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

3/5/52

Dear Chief-

My labor board case to which you referred at lunch yesterday - in connection with the decree - is Labor Bd v Crompton Mills, 337 U.S. 217 - esp p 226

HLB

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

12/29/52

Dear Chief

The Moon Gold has reached me. It is appreciated and is in good hands. I am writing a note to Rev. Floyd Poltry.

With best wishes for a swell '53

Hugo

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

CHAMBERS OF
JUSTICE HAROLD H. BURTON

May 22, 1952

Dear Chief:

This is just a memorandum about the Bowdoin College trip as it is now planned. I have talked to President Sills about it and also have written him in confirmation of the arrangements. The travel reservations have been made for Roberta and you by John W. Frost ("Jack" Frost), an attorney-at-law, at 40 Wall Street, New York City, who is the President of the Board of Overseers of the College. The Board of Overseers is the so-called "Lower House" of the bi-cameral system which governs the College. The "Upper House" is called the Trustees.

Jack's arrangements for your transportation from Washington to Portland, Maine, and return, all in Eastern Standard time, are as follows, although Brunswick and Washington operate one hour later on Daylight Saving Time:

On American Airlines - Flight 374 - Washington to Boston, leaving Washington . . . . . 10:45 a.m. EST June 6 (arriving Boston 1:18 p.m.).

On Northeast Airlines - Boston to Portland, leaving Boston . . . . . 2:20 p.m. EST June 6 (arriving Portland 3:03 p.m.).

On Northeast Airlines - Portland to Boston - Flight 815 - leaving Portland . . . . . 4:30 p.m. EST June 7 (arriving Boston 5:13 p.m.).

On American Airlines - Boston to Washington, leaving Boston . . . . . 6:15 p.m. EST June 7 (arriving Washington 9:04 p.m.).

Jack will arrange for one of the Bowdoin lawyers in Portland, Maine, to meet you at the Portland Airport and drive you to Brunswick, which is 27 miles north of Portland, on Friday afternoon, June 6. Jack also said that if, as sometimes happens, the fog along the Maine Coast prevents the flight from Boston to Portland, he will arrange for you to be met at the Boston Airport and to be driven from Boston to Brunswick.

He has said nothing about definite arrangements for the return trip from Brunswick to the Portland Airport on June 7 but, of

– ° –

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

CHAMBERS OF
JUSTICE HAROLD H. BURTON

May 23, 1952

Dear Chief:

Some weeks ago I agreed to welcome and speak briefly, for the Court, in the East Conference Room at 10:30 a.m., Saturday, May 24, to visitors from a Pediatricians' Convention. It now appears that they are coming in two sections and I will not be able to reach our conference until about 11:15 or 11:20 a.m.

I will send in my votes for use until I am able to be present and regret this unexpected conflict.

H.H.B.

The Chief Justice

7/24/52

Dear Chief -

Selma and I are leaving by automobile tomorrow morning on this itinerary - (with a few "whistlestops" en route) - We had a good visit with the 10th Circuit in Denver. With best wishes to Roberta & you. As Selma & me.

Itinerary of Justice and Mrs. Harold H. Burton

August 1 - 31, 1952

August 1 - 14	Peckett's on Sugar Hill, Franconia, N.H.
15	Leave Sugar Hill by auto
	Arrive Chateau Frontenac, Quebec, Canada
17 (7 a.m.) . .	Leave Quebec on S.S. St. Lawrence (via Saguenay River)
18 (1:10 p.m.) .	Arrive The Manoir Richelieu, Murray Bay, Province of Quebec, Canada
21 (1:10 p.m.) .	Leave Murray Bay on S.S. St. Lawrence
(6 p.m.) . .	Arrive Chateau Frontenac, Quebec, Canada
22	Leave Quebec by auto
	Arrive The Windsor Hotel, Montreal 2, Province of Quebec, Canada
24	Leave Montreal by auto
	Arrive The Chantecler, Ste. Adele en Haut, Province of Quebec, Canada
30	Leave Ste. Adele en Haut by auto
	Arrive The General Brock Hotel, Niagara Falls, Ontario, Canada
31	Leave Niagara Falls by auto
	Arrive Cleveland Hotel, Cleveland, Ohio
September 2	Leave Cleveland by auto
	Arrive Dodge Hotel, Washington 1, D.C.

noted
CJ July 28


Manoir Richelieu - Murray Bay
F-1706-1

POST CARD

CORRESPONDENCE

Murray Bay, P.Q.
Canada.
August 18, 1952

Dear Chief -

This is a glimpse of cool Canada on the St. Lawrence where we are stopping for three days. We have just completed a delightful overnight boat trip on the Saguenay River, North of here.

Best wishes to Roberta & you from
Selma & Harold.

—THIS IS A REAL PHOTOGRAPH—

Published by Associated Screen News Limited
Montreal

ADDRESS

Chief Justice Fred M. Vinson,
Supreme Court of the U.S.,
Washington 13,
D.C.
U.S.A.

To the Chief Justice
with personal regards from
Harold H. Burton
Nov. 12, 1952

THE STORY OF THE PLACE

Where First and A Streets Formerly Met at What Is Now the Site of the Supreme Court Building

By Harold H. Burton

ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES

in cooperation with

Thomas E. Waggaman

MARSHAL OF THE SUPREME COURT
OF THE UNITED STATES

Washington, D. C., May 1952

THE STORY OF THE PLACE

Where First and A Streets Formerly Met at What Is Now the Site of the Supreme Court Building

Places, like people, have personalities. They also have careers. The site of the Supreme Court Building in Washington is as rich in historical interest as it is now radiant in architectural symmetry. Its colorful career falls into nine contrasting periods.

I. *Before 1790 came centuries of serenity*

Let us begin with Capitol Hill as it was in 1550 and as it had been for centuries before that. No human being other than an occasional Indian had seen "The Hill," much less visited its crest at sundown and from there watched the sun set across the still waters and the blue ridge to the west. The hilltop was covered with oak trees. The marshy land below it was filled with sycamores, silver poplars and alders. From the north, a nameless brook wound its way through the woods and westerly to the river. To the south another brook bubbled from a spring. The tourists of that day were the deer, the bears, the raccoons and the wild turkeys. The permanent residents were the grey squirrels—predecessors of those that today enjoy their prescriptive rights to the hollow tree trunks on the Capitol Plaza. "The Hill" of that day was known only to the animals, to the Indians and to God. It was a quiet place that lent itself to inspiration.

By 1650 a trail had been blazed from the settlements in the north to the Indian Village near the falls of the Potomac. Captain John Smith and others, paddling up from the south, had reached those falls by canoe. Lord Baltimore had claimed the area under a proprietary grant from Charles I of England. It was all in a province named Maryland, in honor of Queen Henrietta Maria.

In another hundred years commerce had begun to flow from the trading center at Bladensburg to Georgetown and thence to Alexandria. Title to the land was vested

in private ownership. Some of the properties were known as manors. They produced tobacco and corn. Before 1790 the manor which included "The Hill" had been inherited by Daniel Carroll of Duddington. It extended approximately from what today is L Street on the north of the Capitol to N Street on the south, between Third Street on the west, and Third Street on the east.[1] The brook that flowed from the north across the foot of the hill had been named Goose Creek. Later it was to be renamed Tiber Creek and flow into the canal where now we see Constitution Avenue. The brook that bubbled down to the Anacostia River had been named St. James Creek. Later it was destined to be the St. James Canal. "The Hill" was in the very center of this Carroll property. It was known as Jenkins Hill and no one dreamed that it might become a point of interest to the world.

II. *1790–1815 brought the District of Columbia to "The Hill"*

Late in 1788 the new Constitution for the United States of America gave the world a new guaranty of freedom. In it was Article I, § 8, pregnant with destiny for "The Hill." That clause gave Congress power to "exercise exclusive Legislation . . . over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ."

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[1] Within that area, the Duddington mansion house was completed in about 1797. For more than a century it was to stand between First and Second Streets, S. E., near E Street. The neighborhood became known as Carroll Springs. Its location is roughly indicated now by that of Carroll Street, which extends one block, from First to Second Street, S. E., between Streets C and D. The house at the southeast corner of First and C Streets is still marked Duddington Place. A later development was that of the Carroll Row Houses, on the site of the Congressional Library. Their presence is not now commemorated unless it be in the name of the Carroll Arms Hotel on First Street, N. E., several blocks to the north. At the south end of the Carroll property and reaching to the Anacostia River, there was developed a sparsely settled area called Carrollsburg. Its name survives at Carrollsburg Place, which extends from M Street to N Street, S. W., in the block just west of South Capitol Street.

In 1790, such a District, ten miles square, centered around "The Hill," was recommended by President Washington and his adviser, Major Charles Pierre L'Enfant, as the seat of that new Government. Promptly Maryland, Virginia and the Congress concurred. The hand of history wrote fast. In 1791 a cornerstone of the District was laid in what is now Alexandria, Virginia. The diagonal axis of the square extending due north located about one-third of the District west of the Potomac in Virginia and two-thirds of it east of the Potomac in Maryland. The President named three Commissioners for its government. They were David Stuart of Virginia, Daniel Carroll of Maryland and Thomas Johnson, also of Maryland. Carroll had been a member of the Constitutional Convention of 1787. He was not, however, the Daniel Carroll of Duddington who owned Jenkins Hill. Thomas Johnson had been a member of the Continental Congress and the first Governor of Maryland. Later he was to sit as an Associate Justice on the Supreme Court of the United States.

In 1791 they named this District of Destiny the "Territory of Columbia" and that part of the District which lay west of the Potomac soon was ceded back to Virginia. The remaining two-thirds is the "District of Columbia" as we know it today. The Commissioners required a small area within the District to be laid out in streets and squares. They named that area the "City of Washington." Its streets, running due east and west, were to be lettered alphabetically, in two series, to the north and south from the Capitol Grounds. Similarly, those running due north and south were to be numbered consecutively, in two series, to the east and west from the same point. Major L'Enfant located the site for the Nation's Capitol on Jenkins Hill. On the same map he located First Street, N. E. Likewise he identified, as Square No. 728, the area on First Street extending north from East Capitol Street to A Street. The adjoining triangular plot extending to the north, from A Street to Maryland Avenue, he numbered 727.[2] This land was soon to be appraised at six cents per front foot.

[2] "A" Street then opened directly into First Street. Its north side followed the line now marked by the north wall of the north wing

promptly raised, by private subscription, $25,000. This proved to be enough to buy this corner and to build there a temporary Capitol.[3]

July 4, 1815, its cornerstone was laid. The structure rose to three stories. The Senate Chamber was on the ground floor. The Hall of the House of Representatives was on the floor above. Congress approved the building and occupied it, paying for its use $1,650 a year which represented six per cent on the investment, plus $150 for insurance. Congress paid $5,000 more for furnishings, including the later famous red leather chairs for the Senators. December 4, 1815, the Fourteenth Congress met briefly at Blodgett's Hotel but, by December 13, both Houses of Congress were in the new "Brick Capitol." Vice President Elbridge Gerry of Massachusetts having passed away, the presiding officer of the Senate was its President Pro Tempore, Senator John Gaillard of South Carolina. The Speaker of the House was Henry Clay of Kentucky. The Fifteenth Congress, throughout its life, also met in the Brick Capitol, adjourning *sine die* March 3, 1819. The presiding officer of the Senate for that session was Vice President Daniel D. Tompkins of New York. The Speaker of the House again was Henry Clay of Kentucky.[4]

In December, 1819, the Sixteenth Congress convened in the newly rebuilt and permanent Capitol Building on

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[3] The largest subscriber was Daniel Carroll of Duddington. The next largest was Thomas Law. Like Carroll, he was a substantial property owner. He also was a brother of Lord Ellenborough, Lord Chief Justice of the King's Bench of England. I Bryan, A History of the National Capital (1914); Busey, Pictures of The City of Washington in the Past (1898), 129.

