

The Bicentennial of the United States District Court for the District of Maryland 1790-1990

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**THE BICENTENNIAL OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND
1790-1990***

I. INTRODUCTION

ANDREW RADDING**

For two hundred years now the United States District Court for the District of Maryland has been a theater of daily one-act plays in a vast American drama. The players have included famous judges, such as Samuel Chase and Roger Taney; great advocates, such as Luther Martin and Thurgood Marshall; and obscure litigants, such as a poor, black sailor named Benjamin Brown and a temperamental farmer named John Merryman. Unlike the Broadway stage, however, the characters and stories in a federal district court are not always dramatic, or even interesting. But over the course of a life nearly as old as the nation itself, so many stories are recorded before the court that a selective look back can produce a remarkable picture of the issues, both large and small, that have occupied our district and our nation.

The task of organizing the story of the court for its two hundredth anniversary celebration fell upon Judge Frederic N. Smalkin, who coordinated the event on behalf of the court. Judge Smalkin asked me to chair a bicentennial celebration committee and to coordinate both the ceremonial and social aspects of the event. Planning began almost two years in advance of the ceremony. Early in the process Chief Justice William H. Rehnquist favored us with his acceptance of Chief Judge Alexander Harvey's invitation to attend. Since no Chief Justice had joined and sat with the court in well over a hundred years, we were pleased to know that our ceremony would make history as well as celebrate it.

Three different dates in 1790 compete for recognition as the true beginning of Maryland's federal district court. The committee decided to celebrate on June 1, which a news report lists as the date

* Adapted from proceedings held June 1, 1990, in the United States District Court for the District of Maryland, Baltimore, Md.

** Principal, Blades & Rosenfeld, P.A.; former President, Federal Bar Association, Maryland Chapter. J.D., Boston University School of Law, 1968; B.B.A., City College of New York, 1965.

the first grand jury was charged.¹

In choosing a theme for the ceremony, the committee wanted to stress the venerable nature of the court without losing sight of the fact that this was to be a celebration—indeed, a birthday party. *Webster's* defines the word “venerable” as “calling forth respect through age, character, and attainments.”² The age of the court was, of course, on display. The committee decided to stress the character of the court’s personnel and the importance of its attainments as an institution in as much detail as practicable in a proceeding of this type. It was not to be a dry, academic exercise, but a recognition of a vibrant entity having reached a milestone and planning to carry on its work in the future.

Under the guidance of Judge Smalkin, the committee decided that the presentations should trace the history of the court through significant periods and events in its life. Implementing that plan demanded insight, tact, a knowledge of legal history, and a great deal of good luck. We chose speakers based upon their knowledge or interest in a particular aspect of our theme. The Chief Justice, an authority on one of the early participants in the court’s history, fit in perfectly.

Two elements of the bicentennial festivities were not reflected in the presentations but certainly merit attention. The first was Bankruptcy Judge James F. Schneider’s comprehensive update of H.H. Walker Lewis’s history of the court. This publication, now called *A Bicentennial History of the United States District Court for the District of Maryland*, contains a history of the court and biographies of all its judges and many of its key personnel for the entire two hundred year period. Anyone involved with the court will cherish Judge Schneider’s extraordinary work.

A number of other people deserve credit for their invaluable help in staging the ceremony. William Levasseur, a former Federal Bar Association chapter president, was instrumental in handling the business and technical side of the publication. In addition, Mr. Levasseur and his partner, JoAnne Zawitoski, undertook the preparation of programs, invitations, tickets, and many of the other logistical elements necessary to an undertaking such as this.

The Federal Bar Association sponsored a post-ceremony reception for members of the bench and bar. Joshua Treem, another former president of Maryland’s chapter of the Federal Bar Association,

1. See *infra* notes 6, 8.

2. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2540 (1976).

planned and organized the reception. Douglas Murray and Steven Bers undertook many of the last minute details of the reception.

When June 1, 1990, finally arrived, the United States District Court for the District of Maryland convened precisely at 4:00 p.m. Joining the Chief Justice in attendance were hundreds of guests interested in celebrating the court's long life. The crowd was so large that although the proceedings took place in the ceremonial courtroom, we had to broadcast them on closed circuit television to several other courtrooms in order to accommodate all the visitors. The committee received special permission for this broadcast and videotaping from the court (in itself an historic precedent).

From Chief Judge Harvey's welcoming, to Chief Justice Rehnquist's closing, the remarks represented a mix of scholarship, history, humor, nostalgia, insight, and prediction. In short, the proceedings of June 1, 1990 evoked the broad range of issues, ideas, and emotions that have constituted the daily life of this court and the people involved with it for the past two hundred years. These speeches, with minimal editing and annotation by the staff of the *Maryland Law Review*, are presented in the pages that follow. On behalf of the Federal Bar Association, I hope they inform, entertain, and inspire all who may one day participate in the ongoing drama of the United States District Court for the District of Maryland.

II. WELCOME

HONORABLE ALEXANDER HARVEY, II†

Good afternoon, ladies and gentlemen.

This is a truly historic occasion for this court. Today we celebrate the two hundredth anniversary of the United States District Court for the District of Maryland. To make this event an even more memorable one, the Chief Justice of the United States, the Honorable William H. Rehnquist, has honored our court by joining us on the bench here today. His presence is particularly appreciated in view of the fact that June is perhaps the busiest month of all for the Supreme Court as the Justices conclude their work for the entire 1989-1990 term. We are delighted that Mrs. Rehnquist could also join us here today.

There are so many federal and state dignitaries present in this courtroom today that a good part of our program would be used up were I to name them all. I do want particularly to note the presence of our good friend, United States Senator Paul Sarbanes. I believe also that Congresswoman Helen Bentley and Congressman Kweisi Mfume are to be here. Attorney General Joseph Curran, I believe, is here, and we welcome the Mayor of the City of Baltimore. There are many, many state judges in attendance and we also have our bankruptcy judges and our federal magistrates. We thank you all for coming.

This court was one of the original thirteen district courts created by the Judiciary Act of 1789,³ which became law on September 24, 1789. Later that year, President George Washington appointed William Paca, previously a governor of this state, to be the first judge of this court.⁴

Scholars have debated whether the first session of the court was held on April 17, 1790, on June 1, 1790, or in mid-September of 1790.⁵ Unfortunately, the records in the archives were in a state of disarray, leading to the confusion. According to an account in the Maryland Journal and Baltimore Advertiser, Judge Paca, on June 1, 1790, borrowed a state courthouse several blocks from this spot, and convened a session of this court and delivered "an excellent Charge to the grand jury."⁶ Two hundred years later we sit here as a court composed of nine active judges and five senior judges.⁷

† Chief Judge, United States District Court for the District of Maryland. Chief Judge Harvey's remarks appear in italics throughout the Article.

3. Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73.

4. H.H.W. LEWIS, THE UNITED STATES DISTRICT COURT OF MARYLAND 6 (1977).

5. See *infra* notes 8, 35.

6. See The Maryland Journal and Baltimore Advertiser, June 4, 1790, at 2, col. 1; *id.*, May 11, 1790, at 3, col. 1 (listing the "first Jury under the Authority of the United States, in this State" in a session at Annapolis).

7. The nine active judges are Alexander Harvey, II (Chief); Joseph C. Howard, Norman Park Ramsey, Walter E. Black, Jr., John R. Hargrove, J. Frederick Motz, Frederic N. Smalkin, Marvin J. Garbis, and William M. Nickerson. The senior judges are Roszel C.

We who sit here today are proud of the part that this court has played in the lives of the citizens of this state during the past two hundred years. Through today's celebration of our bicentennial, we seek to recognize anew and underscore for future generations the values exemplified by the dedicated service of our predecessor judges in administering justice in this court. We look forward to the court's third century.

To commence these proceedings, I will ask Joseph A. Haas, Esquire, our Clerk of the Court, to read minutes we have located pertaining to a session of court held on April 17, 1790, which we now believe to be the first one.⁸ Mr. Haas.

The District of Maryland, to wit,

At an Admiralty Court of the United States held for the said District of Maryland at Baltimore town on the seventeenth day of April in the year of our LORD one thousand seven hundred and ninety was present

The Honorable William Paca Esquire, Nathaniel Ramsay Esq., Marshall Joshua Barney Clk.

Robert Smith, Esq. appeared and qualified as a practitioner of the Court by taking the Oath prescribed by Act of Congress in that case made and provided.

Daniel Dennis was appointed Cryer

The Court adjourned until the nineteenth instant.⁹

Thank you, Mr. Haas. Would that our sessions were as brief today. Our program today consists of remarks by judges of this court and active practitioners, and we will also be hearing from the Chief Justice. These speakers will discuss aspects of the court's history during the past two hundred years as well as prospects for the future.

Thomsen, Edward S. Northrop, Frank A. Kaufman, Joseph H. Young, and Herbert F. Murray.

8. Minutes of the U.S. District Court for the District of Maryland, 1790-1911, Apr. 17, 1790 (not paginated) (available in National Archives, Philadelphia) [hereinafter Minute Book]. The earliest minutes of the court appear in the middle rather than at the beginning of the book, probably due to an error by the binder.

9. *Id.*

III. EARLIEST ACTIVITIES AS A COURT OF ADMIRALTY

DAVID R. OWEN

Our first speaker is David R. Owen, Esquire, a retired partner of the Baltimore law firm of Semmes, Bowen & Semmes. Mr. Owen has served in the past as president of the Maritime Law Association and for many years was an active admiralty practitioner in this court. Among his clients some years ago was Baltimore's own nationally known journalist, H.L. Mencken. It is with great pleasure that I recognize Mr. Owen.

Mr. Chief Justice, judges of our court, honored guests.

