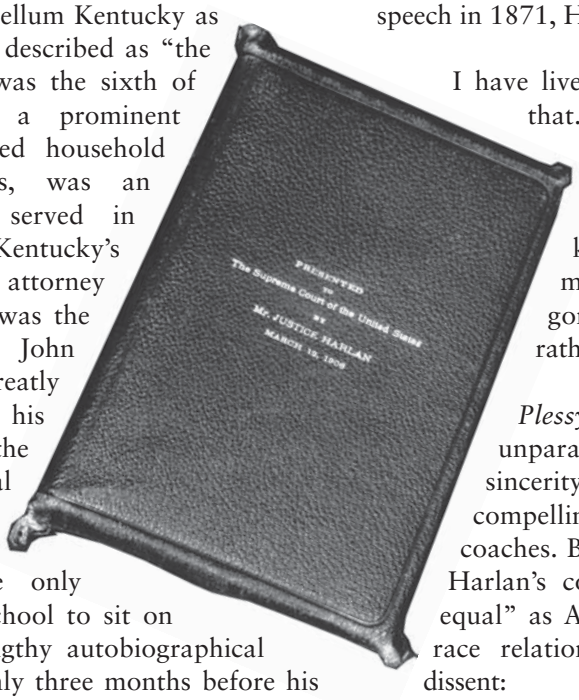
Historical significance of a Kentucky colonel named Harlan

BY JUDGE DARRELL WHITE (RET.)

What do a Kentucky colonel named Harlan, a "colorblind" constitution and an old Bible have in common? Well, for starters, this colonel is known—not for fried chicken—but for his principled stand in support of constitutional equality and against "separate-but-equal" Jim Crow sentiments that plagued America following the War Between the States. Justice Thurgood Marshall picked himself up in low moments by reading aloud from this judge's prose and admired him above any justice who ever sat on the Supreme Court of the United States.[1] The little-known story of this Harlan's March 12, 1906, legacy of a study Bible to the Supreme Court launched a flyleaf-signing tradition that has been handed down from justice to justice without exception to the present day. Regarded by some as a "doctrinal prophet,[2]" attention drawn to the "Harlan Bible" story may further elevate the stature of our 45th Supreme Court Justice—John Marshall Harlan I (1833-1911). A century later, Harlan's life offers a powerful character lesson, and it is fitting—if ironic—to feature this former slave owner during Black History Month.

Harlan grew up in antebellum Kentucky as a member of what has been described as "the southern aristocracy.[3]" He was the sixth of nine children born into a prominent Kentucky family that owned household slaves. His father, James, was an influential attorney who served in Congress and later was Kentucky's secretary of state and attorney general. Harlan's namesake was the legendary chief justice, John Marshall, whom his father greatly admired. Unlike many of his contemporaries, Harlan had the privilege of a formal education, and when appointed to the Supreme Court in 1877, was the only graduate of a formal law school to sit on that Court's panel. In a lengthy autobiographical letter he wrote to his son only three months before his death, Harlan recollects many features of his fascinating life, including sitting at his father's feet listening to orations by the great Whig statesman Henry Clay.[4]



In the pre-war border state of Kentucky, emotions ran high on both sides of the slavery and secession issues. With family background influencing his ethnic attitudes, the young Harlan vigorously defended the property rights of slave owners, believing that government should not interfere. Yet even as he applauded the *Dred Scott* decision and opposed Abraham Lincoln—and subsequently his Emancipation Proclamation, he treasured America's perpetual union and enlisted in the Union Army in 1861, mustering and commanding a regiment to preserve our Constitution against what he viewed as the rebellion of secessionists. Having served with distinction,[5] in 1863 Harlan resigned his colonel's commission in the 10th Kentucky Volunteer Infantry in order to attend to pressing family business prompted by his father's unexpected death.

Following the conflict, Harlan gradually accepted the reconstruction amendments as having become integral to the Constitution. Partly from practical political considerations and partly from revulsion at vicious acts of violence of that period, Harlan reversed his position on the slavery issue and spoke out boldly in opposition to the execrable institution.[6] In one such speech in 1871, Harlan admitted:

> I have lived long enough to feel and declare that...the most perfect despotism that ever existed on this earth was the institution of African slavery...With slavery it was death or tribute...It knew no compromise, it tolerated no middle course. I rejoice that it is gone...Let it be said that I am right rather than consistent.