[4] In the Brick Capitol during these two Congresses were heard many leaders of their day. Among these were Senator Rufus King, of New York, later an unsuccessful candidate for President of the United States; Representative Philip P. Barbour, of Virginia, later a Justice of the Supreme Court; John C. Calhoun, of South Carolina, later Vice President of the United States; William Henry Harrison, of Ohio, later President of the United States; John McLean, of Ohio, later a Justice of the Supreme Court; John Randolph, of Virginia, later a Senator from that State; John Tyler, of Virginia, later President of the United States; and Daniel Webster, then representing New Hampshire but later to become Secretary of State and a Senator from Massachusetts.

the crest of "The Hill." Its reconstruction had been made possible by a $500,000 loan to the Government from the Washington banks. The Supreme Court preceded Congress in its return to the permanent Capitol. There the Court met in the semi-circular room on the ground floor under the Senate Chamber.

The most unique incident that had occurred in the Brick Capitol, while Congress occupied it, was connected with the inauguration of President Monroe and Vice President Tompkins, March 4, 1817. The advance arrangements for the ceremony conformed largely to previous custom, except that, instead of holding the ceremony in the small Senate Chamber, the plan was to move the red leather Senate chairs into the Hall of the House of Representatives. However, the Speaker of the House had not been consulted and, when confronted with the plan, Henry Clay objected, particularly to the presence of the Senate chairs in the House of Representatives. The arrangements were quickly changed. Vice President Tompkins was inducted into office in the Senate Chamber and there made his response, but President-elect Monroe was taken out-of-doors to a temporary portico which had been erected on First Street, directly in front of the building. There in the presence of the general public, the oath of office was administered to him by Chief Justice Marshall. There the President delivered his inaugural address and thus set the precedent for public inaugurals.[5]

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[5] An echo of this was heard in the Senate 20 years later, preceding the inauguration of President Van Buren. Clay was then a Senator and inquired why it was that the Senate, rather than the House of Representatives, had "the exclusive care" of administering the Presidential oath. He recalled the incident at the Old Brick Capitol, in 1817, and furnished what is probably our most authentic account of it. His colloquy of February 28, 1837, is reported in Vol. 13, Pt. 1, of Gales and Seaton's Register of Debates in Congress, 24th Cong., 2d Sess. at 992, as follows:

> "THE PRESIDENT *pro. tem.* presented a letter from the President elect of the United States, informing the Senate that he would be ready to take the usual oath of office on Saturday, March 4, at 12 o'clock, noon, at such place and in such manner as the Senate might designate.
>
> "Mr. GRUNDY [of Tennessee] offered a resolution for the appointment of a committee of arrangements, to make the

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

CHAMBERS OF
JUSTICE HAROLD H. BURTON

November 10, 1952

Dear Chief:

Attached is the material which Marshal Waggaman and I compiled last spring as to the history of the Supreme Court Building site.

You will recall that you then instructed us to gather material so that I might respond appropriately, on May 2, 1952, at a public ceremony at which the Columbia Historical Society and the Bar Association of the District of Columbia proposed to present the Court with a bronze plaque commemorating the history of our site — with special reference to the "Old Brick Capitol" formerly located here. When Mr. Regis Noel died, that project was abandoned by the societies named.

I understand that the plaque is now to be presented to the Court by the Washington Sesquicentennial Commission without ceremony. Therefore, in accordance with our discussion of the matter, I have put this historical material into the form of the attached article. It is intended for our records and for whomever it may interest. A copy will be sent to H.P. Caemmerer, Secretary of the Commission of Fine Arts, who is familiar with the plan for the new plaque and who also is a member of the Columbia Historical Society. It is his thought that the Society may wish to print it in their next volume of historical essays.

I am sending a copy of this letter and its enclosure to each of the brethren, former Marshal Waggaman, the Clerk, the Marshal, the Reporter of Decisions, the Librarian, the Captain of the Supreme Court Building's Guards, the Director of the Administrative Office of the United States Courts and our Director of Press Relations. The article has been printed by our printing office so that additional copies may be obtained from my secretary by anyone interested.

H.H.B.

The Chief Justice

IV. *1819–1824 brought the Circuit Court for the District of Columbia*

When Congress returned to the permanent Capitol, it crowded out the Circuit Court for the District of Columbia. That court, in turn, was allotted space vacated in the Brick Capitol. There it met from 1819 to 1824. Pressure from the local bar induced it to move downtown to Judiciary Square where it occupied space in the new City Hall at the head of what is now John Marshall Place.

V. *From about 1824 to 1861 the site was used for a lodging house, including an occupancy by John C. Calhoun—1849–1850*

Some time after the Old Brick Capitol ceased to be used by the Circuit Court, it was converted into a lodging house. In 1841 we find H. V. Hill advertising furnished

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requisite preparations for administering the oath to the President elect of the United States.

"Mr. CLAY [of Kentucky] said he would like to inquire whether precedents had been examined on this subject. He was aware that the Senate had always had a peculiar agency in this business; but he was not aware why the Senate should act upon it any more than the House, or why it was not a joint concern. He remembered that, on the first election of Mr. Monroe, the committee of the Senate applied to him, as Speaker of the House, for the use of the chamber of the House; and he had told them that he would put the chamber in order for the use of the Senate, but the control of it he did not feel authorized to surrender. They wished also to bring in the fine red chairs of the Senate, but he told them it could not be done; the plain democratic chairs of the House were more becoming. The consequence was, that Mr. Monroe, instead of taking the oath within doors, took it outside, in the open air, in front of the Capitol. Mr. C. mentioned this for the purpose of making the inquiry, what was the practice, and on what it was founded, and why the Senate had the exclusive care of administering the oath.

"Mr. GRUNDY said the committee had found no authority but several precedents, which were in strict accordance with the proposition now proposed to be made. He did not recollect any instance in which the House had participated in it; and, in fact, the House, as such, had no existence, their term having expired on the preceding day. The committee had examined three cases of more modern date, and had found nothing in opposition to the practice proposed. If the committee could not get into the House, they could go out of doors.

"The resolution was adopted, and the Chair was authorized to appoint the above-named committee of three members."

rooms for rent. Several members of Congress lived there.[6] It housed two clubs for young men. Its most prominent tenant was Senator John C. Calhoun from South Carolina. Formerly Secretary of War, Secretary of State and twice Vice President, he was completing 40 years of public service. There Senator Calhoun lived, largely alone, from 1849 until his death at the age of 68, on Sunday, March 31, 1850. It was there that his political opponent, but personal friend, Senator Daniel Webster of Massachusetts, came to cheer him during his final days.

VI. *From 1861 to 1868 the site was occupied by the Capitol Prison*

After an interval, during part of which the building was used as a public school, the site at First and A Streets, N. E., passed into the sixth period of its career. In the spring of 1861, the Old Brick Capitol was converted into a Federal Military Prison. It was known as the Capitol Prison. A high wall was built around the prison yard on the east. The prison was used for "state prisoners" rather than for violators of military discipline. During its first four months only 15 prisoners were sent there. Soon, however, arrests became so numerous that two houses in the adjoining block to the south were used to house the overflow. At one time, 1,004 prisoners are said to have been crowded in. Among its notorious inmates were the Confederate spies, Rose Greenhow and Belle Boyd. Captain Henry Wirz, former Commandant of the Andersonville Confederate Military Prison, was another. He was hanged in the prison yard November 10, 1865, and at least three others are said to have been executed there.

VII. *From about 1867 to 1921 the site again became residential. It included the residence of Justice Field from 1869 to 1899*

In May, 1867, the Old Brick Capitol property and its grounds were sold for $20,000 to George T. Brown, Ser-

[6] Representatives William H. Brockenborough of Florida, Reuben Chapman of Alabama, Joseph A. Woodward of South Carolina, and Isaac E. Morse of Louisiana are among those reported to have lived there in the 1840's.

geant-at-Arms of the Senate. With financial aid from Senator Lyman Trumbull of Illinois, he remodeled and converted the building into three large row houses. They were four stories high and faced First Street on the southeast corner of the A Street intersection. Known as Trumbull Row, numbers 21, 23 and 25, they provided convenient and desirable living quarters.

The most famous occupant of these houses was Justice Stephen J. Field of the Supreme Court of the United States. Appointed to that Court in 1863, he spent much time on the Pacific Coast in performance of his duties as a Circuit Justice. However, in 1870 or 1871, he established his residence in Trumbull Row. He occupied the house at the southerly end of the row which had been acquired by one or more of his brothers, Cyrus, David Dudley and Henry.[7] He built an addition to it and provided a large reception room on the first floor. His library of 3,000 volumes was on the second floor. There he followed a tireless schedule that began at seven o'clock each morning. At the age of 82 he died there on Sunday, April 9, 1899. This was nearly two years after he had submitted his resignation from the Court to take effect December 1, 1897, closing the longest term of office ever served on that Court—34 years, 8 months and 20 days.[8]

VIII. *From 1921 to 1928 the site was the headquarters of the National Woman's Party*

Mrs. Alva Belmont (Mrs. Oliver Hazard Perry Belmont), having acquired the Old Brick Capitol property, presented it to the National Woman's Party as a permanent headquarters for their crusade for equal rights for women. Known as No. 21 First Street, N. E., it was cherished by that organization not only as a headquarters

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[7] Cyrus W. Field was the projector of the first Atlantic Cable. David Dudley Field was the author of the Code of Civil Procedure adopted by New York and followed by many western states. For many years the four brothers met annually with Justice Field at this house to celebrate the birthday of David Dudley Field on February 13.

[8] There also once stood in this block an historic home on East Capitol Street occupied by Captain William Easby, a veteran of the Battle of Bladensburg in 1814. It was built in 1750 by Daniel Carroll and came into the ownership of the Easby family in about 1824.

but as an historical shrine. They embellished the grounds with a garden. When, in 1928, this site was selected for the Supreme Court Building, the National Woman's Party opposed the selection because it meant the removal of their historic building. The Senate adopted a resolution favoring the retention of their building and the abandonment of the proposal to build the Supreme Court Building there. However, Case No. 1911 in the Supreme Court of the District of Columbia resulted in the condemnation of the property and an award to the National Woman's Party of substantially $300,000 as just compensation for the taking of it.[9] The Party thereupon moved to its present headquarters in the historic mansion on the northwest corner of Constitution Avenue (old B Street) and Second Street, N. E.

IX. *Since 1928 the site has been set aside for the Supreme Court of the United States*

Completed in 1935 the Supreme Court Building, designed by Cass Gilbert, Sr., Cass Gilbert, Jr., and John R. Rockart, stands where First and A Streets formerly met. The site is now known as Number One First Street, N. E. The Supreme Court Building provides a fitting climax. Magnificent in design, its central element reflects the proportions of the Parthenon of Athens. Significant as a symbol of the independence of the judiciary, it honors an historic spot. Inspirational in its message of "Equal Justice Under Law," it expresses in fitting form the Faith of our Fathers.

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[9] The parcel acquired from the National Woman's Party was the largest one in the site. The condemnation awards for the entire site came to $1,768,141.

Principal References

Washington—A Not Too Serious History—by George Rothwell Brown (1930).

Pictures of the City of Washington in the Past—by Samuel C. Busey (1898).

The National Capital—Its Architecture, Art and History—by George C. Hazelton, Jr. (1902).

A History of the National Capital—by W. B. Bryan, Vols. I and II (1914).

John C. Calhoun—by Margaret L. Coit (1950).

Stephen J. Field, Craftsman of the Law—by Carl B. Swisher (1930).

Proctor's Washington—by John Clagett Proctor (1949).

Captains and Mariners of Early Maryland—by Raphael Semmes (1937).

Equal Rights, Vol. XIV, pp. 153, 157, 163, 231, 371 (1928).