The first entry in the minutes of this court tells a great deal about the nature of its business in its early years. The minute book recites: "The District of Maryland, to wit, At an Admiralty Court of the United States held for the said District of Maryland at Baltimore Town on [April 17, 1790]."¹⁰

It was no accident that the court commenced as a court of admiralty. The original motivation of the framers of the Constitution was summarized by the Virginia legislature in a prospectus calling for a preliminary convention to be held in Annapolis in 1786:¹¹ "to consider how far a uniform system [of] commercial regulations may be necessary."¹²

Article III of the Constitution extended the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction."¹³ The Judiciary Act of 1789 created the district courts and the circuit courts.¹⁴ The trial courts of general civil and criminal jurisdiction were the circuit courts, which existed until 1911. The district courts were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction."¹⁵ This included all seizures of vessels and cargoes for violation of the customs and navi-

10. Minute Book, *supra* note 8, Apr. 17, 1790.

11. See C. WARREN, *THE MAKING OF THE CONSTITUTION* 15 (1928).

12. *Id.*

13. U.S. CONST. art III, § 2. See generally Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 465-69 (1925) (describing the drafting of the admiralty clause).

14. Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73, 74 (creating the district courts); *id.* § 4, 1 Stat. at 74-75 (creating the circuit courts).

15. *Id.* § 9, 1 Stat. at 77. During the Senate debates Senator Richard Henry Lee of Virginia went so far as to argue that the jurisdiction of the district courts should be "confined" to admiralty and maritime cases. See W. MACLAY, *SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES IN 1789-90-91*, at 86-87 (1880 & photo. reprint 1969). As for the development of the admiralty jurisdiction in the Judiciary Act, see Warten, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 60

gation laws.¹⁶

Other jurisdictions related to the sea included the exclusive cognizance of all suits against foreign consuls.¹⁷ The district courts also had jurisdiction, concurrent with the circuit courts, of certain minor crimes, including those committed on the high seas, for which the punishment was not more than thirty lashes.¹⁸ The district courts had no equity jurisdiction, and their jurisdiction in common-law cases, concurrent with the circuit courts, was limited to suits by the United States for sums exceeding \$100.¹⁹

Interestingly, our court's first judge and first clerk each had a maritime background. Judge William Paca had practiced in the colonial Court of Vice Admiralty, where there is a record of his having represented a group of unpaid seaman in a suit against their ship and master.²⁰ Co-counsel was none other than the famous, or as Mr. Jefferson would have said, notorious Samuel Chase,²¹ later a Justice of the Supreme Court.

Paca had also been for two years a judge of the Court of Appeals in cases of capture,²² a court established by the Continental Congress in 1780 to try the prize cases that arose out of the various wars going on at that time, including the American Revolution.²³ This was the first federal court—not under the Constitution, but under the Articles of Confederation.²⁴

The clerk, Joshua Barney, was one of the great naval heroes of the Revolution and the War of 1812.²⁵ He had been a captain in the Pennsylvania Navy and a privateer captain with a brilliant record of

n.29, 67, 74-75 (1923). Congressman Tucker of Virginia made the same arguments in the House as Lee had in the Senate. *Id.* at 123-24.

16. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 77.

17. *Id.*

18. *Id.* at 76-77.

19. *Id.* at 77. For a summary of the jurisdiction of the district courts created in the Judiciary Act, and its expansion by later statutes, see E. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 95-110 (1987). For a discussion of admiralty jurisdiction, see *id.* at 145-54.

20. Henry Edwards v. The Snow Hannah, Edward Prescott, Commander, Court of Vice Admiralty Record Book at 25a-39b, 63, Sept. 19, 1763 (Admiralty Court Minutes, Series No. S117, 1754-1773, Location 1-6-S-21, Hall of Records, Annapolis, Md.). They had "jumped ship" because of the alleged "repeated Barbarity, Inhumanity and Ill/usage" of the master and mate. *Id.* at 62.

21. *Id.* at 63. For a discussion of Justice Chase, see *infra* Part X.

22. H. BOURGUIGNON, *THE FIRST FEDERAL COURT* 116-17 (1977).

23. *Id.* at 116-21.

24. *Id.* at 113.

25. See 1 *DICTIONARY OF AMERICAN BIOGRAPHY* 632-35 (A. Johnson ed. 1964).

victories at sea.²⁶ At the age of thirty, he accepted the unsolicited appointment as first clerk of this court.²⁷ After serving for three years, he announced that his health had been impaired by his sojourn ashore and that he wished to return to sea. He later became a commodore in the French Navy and then a captain in the United States Navy and was the hero of the Battle of Bladensburg in Maryland in 1814.²⁸

As clerk, Barney reversed the aphorism "the pen is mightier than the sword." Although he was very adept with sword and pistol, he was a very poor record keeper. In fact, his very first entry in the minute book (following the opening session notes) was erroneous in that he dated it 1791 instead of 1790.²⁹ Later entries bear Barney's name, but not in his handwriting, and by August 1791, the minutes were being signed: "Test for J. Barney Clk, J. Winchester, junr."³⁰ James H. Winchester (presumably the same man) became the second judge of the court.³¹

During the court's first fifty years at least ninety percent of its business was admiralty. About two-thirds of the admiralty actions were suits by seamen for unpaid wages.³² Indeed, the very first case, tried on April 19, 1790, was a series of twelve complaints (called "libels" in admiralty) by seamen against the brigantine *Julianna* for unpaid wages.³³ The vessel was arrested, condemned, and sold.³⁴ The pleading filed in that first case is in excellent condition. It is signed by Robert Smith, the first attorney admitted to practice in the court.³⁵

In those days there were also a substantial number of libels filed by the United States against ships or cargoes for violation of customs or navigation acts. On the second trial day, August 2, 1790,

26. *Id.*

27. A BIOGRAPHICAL MEMOIR OF THE LATE COMMODORE JOSHUA BARNEY 161 (M. Barney ed., Boston 1832). The author was Barney's daughter-in-law and the daughter of Samuel Chase. No other mention of Barney's clerkship has been found.

28. See 1 DICTIONARY OF AMERICAN BIOGRAPHY 634-35 (A. Johnson ed. 1964).

29. Minute Book, *supra* note 8, Apr. 19, 1790.

30. See, e.g., *id.*, Aug. 26, 1791.

31. See H.H.W. LEWIS, *supra* note 4, at 17.

32. Author's estimate based on examination of original court papers. See generally Minute Book, *supra* note 8.

33. Minute Book, *supra* note 8, Apr. 19, 1790.

34. *Id.*

35. See Letter from Robert Smith to Hon. William Paca, Esq., filed Apr. 10, 1790 (in the custody of the Clerk's Office, United States District Court for the District of Maryland). Judge Frederic N. Smalkin recently discovered the original papers in the court's vault.

the court heard seven of these forfeiture cases.³⁶

The remaining admiralty cases during the period involved prize, collision, salvage, repairs, charter parties, bottomry bonds (an ancient form of ship mortgage), and quite a number of actions by seamen for assault and battery committed by masters and mates.³⁷ The assault and battery actions were the only type of maritime personal injury suit known at that time.

The only nonadmiralty cases were suits by the United States for small debts.³⁸ Naturalization proceedings were quite numerous.³⁹ Until 1863, when a criminal case first was officially reported,⁴⁰ every single opinion from this court published in the *Federal Cases* volumes involved the exercise of admiralty jurisdiction.⁴¹

During Judge Paca's ten years on the bench, no formal opinions were reported. One of his cases, however, went to the Supreme Court. The sloop *Betsey* was brought to Baltimore as a prize. Paca had held that the district court had no jurisdiction in a prize case. In a leading opinion, the Supreme Court reversed, holding that the constitutional grant of admiralty jurisdiction encompassed prize as well as commercial cases.⁴²

In 1799 James H. Winchester, then aged twenty-seven, became judge. Judge Winchester made notable contributions to the maritime law. Six of his opinions are reported in the *Federal Cases* volumes.⁴³ One of these went to the Supreme Court, which affirmed him in an opinion that became the very basis for the American law of marine salvage.⁴⁴ Another of Judge Winchester's opinions broke new ground by departing from English precedent

36. Minute Book, *supra* note 8, Aug. 2, 1790.

37. Based on author's examination of original court papers. See generally Minute Book, *supra* note 8.

38. *Id.*

39. *Id.*

40. United States v. Cashiel, 25 F. Cas. 318 (D. Md. 1863) (No. 14,744).

41. Compare United States v. Benjamin Brown (an unpublished 1860 criminal prosecution for manslaughter on a ship at sea, discussed *infra* at text accompanying notes 86-89).

42. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 16 (1794). In England, prize and commercial cases were heard by the same judge in the same court but the jurisdictions were technically distinct. H. BOURGUIGNON, *supra* note 22, at 14.

43. United States v. Vickery, 28 F. Cas. 374 (C.C.D. Md. 1803) (No. 16,619); Mason v. The Blaireau, 16 F. Cas. 1009 (C.C.D. Md. 1803) (No. 9230), *aff'd*, 6 U.S. (2 Cranch) 240 (1804); Anonymous, 1 F. Cas. 1004 (D. Md. 1808) (No. 449); Stevens v. The Sandwich, 23 F. Cas. 29 (D. Md. 1801) (No. 13,409); United States v. Owners of The Unicorn, 27 F. Cas. 393 (D. Md. 1796) (No. 15,979a); United States v. Barney, 24 F. Cas. 1014 (D. Md., undated) (No. 14,525).

44. See Mason v. The Blaireau, 6 U.S. (2 Cranch) 240 (1804).

and recognizing a broad constitutional admiralty jurisdiction that encompassed certain contracts made on land.⁴⁵

Fourteen years later, Justice Joseph Story, our greatest admiralty judge, reached the same result in the most important of all American admiralty decisions, *De Lovio v. Boit*.⁴⁶ He cited Judge Winchester's decision three times in his opinion, referring to him each time as "Mr. Justice" Winchester,⁴⁷ a title used in federal courts only to identify Justices of the Supreme Court. Justice Story concluded, "I know not any man in the United States, who seems to have had more profound and accurate views of the admiralty jurisdiction, than this very able judge."⁴⁸ "Mr. Justice" Winchester died in 1806, aged thirty-three.⁴⁹ The portrait committee has, unfortunately, been unable to locate any likeness of either Judge Winchester or of his successor, James Houston.

The predominance of admiralty business continued under Houston, but the proportion of prize cases increased as a result of the war with Britain. Houston produced no published opinions, but three of his cases went to the Supreme Court.⁵⁰ Two involved prize,⁵¹ and the third, in which the Court reversed Houston, became a leading but much criticized case on maritime liens.⁵²

In 1842 the criminal jurisdiction of the district court was greatly expanded by Congress,⁵³ and thereafter it ceased to be predominantly an admiralty court and gradually became a court of general civil and criminal jurisdiction. In 1989 less than two percent of all civil cases filed in this court were labeled "marine."⁵⁴ But the admi-

45. See *Stevens*, 23 F. Cas. at 30-31.

46. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776) (extending admiralty jurisdiction over all maritime contracts).

