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Mapp v. Ohio Revisited: A Law Clerk's Diary

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POLLY J. PRICE[1]

> At conference Frankfurter said *Mapp* is the worst tragedy since *Dred Scott.* Justice Brennan says he means it.
>
> —Richard S. Arnold, from his diary of the 1960 Supreme Court Term[2]

The 1960 Supreme Court Term laid the groundwork for the subsequent revolution in the relationship between state and federal law accomplished by the Supreme Court under Chief Justice Earl Warren. The "most famous search and seizure case in American history"[3] —*Mapp v. Ohio*[4]—would be decided that Term. *Mapp* held that the Fourth Amendment's protection against "unreasonable searches and seizures" required the exclusion of evidence found through an illegal search by state and local police officers, extending to the states a rule that had previously applied only to federal law enforcement. *Mapp* became a pivotal chapter in the story of civil rights in the United States.

Mapp v. Ohio remains a prominent topic today. In bringing state law in line with the older federal exclusionary rule, the decision made the United States the only country to take the position that some police misconduct must automatically result in the suppression of physical evidence. The position of the United States on this subject remains unique more than fifty years after *Mapp* was decided.[5] The future of the exclusionary rule, however, has been the topic of much debate, particularly following the Supreme Court's decision in *Herring v. United States* in January 2009.[6]

Richard S. Arnold, later a renowned judge on the Eighth Circuit Court of Appeals, kept a diary of his clerkship year with Justice William Brennan in 1960–1961. When Arnold began his clerkship, Chief Justice Warren met with all of the new law clerks to impress upon them the need for secrecy. "You will learn things, hear things, know things that you will take to your grave with you," Warren said.[7] But the secrecy already had been breached. Before Arnold began his clerkship, William

Richard S. Arnold (pictured), later a renowned judge on the Eighth Circuit, kept a diary of his clerkship with Justice William J. Brennan in the 1960–1961 Term, the year *Mapp v. Ohio* was handed down.

Rehnquist, a law clerk for Justice Robert H. Jackson and later Chief Justice of the Supreme Court, provided the "first signed statement"[8] by a former law clerk describing the role, in a 1958 article entitled, "Who Writes Decisions of the Supreme Court?"[9] Arnold, by contrast, did not share any part of his diary until after all the Justices who had served during his clerkship had died.[10]

When Arnold became a law clerk, Warren—appointed by Dwight Eisenhower—had been serving as Chief Justice since 1953. The "Warren Court" became synonymous with the liberal exercise of judicial power in favor of civil liberties and civil rights. *Brown v. Board of Education*,[11] decided in 1954, was only the beginning, but already the Warren Court had engendered a political backlash. When driving Justice Brennan to his home in the evenings, Arnold and his fellow clerk Daniel Rezneck would pass along the way an occasional "IMPEACH EARL WARREN" billboard.[12]

The Supreme Court in 1960

In addition to Warren, Felix Frankfurter, and Brennan, the other members of the Supreme Court in 1960 were William O. Douglas, Hugo L. Black, Potter Stewart, Charles Evans

Whittaker, Tom C. Clark, and John Marshall Harlan II. "Harlan II" was the grandson of the first John Marshall Harlan, who served on the Supreme Court from 1877 until 1911 and who was the only Justice to dissent in *Plessy v. Ferguson*.[13]

Arnold's diary reveals his fascination with the Supreme Court as an institution that was dependent upon the character of the individuals who comprised it. He especially enjoyed the tradition of each Justice inviting the other law clerks to lunch during the year, at the Supreme Court dining room usually populated only by the law clerks and staff. Arnold recorded personal characteristics of each Justice, along with anything particularly memorable that the Justice had said.

One example is Arnold's diary entry for November 22, 1960: "The law clerks had lunch today with Justice Black. He intimated that things would have turned out better had the South been required to proceed much more rapidly, instead of 'with all deliberate speed.' He agreed with this formulation in the second round because unanimity was important."[14]

According to biographer Roger Newman, Justice Black believed the Supreme Court in the 1960 Term faced "more cases of great importance" than at any time since he joined the Court. As quoted by Newman, Black told a former clerk: "I do not anticipate a year in which I shall have to rarely dissent."[15]

Arnold was clearly in awe of the seventy-five-year-old Black. Arnold wrote in his diary: "I found him very kind and gracious—he was pleased I was going back to Texarkana. He was perfectly poised and dignified and very acute and bright—not the slightest hint of age. He is truly a great man."[16]

Frankfurter was a professor at Harvard Law School when he was nominated to the Supreme Court by Franklin Roosevelt in 1939. He had previously served Roosevelt as an informal advisor on many New Deal matters. Frankfurter retained his ties with the Harvard Law School faculty and surrounded himself with its recent graduates as law clerks. Frankfurter held the deep esteem of many of the Harvard law faculty and was widely considered the Court's most influential member.[17]

When Frankfurter invited the other law clerks for lunch, Arnold was taken with Frankfurter's antics: "Frankfurter shouted, gesticulated, flung his silver onto the table, and accused a law clerk of being slippery. Frankfurter literally shouted his disapproval of Senator Fulbright for not taking a more forthright stand on *Brown*."[18]

At sixty-two, John Marshall Harlan II was substantially younger than either Frankfurter or Black. Arnold's notes from their law-clerk lunch with Justice Harlan describe him as "very grandfatherly and judicious, verging on the stuffy, but not without humor. He disagrees with almost everything of importance his grandfather ever said. He does not believe Negroes are an unduly favored class of litigants. He asserted further that he would not restrict congressional investigations of communism with a probable cause showing requirement—everything would be all right up to dragging just anyone off the street and asking him if he were a communist."[19] Harlan was "the soul of dignity," and "deserved the title of 'august' if anyone ever did," Arnold recalled. It amused Arnold greatly that when Justice Brennan saw Harlan in the halls, he would say delightedly, "Hiya, Johnny." Arnold did not believe that anyone else, including Harlan's mother, ever called the Justice "Johnny."[20]

Douglas, nominated to the Supreme Court by Franklin Roosevelt, served on the Court for nearly thirty-seven years, making him the longest-serving Justice in Supreme Court history. Arnold wrote that Douglas "was actually rather nice and friendly. He refused to admit that there was any split on the court between two wings or blocks."[21]