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

In Civil War days, John Hitz, the first Swiss Consul-General to the United States, and great grandfather of Justice Harold Hitz Burton, maintained his home and his consulate at 29 A Street, S. E., within what is now the Capitol Plaza, opposite the Congressional Library. At his death in 1864 President Lincoln and Secretary of State Seward attended his funeral services at that residence.

To The Chief Justice - with personal regards.
This is the official version as now published
in the American Bar Journal.
Harold H. Burton

[Published in 38 American Bar Association Journal 991 (Dec. 1952)]

THE DARTMOUTH COLLEGE CASE

A Dramatization

by

Harold H. Burton

ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES

for the

Judicial Conferences of the Third and Tenth
Judicial Circuits of the United States

July 9, 1952, at Atlantic City, N. J.

and

July 18, 1952, at Denver, Col.

The legal significance of the Dartmouth College case[1] has been amply analyzed elsewhere. This statement presents its dramatic quality. Although staged as a three-act play its essential action is authentic. The principal characters are John Wheelock, one-time president of Dartmouth College and Dartmouth University, Daniel Webster, of counsel for the trustees of the College, and John Marshall, Chief Justice of the Supreme Court of the United States. The action takes place in New Hampshire and Washington, D. C., between 1800 and 1820.

Prologue

In 1800, in the office of President Wheelock of Dartmouth College, at Hanover, N. H. President Wheelock is talking with Daniel Webster, an 18-year-old student.

Daniel voices his appreciation of the intellectual world the College has opened to him. He explains how his pioneering father, Captain Ebenezer Webster, had sacrificed the family's interests to send him to Dartmouth and how Daniel plans to help his brother follow him.

Dr. Wheelock tells how his father, Reverend Eleazar Wheelock, about 45 years ago, had established, at his own

[1] *The Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518.

expense, and on his own estate, a charity school for the instructions of Indians in the Christian religion. To this end he secured funds from the Earl of Dartmouth and other English sponsors. To perpetuate his program, he sought a corporate charter for a college. Its trustees were to develop the Indian Charity School independently of the college, and Dartmouth College itself was to provide higher education for English and other youths, as well as Indians.

December 13, 1769, Governor John Wentworth of the Province of New Hampshire, in the name of George III, granted the charter. It ran to The Trustees of Dartmouth College. It prescribed a quorum of seven, "the whole number of said trustees consisting, and hereafter forever to consist, of twelve, and no more . . . ." [2]

It named the original 12 and authorized the trustees thereafter to fill vacancies in their body. The trustees were to hold title to the College properties, appoint its president, professors, officers and other representatives, grant its degrees and govern its affairs. The charter named Eleazar Wheelock as the "founder" of the College, appointed him its first president and authorized him, by his last will, to name his successor to serve unless and until disapproved by the trustees.

The College was established on the Connecticut River at Hanover. New Hampshire lands were granted to it by that State and Vermont lands by the Governor of Vermont. President Eleazar Wheelock died in 1779.

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[2] 4 Wheat. 525.

The trustees were given wide authority to make rules—

"not repugnant to the laws and statutes of our realm of Great Britain, or of this our province of New-Hampshire, and not excluding any person of any religious denomination whatsoever, from free and equal liberty and advantage of education, or from any of the liberties and privileges or immunities of the said college, on account of his or their speculative sentiments in religion, and of his or their being of a religious profession different from the said trustees . . . ." *Id.*, at 533.

By his will he had named as his successor his son, Lieutenant Colonel John Wheelock, who at once gave up his Army career to devote himself to the College.

In 1800 the students number nearly 150 and Dartmouth is the only institution of higher education in New Hampshire. Daniel catches the spirit of the dauntless founder of this College in the forest, dedicated to the intellectual and spiritual advancement of mankind forever. He expresses the hope that some day he may repay a part of his personal debt to Dartmouth.

Act I—*The Issue is Created*

Scene 1

The Trustees Act

August 26, 1815, in a meeting of the trustees of Dartmouth College, at Hanover, N. H.

President John Wheelock refers to the steady increase of his disagreements with the trustees since 1809. Led by United States Senator Thomas W. Thompson,[3] they in turn charge him with starting a bitter war of pamphlets by making false charges against them and attacking their authority to guide the corporate policy of the College. They protest his having memorialized the Legislature to investigate the trustees' conduct of the College. He replies that he has gone further and already has appeared before the Legislative Committee.[4] Some trustees urge

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[3] A trustee from 1802 to 1817, graduate of Harvard, gentleman and lawyer of the old school, rich and courtly, a patron of Daniel Webster, and United States Senator from New Hampshire 1814–1817. Shirley, The Dartmouth College Causes (1879) 81, 83–84; Biographical Directory of the American Congress (1950) 1915.

[4] A misunderstanding between Wheelock and Webster arose in this connection. In the spring of 1815, Wheelock, contemplating personal litigation against the College for money due him and on other grounds, had suggested to Webster that he might wish to retain his professional services. Webster had indicated his willingness to serve him. On August 5, when Wheelock learned that legislative

patience but the majority cannot be restrained. Accusing Wheelock of disrupting the College, they remove him from office as president and trustee. Two protest.[5]

Scene 2

The Legislature Acts

June 26, 1816, in a cloakroom of the New Hampshire House of Representatives at Concord, N. H. The business before the House is a bill "to amend the charter, and enlarge and improve the Corporation of Dartmouth College."

The conversation discloses that in March, 1816, the Anti-Federalists had elected William Plumer as Governor. June 6, in his message to the Legislature, he had urged that the College charter be amended, especially so as to terminate the authority of the trustees to name their successors and so as to require its president to report annually to the Governor upon the state of the College.[6]

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hearings as to the College would begin August 16, he wrote to Webster urgently requesting the latter's appearance with him at the hearings. Webster received the letter too late to attend the hearings and Wheelock had to proceed alone. Webster also explained, later, that court engagements would have prevented his attendance in any event, and that he had not regarded this request as a professional call. Furthermore, he was not convinced that Wheelock was wholly right on the issues before the Committee and he had no inclination to espouse either side of the College controversy, except in proceedings in which his services were "professional." Shirley, 86–92; Farrar, Dartmouth College Case (1819), 379–380, 390–391.

[5] Those protesting were Governor Gilman of New Hampshire and Judge Stephen Jacob of Vermont. Two days later the trustees elected Reverend Francis Brown, of Maine, president of the College. Accepting the office at 31, he served with "rare tact and administrative genius," but died July 27, 1820, after steering the College successfully through its greatest crisis. Shirley, 100–101. Most of New Hampshire and much of New England had taken sides. Orthodox Congregationalists and Federalists generally had supported the trustees. The other denominations and Anti-Federalists generally had supported Wheelock.

[6] Shirley, 106.

The bill before the House includes amendments to the College charter (1) changing its name to Dartmouth University; (2) increasing its trustees from 12 to 21 and its quorum from seven to 11; (3) adding a Board of Overseers of 25 members, with a quorum of 15; (4) authorizing all original and subsequent vacancies among trustees and overseers to be filled with appointees of the Governor and Council, except that the President of the Senate and the Speaker of the House of Representatives of New Hampshire, and the Governor and Lieutenant Governor of Vermont, shall be overseers *ex-officio;* (5) the president and professors of the College shall be nominated by the trustees and approved by the overseers; (6) the overseers may disapprove any action of the trustees provided they do so within 60 days after receipt of copies of the action; and (7) the president shall render an annual report to the Governor.[7]

The bill is ably debated. Written remonstrances from United States Senator and College Trustee Thomas W. Thompson and others are before the body.[8] The point is clearly made that this College was founded and endowed by private individuals, rather than by the King or the Government and that, if this property has been misapplied by its trustees, it is for the judiciary and not for the Legislature to determine that issue. Nevertheless, the bill passes by a small majority.[9]

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[7] See 4 Wheat. 539-544; Farrar, 18–22, for the Act in full.

[8] His remonstrances of June 19 and 24, 1816, charge that the Legislature is about to take action without considering the report of the Legislature's own Fact Finding Committee. He warns that the "tendency of this bill . . . is to convert the peaceful retreat of our college into a field for party warfare." See Farrar, 385–391; Smith, Dartmouth College (1878), 101–106.

[9] In the Senate a proposal to make the amendment subject to approval by the trustees was defeated. The bill was approved by the Governor June 27, 1816. Seventy-five of the 190 members of the House recorded their protest in the journal, declaring that the charter was a contract and that the trustees could not lawfully be deprived of their rights under it in the face of the federal constitu-

Scene 3

The College Carries On

February 28, 1817, in Rowley Hall, Hanover, N. H., President Brown of the College is meeting with Professors Ebenezer Adams and Roswell Shurtleff.

Brown reports that under the reduced quorum amendment of December 18, the University trustees voted to remove him as president and to reinstate John Wheelock, with William Allen as acting president due to Wheelock's ill health.[10] Brown further reports that the University boards have elected, as secretary and treasurer, William H. Woodward, who had been the College secretary; have placed the corporate records and seal of the College in Woodward's possession; have removed four trustees and all members of the faculty who adhered to the old board; and have ousted the officers and faculty from the College buildings. The ousted trustees, officers, faculty and their students have moved to nearby Rowley Hall. There they carry on their educational program. Scarcely any students attend the newly constituted and competing University.

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tional provision against the impairment of the obligation of contracts. Shirley, 109–110; Farrar, 381, 389–390.

The Governor and the Council at once named appointees to fill all of the newly created positions. Meetings of the University boards were called for August 26, 1816. Only ten of the trustees and 14 of the overseers were present. The attendance thus fell one member short of a quorum on each board. August 28, nine of the 12 previously constituted College trustees declared that the amendment was unlawful and that they felt obliged to refuse to act under it. Farrar, 379–384.

December 18, 1816, the Legislature passed a supplementary Act permitting adjournments by less than a quorum of each board, reducing the trustees' quorum to nine, with the concurrence of six trustees necessary to take action. A third Act, approved December 26, prescribed a $500 penalty for hindering officers acting under the amendments. 4 Wheat. 545–549; Farrar, 23–26.

[10] Wheelock died April 11, 1817, leaving $40,000 by will to the University.

The College has sought the legal advice of Senator Jeremiah Mason,[11] Judge Jeremiah Smith[12] and Representative Daniel Webster.[13] Each has high standing at the bar and in public life. February 8, 1817, at their suggestion, a test case already has been filed in the Common Pleas Court of Grafton County, New Hampshire, against William H. Woodward attacking his right to the possession of the College records, seal and other corporate property. Upon an agreed statement of facts the case is pending in the Superior Court of Judicature of New Hampshire, which is the State's highest tribunal.[14]

Brown, Adams and Shurtleff sign "An Address of the Executive Officers of Dartmouth College to the Publick."

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[11] An impressive figure, 6 feet 7 inches tall, he was as large in mind as he was in body. A Federalist, he had served as Attorney General of the State 1802–1805, as United States Senator 1813–1817 when he resigned. He had declined appointment by Governor Plumer as Chief Justice of the Superior Court of New Hampshire in August, 1816.

[12] A Federalist, he served in Congress 1791–1797, as United States District Attorney 1797–1800; Judge of Probate 1800–1802; United States Circuit Judge 1801–1802; Chief Justice of the Superior Court of New Hampshire 1802–1809; Governor 1809–1810; and Chief Justice of the then styled Supreme Court of New Hampshire 1813–1816.

[13] Webster was 35 and on the threshold of his professional and political career. A Federalist, he had served in Congress as a Representative from New Hampshire March 4, 1813–March 3, 1817. He then moved to Boston and was in active practice there throughout the Dartmouth College case. By 1820 he was active in Massachusetts politics. He was a Presidential-elector on the Monroe and Tompkins' ticket in 1820. Later he served as a Federalist Representative from Massachusetts 1823–1827; United States Senator 1827–1841; Secretary of State 1841–1843; a Whig United States Senator 1845–1850; and Secretary of State 1850–1852.