47. *Id.* at 441 n.43, 443.

48. *Id.* at 441 n.43.

49. See H.H.W. LEWIS, *supra* note 4, at 18.

50. *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819); *The Anne*, 16 U.S. (3 Wheat.) 436 (1818); *The Anna Maria*, 15 U.S. (2 Wheat.) 327 (1817).

51. *The Anne*, 16 U.S. (3 Wheat.) 436; *The Anna Maria*, 15 U.S. (2 Wheat.) 327.

52. *The General Smith*, 17 U.S. (4 Wheat.) 438 (opinion by Story, J.). In 1910 this decision was overruled by Congress and Judge Houston's views on maritime liens were enacted. See Act of June 23, 1910, Pub. L. No. 61-259, ch. 373, §§ 1-5, 36 Stat. 604 (codified as amended at 46 U.S.C.A. 31341-43 (West 1990)); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 642-53 (2d ed. 1975) (discussing the problems caused by *The General Smith* decision and calling it one of the two "most ill-advised admiralty decision[s] ever handed down by the Supreme Court.").

53. Act of Aug. 23, 1842, ch. 188, § 3, 5 Stat. 516, 517 (giving concurrent jurisdiction to district and circuit courts over all noncapital federal crimes).

54. See 1989 DIRECTOR OF ADMIN. OFFICE OF U.S. CTS. ANN. REP. 186.

ralty courts are more than 2000 years old,⁵⁵ twice the age of the common law, and my humble prediction is that they will survive.

Thank you.

55. See E. COHEN, *ANCIENT ATHENIAN MARITIME COURTS* 8 (1973).

IV. THE COURT IN THE CIVIL WAR ERA

HONORABLE JAMES F. SCHNEIDER

We will next hear from Bankruptcy Judge James F. Schneider. Formerly General Equity Master to the Supreme Bench of Baltimore City, Judge Schneider became a bankruptcy judge of this court on February 1, 1982. He is recognized throughout the state as a legal historian of considerable note and most recently he has brought up to date Walker Lewis's 1977 history of this court. From 1985 to 1987, Judge Schneider served as chairman of the State Bar Association's Special Committee for the Celebration of the Bicentennial of the Constitution.

Chief Justice Rehnquist, in honoring us today with your presence at this special ceremony, you have resurrected a lost tradition as old as the federal courts. Two hundred and one years ago, the first Congress under the Constitution created the United States district courts and decreed that Justices of the Supreme Court should sit with them twice a year as circuit court justices.⁵⁶ Your visit reminds us of the days before and during the Civil War when Roger Brooke Taney, fifth Chief Justice of the United States and a Marylander, often presided with this court as a circuit justice. Congress did not relieve the Justices of the Supreme Court of the burden of riding circuit until 1869, when full-time circuit judgeships were created.⁵⁷ So this is perhaps a tradition you would not wish to revive.

The American Civil War was fought not only to save the Union and free the slaves, but also to vindicate a principle. That principle is emblazoned upon the base of the pediment of the Supreme Court building in this simple four-word inscription: "EQUAL JUSTICE UNDER LAW."

One hundred thirty years ago, on the eve of the Civil War, the federal courts were already seventy years old. There were only forty-five United States district judges in the entire country.⁵⁸ Today there are 575.⁵⁹

William Fell Giles was only the eighth district judge to serve in Maryland during the first ninety years of this court.⁶⁰ It was not until 1927 that the membership of the court was enlarged to two

56. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75.

57. Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44, 44-45.

58. R. WHEELER & C. HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 19 (1989).

59. *Id.* at 30.

60. H.H.W. LEWIS & J. SCHNEIDER, A BICENTENNIAL HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND 1790-1990, at 163 (1990).

judges, and not until 1961 that the third and fourth district judge-ships were created.⁶¹ Judge Giles served from 1853 until his death in 1879, a year before the advent of the *Federal Reporter* system.⁶² But fifty-eight of Judge Giles's decisions are collected in the thirty volumes of *Federal Cases*, which predate the *Reporter*. Of these, fifteen decisions dealt with bankruptcy and insolvency,⁶³ thirteen with admiralty,⁶⁴ and ten with patent and trademark infringement.⁶⁵ At the time cases involving human rights were rare.

And yet it was a case brought by a former slave to secure his rights as a free man and a citizen that nearly destroyed the prestige of the federal courts and helped incite the Civil War. The *Dred Scott*⁶⁶ decision in 1857 tarnished the reputation of Chief Justice Taney and inflamed the North. It held that a black person could not be

61. *Id.* at 62, 94.

62. *Id.* at 41.

63. *Shaum v. Baker*, 21 F. Cas. 653 (C.C.D. Md. 1874) (No. 12,440); *In re Baltimore County Dairy Ass'n*, 2 F. Cas. 572 (D. Md. 1877) (No. 828); *In re Kirkland*, 14 F. Cas. 679 (D. Md. 1876) (No. 7844); *In re Noakes*, 18 F. Cas. 281 (D. Md. 1873) (No. 10,281); *In re Howard*, 12 F. Cas. 74 (D. Md. 1873) (No. 6751); *Dundore v. Coates*, 8 F. Cas. 33 (D. Md. 1873) (No. 4142); *In re Price*, 19 F. Cas. 1314 (D. Md. 1872) (No. 11,410); *Shaffer v. Fritchery*, 21 F. Cas. 1147 (D. Md. 1871) (No. 12,697); *In re Howard*, 12 F. Cas. 625 (D. Md. 1871) (No. 6750); *In re Rose*, 20 F. Cas. 1176 (D. Md. 1869) (No. 12,043); *In re Wylie*, 30 F. Cas. 731 (D. Md. 1868) (No. 18,109); *In re Lawson*, 15 F. Cas. 88 (D. Md. 1868) (No. 8150); *In re Lawson*, 15 F. Cas. 87 (D. Md. 1868) (No. 8149); *In re Bowie*, 3 F. Cas. 1067 (D. Md. 1868) (No. 1728); *In re Purvis*, 20 F. Cas. 74 (D. Md. 1867) (No. 11,476).

64. *Hatton v. The Melita*, 11 F. Cas. 827 (D. Md. 1880) (No. 6218); *United States v. Bennett*, 24 F. Cas. 1111 (D. Md. 1877) (No. 14,574); *United States v. The Cuba*, 25 F. Cas. 716 (D. Md. 1869) (No. 14,898); *Deely v. The Earnest & Alice*, 7 F. Cas. 345 (D. Md. 1868) (No. 3735); *United States v. Morris*, 26 F. Cas. 1320 (D. Md. 1868) (No. 15,812); *United States v. The Francis Hatch*, 25 F. Cas. 1201 (D. Md. 1864) (No. 15,158); *United States v. The Arcola*, 24 F. Cas. 849 (D. Md. 1861) (No. 14,464a); *United States v. The F.W. Johnson*, 25 F. Cas. 1232 (D. Md. 1861) (No. 15,179); *Haney v. The Louisiana*, 11 F. Cas. 423 (D. Md. 1858) (No. 6020); *Philadelphia & Havre de Grace Steam Tow-Boat Co. v. Philadelphia, W. & B. R.R. Co.*, 19 F. Cas. 474 (D. Md. 1857) (No. 11,085); *United States v. The Anna*, 24 F. Cas. 818 (D. Md. 1854) (No. 14,457); *Reeder v. The George's Creek*, 20 F. Cas. 453 (D. Md. 1854) (No. 11,654); *United States v. The Neptune*, 27 F. Cas. 89 (D. Md. 1854) (No. 15,865).

65. *Odorless Excavating Apparatus Co. v. McCauley*, 18 F. Cas. 589 (C.C.D. Md. 1877) (No. 10,436); *Myers v. Duker*, 17 F. Cas. 1108 (C.C.D. Md. 1874) (No. 9989); *Alleghany Fertilizer Co. v. Woodside*, 1 F. Cas. 429 (C.C.D. Md. 1871) (No. 206); *Du-bois v. Philadelphia W. & B. R.R. Co.*, 7 F. Cas. 1140 (C.C.D. Md. 1871) (No. 4109); *Johnson v. Onion*, 13 F. Cas. 777 (C.C.D. Md. 1870) (No. 7401); *Woodward v. Dinsmore*, 30 F. Cas. 549 (C.C.D. Md. 1870) (No. 18,003); *Cleveland v. Towle*, 5 F. Cas. 1038 (C.C.D. Md. 1869) (No. 2888); *Hoffeins v. Brandt*, 12 F. Cas. 290 (C.C.D. Md. 1867) (No. 6575); *Singer v. Walmsley*, 22 F. Cas. 207 (C.C.D. Md. 1860) (No. 12,900); *Day v. Stellman*, 7 F. Cas. 262 (C.C.D. Md. 1859) (No. 3690).

66. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

a citizen of the United States and could not sue in a federal court,⁶⁷ and proclaimed in dicta that under the Constitution, Congress was powerless to prohibit slavery in the territories.⁶⁸ The essence of *Dred Scott* was that slavery could not be stopped by peaceful, legal means.

By 1860, the nation was poised on the brink of sectional conflict. The census that year counted the American population at 31.5 million, nearly 4 million of whom were black slaves.⁶⁹ In November, Abraham Lincoln was elected president. The following month South Carolina became the first state to secede from the Union. In discharging a federal grand jury that year, Judge Giles expressed his deepest fears for the future of the country.

The next term of this Court will be in March 1861 and it may be that ere that period rolls around, this great and noble Government under which, as a people, we have advanced to our present high position amid the nations of the earth . . . shall have been broken up, and you may be the last Grand Jury of *these present United States* which may ever assemble in this district.⁷⁰

The following year the first blood of the Civil War was shed just beyond the walls of this court on Pratt Street. It was April 19, 1861, five days after the fall of Fort Sumter, when an angry mob attacked Northern troops streaming through the city on their way to defend the national capital. Shots were fired, and when the "Battle of Pratt Street" was over, twelve civilians and four soldiers of the Sixth Massachusetts Regiment lay dead.⁷¹

Because of its proximity to Washington, D.C., Maryland's loyalty to the Union was essential. On the night of May 13, 1861, Northern troops seized Federal Hill overlooking the Inner Harbor.⁷² For the rest of the war Baltimore was an occupied city.⁷³ The Union government declared martial law and suspended the writ of

67. *Id.* at 406.

