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## A SKETCH OF JOHN MARSHALL HARLAN'S PRE-COURT CAREER

DAVID G. FARRELLY\*

Like other men before and after his time, John Marshall Harlan of Kentucky left his imprint on the law. Nearly 34 years on the Supreme Court of the United States gave Harlan ample opportunity to express his opinions on a host of legal questions. Sitting on the high bench as he did from 1877 to 1911, public problems passed before him for review in the form of litigation. During that post-Civil War period as today there was discrimination against the Negro in American society. Despite the constitutional guaranties of the 13th, 14th and 15th Amendments, Negroes were not accorded the equality of the laws to which they have been entitled as citizens of the United States. It has taken decades of struggle to achieve for the Negro even partial equality under the law. The battle for full equality is not ended, of course; it continues today.

Instances of discrimination against the Negro came before the Supreme Court in cases reviewed during the long tenure of Associate Justice John M. Harlan. Two of the leading decisions were announced by the Court over the lone dissent of Harlan. Both the *Civil Rights Cases*<sup>1</sup> and *Plessy v. Ferguson*<sup>2</sup> were landmark opinions in the field of race relations, and each opinion in its effects stamped the Negro as second-class citizen. In these two cases and many others Justice Harlan disagreed with the other members of the Court. Only within recent years has Harlan's position been vindicated.<sup>3</sup> In bygone years Harlan was a dissenter; today in the area of race relations Harlan would be with the Court's majority.

The time is long overdue to uncover more information about Harlan the man. Little has been written about him; many "facts" relating to his life and work have been inaccurately reported. Although Harlan's mark upon the law is quite well known, being readily accessible in the *United States Reports*, his life has never been fully written and interpreted.<sup>4</sup> What follows is an effort to bring together some

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1. 109 U.S. 3 (1883).

2. 163 U.S. 537 (1896).

3. *Brown v. Board of Education*, 347 U.S. 483 (1954).

4. John Marshall Harlan's papers are divided into two groups. There is a collection of letters and scrapbooks deposited in the University of Louisville Law School. The main body of the First Justice Harlan's personal and family papers was collected by his son Richard who had planned to write a biography. This latter collection has been available to the author at U.C.L.A. for the past several years. At the present time, however, it is in the possession of Alan F. Westin, Senior Fellow in Law at the Yale Law School, New

basic background data relating to this great Kentuckian. This is merely a sketch of Harlan's pre-Court career, boiled out of some 200 pages of first-draft manuscript. In particular, an attempt has been made to emphasize the part the Negro played in this political phase of Harlan's life.

#### *Harlan's Kentucky Career*

Abandoned today, but still standing, is the stone house where John M. Harlan was born June 1, 1833. From this farm near Danville the family moved in 1835 to Harrodsburg, and in 1840 they moved again—to Frankfort, the state capital. At the age of seventeen John Harlan graduated from Centre College and then, in 1852, he completed the law course at Transylvania University. His first 28 years were spent largely in and around Frankfort, which lies only 85 miles below Cincinnati, Ohio.

Even in his teens Harlan was concerned with public affairs. At fifteen he drilled in preparation for the Mexican War, but his company was not selected to go. On many occasions he went to political rallies with his father and came to know Henry Clay personally. While serving as a clerk in the State House at the age of eighteen, Harlan was given a surprise appointment as Adjutant General of Kentucky.<sup>5</sup>

Harlan was admitted to the bar at Frankfort in 1853. The next year he was elected city attorney and in 1856 he was re-elected for another two-year term.<sup>6</sup> Also in the latter year, he married Malvina Shanklin of Evansville, Indiana. Theirs was a happy marriage in every respect and they produced six children. One of their three sons, John Maynard Harlan, became the father of the present Justice John M. Harlan.

Entry into party politics occurred in 1854, the year Harlan became city solicitor. Although he had some qualms about joining, he took the oath as a member of the Know-Nothing organization and thereby

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Haven, Conn., to whom they were loaned by the present Mr. Justice John M. Harlan. Mr. Westin had hoped to complete a study of the first Harlan's civil rights opinions and his later attitude toward this question, to go together with the author's sketch of Harlan's Kentucky career. However, it proved impossible for Mr. Westin to complete his analysis in time for this issue of the *Review*. Mr. Westin and I are collaborating on a biography of Harlan.

I have made use of the Harlan Family Papers previously. See my articles: *John M. Harlan's One-Day Diary*, 24 *FILSON CLUB HISTORY Q.* 158 (1950); *Justice Harlan's Dissent in the Pollock Case*, 24 *SO. CALIF. L. REV.* 175 (1951); *'Rum, Romanism and Rebellion' Resurrected*, 8 *WESTERN POL. Q.* 262 (1955).