[14] It was stipulated that "if either party should desire it, the statement of facts should be turned into a special verdict, in order that the case might be carried to the supreme court of the *United States* upon a writ of error." 1 N. H. 111.

An apocryphal story of this period concerns a plan to strengthen the College's case by bringing from Canada some young Indian

It states their case. Believing in the righteousness of their cause and its importance to the College and to others in like situations, they firmly resolve to accept the risk of prosecution and to "continue to instruct the classes committed to them . . . until the decision of the law shall convince them of their error, or restore them to their rights." [15]

Act II—*The State Court Decides*

November 6, 1817. In the Courtroom of the Superior Court of Judicature of New Hampshire, at Plymouth, Grafton County, N. H. On the bench: Chief Justice William M. Richardson,[16] Justice Samuel Bell [17] and Justice Levi Woodbury.[18] Among those at the bar are former Senator Mason, Judge Smith and former

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students. All went well until the Indians, while crossing the river, saw the stone buildings. At once they dove into the river and fled back North, fearing that they were being taken to prison. IV Beveridge, The Life of John Marshall (1919), 233 note.

[15] Shirley, 137–140; Smith, Dartmouth College (1878), 108–112.

[16] As a Federalist, he served in Congress from Massachusetts 1811–1814; he was United States Attorney 1814; and Chief Justice of the Superior or Supreme Court of New Hampshire 1816–1838.

[17] He had served as a trustee 1808-1811. An Anti-Federalist, he was a member of the New Hampshire State House of Representatives 1804–1807; Speaker 1805–1807; State Senator and President of the Senate 1807–1809; State Councilor 1809–1810; Justice of the Superior Court 1816–1819; Governor 1819–1823; and United States Senator 1823–1835.

[18] A doubt has been suggested as to whether Justice Woodbury sat in this case. He had been appointed one of the new trustees of the University in July, 1816, and had attended their meeting of August 26. Later he was appointed a Justice of the Superior Court December 9, 1816, at the age of 28, and took his seat at the February Term, 1817. From 65 N. H. 472, 624, and Farrar's Report of the Dartmouth College Case at pages 28, 206, it appears that "all the judges" were present at the September and November, 1817, Terms. In 1 N. H. 111, there is no express statement as to who participated. However, the local docket for the May and November Terms, 1817, carries a note stating that Justice Woodbury "does not sit" in this case. Shirley, 112, 150–151. Justice Woodbury served on the Superior Court until 1819. An Anti-Federalist, he served later as Governor 1823–1824; State Representative and Speaker 1825; United States Senator

Representative Webster as counsel for the trustees.[19] Attorney General George Sullivan[20] and Ichabod Bartlett[21] are present as counsel for the opposition.

The Chief Justice announces the unanimous opinion of the court in *The Trustees of Dartmouth College* v. *Woodward*.[22]

The court faces squarely the contention of the trustees that the Amendatory Acts exceed the legislative powers of the Legislature and violate the Constitutions of New Hampshire and the United States. It sustains the legislation at every point. It holds the corporation to be a public corporation subject to this kind of control in the public interest. In view of the proceedings to come, the following quotations are especially significant:

> "The office of trustee of Dartmouth College is, in fact, a publick trust, as much so as the office of governor, or of judge of this court; . . . .

1825–1831; Secretary of the Navy 1831–1834; Secretary of the Treasury 1834–1841; United States Senator 1841–1845; and Associate Justice of the Supreme Court of the United States 1845–1851.

[19] The first two had argued the case for the trustees at the May Term, 1817, in Grafton County with Sullivan in opposition. All three had argued for the trustees at the September Term, 1817, at Exeter in Rockingham County, with Sullivan and Bartlett in opposition. With the exception of Webster's, the substance of each of these arguments at Exeter is reported in Farrar, 28–206. The arguments appear also in 65 N. H. 473–624, together with Farrar's report of Webster's final argument in the Supreme Court of the United States. See Farrar, 238–283.

[20] He served as a State Representative in New Hampshire 1805; State Attorney General 1805–1806; in Congress 1811–1813; State Representative and Senator 1813–1815; and State Attorney General 1816–1835.

[21] He served as Clerk of the State Senate 1817–1818; a member of the State House of Representatives 1819–1821; and Speaker in 1821. He served as an "Anti-Democrat" in Congress 1823–1829, declined appointment as Chief Justice of the Court of Common Pleas in 1825 and served again in the State House of Representatives 1830, 1838, 1851 and 1852.

[22] 1 N. H. 111–138. Reprinted with the addition of arguments of counsel, 65 N. H. 473–643. See also, Farrar, 28–237.

"It becomes then unnecessary to decide in this case, how far the legislature possesses a constitutional right to interfere in the concerns of *private corporations*. . . .

. . . . . .

"These [amendatory] acts compel the old trustees to sacrifice no private interest whatever, but merely to admit others to aid them, in the management of the concerns of a publick institution: . . . .

. . . . . .

"If the charter of a publick institution, like that of Dartmouth College, is to be construed as a contract, within the intent of the constitution of the United States, it will, in our opinion, be difficult to say what powers, in relation to their publick institutions, if any, are left to the states. It is a construction, in our view, repugnant to the very principles of all government, because it places all the publick institutions of all the states beyond legislative controul. . . . We are therefore clearly of opinion, that the charter of Dartmouth College is not a contract, within the meaning of this clause in the constitution of the United States." 1 N. H. 119–120, 128, 133–134; 65 N. H. 630–631, 636–637, 640.

Act III—*In the Supreme Court of the United States*

Scene 1

Webster's Argument

March 10, 1818, 11 a. m. In the temporary courtroom of the Supreme Court of the United States—a plain committee room in the partially restored Capitol, in Washington, D. C. Webster and Joseph Hopkinson are ready to proceed for the trustees in the Dartmouth College case.[23]

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[23] A Federalist, Hopkinson was widely known as the author of "Hail Columbia," written in 1798. He also had a distinguished record at the bar, including his able representation of Justice Samuel Chase in the latter's impeachment trial before the Senate in 1804 and 1805. He served in Congress 1815–1819. From 1828–1842 he

Representative John Holmes[24] and Attorney General William Wirt[25] oppose them.

The Court is announced by the crier.[26] All its members are present—Chief Justice Marshall and Justice Washington, both from Virginia and appointees of President Adams, Justices William Johnson of South Carolina, Livingston of New York and Todd of Kentucky, appointees of President Jefferson, and Justices Duvall of Maryland and Story of Massachusetts, appointees of President Madison.

There are no printed or written briefs in the hands of the Court. The case is called and Webster rises. It is his first major case before the Supreme Court. Justice Story takes up his pen to make his customary full notes but becomes

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was to be a United States District Judge for the Eastern District of Pennsylvania, and in 1837 Chairman of Pennsylvania's Constitutional Convention.

[24] He had been a Federalist member of the Massachusetts House of Representatives 1802–1803, then an Anti-Federalist member of the State Senate 1813–1814, and United States Representative 1817–1820. Later he was to serve as United States Senator from Maine 1820–1827, 1829–1833. Still later he was to be a State Representative 1835–1838, and United States Attorney 1841–1843.

[25] He was widely known as an author, attorney and orator, who had gained especial fame through his part in the prosecution of Aaron Burr for treason. He had served in the Virginia House of Delegates and in 1816 as United States Attorney. From November, 1817, to 1829, he was Attorney General of the United States. January 31, 1818, he had written to a friend: "I have been up till midnight, at work, every night, and still have my hands full. . . . The Supreme Court is approaching. It will half kill you to hear that it will find me unprepared; but I shall contrive ways and means to keep my professional head, at least, above water." Shirley, 234.

[26] "The Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States. Oyez, Oyez, Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention for the Court is now sitting. God save the United States and this Honorable Court." The foregoing is the announcement now used. The date of its origin is uncertain. See also, 2 Warren, The Supreme Court in United States History (rev. ed. 1937), 468–469; Smith, Early Indiana Trials (1858), 137.

so absorbed in the argument that his pen remains poised and he takes no notes.[27]

Although stating that the sole issue before this Court is the violation of Article I, § 10, of the Federal Constitution,[28] Webster builds a background for the meaning of its language. In doing so, he summarizes the arguments made by Mason and Smith in the State court knowing also that those arguments may later come squarely before this Court through new test cases. He argues that the charter amendments are beyond the proper scope of legislative power. He cites *Fletcher* v. *Peck*[29] to show that a state contract contains obligations protected by the Contract Clause and *New Jersey* v. *Wilson*[30] to the effect that the obligations of a contract made by the King before the Revolution are as much entitled to protection as those made by a state thereafter. He demonstrates that The Trustees of Dartmouth College constitute a private eleemosynary corporation rather than a public corporation and argues that a state legislature which cannot repeal its grant of such a private corporate charter likewise cannot impair or essentially alter that charter without the assent of the corporation.[31]

At that point, tradition has it, Webster completed his three-hour legal argument and addressed a famous emotional peroration to the Chief Justice. The best authenticated version of it is as follows:

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[27] See statement of Professor Chauncey A. Goodrich, of Yale, who was present at the argument, XV Writings and Speeches of Daniel Webster (1903) 10–13; I Fuess, Daniel Webster (1930), 230–232. Justice Story is quoted as having said later: "For the first hour, we listened to him with perfect astonishment; for the second hour, with perfect delight; for the third hour, with perfect conviction." Wilson, Daniel Webster and Dartmouth, III The Colophon (1938) 10-11.

[28] "Section. 10. No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

[29] 6 Cranch 87.

[30] 7 Cranch 164.

[31] Citing *Terrett* v. *Taylor,* 9 Cranch 43, 51–52.

" '*This, sir, is my case!* It is the case, not merely of that humble institution, it is the case of every college in our land. It is more. It is the case of every eleemosynary institution throughout our country,—of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of life. It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped; for the question is simply this: Shall our State Legislatures be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit!

" 'Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work! You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land!

" 'It is, sir, as I have said, a small college. And yet *there are those who love it*—'

"Here the feelings which he had thus far succeeded in keeping down broke forth. His lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears, his voice choked, and he seemed struggling to the utmost simply to gain that mastery over himself which might save him from an unmanly burst of feeling. . . . [In a] few broken words of tenderness . . . he went on to speak of his attachment to the college. The whole seemed to be mingled throughout with the recollections of father, mother, brother, and all the trials and privations through which he had made his way into life. Every one saw that it was wholly unpremeditated, a pressure on his heart, which sought relief in words and tears.

"The court-room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and eyes suffused with tears; Mr. Justice Washington at his side,—with his small and emaciated frame, and countenance . . . like marble . . . leaning forward with an eager, troubled look; and the remainder of the court, at the two extremities, pressing, as it were, toward a single point, while the audience below were wrapping themselves round in closer folds beneath the bench to catch each look, and every movement of the speaker's face. If a painter could give us the scene on canvas,—those forms and countenances, and Daniel Webster as he then stood in the midst, it would be one of the most touching pictures in the history of eloquence. . . . the *pathetic* depends not merely on the words uttered, but still more on the estimate we put upon him who utters them. There was not one among the strong-minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument, melted into the tenderness of a child.

"Mr. Webster had now recovered his composure, and fixing his keen eye on the Chief Justice, said, in that deep tone with which he sometimes thrilled the hearts of an audience,—

" 'Sir, I know not how others may feel' (glancing at the opponents of the college before him), 'but, for myself, when I see my Alma Mater surrounded, like Caesar in the senate-house, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me, and say, *Et tu quoque, mi filii! And thou too, my son!*'

"He sat down. There was a deathlike stillness throughout the room for some moments; every one

seemed to be slowly recovering himself, and coming gradually back to his ordinary range of thought and feeling." [32] [33]

Scene 2

Pending the Decision

September, 1818, in Rowley Hall, Hanover, N. H., President Brown and Daniel Webster are in consultation

President Brown asks Webster about the argument in Washington. Webster sketches the course of the three-day hearing. In his own opening he had combined Mason's and Smith's arguments in the State court with his and had concluded with a "Caesar in the Senate-House" peroration somewhat as he had done at Exeter in 1817.