68. *Id.* at 452.

69. 1 U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1790, at 15, 18 (1975).

70. Address by W. Calvin Chesnut on the History of the Federal Courts in Maryland (July 3, 1936), reprinted in, MD. STATE BAR ASS'N, REP. OF THE FORTY-FIRST ANN. MEETING OF THE MD. STATE BAR ASS'N 63, 81 (1936) (emphasis in original).

71. G. BROWN, BALTIMORE AND THE NINETEENTH OF APRIL, 1861, at 53 (1887).

72. W. LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY 450 (1965).

73. See MD. HISTORICAL SOC'Y, MARYLAND: A HISTORY 1632-1974, at 344-77 (R. Walsh & W. Fox ed. 1974).

habeas corpus.⁷⁴ Soon the federal court clashed with the military over arbitrary arrests of citizens. Many of these were imprisoned at Fort McHenry, including the Mayor, the Chief of Police, newspaper editors, and a Baltimore County farmer named John Merryman.⁷⁵

Walker Lewis has ranked *Ex parte Merryman*⁷⁶ as Maryland's most famous federal case—and rightly so.⁷⁷ Every lawyer should know the story of John Merryman's imprisonment without trial on suspicion of sabotaging railroad bridges just after the Pratt Street riot.⁷⁸ On May 27, 1861, Chief Justice Taney, then eighty-four years old, sitting with Judge Giles as a circuit justice in the old Masonic Temple on St. Paul Street, challenged President Lincoln's suspension of the writ of habeas corpus without congressional sanction.⁷⁹

It has been written that:

Taney's action in this case was worthy of the best traditions of the Anglo-Saxon judiciary. There is no sublimer picture in our history than this of the aged Chief-Justice—the fires of Civil War kindling around him, . . . serene and unafraid, . . . interposing the shield of the law in the defense of the liberty of the citizen.⁸⁰

Few realize that three weeks earlier, Judge Giles had issued a writ of habeas corpus to effect the release of an underaged recruit from Fort McHenry in the case of *Ex parte John G. Mullen*.⁸¹ When the writ was dishonored, Judge Giles wrote that it was the first occasion in his thirty-three year legal career that such a thing had occurred.⁸² It proved how low the authority of the courts had fallen after the *Dred Scott* decision.⁸³

President Lincoln had determined that the cost of preserving the Union was worth the sacrifice of the historic writ. Were all the laws of the Union save this one to go unexecuted?⁸⁴ The President

74. W. LEWIS, *supra* note 72, at 449.

75. See J. SCHARF, 1 HISTORY OF BALTIMORE CITY AND COUNTY 141 (1971).

76. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

77. See H.H.W. LEWIS, *supra* note 4, at 50.

78. See generally W. LEWIS, *supra* note 72, at 446-55.

79. See *Merryman*, 17 F. Cas. at 149.

80. Mikell, *Roger Brooke Taney*, in 4 GREAT AMERICAN LAWYERS 188-89 (W. Lewis ed. 1908).

81. See *The Sun* (Baltimore), May 6, 1861, at 4, col. 5.

82. *Id.*

83. See G. JOHNSON, THE SUPREME COURT 79-82 (1962).

84. See Address of Abraham Lincoln to Congress in Special Session, July 4, 1861, reprinted in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (R. Basler ed. 1953) (“[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”).

believed his paramount duty was to save the country.⁸⁵

Among the most treasured documents preserved in our clerk's office is a handwritten pardon of a man named Benjamin Brown signed by Abraham Lincoln. If the *Merryman* case is Maryland's most famous federal case, then *United States v. Benjamin Brown* must be its most obscure one. The case concerned a young black man convicted by a federal jury in Baltimore of manslaughter in the death of a shipmate aboard an American ship at anchor in Peruvian waters.⁸⁶ Brown was nineteen years old in April 1860 when Judge Giles sentenced him to three years' imprisonment in the Baltimore City Jail and a fine of one dollar.⁸⁷ At the end of his prison term, Brown was still confined because he was unable to pay the fine.⁸⁸ Judge Giles had no power to revise or commute the sentence, but he wrote to President Lincoln certifying that the prisoner was penniless and recommending executive clemency.⁸⁹

President Lincoln issued a pardon on June 18, 1863, a scant two weeks before the Battle of Gettysburg.⁹⁰ General Lee was invading

85. *Id.* at 429-31.

86. *The Sun* (Baltimore), Apr. 14, 1860, at 1, col. 6.

87. *Id.*, Apr. 24, 1860, at 1, col. 7.

88. See President Lincoln's Pardon of Benjamin Brown, June 18, 1863, *reprinted infra*, at note 90 (original is in the custody of the Clerk's Office, United States District Court for the District of Maryland).

89. See *id.*

90. *Id.* The pardon reads as follows:

Abraham Lincoln

President of the United States of America. To all to whom these Presents shall come, Greeting:

Whereas, at the April Term, A.D. 1860, of the Circuit Court of the United States for the District of Maryland, one Benjamin Brown, colored, was convicted of manslaughter, and sentenced to imprisonment for the term of three years, and to pay a fine of one dollar and and [sic] the costs of prosecution;—

And whereas, the said Benjamin Brown has now served out his said term of imprisonment, conducting himself in a penitent and exemplary manner, and is now detained for non-payment of the aforesaid fine and costs;—

And whereas, the Hon. William F. Giles, Judge, and William Price, Esq., U.S. Attorney, of the United States Court for the said District, do certify that the said Benjamin Brown is penniless, and that a full enforcement of his sentence would amount to imprisonment for life, and do therefore recommend him to Executive clemency;—

Now, therefore, be it known that I, Abraham Lincoln, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, have granted and do hereby grant unto him, the said Benjamin Brown, a full and unconditional pardon.

In testimony whereof, I have hereunto signed my name and caused the Seal of the United States to be affixed. Done at the City of Washington, this Eighteenth day of June, A.D. 1863, and of the Independence of the United States the Eighty-seventh.

the North, and Washington, D.C. stood in peril of attack. And yet at that hour of maximum danger, the President of the United States still found time to grant freedom to an impoverished prisoner in the Baltimore City Jail.

The Civil War was our greatest national tragedy. In four terrible years, the war claimed the lives of 600,000 Americans.⁹¹ It was a time in which our national will was tested. The war stretched our Constitution to the breaking point, but cleansed it of the scourge of slavery. The final outcome, in Lincoln's words at Gettysburg, meant "that government of the people, by the people, for the people, shall not perish from the earth."⁹²

At the opening session of this court on Monday morning, April 17, 1865, William Price, the United States District Attorney, solemnly announced the death of Abraham Lincoln.⁹³ The court then adjourned out of respect for his memory.⁹⁴ Judge William Giles later said that "To live in the memory of those who shall survive us, is not to die."⁹⁵ If that sentiment be true, then today, on this occasion and in this place, the spirit of these great men lives still.

Thank you.

/s/ Abraham Lincoln
By the President
/s/ William H. Seward,
Secretary of State

91. J. RANDALL & D. DONALD, *THE DIVIDED UNION* 531 (1961).

92. A. Lincoln, *Gettysburg Address* (Nov. 19, 1863), *reprinted in* 7 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 22-23 (R. Basler ed. 1953).

93. *Minute Book*, *supra* note 8, Apr. 17, 1865.

94. *Id.*

95. W. GILES, *ANNUAL ADDRESS DELIVERED BEFORE THE MARYLAND HISTORICAL SOCIETY ON THE EVENING OF DECEMBER 17TH, 1866*, at 3 (Baltimore 1867).

V. INTEGRATION OF THE BAR AND BENCH AND CIVIL RIGHTS
LITIGATION

STUART O. SIMMS

Our next speaker will be Stuart O. Simms, Esquire, the State's Attorney for Baltimore City. Mr. Simms is well known to this court, having served as an Assistant United States Attorney and having tried many criminal cases before our judges. He joined the Baltimore City Office of the State's Attorney in 1983, and became State's Attorney for the city in 1987. We are delighted that he has returned to join us once again here on the federal side and that he will be speaking to us on this occasion.

May it please the court, Mr. Chief Justice Rehnquist, Chief Judge Harvey and honorable judges of the United States District Court for the District of Maryland, all members of the judiciary, other dignitaries and guests, good afternoon.

A decade ago, May 16, 1980, at 3:00 p.m., a statue in the rear of this building was dedicated.⁹⁶ The person who is represented by the statue was here that day, Justice Thurgood Marshall. It was the first time I had ever seen him. As he visited Baltimore on that day, along with some of his associate justices and other dignitaries, my thoughts briefly turned to the events enabling him to occupy his position and to the history of this court and the community it serves.

According to David Bogen, a professor at the University of Maryland School of Law, prior to the Civil War the State of Maryland statutorily restricted the practice of law to white males.⁹⁷ Nevertheless, in 1857, Judge Z. Collins Lee of the Baltimore Superior Court examined Edward Garrison Draper, a black graduate of Dartmouth College who had studied law in the offices of a retired Baltimore lawyer.⁹⁸ Judge Lee furnished Draper with a certificate attesting that he was "qualified in all respects to be admitted to the Bar in Maryland, if he was a free white citizen of this State."⁹⁹

Black citizens actually began to practice in the federal court in this district prior to their admission to the Maryland State Bar. James Harris Wolff became the first black attorney admitted to practice in the federal court when he came to Maryland for a short pe-

96. See *The Sun* (Baltimore), May 17, 1980, at 1, col. 2.

97. See Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 982 & n.126 (1985).

98. *Id.* at 983-84 & n.132.