Plessy v. Ferguson presented Harlan with unparalleled opportunity to demonstrate that sincerity. At issue was a Louisiana law compelling segregation of ethnic groups in rail coaches. By affirming that law's constitutionality, Harlan's colleagues countenanced "separate but equal" as America's judicially approved status for race relations. Harlan stood alone in vigorous dissent:

> In the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are

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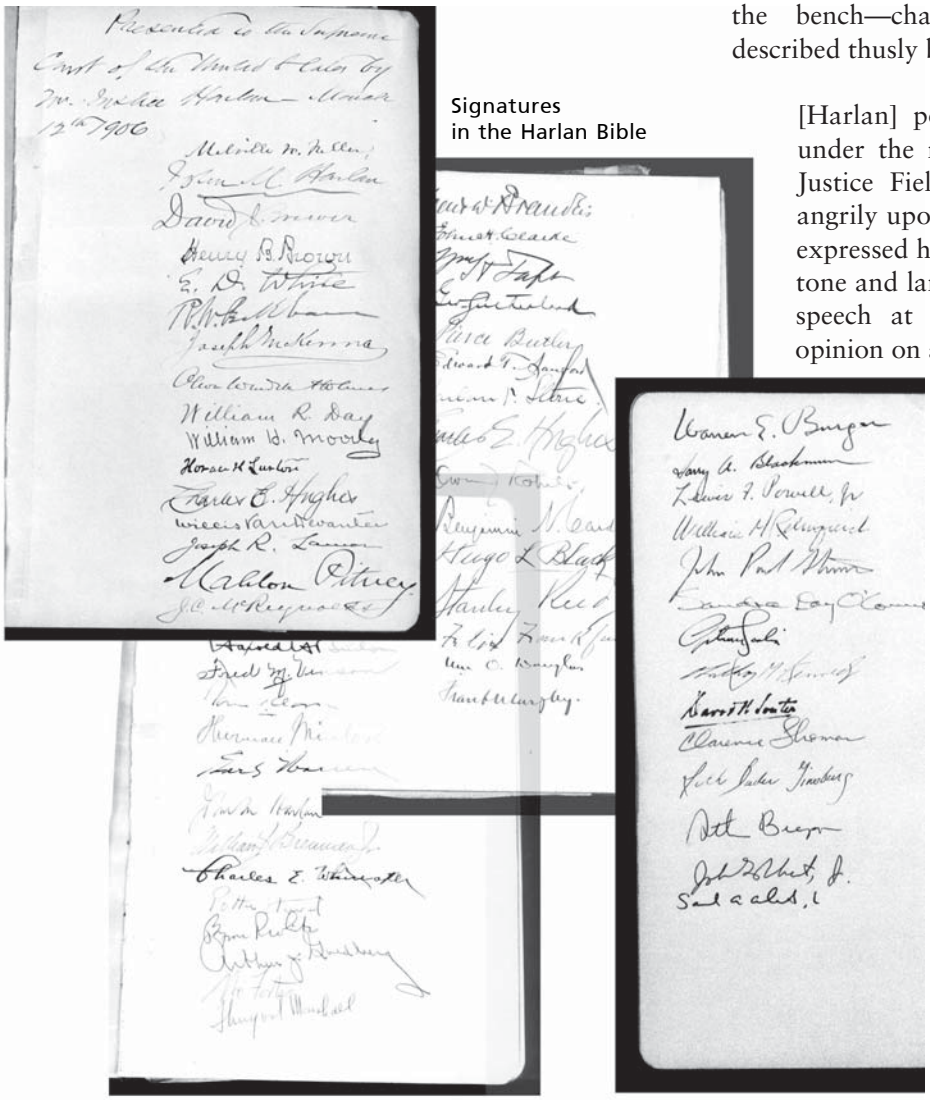

Signatures in the Harlan Bible

> equal before the law. The humblest is the peer of the most powerful....The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.[7]

Harlan's appointment to the Supreme Court in 1877 had come toward the end of the formal Reconstruction Period and while the nation was still healing from the War.[8] During his almost 34 years on the Court, Harlan participated in over 14,000 decisions, compiling one of the longest tenures of any justice. During that time, his often solitary complaints earned Harlan a distinction as "The Great Dissenter.[9]" Perhaps the last of the tobacco-chewing justices,[10] Harlan was a passionate jurist who acknowledged that his emotions about a case sometimes showed. One dissent that he delivered impromptu from the bench—characterized as "an harangue"—was described thusly by the media:

> [Harlan] pounded the desk, shook his finger under the noses of the Chief Justice and Mr. Justice Field, turned more than once almost angrily upon his colleagues of the majority, and expressed his dissent from their conclusions in a tone and language more appropriate to a stump speech at a Populace barbeque than to an opinion on a question of law before the Supreme Court of the United States.[11]

Yet, on a personal level, Harlan was described as quiet, courteous, and good-humored, devoted to his family and revered by his students. His colleague Justice David Brewer remarked that Harlan "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness."[12]

Twelve years prior to his historic lone dissent in *Plessy v. Ferguson*, Harlan had also stood alone in dissent from his colleagues' nullification of the 1875 Civil Rights Act—legislation that had affirmed the equality of all persons in public accommodations.[13] And keen sensitivity to civil rights is evident in other of Harlan's opinions.[14]

While more could be written about Harlan's prescient jurisprudence,[15] what about this "Harlan Bible" flyleaf-signing tradition? To back up, while a panelist fielding law students' questions over former Alabama Chief Justice Roy Moore's controversial Ten Commandments monument, I was asked the question, *"What oath does a federal judge take?"* Confessing ignorance, I pledged to investigate.

To my surprise, I learned of unique features associated with the installation ceremony for justices of the Supreme Court of the United States and an unmistakable biblical allusion[16] embedded in this Judicial Oath as it is called by the Supreme Court. Before taking office, America's federal judges must each take an oath/affirmation that traces back to our nation's very beginning. This Judicial Oath is codified today in 28 U.S. Code 453[17] which, with one minor exception,[18] is identical to language set forth in Section 8 of the Judiciary Act of 1789.[19] That important legislation—passed during the first Congress under our Constitution—established America's inferior federal court system and also prescribed the oath/affirmation of office requirement

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for both clerks and judges of all the federal courts. In Section 7, the clerks' oath/affirmation is set forth, and it renders the ending "*So help me God*" distinctly optional.[20] In contrast, the oath/affirmation required of federal judges in the paragraph immediately following differs in that it leaves no opt-out for the concluding sentence, "*So help me God.*"[21]

My curiosity was aroused over this inspiring directive to *"administer justice without respect to persons"*[22] as well as the mandatory ending, *"So help me God"* for the judges' oath as distinguished from that required of federal court clerks. Why isn't this obligatory[23] appeal to divinity a "religious test" prohibited by Article VI of the then brand-new Constitution? Didn't the principal drafters of the Judiciary Act of 1789—soon-to-be Chief Justice Oliver Ellsworth[24] and Justice William Paterson[25] (both of whom also simultaneously participated in drafting the First Amendment)—know that this *"So help me God"* requirement was on shaky constitutional footing?[26]

To learn more, I called Retired Major General (MG) William Suter, Supreme Court Clerk, and asked him about America's majestic Judicial Oath.[27] He explained some fascinating facts, including how the justices, immediately after Senate confirmation, sign an oath so they can commence performing official duties; then they orally recite that same oath before the cameras. That is the "*Constitutional Oath*" required of all federal employees except the President and prescribed by 5 U.S.C. 3331.[28]

Then MG Suter explained how the justices follow that activity by taking their ceremonial Judicial Oath in the courtroom, which commences with the new justice being seated in former Chief Justice John Marshall's chair (pictured above) before being called forward for the investiture. Next, MG Suter explained matter-of-factly, "Then they sign the Bible." What Bible you ask? The "Harlan Bible!" Maintained by the Supreme Court Curator, the Harlan Bible is presented to each justice shortly after taking office. So far, none of the over 60 justices since 1906 have declined invitation to sign the flyleaf, so the tradition endures to the present.[29]

What possessed Justice Harlan—senior in longevity on the Court at the time—to donate this Bible to the Supreme Court in the first place? Perhaps we find a clue in sentiments he expressed—also in 1906—memorialized on the web site of Washington, D.C.'s historic New York Avenue Presbyterian Church, where Justice Harlan was a leader and Bible teacher:

> I believe the Bible is the inspired word of God. Nothing it commands may be safely or properly disregarded and nothing it condemns may be justified. No civilization is worth preserving that is not based on the teachings or the doctrines of the Bible.[30]

That same year, Harlan stood against segregation within his church denomination's governmental structure.[31] And virulent strains of racism were evident elsewhere in 1906—a Congolese pygmy was placed inside an orangutan's exhibit in the Bronx Zoo,[32] race riots broke out in Atlanta,[33] and anti-Asian prejudice simmered.[34] Perhaps Harlan hoped that the Bible would serve as a reminder that we are really all of "one blood,[35]" a sentiment later expressed by Dr. Martin Luther King Jr. in his famous "*I Have a Dream*" speech.[36]

Why might Harlan's colleagues have joined this firebrand redhead by adding their signatures to his Bible's first flyleaf page? Insight into the shared worldview of some[37] of those justices may be seen in the immigration case of *Rector of Holy Trinity Church v. United States*.[38] The facts concerned the application of an 1885 Act of Congress prohibiting the importation of alien laborers.[39] How would the Supreme Court apply that restriction to Holy Trinity Church's contract with an English minister? That unanimous panel went to great lengths to vindicate the New York City church's hiring practice and concluded with a declaration that "this is a Christian nation.[40]" The ruling noted approvingly the requisite *"So help me God"* ending of oaths of office and specifically singled out with favor a Maryland constitutional provision demanding an acknowledgement of God by officeholders.

Ironically, in just under 70 years, Harlan's namesake grandson, Justice John Marshall Harlan II (1899-1971) would join a unanimous Earl Warren panel that changed the course of American history[41] by nullifying as unconstitutional that precise 200-year-old Maryland Constitution's requirement that officeholders declare a belief in the existence of God as a prerequisite for holding public office.[42] To borrow a phrase from Chief Justice William Rehnquist, "history must judge[43]" which Harlan's view of religious free exercise better serves to

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"secure the blessings of liberty to ourselves and our posterity."[44]

Regarding John Marshall Harlan's legacy, the only two-time signer of the Harlan Bible noted, "Dissents are appeals to the brooding spirit of the law, to the intelligence of another day."[45] Of Harlan's dissents, we the posterity can be grateful that he kept his mind and pen focused on another day. And this glimpse at the "Harlan Bible" flyleaf signing tradition should remind us of the source of our rights, secured[46] by the Constitution and animated by that "promissory note"[47] to all Americans, born and unborn, our Declaration of Independence. The Supreme Court Curator reports that several blank flyleaf pages still remain at the back of The Book.

[1] In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court was confronted with the constitutionality of a Louisiana law that mandated separate but equal facilities for passengers in railway cars. Justice John Marshall Harlan's lone dissent is widely hailed today as more consistent with our constitutional values and deserving of respect than the Court's majority opinion. Discussed at *Harlan's Great Dissent*, by Charles Thompson, published in Kentucky Humanities, 1996 No. 1 issue, page 2, available at http://library.louisville.edu/law/harlan/harlthom.html (accessed 10/20/06).

[2] *Judges as Prophets: A Coverian Interpretation*, by Ronald R. Garet, page 6, http://www.usc.edu/dept/law/symposia/judicial/pdf/garet.pdf (accessed 12/08/06). When it mattered most, Harlan stood against what University of Chicago Law Professor Philip Kurland called the "derelicts of constitutional law"—cases such as *Dred Scott* and *Plessy v. Ferguson*. See http://www.highbeam.com/DocPrint.aspx?DocId=1G1:5053657 (accessed 12/18/06).

[3] Oyez, U.S. Supreme Court Multimedia Resource, http://www.oyez.org/oyez/resource/legal_entity/44/print (accessed 10/13/06).

[4] Harlan also explains his decision to enlist in the Union cause to preserve the Constitution and leaves fascinating glimpses of his war experiences, including his capture of civilian hostages to thwart lynchings, his commandeering of a vessel on which he later learned General U.S. Grant had been sleeping, and his having shot at a group of Confederate soldiers that included fellow Kentuckian Horace Lurton, a soon-to-be-Supreme Court colleague. That memorable letter may be viewed online at http://library.louisville.edu/law/harlan/civilwar.pdf (accessed 12/18/06). On a personal note, Harlan's letter is dated July 4, 1911, which is the very day on which my father—former BRBA member, Gordon Morris White I (1911-2002)—was born.

[5] Unknown to Harlan, at the time of his resignation, President Lincoln had already nominated him to the rank of Brigadier General.

[6] Harlan's attitude may have been impacted by the fact that he had an older slave half-brother, Robert Harlan. Ironically, the most prominent current internet reference to "Harlan" and "Bible" involves the Supreme Court's 2005 denial of review involving the Colorado murder conviction of a Robert Harlan whose death sentence was reversed because the jury had consulted a Bible during their deliberations: See, for example, "High Court Lets Stand No Bible Ruling" at http://www.csmonitor.com/2005/1004/p03s01-usju.html (accessed 12/06/06).