The University trustees had thought it a needless expense to send to Washington Sullivan and Bartlett, who had so ably represented them in New Hampshire. In their stead, Representative Holmes, of the District of Maine, had spoken three hours in reply to Webster. His presentation was more of a stump speech than a legal argument. In the midst of it, Justice Bell of New Hampshire, who was in the audience, seized his hat and dashed out of the courtroom. The newly installed Attorney Gen-

[32] There is no stenographic or official report of this peroration. The above version came, unsolicited, to Senator Rufus Choate of Massachusetts, from Chauncey A. Goodrich, Professor of Rhetoric and Oratory at Yale, who, 34 years before, at the age of 28, had gone to Washington especially to hear the case argued. This version reached Senator Choate in time for inclusion in his eulogy of Webster at Dartmouth College July 27, 1853, whence its fame. XV Writings and Speeches of Daniel Webster (1903) 11–13. See also, Wilson, Daniel Webster and Dartmouth, III The Colophon (1938) 7–23. Webster came to regard his argument in this case as the "greatest effort" of his career. I Fuess, Daniel Webster (1930), 245.

[33] In about 1830, Justice Story set down his impression of the same scene. It is on file in manuscript form in the Library of Congress and is published in Wheeler, Daniel Webster, The Expounder of the Constitution (1905), 29–32.

eral Wirt closed for the University. Although an eloquent speaker and a competent lawyer, he had argued six cases in the Supreme Court between February 2 and March 11, and had not had the time needed to study this case. For example, he had built part of his argument on the theory that the King, rather than Eleazar Wheelock who had originated the school, taught in it and raised the funds for it, was its founder. When it was pointed out to him that the charter itself named Wheelock as the founder, Wirt shifted his ground and asked that he be allowed to resume his argument the next day. Wirt also had inserted an emotional touch in his peroration when he sought to turn back on Webster the latter's reference to Caesar. Evidently referring to the late President Wheelock's disappointment when Webster had failed to appear with him before a Legislative Committee in 1816, Wirt summoned up the ghost of John Wheelock to point his finger at Webster and to quote, in closing, Caesar's famous ejaculation *"Et tu, Brute?"* [34]

In contrast to the inadequacy of the arguments for the University, Joseph Hopkinson closed for the College trustees with an admirable summary showing an understanding of every part of the case.

The next day, the Chief Justice announced that the Justices had conferred on the case, that some had not come to an opinion on it, that those who had opinions did not agree and the cause must therefore be continued until the next term.[35]

Webster had written to Judge Smith that "The chief and Washington, I have no doubt, are with us. Duvall and Todd perhaps against us; the other three holding up. I cannot much doubt but that Story will be with us in the end, and I think we have much more than an even chance for one of the others." [36]

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[34] Wilson, Daniel Webster and Dartmouth, III The Colophon (1938) 20–22.

[35] From the National Intelligencer, quoted in Shirley, 238.

[36] Shirley, 238–239.

Webster recognizes that the New Hampshire Court's opinion is "able, ingenious, and plausible" and is receiving wide circulation in printed form. To offset this, he has sent to Justice Story five copies of a privately printed edition of his own argument.[37]

Brown advises Webster that Chancellor James Kent of the New York Court of Chancery has read the New Hampshire decision and has indicated an inclination to agree with it. He fears that Kent's view may reach Justices Livingston or Johnson, who occasionally confer with the Chancellor on legal questions of the day. To offset this, Webster agrees that Brown should visit the Chancellor at Albany and leave with him the College's printed arguments.

Webster reports also that three new test suits have been filed on behalf of the College. These are actions in ejectment filed in the Federal Circuit Court because of diversity of citizenship, all with the purpose of broadening the scope of review by the Supreme Court of the United States in the event that the College loses on the constitutional issue now under advisement.

Finally they discuss the report that the University is retaining William Pinkney, a leader of the Maryland bar,[38] to seek a rehearing of the case in the Supreme Court.

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[37] Referring to these copies, Webster had written to Justice Story "If you send one of them to each of the five judges as you think proper, you will of course do it in a manner least likely to lead to a feeling that any indecorum has been committed by the plaintiffs." Wilson, Daniel Webster and Dartmouth, III The Colophon (1938) 13 note; IV Beveridge, The Life of John Marshall (1919), 257; I Private Correspondence of Webster 287.

[38] An Anti-Federalist, Pinkney had served in Congress in 1791, as Attorney General of Maryland 1805; as Commissioner to London under Jay's Treaty 1796–1804; as Joint Minister to Great Britain with James Monroe 1806–1807; as Minister Plenipotentiary 1807–1811; as Attorney General of the United States 1811–1814; in Congress 1815–1816; and Minister Plenipotentiary to Russia 1816–1818. Later he was to serve as United States Senator December 1819–1822.

Scene 3

The Final Decision

February 2, 1819, 10:55 a. m. In the newly decorated Supreme Court Chamber in the Capitol at Washington. It is the second day of the term. Many lawyers and spectators, including Webster, Hopkinson and Pinkney, are assembled.

Webster and Hopkinson express to each other the hope that the Dartmouth College decision will come down. Pinkney stands close to the bench with a view to catching the eye of the Chief Justice in order to move for a rehearing in the College case. At 11 the Court is announced and enters. All members are present except Justice Todd. Mr. Pinkney steps forward to address the Court. The Chief Justice looks the other way and announces that the Court has reached a decision in Case No. 25, The Trustees of Dartmouth College v. William Woodward. His opinion covers about 30 pages. He cites no cases but demonstrates his propositions with characteristic clearness. Obviously the decision is a landmark. Among its principal points are the following:

> ". . . On the judges of this Court . . . is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.
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> . . . . .
>
> "It becomes then the duty of the Court most seriously to examine this charter, and to ascertain its true character.
>
> . . . . .
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> "From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or gov-

ernors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

. . . . .

"This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New-Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in this constitution.

. . . . .

". . . It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. . . .

. . . . .

"The opinion of the Court, after mature deliberation, is, that this is a contract, the obligation of which

cannot be impaired, without violating the constitution of the United States. . . .

". . . We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New-Hampshire, to which the special verdict refers.

. . . . .

"By the revolution, the duties, as well as the powers, of government devolved on the people of New-Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department . . . . But the constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act 'impairing the obligation of contracts.'

. . . . .

". . . The whole power of governing the college is transferred [by the amendments] from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New-Hampshire. . . . The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. . . . The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

. . . . .

"It results from this opinion, that the acts of the legislature of New-Hampshire . . . are repugnant to

the constitution of the United States; and that the judgment of this special verdict ought to have been for the plaintiffs. The judgment of the State Court must, therefore, be reversed." 4 Wheat. 625, 630–631, 640–641, 643–644, 650, 651–653, 654.

No other opinions are read.[39] Justice Duvall notes his dissent. No mention is made of Justice Todd. The case is closed. The Dartmouth College charter of 1769 is a contract forever binding upon both the trustees and the State.[40]

PRINCIPAL REFERENCES

The Trustees of Dartmouth College v. *Woodward,* 1 N. H. 111, 65 N. H. 473.
The Trustees of Dartmouth College v. *Woodward,* 4 Wheat. 518.
Fletcher v. *Peck,* 6 Cranch 87.
New Jersey v. *Wilson,* 7 Cranch 164.
IV Beveridge, The Life of John Marshall (1919), 220–281.
Corwin, John Marshall and the Constitution (1921), 147–172.
Farrar, Dartmouth College Case (1819).
I Fuess, Daniel Webster (1930), 215–245.
Lodge, Daniel Webster (1899), 70–106.

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[39] Separate opinions by Justices Washington and Story were filed later with the Clerk and are now published with the opinion of the Court. Justice Johnson concurred, for the reasons stated by the Chief Justice. Justice Livingston concurred, for the reasons stated in the three written opinions. 4 Wheat. 654–713, and see 666. In connection with Story's opinion, see also, his comments in 1833 in *Allen* v. *McKeen,* 1 Sumner 276.

[40] The defendant Woodward having died August 9, 1818, the Court, on motion of Webster, entered the order of reversal and remand February 25, 1819, *nunc pro tunc* as of the February Term, 1818.

Justice Story later disposed of the additional cases pending on circuit. The College had won its decision upon a narrower ground than it had originally expected. Counsel's careful preparation and presentation of it had been well rewarded. The trustees, unable to compensate their counsel with substantial fees, voted to have a portrait of each painted by Gilbert Stuart at the College's expense. Today, portraits of Webster, Hopkinson, Mason and Smith, although not by Stuart, are to be seen in Dartmouth Hall. There they constitute a deserved tribute to their subjects and to the principle that whatever is worth doing at all is worth doing well. Lord, History of Dartmouth College (1913), 177–178, 246; 1 Fuess, Daniel Webster (1930), 224, 243.

Shirley, The Dartmouth College Causes (1879).
Smith, The History of Dartmouth College (1878), 100–116.
Warren, An Historical Note on the Dartmouth College Case, 46 Am. L. Rev. 665–675 (1912).
1 Warren, The Supreme Court in United States History (rev. ed. 1937), 475–492.
Webster, The Writings and Speeches of Daniel Webster, 18 Vols. (1903), Peroration in Dartmouth College Case, Vol. 15, 10–13.
Wentworth, Congressional Reminiscences (1882), 39–46.
Wheeler, Daniel Webster, The Expounder of the Constitution (1905), 16–33.
Wilson, Familiar "Small College" Quotations, Daniel Webster and Dartmouth, III The Colophon (1938), 7–23.
Wright, The Contract Clause of the Constitution (1938).
Wright, The Growth of American Constitutional Law (1942), 43–45.
Biographical Directory of the American Congress (1950).

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

CHAMBERS OF
JUSTICE HAROLD H. BURTON

June 30, 1953

Dear Chief:

Enclosed is a copy of my tentative schedule from July 11 through August 31. This covers substantially all the stops that Selma and I shall make. Mrs. Cheatham will have any further information that I obtain before leaving.

I shall attend my Judicial Conference at Haddon Hall, Atlantic City, July 7-8, returning to Washington for the 9th and leaving again on the 10th.

I gather from the newspapers that you had an exceptionally interesting and constructive Conference in the Fourth Circuit.

Selma and I wish Roberta and you a happy summer "vacation" wherever you take it.