99. *Id.* at 984 n.132.

riod following his graduation from Harvard Law School in 1875.¹⁰⁰ He was soon followed by Charles S. Taylor, another black lawyer from Massachusetts who had been admitted to the federal bar.¹⁰¹ Taylor applied for and was denied admission to the bar of Maryland.¹⁰² Everett J. Waring, a graduate of Howard Law School, became the first black attorney admitted to the bar of Maryland on October 10, 1885.¹⁰³

This court over the years has been a forum for change. In 1953, a suit was filed in this court on behalf of Robert M. Dawson, Jr., against the Mayor and City Council of Baltimore.¹⁰⁴ That action challenged as unconstitutional the practice of racial segregation of public beaches, parks, and bath houses.¹⁰⁵ The plaintiffs were represented by giants of history: Robert L. Carter, Jack Greenberg, Thurgood Marshall, and Linwood Koger, Jr. and Tucker Dearing of the Monumental City Bar Association, an association created in 1935 by black attorneys in the State of Maryland. In that case an appellate court observed that it was "obvious that racial segregation in recreational activities can no longer be sustained as proper exercise of the police power of this state."¹⁰⁶

In 1972, four black Baltimore City firefighters filed a class action suit in this court against the Mayor and City Council of Baltimore, who had rejected prior efforts of black firefighters to eliminate racial discrimination in hiring, assignments, promotion, and other conditions of employment.¹⁰⁷ That litigation resulted in the recognition by this court that the city of Baltimore had engaged in a pattern and practice of discrimination and, therefore, the court required the city to give preference in hiring to city residents as long as qualified city applicants were available.¹⁰⁸

The year 1973 saw the filing of another class action suit in this court against the police commissioner and various city officials, charging a pattern and practice of racial and sex discrimination in the day-to-day operation of the Baltimore City Police Depart-

100. *Id.* at 1032 n.311.

101. *See id.* at 1032.

102. *See In re Taylor*, 48 Md. 28, 33 (1877) (upholding as constitutional a statute that limited the Maryland bar to white males).

103. A. KOGER, *THE NEGRO LAWYER IN MARYLAND* 7 (1948).

104. *See Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954), *rev'd sub nom.*, *Dawson v. Mayor of Baltimore*, 220 F.2d 386 (4th Cir. 1955) (per curiam).

105. *Id.* at 194.

106. *Dawson v. Mayor of Baltimore*, 220 F.2d 386, 387 (4th Cir. 1955) (per curiam).

107. *See Harper v. Mayor of Baltimore*, 359 F. Supp. 1187 (D. Md. 1973).

108. *Id.* at 1218.

ment.¹⁰⁹ In 1979 this court concluded that the defendants had indeed engaged in a pattern and practice of racial and sex discrimination and enjoined the defendants from further discriminatory acts.¹¹⁰ Five black police sergeants were promoted to the rank of lieutenant, fifty-five black police officers were promoted to the rank of sergeant—all with back pay—and the court enjoined racially discriminatory testing.¹¹¹

Time does not allow a recitation of all the deeds of this court, from the Eastern Shore to the Western Shore to the City of Baltimore. But it is worthy of note that just slightly over a decade ago this bench was joined by its first black jurists (and my mentors), Judges Joseph C. Howard and John R. Hargrove, and later by Shirley Jones, the first female.¹¹² We owe praise to people like Presidents Carter and Reagan who stepped forward to nominate them, and to others such as Senators Sarbanes and Mathias, who stepped forward to endorse them.

Throughout the history of the bench of the United States District Court for the District of Maryland, its judges and the attorneys before them have been involved in litigation that has significantly advanced not just abstract legal theory, but the quality of living of people who may have thought of themselves as the disconnected.

This court, as well as the other courts in this system, is inextricably bound to the legacies which flow from, to, and around freedom fighters and attorneys such as Justice Thurgood Marshall. For the next two hundred years we look forward to more like him and for the next two hundred years, we look forward to more from this bench.

Thank you very much.

109. See *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670 (1979).

110. *Id.* at 710, 717, 725-26, 742 (D. Md. 1979).

111. Information obtained from author's conversations with counsel in *Vanguard Justice Soc'y*.

112. See H.H.W. LEWIS & J. SCHNEIDER, *supra* note 60, at 128, 131, 143.

VI. RECOLLECTIONS OF EARLY JUDGES

J. COOKMAN BOYD, JR.

We will next hear from J. Cookman Boyd, Jr., Esquire, a partner in the Baltimore law firm of Boyd, Benson & Hendrickson. Mr. Boyd has been trying cases in federal court since the early 1930s and he has given no indication that he will stop being an active practitioner. He is known to have a vast store of anecdotes pertaining to judges of this court and cases which they have tried.*

Mr. Chief Justice Rehnquist, Chief Judge Harvey, judges from the district and the circuit, I came to the federal court in Baltimore in 1930. Judge Soper was about to move on to Richmond and, therefore, Judge Coleman and Miss Stack were, in fact, the presiding judges. Judge Coleman would tell her how he wanted a case decided, and she wrote the opinion—some of which he became renowned for, particularly in the area of patents.

Judge Coleman was also renowned for his dedication to the great outdoors. His strict and fierce application of the law in duck-hunting cases brought him an interstate reputation of such magnitude that it was rumored that the leaders of the flocks of mallards and Canada geese would stop their flights before crossing the Maryland line, and with strong admonition to every member of the flock, would see that each one then and there, carefully and gratefully, genuflected.

Judge Soper was of a different ilk. His asperity was well known. In fact, when he became bored (an attitude of federal judges of which I have frequently been observant in the past sixty years), he would swivel his chair and carefully study the reredos behind him.

I personally observed this on one occasion when counsel, a retired judge from Oklahoma, was arguing that documents at issue in the case were in fact ambiguous. Counsel was positive of that fact because he, himself, had written those papers. Judge Soper turned away from the reredos and directed his attention to counsel.

“Do I understand that you are contending that these documents are ambiguous and you are certain of this fact because you yourself drew these papers?”

For the first time, counsel thought he had made his point, and he agreed enthusiastically with the Judge. He was somewhat abashed when Judge Soper next spoke.

* “Cookie” Boyd passed away shortly before this went to press. This Court will indeed miss him.

“Well, counsel, if what you say is true, you have indeed created a masterpiece of ambiguity.”

But Judge Soper was not without his nemesis—this time on the distaff side. He came home one night to the family’s apartment on 39th Street and noticed on the hall table a shoe box. He asked Auntie Soper what it was—you could only address her thusly if she expressly invited you—and she replied that his opera shoes were worn out, and the Metropolitan was coming to Baltimore next Tuesday.

“But Grace, dear, the Fourth Circuit has invited me to sit with them next Tuesday.”

It did not take her long to respond.

“Morris Soper, to hell with the Fourth Circuit . . . we’re going to the opera.”

And so they did.

Judge Chestnut was of different structure. He was small physically, but a judicial giant. He enjoyed greatly the history of the court, but he had not a sparkle of humor in him—for diversion, he enjoyed discussing the Vestry Act of 1798.

In court, of course, he preferred jury selection, where each panel presented a captive audience for whom he would review the history of the court. At the end of these lectures, he would ask a single pointed question:

“Now, is there any one among you who would choose not to do your duty as a member of this jury panel?”

Woe betide anyone who showed an inclination not to serve—that is, except for one occasion.

He had finished his lecture to the panel and was making his usual inquiry, when he noticed a disturbance in the courtroom unlike any he had seen before. He could not understand what was being said, so he asked the disturbed individual to step out into the aisle, and repeat himself. This the man tried to do, but only with utter confusion:

“I . . . I . . . I wish to be excused, because my wi . . . wife is about to conceive.”

Judge Chestnut paused for a moment, and then said, “I don’t understand. Perhaps you are trying to advise the court that your wife is about to conceive—or is she about to give birth? But I have decided to excuse you, for in either event, your place is with her.”

Thank you.

VII. THE 1960s AND 1970s

HONORABLE EDWARD S. NORTHROP

Senior Judge Edward S. Northrop is well known throughout Maryland on both the state and the federal side of the law. He has in the past served as majority leader in the State Senate and as chairman of its finance committee. He became a judge of this court in 1961 and he served as Chief Judge from 1970 to 1981. Judge Northrop continues to maintain an active docket and we look forward to hearing from him today.

Mr. Chief Justice Rehnquist, distinguished guests, friends and family.

Back in 1961, I came aboard as the sixteenth appointment in the history of this bench.¹¹³ I joined then Chief Judge Thomsen, Judge Watkins and Senior Judge Chesnut, in what was not exactly a democratic organization. It might best be characterized as a benign dictatorship.

Every week at a brown bag lunch, Judge Thomsen would assign cases. Even in those days, there was no problem keeping busy. For the most part, we handled typical federal cases: admiralty, stevedore and collision, diversity, antitrust, and patents. On very short notice one might find oneself in Norfolk trying an admiralty case. The criminal docket for some reason was replete with bank robbery cases—one of the heaviest caseloads in the country. Despite this, we were soon to look back on this experience as mildly challenging, but entirely manageable and rather pleasant. Then came the deluge of the mid-sixties.

Some have ascribed this unprecedented burgeoning of the federal caseload to an awakening of conscience. Whatever the impetus, the tide began with the activism of the Supreme Court and the inferior federal courts, reflected in the school decisions, the one-man one-vote concept, and, generally, by judicial concern in areas previously left to the legislative branch. Next came the flood of executive remedies which the Johnson administration whipped through a willing, activist Congress.

The trend emphasized individual rights in every conceivable field, and ascribed to the central government powers alien to the concept of federalism. Everything became constitutional and subject to resolution in the federal courts. Judges examined the Consti-

113. See H.H.W. LEWIS & J. SCHNEIDER, *supra* note 60, at 163; THE AMERICAN BENCH, JUDGES OF THE NATION 1165 (M. Hough 5th ed. 1989-90).

tution from a host of new angles, not unlike the proverbial blind men, each describing a different part of the elephant.

Thus, through a combination of judicial fiat, executively constructed power, and congressional excess, the federal judge had become at once the most powerful figure in government and the mucker of the Augean stables. Congress continued this trend through the seventies by enacting at least ninety-four laws which tended to increase the burden on the federal courts.¹¹⁴

Near the end of the seventies, Judge Irving R. Kaufman summed up the situation in the federal courts:

The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history: racial discrimination and segregation, school admissions and affirmative action, busing, free speech and political protest, internal and foreign security, the rights of criminal defendants, church-state relations from prayers in public schools to public funding for parochial schools, legislative reapportionment, obscenity, the draft, abortion, the death penalty, women's rights, and ecology. Moreover, the complex subject matter of modern statutes and Congress's tendency to legislate by exhortatory generality have propelled the courts into what may appear to be an unaccustomed regulatory and quasi-legislative role. Both the pettiest details and the broadest concepts of government have come within the judicial ambit. Ideally, the modern judge should be, as in the phrase describing Justice Brandeis, a master of both microscope and telescope.¹¹⁵

Of course, the seething sixties, marked by campus unrest, urban riots and complex political disputes, spawned a plethora of litigation. Also, an awakening in the private sector created an avalanche of complex, protracted civil litigation.

It became increasingly clear that the system was simply not equipped, in personnel or technique, to handle the enormous tasks imposed by this confluence of factors. The federal judiciary needed extraordinary measures to withstand the flood of litigation anticipated in the 1970s. After instigation by the judiciary, the obvious

114. For a list of the 94 laws, see Northrop, *The Metamorphosis of a Federal Court*, MD. B.J. May 1981, at 7.

115. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 685 (1979) (footnotes omitted).

became apparent to Congress, and relief came in a series of measures that vastly altered the complexion of the federal courts.

One such measure was triggered by the onslaught of massive antitrust suits. Faced with mind-boggling demands on their time, federal judges met and conceived the machinery for streamlining the management of these cases.¹¹⁶ Their plans culminated in Congress's establishing the judicial panel on multidistrict litigation.¹¹⁷

Also, the Federal Judicial Center, designed to research and test new procedures, as well as to educate judges and court personnel, was established in 1968¹¹⁸ and gained momentum in the seventies. The Center's educational seminars numbered around six in 1970 and climbed to 150 in 1980.¹¹⁹ Many of the Center's modernization proposals have been implemented by district courts throughout the country, including Maryland.¹²⁰

In another key development, the Federal Magistrates' Act of 1968¹²¹ authorized the district courts to appoint magistrates. Over the years, the volume of criminal cases handled by the magistrates and the range of their civil jurisdiction has steadily grown.¹²² Disposing of hundreds of cases annually, the magistrates have become an invaluable adjunct to this district court and to all district courts.

Similarly, the creation of the Land Commission¹²³ relieved district judges of practically all the condemnation proceedings for the C&O Canal Park, the National Parkway, and the Washington Area Mass Transportation Authority.

Together, these new mechanisms and new judicial officers enabled us to keep abreast of a civil caseload that rose ninety-four percent between 1970 and 1980.¹²⁴ Criminal filings increased by over

116. See E. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 89-92 (1987).

117. See Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109-10 (codified as amended at 28 U.S.C. § 1407 (1988)).

118. See Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664, 664 (codified as amended at 28 U.S.C. §§ 620-29 (1988)).

119. See 1970 FED. JUD. CENTER ANN. REP. TO THE JUD. CONF. OF THE U.S. 21-23; 1980 FED. JUD. CENTER ANN. REP. 5-43.

120. See E. SURRENCY, *supra* note 116, at 90.

121. Federal Magistrates' Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-39 (1988)).

122. See E. SURRENCY, *supra* note 116, at 367-68.

123. See *In re Land Condemnation Comm'n*, Miscellaneous No. 998-A, at 8-9 (D. Md. Nov. 3, 1976) (en banc) (creating a three-person commission to fix just compensation in various federal condemnation proceedings pursuant to federal rule of civil procedure 71A(h)).

124. See 1970 DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 234; 1980 *id.* at 219.

sixty percent,¹²⁵ while bankruptcy filings soared above 400 percent.¹²⁶

I have yet to mention the most striking additions: six new judgeships between 1960 and 1980.¹²⁷ The exponential growth of the District Court of Maryland over the last few decades might best be illustrated by one simple fact: more people have been appointed to this bench since 1961 than in the entire preceding 170 years.¹²⁸

I will not further belabor statistics. Let me just mention one matter not reflected in the numbers for those years. Judge Thomsen was then immersed in the Penn Central Bankruptcy¹²⁹ and the railroad reorganization. Two circuit judges sat with him, but it was our judge who performed the legwork and handled the complicated details of getting the railroads running again.

Sheer quantity, as impressive as it may be, does not tell the whole story of the court in the sixties and seventies. This, after all, was the era of the great civil rights cases, which irrevocably altered our society. The question of obscenity preoccupied the court for some time indicating the renewed vigor of first amendment debates.¹³⁰ A series of watershed decisions of enormous constitutional import punctuated these two decades.

Perhaps though, it is the individual defendants we will best remember. I would be remiss if I failed to cite just a few of the most notorious, such as the Mafia in the New York bond-stealing cases, or the Berrigan Brothers, whose trial for destroying draft records would become a sixties cause célèbre.¹³¹ It is also hard to forget that the Vice President of the United States passed through this court as a criminal defendant.¹³² These trials mirrored the turmoil

125. See 1970 *id.* at 270; 1980 *id.* at 417.

126. See 1970 *id.* at 299; 1980 *id.* at 548.

127. See 1960 *id.* at 371; 1980 *id.* at 621.

128. See H.H.W. LEWIS & J. SCHNEIDER, *supra* note 60, at 163.

129. See, e.g., Consolidated Rail Corp. v. Trustees of Penn Central Transp. Co., 421 F. Supp. 1047 (Regional Rail Reorg. Ct. 1976); Norwich & Worcester R.R. v. United States, 408 F. Supp. 1398 (Regional Rail Reorg. Ct. 1976).

130. See, e.g., Modern Social Educ., Inc. v. Preller, 353 F. Supp. 173 (D. Md. 1973), *aff'd in part and rev'd in part sub nom.*, Age of Majority Educ. Corp. v. Preller, 512 F.2d 1241 (4th Cir. 1975); Star v. Preller, 352 F. Supp. 530 (D. Md. 1972), *vacated*, 413 U.S. 904 (1973), *on remand*, 375 F. Supp. 1093, *aff'd*, 419 U.S. 956 (1974); Adler v. Pomerleau, 313 F. Supp. 277 (D. Md. 1970).

131. See United States v. Berrigan, 283 F. Supp. 336, 339 (D. Md. 1968) (holding that the reasonableness of defendants' belief of the illegality of the Vietnam War was irrelevant to charges of injuring United States property, mutilating public records, and hindering the administration of the Selective Service Act).

132. See United States v. Agnew, 428 F. Supp. 1293, 1296 (D. Md. 1977) (refusing to

of the times and illustrated the federal court's position at the vortex of society's most pressing concerns.

Of course, not all our cases were somber affairs. I once had to order the police force to accept a nudist cadet, who had the highest marks of his police academy class, despite the problems he might have had with wearing his gun at all times.¹³³ The ruling prompted Commissioner Pomerleau to remark on another occasion, "I know Judge Northrop, but I don't recognize him with his clothes on."

I also did my share to rein in expanding judicial powers by refusing to enjoin the suspension of student protestors at one time.¹³⁴ I was not about to inject the court between the paddle and the behind.

I'd like to close today with a brief prayer for federal judges borrowed from a colleague in Georgia.

Dear Lord, on bended knee I pray you, tomorrow send me a plain old tort case. Or if You can't do that, a suit on a simple contract in writing will do just as well. That's a little enough favor to ask even if I have gotten rusty on the common law since I've been on this Court.

And deliver me, oh Lord, from any 2254s or 1981s, 1983s, 1985s or any 2000s (a-e, inclusive). You got troubles, I know, enforcing Chapter 20 subsections 3-17, inclusive, of the Book of Exodus. But it can't be much worse than what we federal judges have under Title 42. And if You care about me, Lord, don't send me any class actions, whatever they are.

It's not that I mind work. You know me better than that, Lord. It's just that I'm not a pedagogist, penologist, theologist, sociologist, cosmetologist, tonsorialist, . . . literary censor or personnel director.

And another thing, please don't put me on any more three-judge courts. Lord knows, I got enough trouble agreeing with myself—much less trying to convince two other [damn] fools.

. . . .

revoke defendant's probation, entered after nolo contendere plea to charge of tax evasion).

133. *See* *Bruns v. Pomerleau*, 319 F. Supp. 58, 69 (D. Md. 1970) (holding that the police department could not constitutionally refuse to accept a nudist's application for the position of probationary patrolman without showing a paramount governmental interest that would justify intrusion on first amendment rights).

134. *See* *Baughman v. Freienmuth*, 325 F. Supp. 1120, 1122 (D. Md. 1970) (no constitutional state action after the Board of Education stayed an order regulating dissemination of nonschool publications on school grounds), *aff'd*, 439 F.2d 796 (4th Cir. 1971).

Now, Lord, I'm not trying to run Your business. But some day You've got to put an end to the invidious discrimination against me and give me the equal protection of the Ten Commandments and all the recent amendments thereto.

And one more thing, Lord. Watch your step. I've got news for You. You've got real competition down in this section. The first thing You know the . . . Court of Appeals is going to permanently enjoin You from this discrimination against me. Of course, I realize there's a question of service on You under the long-arm statute. But let me warn you—that's not going to bother the [circuit court] very much.¹³⁵

135. A. Lawrence, Address to Atlanta Bar Association (Mar. 17, 1971), *reprinted in* A. LAWRENCE, *TONGUE IN CHEEK* 67-68 (1979).

VIII. 1984 WASN'T SO BAD AFTER ALL

HONORABLE FRANK A. KAUFMAN

Senior Judge Frank A. Kaufman became a district judge in 1966 and served as Chief Judge from 1981 to 1986. Known for his boundless energy, Judge Kaufman continues to be active in the American Bar Association and in the Federal Judges Association. At the present time, he is the district judge representative of the Fourth Circuit serving as a member of the Judicial Conference of the United States.

Chief Justice, as Chief Judge Harvey stated at the beginning of this proceeding, all of us here today are certainly most honored and privileged by your presence.

Also, sir, we certainly hope you are most comfortable and that my robe is not causing you problems of the type which Judge Harvey and I encountered one day during our early tenure, when we mistakenly donned each others' robes and proceeded into two different courtrooms—and he swam in mine and I struggled in his. We can, in any event, assure you, Chief Justice, that there will be no dissenting opinion filed in response to your remarks, despite the fact that you are joined today by fifteen other robed federal judicial officers instead of the eight in whose company you are usually found.

The title of my remarks, "1984 Wasn't So Bad After All," may have provoked the question: "What does the reference to the year 1984 mean?" George Orwell is hardly a household name to many of the younger persons present this afternoon. But when Orwell's best-selling novel entitled *1984*¹³⁶ was published nearly a half-century ago, it was almost compulsory reading and it sent chills through its readers. The chills were caused by Orwell's prediction that in fifty years, we would each be living under the aegis and domination of Big Brother; that is, that an all-pervasive dictatorship would flourish through the utilization of scientific technology.

Orwell wrote that in 1984 each of us would live day and night under scrutiny from central watchers who would observe and listen to us during our every waking and sleeping moment through constantly open two-way "telescreens."¹³⁷ Today's technology has not yet advanced as far as Orwell predicted in *1984*, but it has come close. And yet in this country, under our Constitution, we continue

136. G. ORWELL, *1984* (1949).

137. *Id.* at 6.

to control use of electronic eavesdropping and other intrusions into our privacy. Our Constitution allows us to recognize the clash between governmental and societal interests on the one hand, and the individual's privacy on the other; to balance among them; and to respect and even to enhance the freedoms and human values we have inherited.

In at least one respect, however, we federal district judges have been overcome by modern technology. I refer to the computerized sentencing mandated by Congress.¹³⁸ But we are a resilient group and somehow we shall survive and live to prevail another day.¹³⁹ If we are so to prevail, however, we will need to remember the lessons of the past. When I became a member of the bar of Maryland in 1940, there were two judges on this court—Chief Judge Coleman and Judge Chesnut. It was said in those days that there were two judges over there on Calvert Street—one who couldn't count over five when he sentenced in criminal cases and one who couldn't count less than five in sentencings. So, all was not necessarily perfect in those days.

Indeed, in many ways, all Americans have a lot to accomplish in another day. We have not yet attained a perfect society, not by any means. We still must eliminate many economic and social disparities. We still must learn to live together without discrimination based upon race or sex. Nevertheless, we lead the way in showing to the world that we still believe in and practice the desires and aims of the authors of the Declaration of Independence and the Constitution of the United States. As the decade of the 1990s begins, and the remarkable and unbelievable changes occur in Eastern Europe and, to some extent, in South Africa, all of us—judges, court staff, jurors, and members of the bar—in our daily devotion to the rule of law, continue to adhere to the traditions of our founding fathers and of those who have preceded us in the last two hundred years.

In this court, after I succeeded Judge Northrop as Chief Judge in 1981, and then as Chief Judge Harvey followed me in 1986, the expansion of the caseload and the increase in number of judges continued. Judges Black, Hargrove, Motz, Smalkin, Niemeyer, and

138. Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1987 (codified as amended at 28 U.S.C. §§ 991-98 (1988) and 18 U.S.C. §§ 3551-80 (1988)). See generally Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83 (1988).

139. See Excerpts of William Faulkner's speech upon receiving the Nobel Prize, Dec. 10, 1950, quoted in BARTLETT'S FAMILIAR QUOTATIONS 838 (15th ed. 1980) ("I believe that man will not merely endure: he will prevail.").

Garbis joined us—Judge Nickerson soon will. Remarkably, the enlargement of our court has not disturbed our collegiality. We remain, as we were when Judge Harvey and I came aboard in 1966, a happy, communicative group—with each judge willing to pitch in and aid another, with judges reaching what is euphemistically called “retirement” age continuing to handle heavy loads as senior judges, and with new judges becoming quickly acclimated. And, of course, we could not come close to keeping our heads above water if we did not have such dedicated, hard-working, and able staff members in our respective chambers, in the clerk’s and marshal’s offices, in probation and pretrial services, and among our court reporters and audio operators.

We live today in a society far different than Orwell, writing in the wake of World War II, envisaged would exist in 1984. But that does not mean that our present form of government will be with us fifty years from now, in the year 2040, or two hundred years from now, in the year 2190. Two hundred years is a short time in history. Think of it this way: Judge Northrop and I each have lived more than one-third of the two hundred years which have elapsed since 1790.

Since the astronauts visited the Moon, that way station seems just around the corner—as opposed to Jupiter and Saturn which seem far out there in the universe. To most of you, the year 2190 seems just as far away as Jupiter and Saturn. But 2190 will arrive all too quickly—and when it does, let us hope that in these United States of America—and elsewhere in the world—our descendants will have built upon and improved our traditions and our values. As for the present, let us enjoy and respect those traditions and values, and count our blessings that we have inherited from our outstanding predecessors.

IX. THE FUTURE FROM A PRACTITIONER'S PERSPECTIVE

PAMELA J. WHITE

We will now hear from Pamela J. White, Esquire, a partner in the Baltimore law firm of Ober, Kaler, Grimes and Shriver. Ms. White is the past president of the Women's Bar Association and is an active practitioner in this court, specializing in civil litigation.

Chief Justice Rehnquist, Chief Judge Harvey, members of this bench and distinguished guests:

Given the rich history, the traditions, and the achievements of this court over the past two hundred years, it is a bit overwhelming to contemplate the challenges to come over the next two hundred years. That, however, is the key to the future of our court—the absolute certainty that our court, even as it adapts to meet current crises and the millennium's new tasks, will continue to thrive and achieve justice.

Our task to address the future of the court is advanced by the recent report of the Federal Courts Study Committee.¹⁴⁰ That committee identified many of the challenges that face our court and our Congress, at least in the near term.¹⁴¹ Nevertheless, I will venture a somewhat divergent view of the future, based on a practitioner's experience before this court and an appreciation of its rich history.¹⁴²

The war on drugs will be advanced through the considerable efforts of our bench, but a civil trial will become a rare privilege. The crisis of our judiciary's drug and criminal docket overload, exacerbated by the Sentencing Guidelines,¹⁴³ eventually will abate.

140. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter REPORT]; see also FED. COURTS STUDY COMM., TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT (Dec. 22, 1989).

141. The issues addressed included: reallocating business between the state and federal systems, REPORT *supra* note 140 at 35-54; creating nonjudicial forums for matters currently in the federal courts, *id.* at 55-68; creating judicial capacity within the judicial branch, *id.* at 69-88; expediting litigation, *id.* at 89-108; easing the appellate caseload crisis, *id.* at 109-32; reviewing the sentencing guidelines, *id.* at 133-44; administering the federal courts, *id.* at 145-66; and protecting against bias and discrimination in the judicial branch, *id.* at 167-70. State-court studies also have addressed such problems. *E.g.*, 1989-1988 ANN. REP. MD. JUDICIARY (1990); COMM'N ON THE FUTURE OF VA. JUDICIAL SYS., COURTS IN TRANSITION (1989); see also Address to the General Assembly on the State of the Judiciary by Chief Judge Robert C. Murphy (Jan. 12, 1990), *reprinted in*, The Daily Record (Baltimore), Jan. 24, 1990, at A14, col. 1.

142. See generally W. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 (L. LaRue & W. Holt ed. 1990); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

143. See *supra* note 138.

But the cost will be measured both in judicial burnout and, more tangibly, in new judicial appointments.¹⁴⁴

Our court will be a critical participant in a successful drug war, but it will not sacrifice individual rights and will not act at the expense of cooperative relations with federal, state, and local prosecutors. At the same time, it is apparent that the crisis in our courts will not be resolved without global solutions and congressional recognition of the need for global remedies instead of shortsighted adjustments.

With or without the elimination of diversity jurisdiction, the admiralty and civil docket that remains in the new century will require attorneys to be better managers than advocates. The fine traditions of the admiralty proctors will yield to case management and specialized skills in multi-national corporate disputes, complex environmental claims, and massive product litigation.

Technological advances will improve access to our courts and may enhance the quality of justice, but the breadth of the computerized database cannot substitute for scholarly research, innovative analysis, or judicial common sense.

Consumer and domestic commercial disputes will benefit by institutionalized vehicles for alternative dispute resolution (ADR), but we must expand ADR to avoid our court's collapse under the weight of thousands of mass-tort and product claims. Eventually, the members of this and our state benches, combined with our magistrates, will be instrumental in promoting systematic ADR to overcome the crush of those cases.

From challenges of employment discrimination to prisoners' rights cases, from Social Security appeals to Jones Act¹⁴⁵ compensation cases, the role of state courts, administrative agencies, and arbitration will expand. The remaining docket of this court, however, must not be devoted to adjudicating attorney's fees and discovery disputes. Nor can we tolerate excessive delays and the mounting costs of litigation which put justice out of reach for most of our citizens.

The tradition of excellence of our bench will not yield to adjudicate warfare between counsel, but it expects and demands that attorneys appearing before this court will exhibit only the highest

144. See REPORT, *supra* note 140, at 160.

145. 46 U.S.C. § 688 (1988).

qualities of professionalism.¹⁴⁶ We must have hope that Congress will respond to the critical needs of our court but, in the meantime, we cannot submit or stand witness to any loss of collegiality, professionalism, and goodwill when we appear before this court. Even as we face profound changes in the way attorneys deal with each other, and in the way our citizens seek and secure justice, the men and women appearing before this court must continue to champion our fundamental civil rights without loss of intensity or constitutional vigilance.

The strength and vitality of this court cannot be compromised by inadequate compensation, poorer facilities or working conditions, or insufficient support staff. Its collegiality must and will be maintained even with the expansion of its numbers. Our perception of fairness and the diversity of our bench must and will be enhanced by the addition of women to this court.¹⁴⁷ Our confidence and respect for the quality of this bench will be renewed with the court's continued vigilance to eliminate any appearance of bias in all judicial proceedings, in the court's administration, and in the judicial nominations process.¹⁴⁸

The strength of this court is a function of its traditions and its continuity only so long as that continuity also reflects its ability to adapt to meet new challenges. The successful performance of our federal court as it responds in this new decade to the intense pressure of the drug crisis, or as it serves our citizens from a significantly altered jurisdictional basis, will determine the court's character and viability in the new century.

It is difficult to comprehend the magnitude of society's advances in science, technology, medicine, and communications over the last ten years, let alone in the next century. Our court has coped with these changes, but has remained accessible and responsive to the congressional expansion of its duties as well as to our citizens' changing needs and expectations.

Just as this court recognizes that change is critical to progress, the obligation of this bar to keep pace with changing circumstances

146. See Merhige, *Professionalism*, in *SOCIAL RESPONSIBILITY: BUSINESS, JOURNALISM, LAW, MEDICINE* 50 (L. Hodges ed. 1989).

147. See MD. SPECIAL JOINT COMM., *GENDER BIAS IN THE COURTS* 94 (1989) (recommending, based on survey research, appointment of qualified women at all levels in the Maryland state court system).

148. See generally *id.*; see also MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990) ("A judge shall perform the duties of judicial office impartially and diligently."); *id.*, Canon 2-C ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.").

cannot be avoided. Oliver Wendell Holmes described our obligation as practitioners before this court:

Law is the business to which our lives are devoted, and we should show less than devotion if we did not do what in us lies to improve it, and, when we perceive what seems to us the ideal of its future, if we hesitate to point it out and to press toward it with all of our heart.¹⁴⁹

Thank you.

149. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 473-74 (1897).

X. CLOSING REMARKS: JUSTICE CHASE'S CHARGE
TO THE GRAND JURY†

HONORABLE WILLIAM H. REHNQUIST

Our final speaker this afternoon will be the Chief Justice of the United States, the Honorable William H. Rehnquist. The Chief Justice was appointed to the Supreme Court in 1971 and he became Chief Justice in September of 1986. He has made our bicentennial celebration a very special occasion by honoring us with his presence and by addressing us here today. It is with great pleasure that I present to you the Chief Justice of the United States.

Thank you, Chief Judge Harvey. Judicial colleagues, ladies and gentlemen.

It is a great honor to be here with you this afternoon and participate in the celebration of the two hundredth anniversary of the first sitting of this court.

I want to say a few words this afternoon about Samuel Chase, who was not, strictly speaking, a judge of the district court, but who sat upon this bench many times in his capacity as circuit justice.

President George Washington appointed him to the Supreme Court of the United States in 1796. In those days, the Supreme Court managed to do its business in about six weeks of sitting in February and early March. So, the rest of the time the Justices rode circuit, sitting with the resident district judge of a court, the two together constituting the circuit court for that district. Chase was a Marylander, and his circuit took in the courts in Baltimore, Annapolis, Philadelphia, Richmond, and Newcastle (which was then the capital of Delaware).

It was from the bench of this court that Chase delivered a charge to the grand jury sitting here in May 1803, by which he unwittingly carved a niche in American history for himself. He was a Federalist, as were all of the appointees of Federalist Presidents George Washington and John Adams—which, from the perspective

† Parts of this speech are drawn from: H. ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON (1898); 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919); 1 B. CABELL, JOHN RANDOLPH OF ROANOKE 1773-1833 (1970); P. CLARKSON & R.S. JETT, LUTHER MARTIN OF MARYLAND (1970); R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); 4 D. MALONE, JEFFERSON AND HIS TIME—JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805 (1970); W. STORY, THE LIFE AND LETTERS OF JOSEPH STORY (London 1851); TRIAL OF SAMUEL CHASE (S. Smith & T. Lloyd ed., Washington, D.C. 1805 & photo. reprint 1970); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1923).

of two hundred years perhaps illustrates the French proverb, "*plus ça change, plus c'est la même chose.*"

This was at a time when judges were far less circumspect than they are now about mixing in politics. But Chase was a partisan even by the standards of his own times. The start of the term of the Supreme Court in August, 1800, had to be postponed for several days because of his absence while he was stumping the State of Maryland for the reelection of President John Adams.

But in the election of 1800, John Adams was defeated by Thomas Jefferson in what historians call the "Second American Revolution." Jefferson and his Republican party gained control not only of the presidency, but of both Houses of Congress.

By 1803 it was evident that the times, they were a-changing, and Samuel Chase did not like what he saw. Congress had repealed the so-called "Midnight Judges" law passed in the last days of the Adams administration and populist sentiment in Maryland established a new state constitution which broadened the franchise. So, when Chase was charging the grand jury, he said:

You know, gentlemen, that our state and national institutions were framed to secure to every member of the society equal liberty and equal rights; but the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges, and the recent change in our state constitution by the establishing of universal suffrage, . . . will, in my judgment, take away all security for property and personal liberty. . . . The change of the state constitution will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a mobocracy, the worst of all possible governments.

A spectator at these proceedings sent a newspaper account of them to President Thomas Jefferson, who promptly wrote to Joseph Nicholson, another Marylander in the House of Representatives. Jefferson said:

Ought this seditious and official attack on the principles of our Constitution, and on the proceedings of a state, to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration. For myself it is better that I should not interfere.

The poet Byron described his heroine Julia as "Whispering 'I

will ne'er consent'—consented." Here we have the political equivalent: Jefferson, saying he would never interfere, interfered.

Nicholson did not respond to Jefferson's urging, but his fellow Republican, John Randolph of Roanoke, did, and in 1804, the House of Representatives impeached Samuel Chase in a series of seven articles, one of which was devoted to the charge given by Chase to the Baltimore grand jury. The trial before the Senate took place in February 1805. Chase was represented by a galaxy of able lawyers, headed by his old friend, Luther Martin of Baltimore.

Chase at this time was sixty-four years of age, more than six feet tall and correspondingly broad, it is said. His complexion was brownish-red in color, earning him the name of "Old Bacon Face."

He was born in Somerset County, on the Eastern Shore, but at the age of eighteen he had gone to Annapolis to study law. He was an early and spirited participant in the American Revolution. He was one of the organizers of the Sons of Liberty in Maryland in 1766. He was a delegate to the first Continental Congress. Largely through his efforts, the Maryland legislature had instructed its delegation to the Continental Congress to vote for complete independence from England in July of 1776. He was a signer of the Declaration of Independence, but twelve years later he opposed Maryland's ratification of the Constitution because it contained no bill of rights.

He had a distinguished and successful career at the Maryland bar. In 1791, he became chief judge of the Maryland General Court. Justice Joseph Story of the Supreme Court described Chase as the "living image" of Samuel Johnson, "in person, in manners, in unwieldy strength, severity of reproof, in real tenderness of heart, and above all, in intellect."

Chase's principal defense counsel, Luther Martin, was his long-time friend at the Maryland bar. Luther Martin was surely one of the great lawyers in American history, an ornament of the Maryland bar, and one of the great iconoclasts of the American legal profession. Because of his fondness for strong drink, his detractors referred to him as the "lawyer brandy bottle."

Martin was the first Attorney General of Maryland and served in that office for more than twenty-eight years. He suffered a paralytic stroke shortly after arguing the case of *McCulloch v. Maryland* before the Supreme Court in 1819, but he lived on for seven years, helpless, without family and without means of support. The Maryland legislature took notice of his condition and unanimously enacted a truly remarkable statute: every lawyer admitted to practice in the

State of Maryland was required to pay annually to the clerk of the court in the county in which he practiced the sum of five dollars, which sums were turned over to trustees for the use and benefit of Luther Martin.

The Senate which would try Chase was presided over by the Vice President of the United States, who was then Aaron Burr. Burr himself was a fugitive from justice at the time: in the summer of 1804 he had shot and killed Alexander Hamilton in a duel at Weehawken, New Jersey, and an indictment for murder had issued against him in that state. This led one wag to remark that whereas in most courts the murderer was arraigned before the judge, in this court the judge was arraigned before the murderer.

The thirty-four senators who were to sit in judgment upon Chase heard testimony from numerous witnesses and unbelievably long arguments from counsel on all sides.

Finally, on March 1, 1805, they voted on each of the charges and Chase was acquitted. The largest number of votes for conviction came on the count dealing with his charge to the Baltimore grand jury, but even on that charge there were only nineteen who voted guilty as opposed to fifteen who voted not guilty. Since a two-thirds majority was required by the Constitution, Chase remained a federal judge.

The relationship between Chase and Martin was an interesting one. A few years after his successful defense of Chase, Martin appeared before him sitting as a circuit judge here in Baltimore, and Martin was visibly intoxicated. Chase said to him, "I am surprised that you can so prostitute your talents." Whereupon, Martin, drawing himself up as a straight as he could, replied to Chase, "Sir, I never prostituted my talents except when I defended you and Colonel Burr."

And then, turning to the jury, he added, *sotto voce*, "Confidentially, a couple of the greatest rascals in the world."

Chase angrily instructed the clerk to draw up a citation of Martin for contempt of court, but when it was presented for his signature, that choleric old man, recollecting their forty-year friendship and all that he owed Martin, put the quill pen back in its holder, saying, "This hand could never sign a citation against Luther Martin."

Chase was an able lawyer, but he lacked what is called a judicial temperament. He was impatient with counsel who appeared before him, and on many occasions he heckled counsel. A historian of the bar of the circuit of which Chase served described him as "a man of

ripe legal learning, but of an arbitrary spirit; from the beginning he was unpopular with the Philadelphia bar, owing to his despotic manner on the bench."

The writer then goes on to relate a colloquy which occurred between Chase and Samuel Leake, an attorney from Trenton, New Jersey, who was appearing before Chase for the first time.

Leake was thought remarkable for the number of authorities to which he customarily referred in an argument, and upon this occasion he had brought a considerable portion of his library into court, and was arranging the books upon the table at the time that Chase came on the bench. The following colloquy then took place:

"What books have you got there, sir?" asked Justice Chase.

"My books, sir," Leake responded.

"What for?"

"To cite my authorities."

"To whom?"

"To your honor."

"I'll be damned if you do."

Chase served as a Justice of the Supreme Court after his acquittal until his death in 1811. He was an able lawyer; he probably never should have been appointed to the bench, certainly not as a trial judge, because of his temperament.

His acquittal by the Senate was probably the single most important event in the history of the United States by way of assuring the independence of the federal judiciary. The Senate wisely decided that it was preferable to put up with a judge who lacked a judicial temperament than to risk the removal of federal judges for political reasons. And when you think that the case all began here with his charge to the grand jury in 1803, it seems to me it is fitting to take note of that today.

I thank you for having allowed me to participate.