[7] 163 U.S. 537, 559 and 562 (1896).

[8] Readers will be intrigued to learn that, along his path to his Supreme Court appointment, Harlan's political career involved straightening out a disputed Louisiana election. After Rutherford Hayes was declared the winner of the 1876 presidential election, he appointed a commission to determine which of two Louisiana governments was legitimate, and one of the commissioners was Harlan.

[9] While Harlan delivered the opinion of the Court in 745 cases, he dissented in over 300 others. Professor Loren Beth, in his 1955 article "Justice Harlan and the Uses of Dissent," observed that Harlan's "…heart led him to sound conclusions even when his logic and legal knowledge failed him. If anyone in American judicial history really deserves the title of 'The Great Dissenter,' Justice John Marshall Harlan of Kentucky is the man." From "John M. Harlan," by Louis Filler, published in *The Justices of the United States Supreme Court, 1789-1969, Volume II*, Chelsea House Publishers (1969), p 1294.

[10] Supra, Note 3.

[11] Harlan's dissent in *Pollock v. Farmer's Loan and Trust Co.*, 158 U.S. 601 (1895), as described in *The Justices of the United States Supreme Court, 1789-1969, Volume II*, Supra, Note 9 at 1286-7.

[12] *Judicial Enigma: The First Justice Harlan*, by Tinsley E. Yarbrough, (1995) viii, referenced at http://www.usc.edu/dept/law/symposia/judicial/pdf/garet.pdf (accessed 12/18/06).

[13] Civil Rights Cases, 109 U.S. 3 (1883). A fascinating story is told of how Harlan's wife, Mallie, inspired her husband as he struggled to compose this dissent by placing on his desk the very inkstand used by former Chief Justice Roger Taney in his authorship of the detestable *Dred Scott v. Sandford* opinion that denied the personhood of slaves. Recounted Mallie, "The memory of the historic part that Taney's inkstand had played in the *Dred Scott* decision, in temporarily tightening the shackles of slavery upon the Negro race…seemed to act like magic in clarifying my husband's thoughts….His pen fairly flew on that day and…he soon finished the dissent." The Great Dissenter: John Marshall Harlan, 1833-1911, by Frank B. Latham (1970), pp. 92-93. An interview of Justice Ruth Bader Ginsburg regarding this subject is available at http://www.npr.org/programs/morning/features/2002/may/ginsburg/(accessed 12/18/06).

[14] In *Strauder v. West Virginia*, 100 U.S. 303 (1880), Harlan voted to nullify a West Virginia law restricting jury service to whites. In *Wong Wing v. United States*, 163 U.S. 228 (1896), Harlan voted to nullify the "Chinese Exclusion Act" that had denied jury trial while imposing imprisonment at hard labor and deportation to Chinese persons convicted of unlawful entry to or presence in the United States. In *Berea College v. Kentucky* 211 U.S. 45 (1908), Harlan dissented from a ruling that disestablished a desegregated co-educational school founded in 1855. Harlan asked, "Have we become so inoculated with prejudice of race that an American Government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?" Id. at 69.

[15] Harlan's last dissent, shortly before his death, addressed the judicial activism controversy swirling today: "illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure." He continued, "After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction." *Standard Oil v. United States*, 221 U.S. 1 at 105 (1910).

[16] Such examples are not uncommon to the founding era. Political scientists have concluded that the Bible accounts for 34 percent of founding-era source references. "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," Donald S. Lutz, 78 *The American Political Science Review*, 189-197 (Mar., 1984).

[17] "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. *So help me God*.'"

[18] For reasons still unclear to the writer, this judicial oath was changed slightly in December 1990. The phrase "according to the best of my abilities and understanding, agreeably to the Constitution" was replaced with the language "under the Constitution." No change was made to the oath's conclusion, "*So help me God.*"

[19] The formal title is "An Act to establish the Judicial Courts of the United States" http://memory.loc.gov/cgi-binampage?collId=llac&fileName=002/llac002.db&recNum=481 (accessed 12/21/06).

[20] Section 7 provides "And be it [further] enacted, That the Supreme Court, and the district courts shall have power to appoint clerks for their respective courts, and that the clerk for each district court shall be clerk also of the circuit court in such district, and each of the said clerks shall, before he enters upon the execution of his office, take the following oath or affirmation, to wit: 'I, A. B., being appointed clerk of , do solemnly swear, or affirm, that I will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God.' *Which words, so help me God, shall be omitted in all cases where an affirmation is admitted instead of an oath.* And the said clerks shall also severally give bond, with sufficient sureties, (to be approved of by the Supreme and district courts respectively) to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk." (Emphasis added).

[21] Section 8 provides "And be it further enacted, That the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: 'I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as, according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States. *So help me God*.'" (Emphasis added).

[22] Among character qualities repeated in scripture is that judges be not "*respecters of persons.*" With a total of eight biblical references, four point to this feature of God. "[There is] no iniquity with the Lord our God, nor *respect of persons*, nor taking of gifts." (2 Chronicles 19:7). "Then Peter opened [his] mouth, and said, Of a truth I perceive that God is no *respecter of persons*...." (Acts 10:34). "For there is no *respect of persons* with God." (Romans 2:11). "And if you call on the Father, who without *respect of persons* judges according to every man's work, pass the time of your sojourning [here] in fear." (1 Peter 1:17). Another four references point to this qualification of earthly judgment. "You shall not *respect persons* in judgment; [but] you shall hear the small as well as the great; you shall not be afraid of the face of man; for the judgment [is] God's...." (Deuteronomy. 1:17). "You shall not wrest judgment; you shall not *respect persons*...." (Deuteronomy 16:19). "These [things] also [belong] to the wise. [It is] not good to have *respect of persons* in judgment." (Proverbs 24:23). "But he that does wrong shall receive for the wrong which he has done: and there is no *respect of persons*." (Colossians 3:25). (King James version).

[23] Justice O'Connor's concurrence in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 at page 36 footnote (2004) opines that this "*So help me God*" ending for the judicial oath required by 28 U.S.C. 453 is "optional." However, the writer is aware of no indication that Congress shares her view or any example of a federal judge who has been willing to test her premise at the moment of installation into office.

[24] Ellsworth was an influential member of the Constitutional Convention, who, along with Roger Sherman, proposed the "Connecticut Compromise" resolving the deadlock over state representation. Ellsworth was elected to the first Senate under the Constitution and led the committee charged with framing the structure for the federal courts. He is credited with being the main writer of the Judiciary Act of 1789 that laid out in detail the makeup and composition of the federal courts. One commentator notes with admiration that "aside from a few minor alterations, the structure of the federal judiciary remains the same to this day." *The Founding Fathers: The Men Behind the Nation*, 175-76 John S. Bowman, Ed. (2005). Ellsworth also worked on the draftsmanship of the First Amendment. After his legislative service, Ellsworth served as Chief Justice of the Supreme Court from 1796-1800. Ironically the landmark 1961 case, *Torcaso v. Watkins*, America's first Article VI "no religious test oaths" Supreme Court ruling, approvingly quotes Ellsworth specifically for "his strong arguments against religious test oaths" 367 U.S. 488, 494, n. 9, notwithstanding Ellsworth's writing a requirement into the Judiciary Act of 1789 that federal judges' oaths must end with the utterance, "So help me God." See Section 8 of Judiciary Act of 1789, now codified as 28 U.S.C. 453 at Notes 17 and 21, supra.

[25] Paterson was a signer of the Constitution and a U.S. Senator from New Jersey (1789-1790), during which latter period he participated in drafting the First Amendment and is credited with co-authoring (with Oliver Ellsworth) the Judiciary Act of 1789. The first nine sections of the Judiciary Act of 1789 are in Paterson's own handwriting. President George Washington appointed Paterson to the Supreme Court where he served as an associate justice from 1793-1806. *Soldier-Statesmen of the Constitution*, 166-67 Robert K. Wright Jr. and Morris J. MacGregor Jr. (1987).

[26] America's founders regarded public acknowledgement of God as a self-evident philosophy of government set forth in our charter, the Declaration of Independence, to which reference is made in the Constitution's conclusion (Article VII). That "Unanimous Declaration"—with four distinct references to divinity—still appears at Page One, Volume One of the U.S.C. as comprising the first of America's organic laws. Because the Constitution's legitimacy depends upon the Declaration of Independence, the former's powers cannot contradict the latter's principles. For, if the Declaration is not an actual law both antecedent and superior in authority to the Constitution as well as the source of authority for "We the People" to enact the Constitution, then the Constitution itself is illegitimate. Before the founders could enact their own laws, binding on anyone, including themselves, Americans had to gain legal independence from Great Britain. They secured that independence under the legal auspices of the Declaration. Therefore, they could enact only such subsequent laws as were entirely consistent with the principles the Declaration set forth. The Supreme Court has acknowledged that "[W]e are a religious people whose institutions *presuppose* a Supreme Being." *Zorach v. Clausen* 343 U.S. 306, 313 (1952) (Emphasis added).

[27] Major General (Retired) William Suter is a 1962 Tulane Law School graduate and was Commandant of the U.S. Army's Judge Advocate General Corps School when I had attended as a Louisiana Army National Guardsman.

[28] "Oath of Office—An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. *So help me God.*' This section does not affect other oaths required by law." (Emphasis added). It was my privilege to administer a comparable oath to our son, Gordon White II, when he graduated from the Air Force Academy in May 2006.

[29] Charles Evan Hughes had a break in service on the Supreme Court and signed the Harlan Bible twice.

[30] http://www.nyapc.org/history/?name=Justice%20Harlan (accessed 12/06/06).

[31] "When in 1906 the Washington, D.C. Presbytery voted to reunite its Cumberland Presbyterian Church and Presbyterian Church USA congregations, Harlan was one of two Presbytery members to vote against the reunion, since the reunification permitted segregated congregations wherever people wanted to organize them."

Discussed at http://www.nyapc.org/history/?name=Justice%20Harlan (accessed 12/08/06).

[32] http://www.npr.org/templates/story/story.php?storyId=5787947 (accessed 12/08/06).

[33] http://www.npr.org/templates/story/story.php?storyId=6106285 and http://www.1906atlantaraceriot.org/ (accessed 12/08/06).

[34] The "Asiatic Exclusion League" had been formed the year before in 1905, and Congress's focus was on the immigration rights of "free white persons." Discussed in *Takao Ozawa v. United State*s, 260 U.S. 178 (1922).

[35] Acts 17:26, Holy Bible (King James version). In 1875, Harlan said, "Here those people [Blacks] are and here they will remain. *They were created as we have been, in the image of the Maker*, and every dictate of humanity, to say nothing of self-interest, imperatively demands that political organizations shall cease to keep alive the prejudices and passions which grew out of the abolition of the institution of slavery." See generally, www.onehumanrace.com (accessed 12/18/06).

[36] "When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, 'Free at last! Free at last! Thank God Almighty, we are free at last!'" Dr. Martin Luther King Jr. "I Have a Dream" Speech, Aug. 28, 1963, delivered on steps of the Lincoln Memorial in Washington, D.C.

[37] The first four signers of the Harlan Bible, Chief Justice Melville Fuller and Justices John Marshall Harlan, David Brewer, and Henry Brown, had each joined in the unanimous 1892 Holy Trinity Church opinion. The next justice to sign the Harlan Bible was Louisiana's own Edward Douglas White, who joined the Supreme Court in 1894. Insight into White's worldview is offered by LSU Law Professor Paul Baier, husband of BRBA President Barbara Baier. Professor Baier is also the playwright and director of "Father Chief Justice" and shares, "White's deep religious convictions may have had something to do with the nomination. Sometime before the nomination, at a party given by one of White's fellow senators, President Cleveland overheard White ask if there was a Catholic church nearby where he could attend early Mass. 'I made up my mind,' said [President Grover] Cleveland, 'that there was a man who was going to do what he thought was right; and when the vacancy came, I put him on the Supreme Court.' B. Perry, *And Gladly Teach* 146-47 (1935)." 43 La. L. Rev. 1001, 1004 n. 14 (1983).

[38] 143 U.S. 457 (1892). Accessible online at http://supreme.justia.com/us/143/457/case.html (accessed 12/18/06).

[39] "The law is no respecter of *parsons*" punned one editorialist over Congress' failure to exempt ministers alongside "actors, artists, lecturers, singers, or personal servants" from the Alien Contract Labor Act's hiring restrictions. The Church claimed "free exercise" protection.

[40] *Holy Trinity,* 143 U.S. at 471.