With personal and cordial regards,

Sincerely,

Harold H. Burton

The Chief Justice

Justice and Mrs. Harold H. Burton
Tentative Schedule for 1953 Vacation
(June 23, 1953)

July 11	Saturday - Noon		Sail from Hoboken on MV "Noordam" - Holland-America Line
11-20			At sea
20	Monday		Arrive Rotterdam, Netherlands
20-21	Monday and Tuesday		The Hague
22	Wednesday,	11:30 a.m.	Leave Amsterdam (plane) (change at Copenhagen)
		7:25 p.m.	Arrive Stavanger, Norway - Hotel Atlantic (Norway, Sweden & Denmark with Bennett Travel Bureau)
23	Thursday,	10:00 a.m.	Leave Stavanger (steamer and motorcoach) (Change at Haugesund)
		p.m.	Arrive Solfonn, Norway - Solfonn Hotel
24	Friday	11:45 a.m.	Leave Solfonn (motorcoach and ferry) (change at Odda and Brimnes)
		4:40 p.m.	Arrive Ulvik - Brakanes Hotel
25	Saturday		Ulvik
26	Sunday	9:30 a.m.	Leave Ulvik (motorcoach) (Changes at Granvin and Norheimsund)
		4:45 p.m.	Arrive Bergen - Hotel Norge
27	Monday		Bergen
28	Tuesday	8:30 a.m.	Leave Bergen (railroad)
		7:50 p.m.	Arrive Oslo - Grand Hotel
29	Wednesday		Oslo
30	Thursday	8:30 a.m.	Leave Oslo (plane)
		10:10 a.m.	Arrive Stockholm, Sweden - Carlton Hotel
31	Friday		Stockholm
Aug. 1	Saturday		Stockholm
2	Sunday		Stockholm
3	Monday	1:50 p.m.	Leave Stockholm (plane)
		3:50 p.m.	Arrive Copenhagen, Denmark - Hotel D'Angleterre
4	Tuesday		Copenhagen
5	Wednesday		Copenhagen
6	Thursday	10:50 a.m.	Leave Copenhagen (plane)
		2:10 p.m.	Arrive Zurich, Switzerland - Baur-au-Lac Hotel
	(Reservations to be confirmed in Switzerland and France)		
7	Friday	9:27 a.m.	Leave Zurich (train)
		11:14 a.m.	Arrive Bern - Hotel Bellevue-Palace
8	Saturday	8:47 a.m.	Leave Bern (train)
		11:31 a.m.	Arrive Leysin - Hotel La Mesange
9	Sunday	10:05 a.m.	Leave Leysin (train)
		2:15 p.m.	Arrive Chamonix, France - Hotel Les Alpes
10	Monday		Chamonix
11	Tuesday		Chamonix
12	Wednesday	8:40 a.m.	Leave Chamonix (train)
		8:57 p.m.	Arrive Glarus - Hotel Glarnerhof
13	Thursday	1:57 p.m.	Leave Glarus
		4:42 p.m.	Arrive Klosters - Hotel Vereina
13-19	Thursday to Wednesday		Klosters

20	Thursday	9:52 a.m.	Leave Klosters (train)
		12:49 p.m.	Arrive Zurich
		7:46 p.m.	Leave Zurich (change at Basel) (night train)
21	Friday	10:25 a.m.	Arrive Rotterdam, Netherlands - Hotel Atlanta
21			Rotterdam
22	Saturday		Sail from Rotterdam on MV "Noordam"
22-31			At sea
31	Monday		Arrive Hoboken

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

Dear Chief -

A friend sent me this clipping which might interest you as a matter of perspective.

4/5/53

TWO YEARS AGO my son, who was then 13, proudly announced one day: "I was the only one in our class that got 100 in the Social Living test."

"That's fine," I said. "Were the questions hard?"

"Well, the only one I didn't know the answer to was 'What is the salary of the Chief Justice of the United States?' but I figured it out. I knew that Ted Williams got $100,000 a year from the Red Sox, and I decided that a Chief Justice would probably get about a fourth as much. So I put down $25,000, and it was right."

— Contributed by Ruth Whetstine

File

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

CHAMBERS OF
JUSTICE HAROLD H. BURTON

July 2, 1953

Dear Chief:

In accordance with our recent conversation, I enclose a copy of the statement I propose to make to the Third Judicial Conference on July 7, 1953, under the title of "The Keystone of Our Freedom -- An Independent Judiciary."

It deals with the process of impeachment and the acquittal of Justice Samuel Chase, showing the refusal of the Senate to convert an impeachment trial into a mere optional right of removal.

H.H.B.

The Chief Justice

To my Chief Justice
with cordial and personal regards
from
Harold H. Burton
July 2, 1953

THE KEYSTONE OF OUR FREEDOM— AN INDEPENDENT JUDICIARY

By Harold H. Burton

Associate Justice of the Supreme Court
of the United States

at the

Judicial Conference
of the Third Judicial Circuit

Atlantic City, N. J.—July 7, 1953

When young people ask me what the Supreme Court is for, I tell them about a boy who asked me why we had so many courts in Cleveland. In return, I asked him if he played baseball. When he replied, "Of course," I asked him if he used an umpire when he played. To that question, he gave me an answer full of wisdom. He said, "Well, when we want to last a full nine inning game, then we have an umpire." He knew that boys can play a short scrub game without an umpire, but he knew also that if they are to play a long, hard game and not end in a fight, they need an umpire. They do not expect him to be perfect. They expect him to know the rules, to be honest, to apply the rules promptly and, above all, to be independent.

The same is true of life in general. The courts are the umpires. The laws are the rules. In our Federal Government, our independent judiciary is the keystone that holds in place the other members of the governmental arch which our Constitution has designed to sustain a representative republic, dedicated to the preservation for the individual of the greatest freedom consistent with like freedom for others. With its keystone, an arch has extraordinary strength. Without it, it collapses.

How to secure an independent judiciary? How to assure its continuing independence? The architects of our Constitution solved those major problems by providing that—

1. Federal judges shall be appointed by the President "with the Advice and Consent of the Senate." Art. II, § 2. They "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1. Those provisions reflected lessons learned in the long struggle to free British judges from the domination of their King.[1]

2. All civil officers, including judges, "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4. While this provision was primarily for the protection of the public against the abuse of judicial power, one omission was made from the British procedure and a limitation was inserted in the impeachment procedure to protect the judges against their arbitrary removal from office.

The Constitutional Convention thus omitted a proposed provision to give the President a power of removal comparable to that of the British Crown to remove judges upon a joint address of the Houses of Parliament. Madison's notes tell the story of that omission as follows: [2]

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[1] Originally, the King commissioned his judges to serve during his pleasure—"*durante bene placito.*" By the statute of 12 and 13 W. III, c. 2 (1700), it was provided that the tenure of judges be during their good behavior—"*Quamdiu se bene gesserint,* and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them." See also, 1 Blackstone's Commentaries (Lewis' ed. 1902) 267. Nevertheless, by 1776, the King had gained authority to appoint colonial judges to serve at his pleasure, and this was one of the subjects of complaint in our Declaration of Independence. Carpenter, Judicial Tenure in the United States (1918), 2.

[2] Documents Illustrative of the Formation of the Union of the American States (1927) 622–623; 2 Farrand, The Records of the Federal Convention of 1787 (1911), 428–429. A right of removal of judges upon the joint address of two Houses of the Legislature exists, however, in several states. Carpenter, *supra,* at 126–135.

August 27, 1787, John Dickinson of Delaware moved to insert after the words "good behavior" relating to federal judges, the words "provided that they may be removed by the Executive on the application by the Senate and House of Representatives." Gouverneur Morris of Pennsylvania "thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial. Besides it was fundamentally wrong to subject Judges to so arbitrary an authority." Edmund Randolph, of Virginia, "opposed the motion as weakening too much the independence of the Judges."

Eleven states were on the roll call. Of these Massachusetts, New Jersey and North Carolina were absent. Connecticut voted "ay," but Delaware, Georgia, Maryland, New Hampshire, Pennsylvania, South Carolina and Virginia voted "no," and thereby rendered infinite service to the cause of an independent judiciary.

The removal of federal judges was limited also not only to those impeached by the House of Representatives for "Treason, Bribery, or other high Crimes and Misdemeanors" but to those convicted by the Senate upon the "Concurrence of two thirds of the Members present." Art. I, § 3.

The Twelve Impeachment Trials

Under these provisions, the Senate has sat as a Court of Impeachment 12 times. It sat first in 1798 to consider charges against Senator William Blount, of Tennessee. It dismissed them for want of jurisdiction, recognizing that the Constitution authorized each House to be the judge of the qualifications of its own members, to punish them for disorderly behavior and, with the concurrence of two-thirds, to expel a member. Art. I, § 5.

Of the other trials, two were of executive officers. One was that of President Andrew Johnson, of Tennessee. He was acquitted in 1868. The other was that of Secretary of War William W. Belknap, of Iowa. He resigned before trial and was acquitted in 1876.

The remaining nine were trials of judicial officers, illustrating that the impeachment provisions are applicable especially to offending judges who enjoy substantially life tenure in contrast to the limited tenures of executive officers. Of the judges tried, one was an Associate Justice of the Supreme Court, Samuel Chase, of Maryland. His case will be considered later.

One trial was that of a judge of the Commerce Court, Robert W. Archbald, of Pennsylvania. He was removed from office in 1913.

The other seven trials were of District Judges. Of these, Judge George W. English, of Illinois, resigned before trial and his impeachment was dismissed in 1926.

Three judges were acquitted: James H. Peck, of Missouri, in 1831; Charles Swayne, of Florida, in 1905; and Harold Louderback, of California, in 1933. Three were removed from office: John Pickering, of New Hampshire, in 1804; West H. Humphreys, of Tennessee, in 1862; and Halsted L. Ritter, of Florida, in 1936.

Thus, four trials have produced convictions and only those four indicate what the Senate holds to be a sufficient basis for the conviction and removal of a judge. Two of these provide little guidance. Judge Pickering, of New Hampshire, was removed following a substantial concession that he was insane and a recognition that no provision had then been made for terminating his judicial tenure on grounds of disability. Judge Humphreys, of Tennessee, was removed when he adhered to the Confederacy without resigning his federal office. The removal of Judge Archbald in 1913 and that of Judge Ritter in 1936 were, however, upon charges of abuse of their offices for financial gain. In those cases, impeachment, at last, was shown to be an effective, although cumbersome, vehicle in certain circumstances.[3]

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[3] In The American Commonwealth (1908) at page 211, Bryce refers to impeachment under our Constitution as "the heaviest piece of artillery in the congressional arsenal, but because it is so heavy

The Archbald conviction has now established the jurisdiction of the House to impeach and that of the Senate to convict and remove a judge because of his abuse of judicial authority within the special constitutional meaning of the words "high Crimes and Misdemeanors," although his offenses were not indictable. The Ritter trial demonstrated also that, while a conviction carries with it removal from office, future disqualification to hold office rests in the discretion of the Senate.[4]

The Acquittal of Justice Chase

In the trial of Justice Chase, the controversy was not whether the authority of the Senate was broad enough to reach an abuse of judicial power involving corruption. It was whether the authority of the Senate could, and should, be used to remove a judge because of his procedural rulings, and his statements to a grand jury in criticism of the National Administration. Although the Constitutional Convention had rejected a provision for the removal of a judge upon the joint address of the Houses of Congress, nevertheless, this proceeding, in substance, was an attempt to reach that result through impeachment by the House and trial by the Senate for alleged high crimes and misdemeanors.

The controversy struck deeper than was apparent. It involved the cleavage between President Jefferson and Chief Justice Marshall as to the latter's doctrine of

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it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at."

[4] Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter, S. Doc. No. 200, 74th Cong., 2d Sess. 639–642 (1936); U. S. Const., Art. I, § 3; Art. II, § 4.

In 1935, the Senate Rules for Impeachment Trials also were amended so that, upon order of the Senate, its Presiding Officer shall appoint a committee of 12 Senators to receive evidence and take testimony with all the powers of the Senate. Rule XI, Senate Manual (1953) 105.

judicial review of constitutional questions. Until the opinion of the Supreme Court had been announced in *Marbury* v. *Madison,* 1 Cranch 137, the doctrine of final judicial review was not widely understood. After that opinion, Jefferson had little hope of its modification by the Supreme Court which, in 1804, consisted of five Federalists and one Anti-Federalist (William Johnson). If, however, the impeachment and conviction of judges could be made substantially equivalent to their removal upon a joint address of the Houses of Congress, the supremacy of the judiciary would be at the mercy of a majority of the House of Representatives when supported by two-thirds of the members present in the Senate. That road was to be explored.

The events speak for themselves:

February 24, 1803—The opinion in *Marbury* v. *Madison* was announced.

May 2, 1803—Justice Samuel Chase, while on circuit at Baltimore, addressed the grand jury in terms of doubtful propriety understandably offensive to President Jefferson. He said:

> "Where law is uncertain, partial, or arbitrary . . . where justice is not impartially administered to all; where property is insecure, and the person is liable to insult and violence without redress by law,—the people are *not free,* whatever may be their form of government. To this situation I greatly fear we are fast approaching. . . . 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, and the further alteration that is contemplated in our State judiciary (if adopted) will in my judgment take away all security for property and personal liberty. The independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it. . . .