5. Harlan MS., *My Appointment as Adjutant General of Kentucky and My First Meeting with James G. Blaine* (undated, 3 pp.), Harlan Family Papers. See also FEDERAL WRITERS PROJECT, *MILITARY HISTORY OF KENTUCKY* 404 (1939), which shows that Harlan served as Adjutant General from 1851 to 1859. In Harlan's day the position was relatively unimportant, the militia being decentralized. However, he was brought into wide contact with many men, among whom was James G. Blaine. At the Republican national convention in 1876 Harlan opposed Blaine's nomination for President and on the crucial seventh ballot Blaine lost to Hayes.

6. JOHNSON, *HISTORY OF FRANKLIN COUNTY* 137 (1912).

aligned himself with the Whig hierarchy of Frankfort.<sup>7</sup> The next year Harlan campaigned for the candidates of the American party and attracted immediate attention.<sup>8</sup> "He came amongst us unknown to fame, and utterly unheralded," said one reporter, "but he left an impression behind him that will not be effaced for a long time."<sup>9</sup> In 1856 Harlan canvassed 40 counties for the presidential ticket of the American party. In August, 1858 he was elected judge of Franklin County (Frankfort) on the American slate, and he held office until May 4, 1861.<sup>10</sup>

In 1859 young Judge Harlan ran for Congress in the famous Ashland District. Fraudulent voting by the Democrats beat him, but it was politically inexpedient to contest the result.<sup>11</sup> As a Constitutional Unionist in 1860 Harlan canvassed in the Ashland area and cast his presidential elector's ballot for Bell and Everett. Moving to Louisville in 1861, Harlan's plans for law practice were forced aside by the Civil War. He was commissioned a colonel in the Union Army, raised his own regiment, and served on active duty for 17 months, including all of 1862.

Resigning from the army in March, 1863, Harlan went back to Frankfort where he was immediately nominated as candidate for Attorney General.<sup>12</sup> He was elected easily and served four years in office.<sup>13</sup> After moving to Louisville in 1867 Harlan coupled the practice of law with politics for the next decade. He ran for governor in 1871 and 1875 and devoted his energies to building the Republican party which he had joined in 1868. In 1876 he was instrumental in switching the Kentucky delegation to Hayes at the Republican national convention. President Hayes in 1877 appointed Harlan to his Louisiana Commission.<sup>14</sup> Then,

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7. Harlan MS., *The Know-Nothing Organization—My First Appearance as a Public Speaker and Participation in the Presidential Campaign of 1856—Election as County Judge in 1858, and Contest for Representative in Congress in 1859* (undated, 23 pp.), Harlan Family Papers.

8. *Ibid.*

9. Lexington Observer and Reporter, July 25, 1855, quoted in Hartz, *John M. Harlan in Kentucky, 1855-1877*, 14 *FILSON CLUB Q.* 17, 19 (1940).

10. Franklin County Court Order Book N, 222, 379, 382 (1854-1862).

11. Harlan MS., *supra* note 7.

12. Harlan MS., *My Father's Death and My Resignation as Colonel . . . Election on the Union Ticket as Attorney General of Kentucky, in August, 1863* (undated, 4 pp.), Harlan Family Papers.

13. Tri-Weekly Commonwealth, Sept. 4, 1863, shows Harlan, Union party, 65,742; Thomas Turner, Peace Democrat, 12,890.

14. The Louisiana Commission has been confused by several writers with the Louisiana Returning Board. The former was a commission appointed by President Hayes to investigate the political situation in Louisiana and report back to him. Two rival governments in the state claimed recognition, and Hayes sent his fact-finding body to New Orleans. On the other hand, the Louisiana Returning Board was a local body officially responsible for determining whether the state's votes had been accurately recorded in favor of Hayes or Tilden in the November, 1876 presidential election. President Hayes, it will be recalled, was elected by one electoral vote, but Harlan had nothing to do with the Hayes-Tilden controversy.

unable to give Harlan a place in the Cabinet or to tempt him with the ambassadorship to Great Britain, Hayes named Harlan to the Supreme Court in October, 1877.

*Pre-War Politics in Kentucky*

The ante-bellum decade in Kentucky politics was a struggle between Democrats and old Whigs. For almost 40 years the main opposition to the Democratic party had been led by Henry Clay. The Whig party had long been the vehicle of Clay's ambitions, but his death in 1852 marked the end of that party. Henry Clay never had a more faithful follower and friend than James Harlan. Son John shared his father's political views which included an intense dislike of Democratic principles and policies. "It was best," wrote Harlan, "for *any* organization to control public affairs rather than to have the Democratic party in power. That was the kind of political meat upon which my father fed me as I grew up."<sup>15</sup>

While remnants of the Whig party in the north drifted into the new-born Republican party, southern followers of Henry Clay had to tread a different path. In Kentucky their search for a new political home led through the wilds of Know-Nothingism. Factors in the development of the border state especially determined this course. One of the principal influences was the institution of slavery. It would have been political suicide for the Kentucky Whigs to renounce the slave system even if they felt opposed to it in their hearts. Many old Whigs, like James Harlan, owned slaves themselves.<sup>16</sup> They might personally favor some plan for Negro freedom, but they did not advocate general emancipation and they were definitely not Abolitionists. When a friend wrote to James Harlan that political enemies were seeking to brand him "an Abolitionist," John's father replied: "He who applies it to me lies in his throat."<sup>17</sup> While James Harlan allowed at least two of his dozen slaves to purchase their own freedom, he never publicly opposed slavery. Before the war John Harlan did not own slaves, yet he too never condemned the institution of slavery. On the contrary, he espoused it.