[41] "Not until 1961 was this 'declaration of belief [in God]' ...invalidated." Leonard F. Manning, *The Law of Church-State Relations in a Nutshell* 3 (St. Paul: West Publishing Co., 1981). Another commentator writes, "The Constitution required an oath of office, but prohibited a religious test; an oath, however, presupposed a belief in God; therefore, only under the most extreme and absurd application of Article VI could a belief in God have been considered a religious test. Consequently, when the *Torcaso* Court struck down the requirement of belief in God to hold office, it essentially struck down the requirement that public officials take an oath to uphold the Constitution." David Barton *Original Intent* 39 (1996). Yet moral-absolutism remains embedded in America's judicial system as all witnesses, before testifying, must declare to tell the truth by oath/affirmation administered in a manner calculated to *awaken the conscience*. See Federal Rules of Evidence, Rule 603. If America's institutions *presuppose* the existence of a Supreme Being, an appeal to that Supreme Being for the performance of our oaths is logical. *See,* Note 26, supra.

[42] The watershed case of *Torcaso v. Watkins*, 367 U.S. 488 (1961), was the Supreme Court's first Article VI ruling interpreting the "no religious test" clause of the officeholders' oath/affirmation requirement. Roy Torcaso was denied a commission as a Maryland notary public upon his refusal to sign that state's affirmation requiring "a declaration of belief in the existence of God" per Maryland's Constitution's Declaration of Rights, Article 37. Torcaso had lost in the Maryland state courts on a finding that the qualification of office was self-executing: "The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief, he cannot hold public office in Maryland, but he is not compelled to hold office." Id. at 495. The Supreme Court's reversal and nullification of Article 37 failed to note that the same Maryland Constitution's Declaration of Rights also protected Torcaso's "free exercise" of religion in Article 36. That the word "religion" meant a denominational test and did not embrace "irreligion" (atheism) is evident from Article 36's expectation that one "believes in the existence of God...." *See* Note 26, supra.

[43] In a lengthy dissent from the Supreme Court's majority opinion nullifying Alabama's moment of silent prayer statute, then-Justice Rehnquist declared, "History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985).

[44] Harlan II was an associate justice from 1955 until 1971. Like his grandfather, he shared a concern for ethnic equality. See *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gomillon v. Lightfoot*, 364 U.S. 339 (1960); and *Loving v. Virginia*, 388 U.S. 1 (1967). However these two Harlan Bible signers held different worldviews concerning the relative importance of the Bible in public affairs. When invited, Harlan I declined to depart from the founders' meaning of the word "religion" as expressed in the First Amendment. See *Reynolds v. United States*, 98 U.S. 145, 162-64 (1878), and *Davis v. Beason*, 133 U.S. 333, 342 (1890). In contrast, Harlan II not only abrogated a state's prerogative to insist on God-acknowledging oaths by public officeholders, but he specifically recognized that a number of "religions" (including "secular humanism") are entitled to constitutional protection (See *Torcaso*, at n. 11). Harlan II also blazed a trail we still walk by removing school prayer and Bible readings from America's public schools beginning in the early 1960's See *Engel v. Vitale,* 370 U.S. 421 (1962), and *Abington Township School Distr. v. Schempp*, 374 U.S. 203 (1963). How far will the word "religion" be stretched? As this article goes to press, Phillip Distasio (34) is defending himself against Ohio drug and pedophilia charges on grounds that the conduct constitutes "sacred rituals" of his religion. Distasio claims to be a "pagan friar" and member of a religion called Arcadian Fields Ministries. He said, "I'm a pedophile. I've been a pedophile for 20 years. The only reason I'm charged with rape is that no one believes a child can consent to sex. The role of my *ministry* is to get these cases out of the courtrooms." http://www.lifesite.net/ldn/2006/aug/06080304.html (emphasis added)(accessed 12/08/06).

[45] Chief Justice Charles Evan Hughes, attributed at C.E. Hughes, *The Supreme Court of the United States* 68 (1928), noted in K.M. Zobell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, (1959) 44 Cornell L.Q. 186, 211 and http://en.wikiquote.org/wiki/Charles_Evans_Hughes (accessed 12/04/06).

[46] The Declaration of Independence notes that civil government's purpose is to *secure* rights that are endowed by a Creator. The Constitution's Preamble declares that among its purposes is to *secure* blessings of liberty to our posterity. And Thomas Jefferson's Memorial admonishes us that the liberties of a nation cannot be *secure* if their only firm basis—"a conviction in the minds of the people that these liberties are a gift from God"—were to be removed.

[47] "When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a *promissory note* to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the inalienable rights of life, liberty and the pursuit of happiness." *See* Note 36, supra. (emphasis added).