> Our republican Constitution will sink into a mobocracy,—the worst of all possible governments." [5]

This supplemented the Justice's active campaigning in 1800 for the reelection of President John Adams over Jefferson, his long-standing reputation for overbearing manners and his vigorous efforts to enforce the Alien and Sedition Acts which Jefferson abhorred.

May 13, 1803—Jefferson wrote to Representative Joseph H. Nicholson, of Maryland—

> "You must have heard of the extraordinary charge of Chase to the grand jury at Baltimore. 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 those questions for your consideration; for myself, it is better that I should not interfere." [6]

January 5, 1804—The House of Representatives gave consideration to a motion to appoint a Committee to inquire into the official conduct of Justice Chase and report whether he had so acted as to require the interposition of the constitutional power of the House. Representative John Randolph, of Virginia, Joseph H. Nicholson and others were appointed to that Committee.[7]

March 12, 1804—Following a plea by Judge Pickering's son that his father was insane, the Senate, in the absence of any statutory provision for the judge's retirement for such disability, found him guilty as charged and ordered him removed from office.

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[5] 2 Adams, History of the United States of America During the First Administration of Thomas Jefferson (1898), 148–149.

[6] 2 Adams, *supra*, at 150. Nicholson already was one of the managers of the impeachment trial of District Judge Pickering instituted at the suggestion of Jefferson because of the judge's unfitness to perform his duties due to intoxication and other causes. *Id.*, at 143–144.

[7] Evans, Report of the Trial of the Hon. Samuel Chase (1805), Introduction, 1, 5. Although Randolph was but 30 years old, he took the lead. He had studied law and was recognized as an effective speaker but had never practiced his profession.

On the same day, the House adopted its Committee's Report recommending the impeachment of Justice Samuel Chase for high crimes and misdemeanors.

December 5, 1804—A Committee of seven was appointed to manage the Chase impeachment. It included John Randolph, Caesar A. Rodney, of Delaware, and Joseph H. Nicholson.[8]

December 7, 1804—Having approved eight articles of impeachment, personally drafted by Randolph, the House transmitted them to the Senate.[9] They charged that the Justice—

I. While presiding on circuit in Philadelphia, in April and May, 1800, at the trial of Fries for high treason (1) delivered an opinion on a question of law tending to prejudice the jury against Fries; (2) prohibited counsel for Fries from recurring to certain English authorities and from citing certain statutes of the United States; and (3) debarred counsel for Fries from addressing the jury on the law as well as on the facts of the case.

II. While presiding on circuit in Richmond, also in May, 1800, at the trial of Callender for a criminal libel of President John Adams, had refused to excuse a juror who stated that "he had made up his mind as to the publication from which the words, charged to be libellous . . . were extracted."

III. At the same trial had refused to permit a material witness to testify for Callender "on pretence that the said witness could not prove the truth of the whole of one of the charges contained in the indictment."

IV. During the same trial the Justice's conduct had been marked "by manifest injustice, partiality and intemperance, viz:" (1) in compelling prisoner's counsel to reduce to writing, for their admission or rejection, all

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[8] Evans, *supra*, Introduction, at 12; 1 Warren, The Supreme Court in United States History (rev. ed. 1937), 289.

[9] The summaries here presented are made from the articles as reported in Evans, *supra*, Appendix, at 1–6. For Randolph's authorship of the articles, see 1 Memoirs of John Quincy Adams (1874) 364.

questions to be asked of a certain witness; (2) in refusing to postpone the trial because of the absence of a material witness; (3) in using "unusual, rude, and contemptuous expressions towards the prisoner's counsel," and falsely insinuating that such counsel "wished to excite the public fears"; (4) in making repeated and vexatious interruptions of counsel, which induced such counsel to abandon the cause; and (5) in an indecent solicitude for the conviction of the accused.

V. At the same trial had arrested Callender and committed him to close custody, whereas the laws of Virginia prescribed that the court in such a case should order the clerk merely to issue a summons for the accused to appear and make answer.

VI. At the same trial had required the accused to be tried during the term at which he had been indicted, whereas the laws of Virginia prescribed that the accused be held to answer at the next term.

VII. While presiding on circuit in New Castle, Delaware, in June, 1800, after the grand jury had found no bills of indictment, the Justice, nevertheless, had directed the attention of the grand jury to the presence in Wilmington of "a most seditious printer" and had enjoined the district attorney to examine a certain file of papers in order to find in them ground for the prosecution of their printer.

VIII. While presiding on circuit in Baltimore, in May, 1803, in addressing the grand jury, the Justice "did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland against the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion in a proper manner, were at that time and as delivered by him, highly indecent, extra-judicial and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partizan."

December 21, 1804—Senator John Quincy Adams, of Massachusetts, recorded a striking avowal of the purpose of this impeachment, as stated by Anti-Federalist Senator William B. Giles, of Virginia, a leader in the Senate. The avowal was made in a conversation between Senator Giles, Senator Adams, Senator Israel Smith, of Vermont, and Representative John Randolph. Senator Adams' notes recite that—

> "Giles labored with excessive earnestness to convince Smith of certain principles, upon which not only Mr. Chase, but all the other Judges of the Supreme Court, excepting the one last appointed [William Johnson, appointed by President Jefferson], must be impeached and removed. He treated with the utmost contempt the idea of an *independent* judiciary—said there was not a word about such an independence in the Constitution, and that their pretensions to it were nothing more nor less than an attempt to establish an aristocratic despotism in themselves. The power of impeachment was given without limitation to the House of Representatives; the power of trying impeachments was given equally without limitation to the Senate; and if the Judges of the Supreme Court should dare, AS THEY HAD DONE, to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, AS THEY HAD DONE, it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them. . . . I perceive, also, that the impeachment system is to be pursued, and the whole bench of the Supreme Court to be swept away, because *their offices are wanted.* And in the present state of things I am convinced it is as easy for Mr. John Randolph and Mr. Giles to do this as to say it." [10]

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[10] 1 Memoirs of John Quincy Adams, *supra,* at 322–323.
"It is impossible to put too much emphasis on Giles' avowal. His

January 2, 1805—The stage was set for high drama. The Senate met in its chamber in the North Building of the Capitol—a rectangular building having neither of the great wings that are now attached to it and having no dome between it and the Hall of the House of Representatives. The chamber was above the ground floor and directly over the courtroom of the Supreme Court.[11] As presiding officer, Vice President Aaron Burr had changed the seating arrangements to conform to those of a court in which the 34 Senators were to be the judges.[12] He placed the Senators in equal numbers on his right and left, seated in double straight rows at desks covered with crimson cloth. In front of him sat the Secretary of the Senate and the Sergeants at Arms of the House and Senate. Facing the Court, on the presiding officer's right, was a box for the managers of the House. On his left was another for the accused and his counsel. Both boxes were covered with blue cloth.

At the rear of the semi-circular chamber were three benches, rising in tiers, for members of the House, with a box for members of the Executive Department, foreign ministers and others. A temporary gallery, reserved for ladies, had been built above the seats of the House members and beneath the permanent gallery. Those seats and the temporary gallery were covered with green cloth. The public was admitted to the permanent semi-circular gallery at the rear.

The procedure resembled that of a court. The Secretary read the return of the summons. Proclamation was

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statement is the key to the Chase impeachment." 3 Beveridge, Life of John Marshall (1919), 159, n. 5.

[11] About 60 years later, this chamber, in turn, was to begin a service of 75 years as the courtroom of the Supreme Court.

[12] Burr came to this session under indictment for the murder of Alexander Hamilton, whom he had killed in a duel less than six months before. This trial was Burr's last substantial service in public office, and it was universally recognized that he presided with marked credit to the Senate and himself. 3 Beveridge, *supra*, at 182–183. For the arrangement of the chamber, see Evans, *supra*, at 1.

made that Samuel Chase either appear or that his default be recorded. He advanced to the center of the chamber and stood there—a signer of the Declaration of Independence, a former outstanding member of the Continental Congress, known as the "Demosthenes of Maryland," a former judge of the Criminal Court of Baltimore, a former chief justice of the General Court of Maryland, an outstanding and vigorous Federalist, and a Justice of the Supreme Court appointed by President Washington in 1796. Sixty-three years old, six feet tall, large of frame, with long white hair, stout, ruddy of complexion, and afflicted with gout, he answered to his name and asked for a chair, which was furnished him. The managers from the House were not present. Justice Chase then rose and made a respectful address, asking for time within which to prepare a detailed answer to the charges against him. He asked that he be allowed until the next session of Congress which, in regular course, would begin December 2, 1805.[13]

January 3, 1805. The constitutionally required oath was administered by the Secretary of the Senate to the Vice President and by the latter to the Senators. The Senate, by a vote of 12 to 18, defeated a motion to set the Justice's answer date as requested on the first Mon-

[13] While the Justice's address was generally restrained and nonprovocative, something of his suppressed feeling appears in the following sentence:

". . . acrimonious as are the terms in which many of the accusations are conceived; harsh and opprobious as are the epithets wherewith it has been thought proper to assail my name and character, by those who were 'puling in their nurse's arms' [probably referring especially to John Randolph], whilst I was contributing my utmost aid to lay the ground work of American liberty; I yet thank my accusers, whose functions as members of the government of my country I highly respect, for having at length put their charges into a definite form, susceptible of refutation; and for having thereby afforded me an opportunity of vindicating my innocence, in the face of this honorable court, of my country, and of the world." Evans, *supra*, at 7.

day in December. By vote of 21 to nine, it set it on February 4, 1805.

February 4, 1805—In the same dramatic setting, the proceedings were resumed.[14] The members of the House, preceded by their Speaker and their seven managers, took their seats.[15] Justice Chase presented his counsel.[16] The reading of Chase's answer by his counsel consumed several hours. The closing portion—in the nature of a religious appeal—was read by the Justice himself.[17]

February 8–20—The Senate met nearly every week day as a Court of Impeachment. It heard over 50 witnesses.[18]

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[14] February 4, 1805, was the ninth anniversary of the Justice's oath of office as a member of the Supreme Court. Also, on February 4, 1805, the Supreme Court opened its regular February Term. It met and heard arguments from Monday through Saturday throughout the month. Justice Chase sat with it only on February 5 and 6.

[15] The managers were Representatives John Randolph, of Virginia; Caesar A. Rodney, of Delaware; Joseph H. Nicholson, of Maryland; Peter Early, of Georgia; John Boyle, of Kentucky; George W. Campbell, of Tennessee; and Christopher Clark, of Virginia.

[16] He presented Luther Martin, long Attorney General of Maryland and an acknowledged leader of the American Bar; Robert G. Harper, formerly a leading Federalist member of the House from South Carolina and, subsequently, a Senator from Maryland; and Joseph Hopkinson, well known as the author of "Hail Columbia," later a Federalist Representative from Pennsylvania and finally a United States District Judge. Although not mentioned in the record on this day, his counsel also included Charles Lee, former Attorney General under Presidents Washington and John Adams, and Philip Barton Key, a brother of the author of "The Star Spangled Banner," and himself later to serve as a Federalist Representative from Maryland. 2 Adams, *supra,* at 227 *et seq.;* 1 Memoirs of John Quincy Adams, *supra,* at 355 *et seq.;* Evans, *supra,* at 116 *et seq.*

[17] February 7—The Replication of the House was filed and read. February 8—A brief session was held and the examination of witnesses began February 9. During this month, the Senate conducted its legislative work and its consultations in a committee room. It met in legislative session usually at 10:30 a. m. 1 Memoirs of John Quincy Adams, *supra,* at 345–348; Evans, *supra,* Appendix, at 40.

[18] Chief Justice John Marshall and his brother William testified on behalf of Justice Chase and were cross-examined. The Chief Justice's testimony related to the Callender trial which had been

The testimony, in general, substantiated the factual events charged without establishing their illegality, although in some instances indicating their doubtful propriety.