An immediate and potentially fruitful source of party rootage seemed to the old Whigs to lie in the exploitation of nativistic feelings against the immigrants. Almost three million foreigners came to America in the decade 1845-1855. The Germans in particular began to arrive in large numbers after their revolution of 1848. Half a million came over from 1852 to 1854, and Kentucky felt the influx of these refugees from Europe. Perhaps the main cause of friction stemmed

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15. Harlan MS., *supra* note 7.

16. James Harlan gained possession of his slaves by inheritance. He abhorred the slave trade.

17. Letter, James Harlan to a friend, Aug. 5, 1851, Harlan Family Papers.

from the unfamiliar attitudes and customs of the Germans. Here were beer drinkers in the Bourbon State, foreigners who did not observe the Sabbath in strict fashion, farmers and merchants who had been raised in a culture that had not embraced the institution of human slavery.

In the Know-Nothing Society, the Kentucky Whigs discovered an organization that had come into being for the purpose of destroying the influence of foreigners and Roman Catholics in public affairs. All the old Whigs of Frankfort belonged to this society and when John Harlan became twenty-one he joined too. Secret sessions of the Know-Nothing Society in 1855 produced nominees for public office, but they ran openly on the ticket of the American party. The American slate scored a great victory sweeping all statewide offices before them. But the next year their presidential candidate, Fillmore, failed to carry Kentucky by a narrow margin and the party collapsed nationally as it won only Maryland. The burning issue of slavery came to the fore, and Know-Nothing principles were abandoned entirely as the American party conducted its last Kentucky campaign in 1858, the year Harlan won his judicial post. In 1859 the ex-Whigs carried on under the label of the Opposition party, and in 1860, this time as Constitutional Unionists, they backed successfully the border-state candidate (Bell) in the race for President. At no point in the pre-war decade was the eradication of slavery a principle of these Kentucky ex-Whigs.

#### *Keeping Kentucky in the Union*

The Harlans, father and son, were loyal to the great traditions of Henry Clay. After the firing on Fort Sumter, Kentuckians were being forced to make a decision between two values: Union or the institution of slavery. Long before his death Clay had given his answer—Union. However, in the beginning many Kentuckians saw the issue only as one between Union or Secession. It was in these terms of perhaps easier alternatives that the Harlans were first called upon to manifest their devotion to the Clay principles of nationalism.<sup>18</sup>

Spring in 1861 found Kentucky in an embarrassing position. She was a slave state and her geographical location was strategically important. Her business interests were geared to the South and her people were strongly connected with the South by ties of kinship and sentiment. The state seethed with public and private debate over what course to take: neutrality, support of the Confederacy, allegiance to the Union. When President Lincoln called upon the states for volunteers, he was rebuffed instantly by the Governor of Kentucky: "Kentucky will

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18. Clay had favored gradual emancipation of slaves in Kentucky, thus removing the issue from the national level and making it a matter of state policy.

furnish no troops for the wicked purpose of subduing her sister Southern States."<sup>19</sup> While the north galvanized into action, Kentucky began an official policy of neutrality.

John Harlan at Louisville and his father at Frankfort declared their adherence to the Union at the outset of hostilities. They dedicated their efforts to the Union cause in a difficult situation. Governor Beriah Magoffin and the state administration held decidedly southern sympathies; the legislature was about equally divided; the State Guard was almost completely disloyal. The secessionists "were active, defiant and aggressive, while the unionists, without organization and without arms, were anxious and fearful."<sup>20</sup>

Positive action was required on the part of the Union men. Together with other loyalists, John Harlan and his father worked both openly and secretly to keep Kentucky from secession. From May through July John and other Louisville men held street corner rallies to persuade the public of the values of Union. By his own estimate Harlan made at least 50 store-box speeches.<sup>21</sup> To offset the military weakness of the Union sympathizers, loyal mayors created home guards; John Harlan was commissioned captain of the Crittenden Union Zouaves.<sup>22</sup> He also helped to run guns into the Frankfort and Lexington areas where the home guards were weaponless. In May he went to Frankfort and lobbied against Governor Magoffin's proposal for a Sovereignty Convention. Malvina Harlan wrote: "My husband and a few others of the younger men actually slept in the State House during several all-night sessions when the dangerous resolution was being discussed."<sup>23</sup>

In August Harlan played an undercover role to keep the *Louisville Daily Journal* from switching its position to favor the secessionists. The discovery of a plot to change the paper's editorial policy and the counterplot by Harlan and a few Union friends saved the newspaper for the Union cause.<sup>24</sup> September saw Harlan active militarily. He led his Zouaves to help defend Louisville from a threatened rebel advance. In addition to becoming well acquainted with General W. T. Sherman, Harlan personally led a key mission to deliver 5,000 rounds of ammunition to loyalists.<sup>25</sup>

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19. Telegram, Gov. Magoffin to Secretary of War Cameron, Apr. 15, 1861, FEDERAL WRITERS PROJECT, MILITARY HISTORY OF KENTUCKY 152 (1939).

20. *General Nelson, Kentucky and Lincoln Guns*, 10 Magazine of American History, Aug. 1883, p. 115.

21. Harlan MS., *The Union Cause in Kentucky, etc.* (undated, 20 pp.), Harlan Family Papers. This manuscript is partially reprinted in SPEED, *THE UNION CAUSE IN KENTUCKY* 116-21, 195-99 (1907).

22. Harlan MS., *Some Experiences as a Captain of the Home Guards*, (undated, 5 pp.), Harlan Family Papers.

23. Harlan MS., *supra* note 21. Malvina Harlan MS., *Some Memories of a Long Life 1854-1911* (typescript, 1915, 297 pp.), Harlan Family Papers.

24. Harlan MS., *supra* note 21.

25. Harlan MS., *supra* note 22.

*Harlan as a Soldier*

After Harlan returned to Louisville with his home guard company of Zouaves, the question of regular army service was faced. He wanted to enlist but he felt his first duty was to his young wife and two small children (a third was on the way). Malvina Harlan came to her husband's rescue and urged him to "go to the front."<sup>26</sup> Relieved of this anxiety for his family's welfare, Harlan determined to raise a regiment. He was commissioned a colonel and soon 847 men were enlisted in his regiment. On November 21, 1861, the 10th Kentucky Volunteer Infantry was mustered into federal service and assigned to the division commanded by General George H. Thomas.

Harlan's war service was as a troop officer, a field commander, and this experience brought him into close relationships with rank and file. Indeed, it is doubtful if any other period in his long life gave him such opportunity to mix so intimately with men of all classes and creeds. Sharing the hardships of war with his soldiers, Harlan learned at first hand what it meant to suffer the privations of war: heat and dust, cold and mud, lack of food and rest, shortage of equipment. On the whole Harlan's war experience was a great leveler and his soldiers affectionately called him "Old Red." His dispatches frequently spoke in tribute of the willingness of his men to endure the sufferings of warfare. Out of this comradeship at arms Harlan developed a life-long sympathy for the common man.

The war record of the 10th Kentucky Volunteers as well as Harlan's recollections show they marched more than they fought.<sup>27</sup> They missed out on their first engagement at Mill Springs, Kentucky in January, 1862. Three months later Harlan's regiment and Thomas' entire division arrived too late at Shiloh to participate in the awful carnage of that important battle. Yet on garrison duty in Mississippi in July, skirmishes were fought and Harlan had two of his companies captured by the enemy. In October at Perryville, Kentucky a big battle was fought but the main forces were uncommitted on both sides and Harlan's division was out of it.

December saw Harlan placed in command of his brigade, and at Castalian Springs, Tennessee, he took the initiative to advance on Hartsville only to find that Union forces had been surprised and defeated there by Confederate General Morgan. Still, Harlan's forced march surprised the rebels in turn and led to the recovery of much

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26. Harlan Memorandum to his son Richard (undated), Scrapbook in Harlan Family Papers.

27. Harlan wrote several memoranda concerning his war experiences and these are in the family papers. The activities of Harlan and his regiment are referred to in several books, *e.g.*, FEDERAL WRITERS PROJECT, *MILITARY HISTORY OF KENTUCKY* (1939); SPEED, *THE UNION CAUSE IN KENTUCKY* (1917); *WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* (1882).

property. After Christmas Harlan's troops were ordered to stop Morgan who had entered Kentucky again. By quick movement Harlan's infantry brigade came upon part of Morgan's cavalry near Johnson's Ferry, Kentucky. Harlan claimed two credits for his troops: they saved an important trestle over the Rolling Fork, and they drove Morgan's men from the railroad. Since Morgan had already destroyed other key bridges, and the Union Army in Tennessee was dependent upon the railroad for supplies, the saving of the trestle was a vital contribution. Yet by the fortunes of war Harlan being then in Kentucky missed out in the big battle at Murfreesboro, Tennessee. Late in January, 1863, Harlan's brigade operated against rebel cavalry near LaVergne, Tennessee. This engagement, Harlan's last, took place amid heavy skirmishing in severe winter weather which saw his troops suffer immensely from cold and rain.

Harlan's father died suddenly on February 18, 1863, and John was the only member of his family fully qualified to take charge of unsettled business, wind up the estate and provide for his mother. He submitted his resignation which was accepted March 6 at a time when he was being processed for promotion to Brigadier General.

Leaving the army so soon after Lincoln's Emancipation Proclamation, Harlan left himself open to future attack on his motives for resignation. Fortunately, he wrote at the time:

It was my fixed purpose to remain in the Federal Army until it had effectually suppressed the existing armed rebellion, and restored the authority of the National Government over every part of the nation. No ordinary considerations would have induced me to depart from this purpose. Even the private interests, to which I have alluded would be regarded as nothing, in my estimation, if I felt that my continuance in or retirement from the service would to any material extent affect the great struggle through which the country is now passing.

If, therefore, I am permitted to retire from the army, I beg the Commanding General to feel assured that it is from no want of confidence either in the justice or the ultimate triumph of the Union cause. That cause will always have the warmest sympathies of my heart, for there are no conditions upon which I will consent to a dissolution of the union. Nor are there any conditions consistent with a republican form of government, which I am not prepared to make in order to maintain and perpetuate that Union.<sup>28</sup>

The timing of Harlan's resignation, coming so soon after Lincoln's final Emancipation Proclamation on January 1, 1863, raised questions in people's minds as to his true purpose in returning to civilian life. Three years later unfriendly newspapers alleged an ulterior motive, stating that Harlan had made reservations prior to his entry on active

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28. Harlan Family Papers. Also National Republican clipping 1884, and Lewis, *The Appointment of Mr. Justice Harlan*, 29 *IND. L.J.* 46, 67, 68 (1953).

duty. Said one paper: "When he was raising his regiment he pledged himself to the people that if he saw any decision on the part of the Government to turn the war into a struggle for the destruction of slavery he would not only resign his commission but he would go over to the Confederates and take his regiment with him, and help them to fight their battles against the government."<sup>29</sup> Whether or not this story is true, we do know and shall see further that Harlan regarded the war as one for the preservation of the Union and not for the destruction of slavery. However, the death of his father did necessitate his presence at home and the sincerity of his devotion to the Union is beyond challenge. It seems highly improbable that Harlan used his father's death as a mere pretext to gain acceptance of his resignation.

*Kentucky in Turmoil, 1863-1867*

Within ten days of his release from the army Harlan was back in politics. Selected as a delegate to the Union party convention on March 16, Harlan was in Louisville on the 18th and 19th where he was unanimously nominated to run as Attorney General.<sup>30</sup> Responding briefly, he urged an earnest prosecution of the war and an end to the idea of peace on any terms less than the full submission of the rebels.<sup>31</sup>

Pre-war party lines were all but obliterated in Kentucky when Harlan accepted nomination. A convention of old States' Rights men had been quashed by federal troops one month before. The Union party in 1863 was composed of many Democrats among whom Harlan would ordinarily have felt ill at ease. However, it was either the Union party or the Peace Democrats—the latter an impossible affiliation for Harlan. In the campaign that followed Harlan and his fellow candidates blasted the secessionists. It was already the kiss of political death to be linked to Lincoln and Harlan condemned the President's first Emancipation Proclamation on the grounds that it was unconstitutional, and he scored the President's suspension of the writ of habeas corpus. Young Champ Clark heard Harlan speak in July and asked his father why Harlan was not running for governor! "His intellectual superiority . . . was perfectly apparent even to me," wrote Clark later. He was a spell-binding orator who "made not only the welkin but the woods ring, not only with logic and eloquence, but with wit, humor, banter, sarcasm."<sup>32</sup> The August voting was conducted under conditions of martial law, but none of the winners raised his voice against the military excesses in that election.

Harlan's term as Attorney General ran for four years beginning

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29. Frankfort Tri-Weekly Yeoman, July 21, 1866, quoted in Hartz, *supra* note 9, at 25.

30. Frankfort Tri-Weekly Commonwealth, Mar. 23, 1863.

31. *Ibid.*

32. Saturday Evening Post, Sep. 15, 1900.

in September, 1863. For nearly half of this period the war was still going on, and it is difficult for a student today to avoid the conclusion that the federal government was oppressive in its handling of problems in Kentucky. The historian Coulter has written: "[T]he state's relations with the Federal government were never close and cordial, but, instead, were characterized by mutual distrusts, suspicions, and misunderstandings. Kentucky never came to feel that she was treated as one of the loyal states and as a part of the Union."<sup>33</sup> In everything but name Kentucky was occupied territory during the war. Indeed, starting July 5, 1864, the entire state was formally under martial law for over 15 months. A whole series of high-handed, tactless moves by federal military authorities irritated the people of Kentucky and their public officials. It is not difficult to understand the behavior of the thirty-year-old Attorney General in this context.

Kentucky's strong anti-Lincoln feeling boiled over at the polls in 1864 even though conditions of martial rule made the election anything but free. McClellan, Lincoln's opponent, carried only three states—New Jersey, Delaware and Kentucky. And Kentucky provided 11 of the loser's 21 electoral votes! In that presidential campaign Harlan vigorously supported McClellan and other Democrats, conducting his canvass in Indiana as well as in his native state. In addition to his opposition to Governor Oliver Morton, Indiana's Radical Republican leader, there was a personal reason for Harlan's excursion across the Ohio River. His wartime comrade, Colonel Mahlon Manson, was on the Democratic ticket as candidate for lieutenant governor. Both Harlan and Manson had been regimental commanders in the same division.

One of Harlan's best speeches of the campaign was delivered at New Albany, Indiana on October 4, 1864. In essence Harlan's argument was that Lincoln had disregarded the declared purpose of the nation to preserve the Union. Instead, the President had perverted the character of the war. In Harlan's eyes Lincoln was warring chiefly for the freedom of the African race and he had set aside the Constitution, assuming "unlimited and unconstitutional powers." Roared Harlan: "The triumph of abolition would be the triumph of a spirit which in order to effect its purpose would not hesitate to trample upon constitutions and laws with impunity. There is no safety in this land of ours except in rigid adherence to law—no safety for life, liberty, or property."<sup>34</sup>

Harlan's advocacy of McClellan was his one and only effort for the Democratic party, apart from his anti-Morton work that year in Indiana. In explanation it must be said that there was no other practical

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33. COULTER, *CIVIL WAR AND READJUSTMENT IN KENTUCKY* 189 (1926).

34. GRESHAM, *LIFE OF WALTER Q. GRESHAM* 823 (1919).

course of action in the Kentucky political situation in 1864. The energy of his campaigning stemmed from his deep-seated hostility to Lincoln's "unconstitutional" acts and the typical enthusiasm with which Harlan undertook every endeavor. Despite the negative (anti-Lincoln) rather than the positive (pro-McClellan) emphasis in his 1864 speeches, Harlan later supplied another reason for his performance. Writing at the time of his nomination to the Supreme Court, he stated:

I did not vote for McClellan because I was a Democrat, or because he was a Democrat, but because I *then* believed that his mode of prosecuting the war was most likely to bring it to a speedy conclusion, with the Union preserved intact. But subsequent events satisfied me that my judgment in this particular was erroneous, . . . the defeat of Mr. Lincoln would have been the greatest calamity which could have befallen the country at that time. In the Speeches which I made for McClellan, I placed my advocacy of him upon the ground that, in his letter of acceptance, he had declared for the preservation of the Union at all hazards and at whatever cost.<sup>35</sup>

In 1865, 1866 and 1867 Harlan was back in more hospitable political surroundings. He was one of the leaders of the Constitutional Union or Third party in Kentucky, but it proved impossible to generate mass support for this vehicle of opposition to the Democrats. Kentucky had embarked upon a Democratic course from which it was not to deviate for thirty years. Nevertheless, for this brief, three-year period, Harlan entertained the hope that Kentucky conservatives and Union men could produce a real alternative both to the solid Democratic party and to the weak, fetal Republican party. His work for the Constitutional Unionists consisted primarily in making speeches for candidates and on issues.

Kentuckians like Harlan certainly deluded themselves by believing they could fight to preserve the Union and still retain the institution of slavery or do away with it in their own manner. Lincoln's Emancipation Proclamation in 1863 did not apply to the slaves in Kentucky, yet it sounded the death knell for human slavery in America. Passage of the 13th Amendment by Congress in January, 1865, brought the issue of slavery squarely before the Kentucky Legislature, but ratification was defeated. The general feeling was that slave owners should be reimbursed by the federal government. On the 18th of December of the same year the 13th Amendment became part of the Constitution. Significantly, Union military commanders in Kentucky began to aid and abet the movement for freedom before the constitutional steps had been completed. Unmindful of legal niceties, consti-

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35. Letter, Harlan to James B. Beck, October 31, 1877, reproduced in Lewis, *The Appointment of Mr. Justice Harlan*, 29 *IND. L.J.* 46, 61 (1953).

tutional or statutory, army officers had long since used their authority to emancipate Kentucky slaves whenever and however they could.

After an abortive declaration by one general in February, 1865, that Kentucky was under martial law (a decree that was revoked immediately by President Lincoln), Major General John M. Palmer was appointed to command the federal troops in the state. As Palmer admitted later: "When I came to Kentucky I made up my mind that all that was left of slavery was its mischiefs, and that I would encourage a system of gradual emancipation . . ."<sup>36</sup> General Palmer used several methods to accomplish his purpose. For example, he had squads of Negro soldiers roam about the country enticing colored men to join the army. A Congressional Act aided him, too, for the law made wives and children of such enlistees free persons. After Appomattox these recruiting squads were more successful than ever in their endeavors.<sup>37</sup>

It was the Palmer policy of issuing free passes for Negroes to travel that brought about his indictment by a grand jury in Jefferson County (Louisville). At first passports were issued to free Negroes, then to wives and children of Negro soldiers. Soon, however, passes were handed out indiscriminately to any colored person, slave or free. In the fall of 1865, after martial law had been abolished on October 12, the grand jury indicted Palmer for feloniously aiding Ellen, a slave, to escape from her owner. The general was charged with having violated a Kentucky statute which made it unlawful for any free person to aid or assist the escape of a slave. Ellen went across the Ohio River into Indiana under cover of a passport issued by the provost marshal in obedience to Palmer's orders.<sup>38</sup>

On December 8 the circuit judge quashed the indictment, basing his decision on judicial knowledge that the necessary number of states had ratified the 13th Amendment and, hence, Ellen was not then a slave. The judgment was appealed to the Kentucky Court of Appeals at Frankfort, and a decision was handed down ten months later, on October 5, 1866.<sup>39</sup> John Harlan argued the case against Palmer and won; the high court remanded the case for re-trial. It was, however, a hollow victory for the Attorney General and the state. Palmer was no longer in command, and he had actually left Kentucky soil.

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36. Quoted in COULTER, *op. cit. supra* note 33, at 264.

37. *Ibid.*

38. *Commonwealth v. Palmer*, 65 Ky. (2 Bush) 570 (1866). General Order No. 32 was issued May 11, 1865, after the mayor of Louisville and three members of the general council informed Gen. Palmer that large numbers of Negroes, claiming to be free, had crowded into the city where disease (smallpox) was prevalent and unemployment widespread. The General Order advised all colored persons to seek employment elsewhere, and to assist them the provost marshal was authorized to issue passports to any colored person or his family who claimed he could not find a job.

39. *Commonwealth v. Palmer*, *supra* note 38.

The opinion of Judge George Robertson of the Court of Appeals was a tirade against General Palmer and his usurpation of authority. Robertson referred to Palmer's general order as a "cover" issued under false pretenses and ingeniously fabricated with the intent to operate upon all slaves in Kentucky. If the opinion served no other purpose, it certainly expressed the hostile feelings of the Kentucky public toward Palmer and his military administration. As the Commonwealth's Attorney, Harlan truly spoke for the people on this case.

When the 13th Amendment became valid in December, 1865, its immediate practical effect was to free only the slaves in Delaware and Kentucky. This, to Harlan, was a manifest violation of the right of his state to solve the slavery problem, and to solve it in such a way as to mitigate the social, economic and political consequences of this violent change. A state that had remained loyal to the Union was treated no differently than any of the rebel states!

Small wonder that throughout 1865, while the proposed Amendment was pending ratification, Harlan was outspoken against it. He opposed it because of the "ruinous effects of such a violent change in our social system." He opposed it because he felt deeply that it was up to Kentucky herself to abolish slavery and this he thought could be done within seven years. He opposed it as a dangerous precedent "which in some shape, and at some future date in the history of our country, may eventuate in the destruction of our present form of government."<sup>40</sup>

Harlan and his fellow Constitutional Unionists continued to seek a middle way in the political environment of 1866. Having been duly ratified in December, 1865, the 13th Amendment was now the law of the land. Harlan accepted this constitutional change and no longer spoke against emancipation. Instead, he and his friends turned their powerful voices against the programs of the Radical Republicans in Congress. Virtually branding the Radicals as revolutionists, Harlan denounced the Northern Republicans for attempting to disenfranchise the southern whites, for seeking to "work a complete revolution in our Republican system of Government," for striving to overthrow constitutional liberty.<sup>41</sup> The Democrats were condemned, too, but they were sinners and evil men because they were heretics of secession and rebellion.<sup>42</sup>

The Constitutional Unionists got nowhere in their campaign efforts of 1866. They were largely politicians of the past, unable to adapt themselves to the new, post-war conditions. Besides, they were up against the American two-party system and the Republican party had

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40. Quotations from Lexington Observer and Reporter, June 1, 1865, in Hartz, *supra* note 9, at 29, 31.

41. Louisville Courier-Journal, June 3, 1871, quoting Harlan's 1866 speeches, Hartz, *supra* note 9, at 31.

42. Cincinnati Commercial, July 20, 1866, in Hartz, *supra* note 9, at 31.

emerged nationally as the real rival of the Democrats. Harlan must have been able to assess the Kentucky political situation in some such terms. Even though 1867 was an election year in politically-minded Kentucky, Harlan was relatively inactive. Moreover his four years as Attorney General were coming to an end in September, and he made a decision to construct a future along professional lines. He moved to Louisville and went into law practice with Judge William Newnan.

*Champion of Kentucky Republicanism*

Beginning in 1868 Harlan threw in his lot with the Republican party. He campaigned for U. S. Grant whom he had come to know personally during his military service. Indeed, this acquaintance may have been a factor of some consequence in Harlan's conversion to Republican ranks. Louisville, a thriving commercial center, was quite unlike Frankfort; the change in setting away from proximity to the Bluegrass area could have worked wonders. It seems likely, too, that Benjamin Bristow, a strong and ardent Republican in Louisville, was in a position to influence Harlan's political judgment. The two men saw much of one another and shortly they were to become law partners.

Once committed to the party, Harlan embraced Republicanism thoroughly and never strayed from the fold. The party had started from nothing in Kentucky (Lincoln received less than one per cent of the vote in 1860), and when Harlan joined, the party was still weak.<sup>43</sup> In terms of organization the real beginning of the GOP in Kentucky was 1868 when Harlan entered as a leader with some personal following. Until Harlan campaigned for governor in 1871 and 1875 the party scarcely had an existence in Kentucky, yet so strenuously did he work at politics that by 1873 he was referred to as the "Champion of Kentucky Republicanism."<sup>44</sup> His party-building efforts must be left for future telling, and space here is needed to indicate his shift in position and change of heart.

Harlan had to "eat crow" for his past pronouncements, but he did so in a forthright manner. He expressed regret that he had once mouthed Know-Nothing sentiments, that he had opposed the Civil War Amendments, that he had been pro-slavery.<sup>45</sup> His position was that he would rather be "right than consistent" and he called attention to the fact that everyone had changed his opinions in the

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43. SHANNON AND McQUOWN, *PRESIDENTIAL POLITICS IN KENTUCKY, 1824-1948* (1950). In 1864 with a low turnout at the polls, Lincoln received only 30 per cent of the two-party vote, his poorest showing in the nation.

44. A term used in a letter inviting Harlan to be the commencement speaker at Indiana University in 1873. Harlan Family Papers.

45. See Hartz, *supra* note 9, at 33-37.

previous ten years.<sup>46</sup> "There is no man on this continent," he confessed, "from the lakes on the North to the gulf on the South, that rejoices more than I do at the extinction of slavery on this continent."<sup>47</sup> He had "acquiesced in the irreversible results of the war," the Democratic policy of further opposition to the Civil War Amendments was "suicidal and ruinous," and Kentuckians must not "enter upon a career of agitation which can bring the state to no good, which would be obviously useless, and can only tend to isolate us from the balance of our countrymen."<sup>48</sup>

By no means did Harlan advocate social equality between the Negro and the white race. It was legal equality for the colored people that Harlan stressed. "Social equality can never exist between the two races in Kentucky," said Harlan. Segregation in the public schools is "right and proper."<sup>49</sup> Yet he came out strongly for the Civil Rights Bill and the Ku Klux Klan Act as necessary national measures to deal with lawlessness. The Civil Rights Bill, in particular, was required for law and order in his state. "Thousands of gallant men in the State of Kentucky owe their lives to that bill and to the fact that it opened the doors of the Federal Courts for the protection of their lives, their liberty and their property." Had "the Federal Government, after conferring freedom on the slaves, left them to the tender mercies of those who were unwilling to protect them in life, liberty and property, it would have deserved the contempt of freemen the world over."<sup>50</sup>

Here, in 1871, we see Harlan's pre-Court thinking on the problem of the Negro in the South and in the border states. In a private letter three years later his position is the same, but clearer. "The North must bristle up, and exhibit earnestness in the protection of the colored people [in the South]. Otherwise, we will drift into a state of utter helplessness and anarchy. I do not think that the remedy lies in mixed schools, . . . but in an exhibition of Federal power for the protection of life, liberty and free elections."<sup>51</sup>

What moved Harlan between 1868 and 1877 was the general breakdown of orderly justice in Kentucky. A new strife was the aftermath of war and the state "was dotted with crimes and defaced with speedy non-judicial punishments that frequently brought on a type of private

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46. Louisville Daily Commercial, May 26, 1871, June 3, 1871, quoted in Hartz, *supra* note 9, at 34.

47. Louisville Daily Commercial, May 26, 1871, Hartz *supra* note 9, at 34.

48. Louisville Daily Commercial, June 3, 1871, July 28, 1871, July 29, 1871, Hartz, *supra* note 9, at 34.

49. Louisville Daily Commercial, July 29, 1871, Cincinnati Daily Gazette, June 3, 1871, Hartz, *supra* note 9, at 35.

50. Louisville Daily Commercial, July 29, 1871, Hartz, *supra* note 9, at 35, 36.

51. Harlan to Benjamin Bristow, Aug. 28, 1874, Bristow Papers in the Library of Congress.

warfare."<sup>52</sup> These were years of organized lawlessness when bands of men (Regulators, Skaggs Men, