this time, would be of real service to the country. . . .

Think of this, without consulting any one—for consultation may raise false hopes—and let me know your views. If you do not concur, I will not move in the matter. If you think well of the suggestion, I will bring the matter to the attention of the Attorney-General and ascertain his views. . . .

Altogether you are to be congratulated—all the more because you made your way without any help from the Circuit Justice [Harlan] who, under ordinary circumstances would have been glad to have conferred with you. . . .

*Harlan to Senator John C. Spooner.*<sup>23</sup>

Pointe au Pic  
July 14, 1902

Dear Senator:

Many thanks for the copy of your speech on the Philippine question. . . . [The] debate about the army and the treaty had the effect to withdraw the attention of the people from some questions of grave moment that are suggested by the Philippine problem—questions which, in my judgment, involve the integrity of our free institutions. The question which, as I think, overshadows all others is whether we are to have what is known as a *colonial* system, under which the United States, as a result of the war or of treaty, may exercise authority over territories or peoples, which territories have not been acquired with any view of their becoming States of the Union, and which peoples are not, and may never become, citizens of the United States, entitled to all the privileges, and subject to all the responsibilities appertaining to such citizenship.

Now, more than at any time in the past, it behooves us to take care that in fulfilling some supposed duty to the world or to any particular peoples, we do not impair these principles of government which are embodied in the Constitution. There is a manifest tendency among the captains of industry, and others of enormous wealth, to make everything subservient to the necessities of *com-*

<sup>23</sup> Harlan Papers, Louisville.

*merce and trade.* This tendency must be resisted at all hazards, and the nations and peoples of the earth given to understand that America will not under any circumstances, be false to true liberty, as defined and safeguarded by our Constitution. I heard a Senator not long ago declare that the Constitution was always to be interpreted and enforced in accordance with the *necessities of the nation*, and that the *opinions of the people* from time to time must furnish the rules for its interpretation. . . . I would not have said all this, if my views upon the general questions involved in our relations with newly acquired territories had not already been expressed in judicial opinions. I am willing to say to you what I would not say to others. . . .

*Harlan to Augustus Willson.*<sup>24</sup>

Washington, December 1, 1905

Dear Willson:

. . . The President [Theodore Roosevelt] will win his fight on the railroad rate question, and ought to win it by having a bill passed which will operate as a check upon great railroad systems which threaten to dominate the country. Indeed, the greatest injury to the integrity of our social organization comes from the enormous power of corporations. We must have corporations. We could not get along without them, but we must see that they do not corrupt our government and its institutions. Men in charge of corporations will use their money in ways and for purposes that would not be practiced by them in respect to their own money. We had reached that point in the management of politics when educated men, being at the head of national and State committees would be willing to receive from officers of corporations money for political purposes which they knew was practically stolen from stockholders and policyholders. We are now passing through a crisis upon this subject of private and public honesty. The American people have determined to have a thorough house cleaning, the end of which will be the elimination from our public life of many who are now influential and are deemed respectable.

. . .

<sup>24</sup> Harlan Papers, Louisville.

*Harlan to Willson.*<sup>25</sup>

Pointe au Pic  
September 26th, 1906

Dear Willson:

. . . As our Court will soon reassemble, there looms up before me a very important question—that of my retirement from the Bench. I do not know what decision to make. Some of my friends think that much good will come to me from a cessation of judicial work, which, of course, involves a *strain* upon one's mind and body. Others think that my days will be prolonged if I hold on in the ways that I have followed for nearly 29 years. My inclination is to retire, in order that I may do certain writing which cannot be done while on the Bench. I would not be idle, if I retired, for that writing would give me employment. Besides, I would continue my lectures at the [Columbian] law school on Constitutional Law, in which I take much interest. So that I would not *rust*—would not go down from mere idleness. It might also come in the way for me to earn some fees in law matters, which it would be legitimate for a retired Judge to do. Justice Strong earned ten thousand dollars a year, after he retired, by giving opinions on law questions, acting as arbitrator. I confess that such work would not be the most agreeable to me, however legitimate for one who was receiving a government pension.

On the other hand, my desire is strong to participate in the decision of some great questions which will confront the Court within the next five years. [Author's note: Harlan lived exactly five years more.] It is an inspiration to feel that you are all the time assisting in the determination of matters that are to tell upon the destiny of the country for all time.

Of course, the question would be easy of solution if I was physically or mentally incompetent to meet the requirements of my position. That is a matter which would not be referred to myself alone. Ordinarily, an old man will not recognize the fact that he is steadily going down the hill. If my judgment on the subject is to be trusted, I am physically equal to my judicial work, although I know that I am not as *keen* for it as I was a few years ago. Many friends—in perfect good faith I do not doubt—have assured me that my opinions of last term are as clear and vigorous

<sup>25</sup> Harlan Papers, Louisville.

as any I have written, and that such is the judgment of the profession. They wish me to *stand*, and not to think of retiring.

So, you see, the question is up to me, and I must take the responsibility of deciding it. When I think of the matter at all, five dates come up for retiring: 1. On the 10th of December next, when I shall have been on the Bench twenty nine years; 2. December 23rd, when I shall have been married fifty years; 3. March 4th 1907, so as to enable Congress to confirm the nomination of my successor; 4. At the end of the next term, June 1st 1907, I will be, if alive, 74 years of age; 5. December 10, 1907, when I shall have been on duty *thirty* years. To put all these dates aside would mean that I would remain on duty until death removed me. My sons say, *stick*. . . . How does the matter strike you? Let me have your views fully and frankly. . . .

The general question has occurred to me, and doubtless will to you, whether all things considered, it is not best for a Judge, to have it asked *why he retired*, than why the old man did not retire, and give way for one younger or more vigorous in health.

*Harlan to Henry St. George Tucker.*<sup>26</sup>

Washington, D.C., December 25th, 1906.

Dear Tucker:

We were much gratified to receive the letter of congratulations of yourself and Mrs. Tucker. Our wedding anniversary was a most enjoyable occasion, but it would have been more enjoyable if circumstances had permitted you and Mrs. T to be present.

There is nothing on the earth more delightful than genuine human friendships, of which fact we had abundant evidence when friends called on our recent wedding anniversary.

You express the hope that I will "stand by the ship" and assist in taking care of "State's Rights." . . . I am afraid that you do not deem me a *sound* States-Rights man. Certainly I am not, if the Virginia and Kentucky Resolutions of 1798-9 are to furnish a test of sound constitutional views. My old Whig father looked with horror upon many things in those Resolutions, and I have inherited his views—the same general views held by that pre-eminent Virginia Judge whom Jefferson once spoke of as "Jack"

<sup>26</sup> Harlan Papers, Louisville.

Marshall. I am a States Rights man in, as I think, the truest sense—not in the sense that Spencer Roane and Thomas Jefferson were. I do not mean to depreciate Jefferson. He was a great man, perhaps the truest apostle of liberty for man, *as man*, as any one of his day and generation. But his views of the relations which should subsist between the States and the General Government were mischievous in the last degree. If his notions had controlled at the outset the Union would have been absolutely worthless—a rope of sand.

It is funny to hear some public men of this day talk about recurring to the fundamental principles of the Constitution as announced by Jefferson. And yet not one of them would dare read the Virginia and Kentucky Resolutions of 1798-9 to an American audience and say that each and all of them met his approval. I tell my law students that the true friend of the States *must* necessarily be a friend of the Union, and a true friend of the Union *must* necessarily be a friend of the States. The man who thinks all of the States and nothing of the Union, as well as the man who thinks all of the Union and nothing of the States, are, equally, an enemy to the Constitution. Neither is a true friend of the Union or of the States. . . . The foundation upon which my views of the Constitution rest is—full, national control in respect of all matters intrusted by express grant or by necessary implication to the National Government; full State control in respect of all matters not surrendered by the Constitution to National control. . . .

*Harlan to Augustus Willson.*<sup>27</sup>

Pointe au Pic  
July 17th, 1908

Dear Willson:

. . . There is a good deal in [William Jennings] Bryan's position [as Democratic candidate for President] that may be made the basis of attack upon his party. Taft, I assume, will bring out boldly the fact that Bryan has declared in favor of National ownership of railroads. Of course, Bryan will say, in reply, that there is no such issue in the present campaign, but he can't escape the fact that he believes in the principle of National ownership.

<sup>27</sup> Harlan Papers, Louisville.

Who knows but when he gets into the White House he will insist upon the adoption of that principle in legislation against interstate railroads? And then as to Initiative and Referendum. What a monstrous doctrine that is in its application to our National affairs. Then again, his talk in favor of a National guarantee of bank deposits. Could anything be more dangerous or stupid than that? . . .

In short, it will not be difficult to so prepare the issues of the campaign as to show that all the elements of disorder and lawlessness are to be found in the Democratic plans and policies, while the guarantees of life, liberty and property will only be effectively enforced under Republican rule. . . .

*Harlan to Justice Horace Lurton.*<sup>28</sup>

Pointe au Pic, P.Q. Canada  
July 3rd, 1910

Dear Judge:

. . . Now about your proposed address at Hot Springs on the 25th of July. I am glad you accepted the invitation. The general subject you suggest is a good one. You need only avoid expressing a *new* view of judicial power, for that would commit you when that particular view arises for the consideration of the Court. You could rather put yourself in the attitude of expressing the *substance* of what has already been declared by the Court. In line with the general subject you could quote from the Sinking Fund Cases 99 U.S. (*Union Pacific R.R. Co. v. United States*). "One branch of the Government cannot infringe on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Judicial legislation is a cowardly evasion of the rule that ours is a government of enumerated powers, and that one of the coordinate Departments, charged by the Constitution with certain, defined duties cannot exert the powers belonging to another Department. This rule is, in my judgment, vital to the integrity of our Constitutional System. The country will respect the judiciary if it keeps its hands off of legislative or executive matters except as they may be involved in the legitimate action of the courts when declaring the law. . . .

<sup>28</sup> Harlan Papers, Author's Possession.

The above items, the majority of which are drawn from a collection of Harlan manuscripts which fills four locker trunks, are not presented as a systematic portrayal of Harlan's career, since such an offering would have required many times the space available here. Nor do the fine points of Harlan's attitude toward subjects discussed in these letters or memoranda always emerge from the particular selection included. What the potpourr should offer contemporary readers, however, is something of the passion and flavor of John Marshall Harlan and a look at his self-image. These are far from small keys to an understanding of Harlan's judicial universe. Neither an aristocratic liberal like Holmes (and without his fine-honed intellectual discipline as a Justice) nor a committed social reformer like Brandeis (and lacking his insight into the nature of the judicial function), Harlan was part of the nineteenth century "progressive" tradition and served this cause on the merits from his place at the Bench. His nationalism, anti-capitalism, and anti-imperialism, plus his unusual racial egalitarianism, were all moulded by a fundamentalist religion which invested political and judicial issues with the qualities of Rightness and Wrongness. From 1877 to 1911, in an era of getting and spending when financiers were culture heroes and American politics was a game of spoils, Harlan voiced the protest of the Old America and found common cause with the emerging spokesmen of the new progressivism.

To sample the flavor and passion of Harlan is to know very much about him indeed.