February 20–27—Full arguments were made by both sides. Counsel for the defense were, generally, more impressive than the managers for the House. John Randolph, leader of the managers, who was exhausted by his recent efforts in the Yazoo land scandal debate, suffered by comparison with Joseph Hopkinson and Luther Martin. Counsel for the defense pressed the argument that, under the Constitution, impeachment was and should be limited to indictable crimes and misdemeanors. The House managers, instead of taking a firm position in favor of a broader interpretation, substantially conceded this point, and attempted to bring the articles of impeachment within that interpretation. On Wednesday, February 27, the Senate determined that it would pronounce judgment on Friday, March 1.

March 1, 1805—At twelve thirty, the Vice President was in the chair. All 34 Senators were present. Senator Tracy, of Connecticut, had been brought in on a couch but he rose from it and took his regular seat. Nine of the Senators were Federalists. Twenty-five were Anti-Federalists (then generally known as Republicans). As a two-thirds vote of the Senators present was necessary to convict, the vote required to do so was 23. If three Anti-Federalists and the nine Federalists voted "Not guilty," there could be no conviction. The Secretary read the first article—relating to procedure at the Fries trial. He then put the question: *"Is Samuel Chase, esq. guilty or*

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held in Richmond while Marshall was practicing at that Bar. In that case, he had secured the release of the Sheriff of Henrico County from jury service. On cross-examination, a largely unsuccessful effort was made to obtain from him a criticism of the legality and propriety of Justice Chase's rulings on procedure. Evans, *supra,* at 69–71, and see 64–68.

not guilty of a high crime or misdemeanor in the article just read?" [19] Federalist Senator John Quincy Adams, of Massachusetts, was the first called. He voted "Not guilty." The first break came with Senator Bradley, Anti-Federalist Senator from Vermont. He voted "Not guilty." Anti-Federalist Senator Gaillard, of South Carolina, who had entered the Senate January 31 to fill a vacancy, was the next to cross the party line. He voted "Not guilty." The next response was a major surprise. Anti-Federalist Senator Giles, of Virginia, who had championed the broadest possible scope for the Senate's jurisdiction to impeach, voted "Not guilty." When the call was completed, 18 had voted "Not guilty" and 16 "Guilty." The prosecution had received two less votes than a plain majority and seven less than the constitutionally required majority of 23.

On the second article, Senator Giles voted "Guilty," and there were several other changes but the total was even more favorable to Justice Chase than on the first. Twenty-four voted "Not guilty"—10 "Guilty."

On the third article—relating to the exclusion of testimony in the *Callender* case—the tide turned slightly. There were 16 votes of "Not guilty" to 18 of "Guilty." For the first time, there was a majority for conviction. The vote to convict was, however, still five short of that required.

On the fourth article, the total was the same—16 "Not guilty" and 18 "Guilty."

On the fifth article, in which Justice Chase was charged with arresting Callender instead of summoning him under

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[19] These proceedings are taken from Evans, *supra*, at 268, and the tabulation of votes from the Appendix of that book at 62. Before the first roll call the Vice President ordered the officers in the upper galleries to turn their faces toward the spectators and to seize and commit to prison the first person who should make the smallest noise or disturbance. 1 Memoirs of John Quincy Adams, *supra*, at 362–363, 3 Beveridge, *supra*, at 217–219.

Virginia practice, the Justice was completely vindicated. The vote was 34 "Not guilty."

On the sixth article—in which the Justice was charged with requiring the accused to be tried at the current term instead of at the next term—the Justice's vindication was almost as complete—30 "Not guilty," and four "Guilty."

On the seventh article—charging that the Justice had improperly instigated the investigation of a seditious printer—the vote was 24 "Not guilty" to ten "Guilty."

Finally came the crucial test—the eighth and last article. This charged the offense which had brought on the impeachment—Justice Chase's remarks to the grand jury at Baltimore. Again Senator Bradley, of Vermont, voted "Not guilty." Again Senator Gaillard, of South Carolina, voted "Not guilty." This time, Senator Giles, of Virginia, voted "Guilty." The necessary twelfth vote was not assured until the call reached Anti-Federalist Senator Mitchill, of New York. He recently had come to the Senate from the House of Representatives where, in the preceding year, he had been one of the managers for the House in the impeachment trial of District Judge Pickering. He voted "Not guilty." When the call was completed, there were 15 votes of "Not guilty" to 19 of "Guilty." This was the highest total that was reached in favor of the prosecution but it was four below the number required to convict. The independence of the judiciary was saved by that margin. Whatever credit goes to the Constitutional Convention, for protecting the independence of the judiciary by its conscious omission of the proposal for the removal of judges upon the joint address of the two Houses of Congress, must be shared with the credit for its insistence upon the concurrence of two-thirds of the members present in the Senate to reach a conviction after trial on impeachment.

The Vice President announced: *"There not being a constitutional majority on any one article, it becomes my duty to pronounce that Samuel Chase, esq. is acquitted*

on the articles of impeachment exhibited against him by the house of representatives." Thereupon, the Court of Impeachment adjourned *sine die.*

The sequel confirmed Senator Adams' analysis of the proceedings. Randolph at once proposed, in the House of Representatives, a constitutional amendment whereby federal judges might be removed on the joint address of the two Houses of Congress.[20] It never has been adopted.

While the grounds for the Senate's acquittal of Justice Chase cannot be determined, it is clear that two-thirds of the Senators were not willing to remove from office a Justice of the Supreme Court on the charges and proof adduced. Some may have voted against removal because they believed that impeachment was not authorized by the Constitution for nonindictable offenses. Others may have voted against removal because, although they believed that some nonindictable offenses were impeachable, yet those charged and proved in this case were not sufficiently serious to come within the kind of "high Crimes and Misdemeanors" that would justify the removal of Justice Chase from office. Still others may have voted against removal simply because the offenses charged were not proved to have been committed.

Since the Archbald and Ritter convictions and removals in 1913 and 1936, it is, however, now reasonable to assume that the Senate recognizes that there are at least some nonindictable offenses that are impeachable and which, if proved, may lead to removal from office. At the same time, the Senate's acquittal of Justice Chase and of other judges has demonstrated that the Senate is reluctant to weaken the independence of the judiciary. There is ground to believe that both the American people and their Senators expect from their courts, no less than from their baseball umpires, honest, informed and inde-

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[20] 14 Annals of Cong. 1213 (1805). Nicholson added a proposal that State Legislatures might, at will, recall their Senators. *Ibid.* See also, 15 Annals of Cong. 499–507 (1806).

pendent judgments, regardless of whom the decisions may disappoint.

Our legal profession owes no more sacred obligation than to justify such a faith in the integrity and independence of the judiciary.[21]

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[21] "No conviction is deeper in my mind, than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government, no government." 3 Works of Daniel Webster (6th ed. 1853) 176, and see Haines, The American Doctrine of Judicial Supremacy (2d ed. 1932), 493.

7th day at Sea -
July 17, 1953 -

Dear Chief & Roberta -

Selma and I are enjoying a delightful cruise - excellent weather - temperature about 58°. We are at the Captain's table with Dr & Mrs. Arthur Compton (Washington University (St. Louis)) and Dr & Mrs. Marion ten Hoor (University of Alabama). The meals are real Dutch meals - some walk about 1½ miles on the deck after each meal. With best wishes from

Selma & Harold Burton

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May 8, 1948

Herbert Bruce Griswold is hereby designated and appointed to serve as my Senior Law Clerk from the 1st day of August, 1948 at a salary of $5116.32, per annum.

Associate Justice of the Supreme Court of the United States.

Approved:

Chief Justice of the United States.

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

July 1, 1948

James Albert Lake is hereby designated and appointed to serve as my Senior Law Clerk from the 1st day of August, 1948 at a salary of $5,254.26, per annum.

Associate Justice of the Supreme Court of the United States.

Approved:

Chief Justice of the United States.

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

May 18, 1950

Marvin Schwartz is hereby designated and appointed to serve as my Senior Law Clerk from the 1st day of August, 1950 at a salary of $5,610, per annum.

Harold H. Burton
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
Chief Justice of the United States.

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

May 18, 1950

Ray Simmons is hereby designated and appointed to serve as my Junior Law Clerk from the 1st day of August, 1950 at a salary of $4,757.50, per annum.

Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson

Chief Justice of the United States.

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

June 19, 19 51

Charles C. Hileman III is hereby designated and appointed to serve as my senior law clerk from the 1st day of August, 19 51 at a salary of $ 5,610, per annum.

Harold H. Burton
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
Chief Justice of the United States.

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

June 19, 19 51

John W. Douglas is hereby designated and appointed to serve as my senior law clerk from the 1st day of August, 19 51 at a salary of $ 5,610, per annum.

Associate Justice of the Supreme Court of the United States.

Approved: JUN 21 1951

/sgd/ Fred M Vinson

Chief Justice of the United States.

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

May 13, 19 53

Raymond S. Troubh is hereby designated and appointed to serve as my Senior Law Clerk from the 1st day of August, 19 53 at a salary of $ 6,116, per annum.

Harold H. Burton
Associate Justice of the Supreme Court of the United States.

Approved:

(Signed) Fred M. Vinson
Chief Justice of the United States.


Delft. Brabantsche Turfmarkt

July 22, 1963

Dear Chief + Roberta -

Yesterday Selma and I visited this delightful little town of Delft - in Holland - famous for its blue china, quaint canals & church spires.

We had a perfect crossing and had an enjoyable visit yesterday with a retired judge of the High Court of the Netherlands and his family.

We leave this afternoon for Norway. With best wishes from

Selma + Harold

Hotel Witteburg
The Hague, Holland.

Chief Justice Fred M. Vinson,

Supreme Court of the U.S.

Washington 13.
D.C.
U.S.A.

HEMO

MEMORANDUM TO THE CONFERENCE

In the memorandum which I circulated this morning, I referred to No. 750 - United States v. Berman as though it were here on a petition for certiorari. It is, however, an appeal by the United States from the dismissal of an indictment by the District Court.

Accordingly, instead of granting a petition for certiorari and then reversing, citing Nos. 634, 635 and 636, the appropriate disposition would be to reverse summarily, citing Nos. 634, 635 and 636.

H.H.B.

June 10, 1953

Original Filed in VIP Correspondence File

MEMORANDUM TO THE CONFERENCE

The cases listed below are related to the Bridges (No. 548) and Grainger (Nos. 634, 635, 636) cases. They will be before us on Saturday, June 13. I suggest the following dispositions:

1. No. 549 - Bridges v. United States. Here the same District Court that convicted Bridges in No. 548 revoked his citizenship, under § 338(e) of the Nationality Act of 1940. I suggest that we grant this petition for certiorari, vacate the judgment and remand the cause to the District Court for reconsideration in the light of our opinion in No. 548 - Bridges v. United States.

(The United States apparently also has pending a civil proceeding to revoke Bridges' citizenship but that case is not here.)

2. No. 527 - United States v. Klinger. We have voted to affirm this judgment, without opinion, by an evenly divided Court. Because of the several issues involved, that affirmance is consistent with my views stated for the Court in the Grainger cases and I believe that our opinions in the Bridges and Grainger cases eliminate every substantial basis for a reargument in the Klinger case.

3. No. 750 - United States v. Berman. The same District Court that dismissed the indictments in the Grainger cases dismissed this indictment. It was filed, in 1952, against respondents charging embezzlement, in 1946, of funds of the Commodity Credit Corporation after those funds came into the hands of the respondents through sales of wool made by them on behalf of the C.C.C. The case also includes a conspiracy count relating to the same fraud. I recommend that certiorari be granted, the judgment reversed and the cause remanded to the District Court, citing Nos. 634, 635 and 636 - United States v. Grainger, etc.

H.H.B.

6/10/53

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

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

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

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

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