Arnold's impression of Justice Whittaker was improved by the clerks' lunch. "He made a much more favorable appearance than we had expected. He is a simple but tough-minded man, well aware of his own limitations,

genuinely humble. He supports *Brown* but thinks *Shelley v. Kraemer* [22] is wrong. He is very sensitive to criticisms of the court as too liberal, procommunist. He was truly a character to inspire affection."[23]

Lunch with a Justice other than one's boss was a rare event, occurring by tradition but once during the Term. More frequently, Arnold and Rezneck ate lunch with Brennan, especially on Saturdays. On one occasion Arnold met the two retired Justices who still had offices at the Supreme Court, Harold H. Burton and Stanley Reed. "The Justice and I had lunch in the Methodist building, and Mr. Justice Burton, who is often there, joined us. He is rapidly declining in physical strength. His left hand shakes, and his mental reactions are slow and dull. When we came back to the Court we saw Mr. Justice Reed on the ground floor—he was a model of courtesy and vigor, showing no signs of age."[24]

But overwhelmingly, Arnold's diary reflects his observations of his "boss," as he put it, Justice Brennan. In the 1960 Term, Brennan was only in his fourth year on the Court.[25] Brennan's relatively junior status at the time and the ideological divisions on the Court left him frequently on the dissenting side that year. The 1960 Term, which Arnold would witness, was particularly noteworthy for the number of 5–4 decisions handed down during it, with Brennan often in the minority.

Professor Paul Freund selected law clerks for Justice Brennan, Eisenhower's recent nominee to the Court. Freund was one of the leading scholars of constitutional law. One Brennan clerk for the 1960–1961 year had already been selected: Rezneck, a graduate of the Harvard class of 1959, who had spent 1959–1960 as a research assistant for Freund on the **Holmes Devise History of the Supreme Court**.[26]

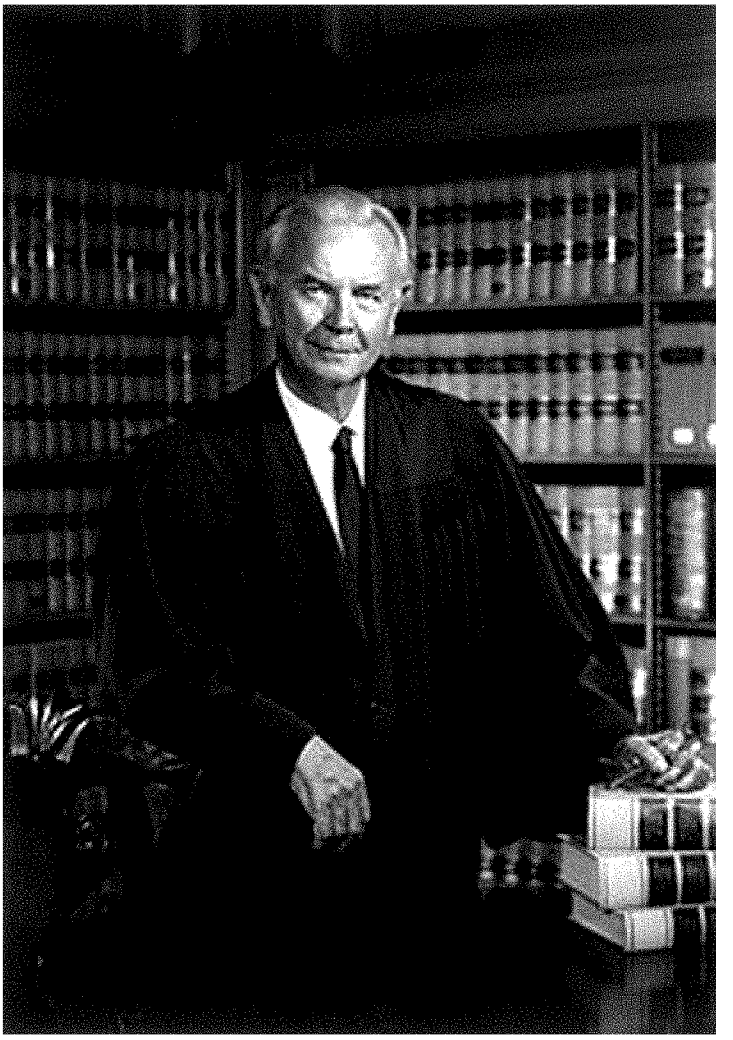
In mid-fall of 1959, Freund called Arnold into his office to offer him a clerkship with Brennan. A short time later, Brennan wrote to Arnold, "I am most happy to follow the suggestion of Professor Freund and invite you to accept a law clerkship with me for the 1960 term. It will give me great pleasure if you will accept."[27] Arnold's prompt reply stated that he was "delighted to receive this morning your letter inviting me to serve as your law clerk for the Court's 1960 Term. I view the appointment as a great honour and promise to do my best to justify your confidence."[28]

Arnold did not meet Brennan until he started work. The two Brennan law clerks chosen for that year—Arnold and Rezneck—developed a close relationship with Brennan. On most days they would drive him to and from his home in Georgetown, often discussing the Court's pending cases.[29]

The politics of determining which cases to take and which to avoid was an important feature of the 1960 Term. The Justices weighed priorities for disposition on a weekly basis. The custom at the time was for the Justices to hold a weekly conference on Fridays to discuss the cases argued during that week, assign opinions to be written, and also consider which, if any, of the numerous appeals filed during the week to accept for review. On occasion, these conferences would carry over to Saturday morning.

Brennan made it a regular practice to discuss with his clerks the results of the Friday conferences. Law clerks were never present for any of these conferences, but Justice Brennan would relate the day's events to his clerks. Stories from the Justices' conferences, as recorded in Arnold's diary, are from Brennan's explanations. Not all Justices favored their clerks with a blow-by-blow of the conferences. Arnold would sometimes find himself in the position of informing other Justices' law clerks about what had happened there.[30]

It was a busy Term for the Justices and their law clerks. Throughout the year, the Supreme Court heard 146 cases on oral argument out of nearly 2,000 petitions for review presented to the Court.[31] An early entry in Arnold's diary notes: "Tomorrow, conference. How can the court dispose of five or six argued cases, most of them of considerable difficulty,



There were five separate opinions in *Mapp* because the Justices could not agree on which part of the Constitution to base their reasoning. Brennan joined Justice Tom Clark's majority opinion holding that evidence obtained in violation of the Constitution could not be used in state prosecutions.

and then go on to deal with all the appeals and petitions for certiorari (at least 30 of which are to be discussed)? Who knows?"[32]

Civil Liberties in the Supreme Court, 1960–1961

It was an auspicious time for anyone, let alone a Southerner like Arnold, to be present at the Supreme Court. Only two years before Arnold began his clerkship, the Supreme Court handed down its famous decision in *Cooper v. Aaron*.[33] This case was the only instance in which the Supreme Court accepted an appeal involving desegregation in Little Rock, Arkansas. Members of the Little Rock School Board, including the Superintendent, had succeeded in securing from a federal district court an order to delay integration of the schools for another two and one-half years, citing the turmoil created by Governor Orval Faubus's stand against integration and the arrival, for a time, of the United States Army's 101st Airborne division, sent by President Eisenhower.

The Eighth Circuit Court of Appeals had reversed the district court, but the Supreme Court took the case, in an August

Dollree Mapp, an Ohio woman, had been sentenced to seven years in prison for possessing obscene literature, which she claimed she was merely storing for a former tenant who had left it behind with other belongings. Police officers had searched her home, without a warrant, based upon the allegations of an unnamed informant who claimed that a person wanted for a recent bombing was hiding there.

Special Term, in order to affirm federal judicial supremacy and the mandate of *Brown v. Board of Education*:

> Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.[34]

Justice Brennan was the primary author of *Cooper v. Aaron*, although it was signed by all nine Justices.[35] While Arnold was clerking for Justice Brennan, he later noted, "the memory of *Cooper v. Aaron* was fresh."[36] And the nation still had, in the scheme of things, a fresh memory of *Brown v. Board of Education*. The

"Southern Manifesto"—a statement by Southern members of Congress that *Brown v. Board of Education* was illegal and illegitimate as a matter of constitutional law—came in 1956. It had been signed by, among others, Arkansas Senator J. William Fulbright.

But the 1960 Term was perhaps most notable for the steps it did not take in favor of racial equality. Part of the reason for this had to do with the composition of the Court. In his last years on the Court, Frankfurter became an outspoken critic of many of the Court's ground-breaking decisions to end racial segregation. He was also the Court's most ardent advocate of judicial restraint at the time. Frankfurter left the Court in 1962 after suffering a stroke, so the 1960 Term—documented in Arnold's diary—was for all practical purposes Frankfurter's last full year.

The fault lines on the Supreme Court are apparent not only in Arnold's diary but also in academic assessments of the 1960 Term. In many close cases, Warren, Black, Douglas, and Brennan found themselves together in dissent. Justices Frankfurter and Douglas were the furthest apart; Chief Justice Warren and Justice Brennan agreed more often than any other two Justices.[37] Arnold recognized the link between Warren and Brennan, noting on one occasion: "The Chief was in to see the boss today twice—he seems to look to Justice Brennan quite a bit for advice."[38] There were stark ideological differences that year in particular, resulting in both unusual techniques of withholding ultimate constitutional adjudication and what one observer termed "deeds without doctrine"—Court actions without a rationale sufficient to provide jurisprudential guidance for the future.[39]

In the 1960 Term, there was only a smattering of civil-rights cases involving race that the Supreme Court decided to hear. It was a year of retrenchment on racial matters, but the Court's decisions on the Fourteenth Amendment and how it applied to the states would have a significant impact on the nation. The Court struggled to articulate what obligations the states must recognize in order to make meaningful a national system of individual rights. The Supreme Court was in the midst of a federalism revolution that many observers found astonishing.

Mapp v. Ohio: The Exclusionary Rule in State Criminal Prosecutions

The most striking and revolutionary decision of the Term was *Mapp v. Ohio*,[40] which held that evidence obtained by a search in violation of the federal constitution could not be admitted in state prosecutions. Nominally a 6–3 decision, the case resulted in five separate opinions. The decision was handed down on the last day of the Term, and Arnold's diary explains why it took until then for the Justices to work out a resolution. Robert McCloskey, reviewing the 1960 Supreme Court Term in the *American Political Science Review*, said *Mapp v. Ohio* was a development "so spectacularly libertarian" that it must play a major part in any evaluation of the Term's results.[41]

Dollree Mapp, an Ohio woman, had been sentenced to seven years in prison for possessing obscene literature, which she claimed she was merely storing for a former tenant who had left it behind along with other belongings. Police officers had searched her home, without a warrant, based upon the allegations of an unnamed informant who claimed that a person wanted for a recent bombing was hiding there, along with gambling paraphernalia. All the police found after an extensive search of the home were allegedly obscene books and pictures. Those materials—evidence that was admittedly seized illegally—were introduced in court and resulted in Mapp's jail sentence.

Mapp v. Ohio came to the Supreme Court seemingly as a First Amendment case. The lawyers had argued it that way before the Court, and the only suggestion that it might turn on another provision of the U.S. Constitution came in an amicus brief filed by the American Civil Liberties Union. In one

paragraph, the ACLU suggested instead that Dollree Mapp's conviction was invalid because it was based on evidence from an illegal search.

Arnold's conversations with Brennan reflect little early emphasis on the illegal search. On a drive home from the Supreme Court, Arnold discussed the case with Brennan: "The Justice not only thinks that [the Ohio obscenity statute is] unconstitutional, but went so far as to say the states cannot constitutionally punish a man for reading, in private but with prurient interests, obscene books. Dan and I disagreed, and the Justice labeled us as 'hopeless reactionaries.'"[42]

Arnold also recorded a strategy session between Warren and Brennan: "The Chief came in today to talk over *Mapp* with the Justice. He, too, thinks it must be reversed. [Brennan] and Dan and I argued the matter at some length again this afternoon. The Justice admits he's in an analytical dilemma, but he is 'damn well going to vote to reverse, anyway.'"[43]

The analytical dilemma was this: Three years earlier, in a case known as *Roth v. United States*,[44] the Supreme Court redefined the constitutional test for obscene material. Brennan had written the majority opinion. The First Amendment, he said, protected "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion."[45] But material that would qualify as "obscene" received no such protection: "We hold that obscenity is not within the area of constitutionally protected speech or press."[46] Obscenity, in turn, was determined by "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[47]

The problem, then, was that by all accounts the material in Mapp's house *was* obscene, or at least had been determined to be obscene in a state judicial proceeding. There were only three dissenters in *Roth*, so there would be no way Brennan could find enough votes to reverse Mapp's conviction on the basis of the First Amendment while *Roth*—an opinion he had written—was still good law.[48]

This left the possibility that the Court might view the illegal search and seizure at Mapp's house as requiring reversal of her conviction. But here again, the analytical dilemma was great. An "exclusionary rule" had long been applied in federal prosecutions where evidence had been obtained in violation of the Fourth Amendment's prohibition of "unreasonable searches and seizures." Such evidence could not be used against the defendant at trial. But the federal exclusionary rule did not apply to state prosecutions, and half of the states at that time—including Ohio—still admitted illegally seized evidence in criminal prosecutions. Eleven years earlier, in a case titled *Wolf v. Colorado*,[49] the Supreme Court had concluded that the exclusionary rule did not apply to state court proceedings. In *Wolf*, four Justices read the Fourteenth Amendment to incorporate all the protections of the Fourth Amendment in state criminal prosecutions, but Frankfurter's majority opinion would not go that far. State officials, Frankfurter wrote, need not apply the exclusionary rule in state court proceedings.[50] Justice Black went even further. In a concurring opinion in *Wolf,* he said that the failure to exclude evidence obtained by an illegal search did not violate the Due Process Clause of the Fourteenth Amendment.

Later conversations reflect Brennan's difficulty with the case: "The Justice is determined to vote to reverse *Mapp*, but he doesn't quite know how. I argued at length with Dan and him that since the First Amendment is out of the case, that the only way to strike down the Ohio statute is to say that to make knowing possession a crime is to use an impermissible means of implementing the state's permissible anti-obscenity policy. Of course, best of all would be to overrule *Wolf* and reverse this case on the Fourth Amendment, but no one thinks there's a chance of that."[51]

This is precisely what would happen. Writing for a bare majority, Justice Clark held that Fourth Amendment protections,

incorporated through the Due Process Clause of the Fourteenth Amendment, did require state courts to follow the exclusionary rule, and overturned *Wolf*. The voting was complicated, with the deciding vote falling to Justice Black, who had voted with the majority in *Wolf*.

At the Friday conference that week, Arnold wrote that "[t]he Chief Justice, Douglas, Brennan, and Clark, were all in favor to overrule *Wolf* (great effort is to be made to get a fifth somewhere for this proposition, to apply the fourth amendment exclusionary rule to states through the 14th amendment)."[52]

The conference notes also described indecision on the part of other Justices about whether the case could be decided on First Amendment grounds (a decision ultimately rejected): "Two—Black, also Douglas—to overrule *Roth*. Two—Harlan, Frankfurter—say it violates substantive due process to forbid mere possession. Five—The Chief Justice, Brennan, Clark, Whittaker, and Potter Stewart—say the First Amendment forbids prohibition of mere possession; *Roth* distinguished as involving only possession for purposes of sale."[53]

Mapp v. Ohio was not decided at the first conference. Instead, that conference began a series of exchanges between individual Justices concerning strategies to resolve the case. Private meetings of coalitions among the Supreme Court were not uncommon in the 1960 Term, according to Arnold's diary, with Frankfurter often the convener.

The most important development was Black's decision on the Fourth Amendment question. Arnold wrote: "Black in to see the Justice before lunch. He has decided to go along with overruling of *Wolf* in *Mapp*. He had just talked an hour with Clark—is convinced that the Fourth Amendment is an empty guarantee without the exclusionary rule. He told Clark he would join him if his opinion applied the Fourth Amendment to the states, as such, as a specific of the Bill of Rights. Naturally the Justice is overjoyed. We are not to speak of it to anyone else within the court for the time being, however."[54]

Brennan informed his clerks that Justice Felix Frankfurter (pictured) had taken his defeat in *Mapp* very badly in conference. According to Arnold's diary, Brennan told him: "In conference Frankfurter became violent. He shook, almost cried—it is 'a death blow for federalism.'"

Justice Clark had been assigned the majority opinion. His opinion, which he circulated to the other Justices, overruled *Wolf*, applied the exclusionary rule to the states, and made that the sole ground of reversal. As Arnold noted, Clark held "that the Fourteenth Amendment absorbs or incorporates the Fourth Amendment as such and in full." This was apparently too much for Frankfurter. When Frankfurter received the *Mapp* circulation, Arnold wrote, "he took one look and shot off down the hall in a great hurry, perhaps to see Clark."[55]

Clark received complaining letters from two Justices who would end up among those

dissenting in the case, "one from Potter Stewart (as *Wolf* was not discussed at conference, and was raised only by ACLU as amicus), one from Harlan (four pages insisting that the exclusionary rule is not a constitutional requirement even in the federal courts)."[56]

Frankfurter took his defeat in *Mapp* as a personal affront, and he looked for ways to change the result even after Clark's opinion had gained a majority. According to Arnold (as reported by Brennan, whom Arnold referred to as "the Justice" or "the boss"):

> In conference Frankfurter became violent. He shook, almost cried—it is "a death blow for federalism." He demanded reargument—which was voted down, five to four. Most of the tirade was aimed straight at the boss [Brennan], who said "I've had things said to me today that haven't been said since I was a child." Frankfurter said he would vote against the procedure of the decision—question not fully argued, counsel incompetent, no thorough survey of state law, wrong to go on a ground which divides the court when it unanimously believes the Ohio statute is unconstitutional. Frankfurter wants special counsel appointed to argue the states' case, with a team of experts to study state law. The Justice said he and Clark were the only calm ones there. Brennan told me, "Finally I got fed up and said as calmly as possible, 'I can't help thinking all this furor is directed only to the result in this case, not to the circumstances of reaching it.'" That made Felix furious.[57]

Brennan told Arnold that he had "never seen Harlan so exercised. He's going to write a bitter dissent on the affront to collegial spirit of the court." Stewart and Whittaker also were troubled about "turning *Mapp* into an unexpected vehicle for overruling *Wolf*, but that they will join the court on the merits." Arnold records that Harlan, Frankfurter, Stewart, and Whittaker had met privately before the conference to plan their attack. Brennan said, "I would have been more impressed if I hadn't known it was planned." Frankfurter and Harlan planned to file dissents after the term was over. Frankfurter said it would take him at least ten months to write his dissent.[58]

Along the way, Brennan worried that Black was "getting cold feet" and might ask for re-argument. If he did, Arnold wrote, Clark would "withdraw his whole opinion, and rewrite to hold the Ohio statute unconstitutional under the First Amendment."[59] Black thought *Mapp* would be "the most damned case of the term."[60]

Mapp became the subject of yet another conference of the Justices, the last collective discussion of *Mapp* before the end of the Term. "At conference Frankfurter said *Mapp* is the worst tragedy since *Dred Scott*. Justice Brennan says he means it. A note from the Justice in conference says *Mapp* will not come down [on Monday]. The conference was long—lasted until 2:15 p.m. *Mapp* was the subject of much argument."[61]

Justice Black resolved his dilemma over *Wolf* with an explanation in a concurring opinion. In *Wolf*, Black had characterized the exclusionary rule to be merely "a judicially created rule of evidence," not required by the Fourth Amendment. In *Mapp*, Black wrote, "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized in violation of its commands." Nevertheless, a "more thorough understanding of the problem" led him to conclude that "the Fifth Amendment's ban against compelled self-incrimination" was the true basis of the exclusionary rule.[62] To accept the Black position would have required the Court to "incorporate" the privilege against self-incrimination within the due process protections of the Fourteenth Amendment.[63] The Supreme Court would not take this step until 1964.[64]

The debate between Frankfurter and Brennan (along with Black) over incorporation was of long standing. Arnold recorded an amusing exchange between Brennan and Frankfurter toward the end of the Term: "Last night at 11 p.m., the Justice [Brennan], who had gone to sleep, got a call from Frankfurter. Frankfurter said 'Potter? Potter Stewart? Potter?' The Justice said, 'This is Bill.' Felix said, 'Oh, all right, I wanted to talk to you, too.'" Frankfurter brought up an opinion Brennan had circulated in a case involving search warrants for allegedly obscene material. Frankfurter told Brennan his opinion was "substantially all right," but Frankfurter wanted the case to go on the Fourteenth Amendment alone, with no reference to the First. "'You're throwing absorption in my face,' he said. The Justice said he had no such design, and agreed to alter the opinion."[65]

Arnold preferred the view openly expressed by Black that "incorporation" of the individual guarantees of the Bill of Rights in the Constitution against state action should be total and should result from the Privileges and Immunities Clause. As Arnold described Justice Brennan's position on incorporation of the Bill of Rights,

> He didn't go as far as Black. He wanted to incorporate only some provisions. And I never did understand how you would decide which you would incorporate and which you wouldn't. And I don't think that anybody has ever answered that question satisfactorily.[66]

The explicit overruling of a recent Supreme Court decision—*Wolf v. Colorado*, decided in 1949—was a rare step for the Warren Court. The line-up in *Mapp,* expressed in five separate opinions, represented only five votes to reverse *Wolf*, with the primary rationale for doing so receiving only a four-vote plurality (Warren, Clark, Douglas, and Brennan). Justice Black wrote that a combination of the Fifth and Fourth Amendments, rather than the Fourteenth Amendment's Due Process Clause, required states to follow the exclusionary rule.[67] Justice Stewart, in a two-sentence separate opinion, had concurred in the judgment solely on First Amendment grounds, otherwise joining Justice Harlan's dissent.[68]

The dissenters—Harlan, Frankfurter, and Whittaker—refused to apply the exclusionary rule to the states. Harlan wrote, "I think it fair to say that five members of this Court have simply 'reached out' to overrule *Wolf*. With all respect for the views of the majority, and recognizing that *stare decisis* carries different weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*."[69]

In 1983, then-retired Justice Stewart spoke about the case in his Harlan Fiske Stone lecture at Columbia Law School.[70] Stewart said, "I was shocked when Justice Clark's proposed Court opinion reached my desk. I immediately wrote him a note expressing my surprise and questioning the wisdom of overruling an important doctrine in a case in which the issue was not briefed, argued, or discussed by the state courts, by the parties' counsel, or at our conference following the oral argument." More than two decades after the decision, Stewart maintained his concern that "a first amendment controversy was transformed into perhaps the most important search-and-seizure decision in history."[71]

There are several other accounts in print of the machinations behind *Mapp v. Ohio*.[72] Arnold's version, recorded from his conversations with Justice Brennan, is largely consistent with these earlier stories. It confirms, for instance, Justice Stewart's suspicion that "the members of the soon-to-be *Mapp* majority had met in a . . . 'rump caucus' to discuss a different basis for their decision."[73] Arnold's diary adds color and detail, especially in the period after it was clear to the dissenters that *Wolf* would be overturned. Frankfurter's histrionic comparison of *Mapp* to the *Dred Scott*

decision at conference, presumably on federalism grounds, is especially informative. *Mapp* was, after all, a "major step away from Frankfurter's reading of the Due Process Clause."[74]

Other Dividing Lines in the 1960 Term

In its lasting effects, *Mapp v. Ohio* was the most significant decision of the Supreme Court's 1960 Term. But there were other momentous cases that year that Court watchers likely anticipated to be of greater moment than a case about obscenity. Some of these cases further inform the divisions on the Court that were evident in *Mapp*.

In the 1960 Term, the Supreme Court heard a number of cases related to Communist party activities—real or imaginary—and the efforts of Congress and the states to stamp out "subversion." In the cases involving the "communist menace," as McCloskey summarized, "[t]he Court, with minor exceptions, held against the individual and in favor of governmental power."[75] Many of the decisions were 5–4, with Brennan often notably in dissent.

One of the more surprising racial-rights decisions of the Term, according to contemporary observers, *Gomillion v. Lightfoot*[76] involved gerrymandered city elections in Tuskegee, Alabama, which excluded from voting all but 4 or 5 of its 400 former Negro residents. The Supreme Court held that the legislature had affirmatively acted to deny the vote on *racial* grounds, specifically forbidden by the Fifteenth Amendment.[77] *Gomillion* thus stood for the proposition that electoral apportionment is subject to challenge on the ground of racial discrimination. In the same Term, the Court had agreed to hear *Baker v. Carr*,[78] a more general challenge to apportionment schemes that left some populations within a state proportionately less represented. The *Gomillion* opinion was assigned to Felix Frankfurter.

At Warren's urging, the Court had previously presented a unanimous front on racial cases, most notably *Brown v. Board of Education* and *Cooper v. Aaron*. But one Justice was convinced that the case should turn on the Equal Protection Clause. "Charles Whittaker has circulated a short concurrence in *Tuskegee*," Arnold wrote, "in spite of the various Justices' efforts to persuade him not to last night at the Chief's black-tie dinner. The Justice said all the wives were disgusted at the conversations all being taken up with this subject."[79]

Whittaker would not be dissuaded, and his concurrence set out the path the Court would take in *Baker v. Carr*, a case that was argued, but not decided, that year. The following year, *Baker v. Carr* yielded one of Justice Brennan's most important opinions.[80] It also yielded Frankfurter's last opinion of any sort—a dissent. Warren called *Baker v. Carr* "the most vital decision" during his service on the Court.[81] *Baker v. Carr* would be politically more explosive than the Tuskegee case because it permitted federal courts to examine state apportionment on general equality principles ("one man, one vote"), not solely for overt racial manipulation of elections.

The case was originally argued that spring. Frankfurter and Stewart were primarily responsible for the decision to reargue the case in the following year. Arnold's diary records the following account:

> Frankfurter filibustered for 90 minutes before lunch, and it was all directed at Whittaker, who had been openly for appellants at the argument, more than any other Justice, and who had spoken brave words about the plain duty of courts to enforce the Constitution. Frankfurter conducted a parade of horribles, playing on Whittaker's fears. "He scared the hell out of him," the Justice said. "It worked. He certainly knows his man." Whittaker became very nervous, his lip trembled. Frankfurter started out by citing the morning's

> papers, which recount the U.S.'s horrible blunder in Cuba, caused by lack of foresight. Frankfurter said "Let's not make the same mistake here. Do you realize the terrible difficulties you would place the court in? Look ahead, not just in front of your noses. Look before you act!" He then launched into a very detailed, erudite, and effective lecture on the political question cases. His voice was grave, his arms wildly gesticulating. Harlan and Clark went solidly with Frankfurter. The Chief Justice, Black, Douglas, and the boss were firm to reverse. That left the case up to Whittaker and Potter Stewart.[82]

At the following week's conference, the Justices decided *Baker v. Carr* would be reargued, at the request of Stewart. Arnold wrote that Stewart "needs the summer to make up his mind. Whittaker says he's relieved—had grave doubts about his vote to affirm."[83]

In between the two conferences, Frankfurter had "worked on" Whittaker in particular. Arnold wrote: "Black called the Justice today—he said that Whittaker had called him over the weekend, was very troubled over the position he had taken on *Baker v. Carr* at the conference of April 21, wanted to come see Black. He did so, they had long colloquy. Whittaker left saying he was solid to reverse. Later in the week Frankfurter had a private meeting of Clark, Harlan, Potter Stewart, and Whittaker, and beat Whittaker down again."[84]

Arnold's report of the maneuvers in *Baker v. Carr* ended there. When the case was reargued the following fall, Arnold had completed his clerkship for Justice Brennan.

Racial equality in public accommodation was also largely a development for the future, not the 1960 Term. Yet Arnold observed the careful and cautious approach of the Justices to matters of race. He recorded, for instance, an anecdote from Brennan about efforts to avoid unnecessary confrontation with segregationists:

> The Justice told me last Saturday that no Supreme Court opinion on schools has ever used the word "integration"—only "desegregation." In the two *Brown* cases this was pure chance. But not so in *Aaron v. Cooper*. While the Justice was sitting on his porch one day writing the opinion in that case, his next-door neighbor, an NBC-TV news man, came over and told him that at a meeting of the full NBC news staff it had been decided not to use the word "integration" over the air because (it was thought) in the South that word connoted racial intermarriage. So the next day at conference, at the Justice's suggestion, it was decided not to use the word in the opinion.[85]

The agreement not to use the word "integration" did not survive the Term. Arnold described a visit from Black to Brennan's office in late February. The purpose was to discuss two cases involving contempt prosecutions by the House Un-American Activities Committee (HUAC). Black was "most anxious to get the Justice to join his dissents in *Braden*[86] and *Wilkinson*,[87] but the Justice wouldn't budge, although he again asked Dan and me what we thought."[88] Brennan also dissented in those cases, in which the majority narrowly affirmed the convictions, but he would not join Black's dissents, which were far more strident on the First Amendment. Black believed Braden's harassment by HUAC had to do not with alleged communist sympathies, but with the fact that Braden had promoted "racial integration" in the south. Arnold later reported: "Black's *Braden* uses the word 'integration.' The Justice said he forgot to remind Hugo Black of the court's practice of not using that word."[89]

Conclusion: William Brennan and the Coming Due-Process Revolution

When Earl Warren stepped down as Chief Justice of the Supreme Court in 1969, the Warren Court's near-complete incorporation of the Bill of Rights into the Fourteenth Amendment meant that there was no longer any significant difference between rights applicable in federal courts and rights applicable in state courts.[90] The most liberal period of the Warren Court—1962 to 1969—was a due-process revolution.[91]

In the late 1960s, as public concern with crime and violence became a feature of political debate, Richard Nixon ran for president in 1968 as a critic of the Warren Court's rulings in favor of criminal defendants, especially the Court's decision in *Miranda v. Arizona*.[92] Immediately after the *Miranda* decision, Congress enacted a statute ostensibly overruling the case to make "voluntary" statements admissible.[93] Nearly all of these later decisions from the Warren Court are still good law, however, despite later attempts to staff the Court with nominees willing to undo some or all of this legacy.

Although the Supreme Court's strides in favor of civil rights and civil liberties in the 1960 Term were small in comparison with the earlier great leap forward in *Brown v. Board of Education*, McCloskey concluded at the time that "the signs of forward movement in the field of criminal procedure . . . seem unmistakable."[94] The *Mapp* decision, he wrote, stood out "like a beacon, perhaps even portending a general erosion of the scruples about federalism that have heretofore retarded movement of this kind."[95]

As was apparent to Arnold, the composition of the Court was an important factor. The most liberal of the Warren Court's decisions on criminal procedure and racial equality occurred after Frankfurter was no longer a member of the Court.

Brennan and Arnold began a lifelong correspondence.[96] The two remained close friends until Brennan's death in 1997, at the age of ninety-one. Later in his life, Arnold rebutted the view that Justice Brennan molded the Warren Court through the force of his personality:

> Personality, no doubt, is important. Judges are human beings. They live in bodies and react on a personal level. But judges do not cast votes simply because their backs are slapped in a particularly engaging way. What Justice Brennan did, he did as a lawyer and as a judge, and his mastery of the English language, of the history of the Constitution, and of the technical aspects of the law played at least as big a part in his success at constructing majorities as the warmth of his personality and manner.[97]

By the end of the 1960–1961 Term, Brennan's weariness was apparent to his clerks. It was marked in one respect by Brennan's openness with his clerks about his fears for the Court: "The other day in the car going home the Justice said sadly the court is deteriorating to the point where Justices, especially Black, Frankfurter, and Harlan, are more concerned with maintaining the integrity of their own constitutional positions than with getting a decision in particular cases."[98]

Arnold observed how Brennan coped with the relentless parade of controversies to be decided. In his later years as a judge on the Eighth Circuit, Arnold learned to appreciate what Brennan and the other Justices faced:

> Justice Brennan would come back from a conference with his notebook and sit down with us and go over the cases they had discussed, and tell us what the Court was going to do. Except on days when he was too tired, and on those days, he'd just give us the notebook. I never did understand why it would make somebody so tired to sit in a room and talk about the law

> for a couple of hours, until I did it myself with a bunch of other judges. And now I understand it.[99]

The perspective portrayed in Arnold's diary reveals the evolution of Justice William Brennan to become, as Morton Horwitz wrote, "the most important intellectual influence on the Warren Court."[100] But relationships among the Justices were also significant drivers for the outcome in *Mapp v. Ohio*. The Justices were passionate. Arnold's recount of the decision in *Mapp* is instructive for the level of disagreement and temper it reveals. This episode enhances our understanding of the division-creating federalism issues in the early stages of the Warren Court's due-process revolution.

ENDNOTES

[1] Some of the diary entries included here previously appeared in Polly J. Price, **Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench** (Prometheus Books, 2009).

[2] Richard S. Arnold, Personal Diary (June 5, 1961) (Arnold Papers, archival designation pending).

[3] Yale Kamisar, "*Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure 'Revolution,'" in C.S. Steiker, ed., **Criminal Procedure Stories** 46 (2006).

[4] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[5] Adam Liptak, "U.S. Stands Alone in Rejecting All Evidence When Police Err," *N.Y. Times*, July 19, 2008, A1.

[6] *Herring v. United States*, 129 S.Ct. 695 (2009). Morgan Cloud has written extensively both about the original underpinnings of *Mapp* and contemporary debate about the exclusionary rule. *See* Morgan Cloud, "Rights without Remedies: The Court That Cried 'Wolf,'" 77 *Miss. L. J.* 467 (2007); Morgan Cloud, "A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment," 3 *Ohio St. J. Crim. L.* 33 (2005); Morgan Cloud, "Judicial Review and the Exclusionary Rule," 26 *Pepp. L. Rev.* 835 (1999).

[7] Interview with Daniel A. Rezneck, Senior Counsel, Office of the Att'y Gen. of D.C. (Dec. 12, 2005).

[8] William D. Rogers, "Clerks' Work Is 'Not Decisive of Ultimate Result,'" *U.S. News & World Report*, Feb. 21, 1958, at 114.

[9] William H. Rehnquist, "Who Writes Decisions of the Supreme Court?", *U.S. News & World Report*, Dec. 13, 1957, at 74. In this article, Rehnquist charged that the Court was staffed with an overabundance of liberal, left-wing law graduates. *Id.*

[10] *See, e.g.*, David J. Garrow, **Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade*** 184–85 (1994) (relating an anecdote from the 1960 Term Arnold diary, provided by Richard Arnold).

[11] *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

[12] John D. French, "Remembering Richard," 58 *Ark. L. Rev.* 505, 506 (2005).

[13] *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy v. Ferguson* was a landmark decision upholding the doctrine of "separate but equal" in public accommodations, later repudiated in *Brown v. Board of Education*, 349 U.S. 294 (1954).

[14] Personal Diary of Richard S. Arnold (Nov. 22, 1960).

[15] Roger K. Newman, **Hugo Black: A Biography** 502 (2d ed. 1997) (quoting letter from Hugo L. Black, former Associate Justice, U.S. Supreme Court, to John McNulty (Oct. 10, 1960)).

[16] Personal Diary of Richard S. Arnold (Nov. 22, 1960).

[17] Robert O'Neil, "Clerking for Justice Brennan," 1991 *J. Sup. Ct. Hist.* 2, 3 (1991) (describing view of Harvard faculty at the time).

[18] Personal Diary of Richard S. Arnold (Nov. 22, 1960).

[19] Personal Diary of Richard S. Arnold (Apr. 11, 1961).

[20] Richard S. Arnold, "A Remembrance: Mr. Justice Brennan," 1991 *J. Sup. Ct. Hist.* 5, 7 (1991).

[21] Personal Diary of Richard S. Arnold (Mar. 14, 1961).

[22] *Shelley v. Kraemer*, 334 U.S. 1 (1948). *Shelley v. Kraemer*, a case from Missouri, was argued by Thurgood Marshall. The Supreme Court held that restrictive covenants excluding sales of property on the basis of race could not be enforced by states as a violation of the Fourteenth Amendment. *Id.* at 21–22.

[23] Personal Diary of Richard S. Arnold (May 16, 1961).

[24] *Id.* at Apr. 1, 1961.

[25] Justice Brennan would serve on the Court for a total of thirty-four years.

[26] Interview with Daniel A. Rezneck, *supra* note 7.

[27] Letter from William Brennan, former Associate Justice, United States Supreme Court, to Richard S. Arnold (Dec. 14, 1959) (Brennan Papers, on file with the Library of Congress).

[28] Letter from Richard S. Arnold to William Brennan (Dec. 17, 1959).

[29] Arnold, "A Remembrance," *supra* note 19, at 6.

[30] Arnold's diary for Saturday, October 15, 1960, notes that Arnold had lunch with Chief Justice Warren's law clerks. Arnold "told them the news of what went on at the conference. Apparently the Chief tells them very little about what happens." *Id.* at Oct. 15, 1960.

[31] "Supreme Court, 1960 Term," 75 *Harv. L. Rev.* 83, 85 (1961).

[32] Personal Diary of Richard S. Arnold (Oct. 13, 1960).

[33] *Cooper v. Aaron*, 358 U.S. 1 (1958).

[34] *Id.* at 19–20.

[35] Richard Arnold wrote about this episode in a tribute to Justice Brennan: "It is well known that Justice Brennan wrote the Court's opinion in *Cooper v. Aaron*, or most of it, at any rate. (The Justice told me that Justice Black wrote the opening paragraph, and that Justice Harlan inserted into the last paragraph the statement that the three new Justices who had come to the Court since the first opinion in *Brown v. Board of Education*, Justices Harlan, Brennan, and Whittaker, were fully persuaded of the correctness of the opinion.)" Richard S. Arnold, "In Memoriam: William J. Brennan, Jr.," 111 *Harv. L. Rev.* 6–7 (1997).

[36] Letter from Richard S. Arnold to Bennett Boskey (Arnold Papers, archival designation pending).

[37] "Supreme Court, 1960 Term," *supra* note 30, at 92.

[38] Personal Diary of Richard S. Arnold (Oct. 19, 1960).

[39] *Compare* Alexander M. Bickel, "The Supreme Court, 1960 Term, Foreword: The Passive Virtues," 75 *Harv. L. Rev.* 40, 40 (1960), *with* Robert G. McCloskey, "Deeds without Doctrines: Civil Rights in the 1960 Term of the Supreme Court," 56 *Am. Pol. Sci. Rev.* 71, 71–89 (1962).

[40] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[41] McCloskey, *supra* note 38, at 81.

[42] Personal Diary of Richard S. Arnold (Oct. 18, 1960).

[43] *Id.* at Mar. 30, 1961.

[44] *Roth v. United States*, 354 U.S. 476 (1957).

[45] *Roth*, 354 U.S. at 484.

[46] *Roth*, 354 U.S. at 485.

[47] *Roth*, 354 U.S. at 489 (citations omitted).

[48] Justice Brennan would later abandon this view of obscenity under the First Amendment. By the time the Supreme Court abandoned the *Roth* test in *Miller v. California*, 413 U.S. 15 (1973), Brennan argued all obscenity was constitutionally protected unless it involved minors or was distributed to minors or unwilling third parties.

[49] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[50] Thomas Y. Davies, *Mapp v. Ohio*, in **Oxford Companion to the United States Supreme Court** 520 (Kermit L. Hall et al. eds., 1992).

[51] Personal Diary of Richard S. Arnold (Mar. 29, 1961).

[52] *Id.* at Mar. 31, 1961.

[53] *Id.*

[54] *Id.* at Apr. 12, 1961.

[55] *Id.* at Apr. 28, 1961.

[56] *Id.* at May 2, 1961.

[57] *Id.* at May 5, 1961.

[58] *Id.*

[59] *Id.* at June 8, 1961.

[60] *Id.* at June 5, 1961.

[61] *Id.* at June 9, 1961.

[62] *Mapp v. Ohio*, 367 U.S. 643, 661, 665 (1961).

[63] Francis A. Allen, "Federalism and the Fourth Amendment: A Requiem for *Wolf*," 1961 *Sup. Ct. Rev.* 25 (Phillip B. Kurland ed., 1961).

[64] *Malloy v. Hogan*, 378 U.S. 1 (1964).

[65] Personal Diary of Richard S. Arnold (June 1, 1961). The case Frankfurter referred to was *Marcus v. Search Warrants of Property, Kansas City, Missouri*, 367 U.S. 717 (1961). That case presented a challenge to Missouri's procedures authorizing the search for and seizure of allegedly obscene publications. Brennan's opinion held that the search procedure lacked adequate safeguards required by due process under the Fourteenth Amendment, and it avoided a discussion of the First Amendment, as Frankfurter had suggested. *Id.*

[66] Interview with Richard S. Arnold, Little Rock, Ark., July 1, 2004.

[67] *Mapp*, 367 U.S. at 661–62 (Black, J., concurring).

[68] Justice Stewart's concurrence states: "Agreeing fully with Part I of Mr. Justice Harlan's dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of §2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.'" *Mapp*, 367 U.S. at 666–67 (Stewart, J. concurring).

[69] *Mapp,* 367 U.S. at 674–75 (Harlan, J., dissenting).

[70] Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases," 83 *Colum. L. Rev* 1365 (1983).

[71] *Id.* at 1368.

[72] *See, e.g.,* Carolyn N. Long, ***Mapp v. Ohio*: Guarding Against Unreasonable Searches and Seizures** 81–85 (2006); Roger K. Newman, **Hugo Black: A Biography** 555–57 (2d ed. 1997); Yale Kamisar, "*Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure 'Revolution,'" in C. S. Steiker, ed., **Criminal Procedure Stories** 45–99 (2006); Dennis D. Dorin, "Marshalling *Mapp*: Justice Tom Clark's Role in *Mapp v. Ohio*'s Extension of the Exclusionary Rule to State Searches and Seizures," 52 *Case W. Res. L. Rev.* 401 (2001).

[73] Stewart, *supra* note 69, at 1368.

[74] Morton J. Horwitz, **The Warren Court and the Pursuit of Justice** 93 (1998).

[75] McCloskey, *supra* note 38, at 86.

[76] *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[77] McCloskey, *supra* note 38, at 84.

[78] *Baker v. Carr*, 364 U.S. 898 (1960), prob. juris. noted.

[79] Personal Diary of Richard S. Arnold (Nov. 3, 1960).

[80] *Baker v. Carr*, 369 U.S. 186 (1962).

[81] Jack W. Peltason, "*Baker v. Carr*," in **Oxford Companion to the United States Supreme Court**, *supra* note 49, at 57.

[82]Personal Diary of Richard S. Arnold (Apr. 21, 1961).
[83]*Id.* at Apr. 28, 1961.
[84]*Id.* at May 1, 1961.
[85]*Id.* at Nov. 22, 1960.
[86]*Braden v. United States*, 365 U.S. 431 (1961).
[87]*Wilkinson v. United States*, 365 U.S. 399 (1961).
[88]Personal Diary of Richard S. Arnold (Feb. 27, 1961).
[89]*Id.*
[90]D. Grier Stephenson, Jr., "Book Review," 33 *J. Sup. Ct. Hist.* 212 (2008) (reviewing Jim Newton, **Justice for All: Earl Warren and the Nation He Made** (2007)).
[91]*Id.*
[92]Jim Chen, "Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice under the Law," 59 *Wash. & Lee L. Rev.* 1203, 1249 (2002); Jack Harrison Pollack, **Earl Warren: The Judge Who Changed America** 269 (1979).
[93]18 U.S.C. §3501 (1968). In 2000, the U.S. Supreme Court ruled that *Miranda*, not this statute, governs statements made during custodial interrogations in both state and federal courts. *Dickerson v. United States*, 530 U.S. 428 (2000).
[94]McCloskey, *supra* note 38, at 86.
[95]*Id.*
[96]*See* correspondence file, "Richard S. Arnold," in Brennan Papers, Library of Congress, Washington, D.C.
[97]Arnold, "In Memoriam," *supra* note 34, at 9.
[98]Personal Diary of Richard S. Arnold (June 10, 1962).
[99]Interview with Richard S. Arnold (July 1, 2004).
[100]Horwitz, *supra* note 73, at 8.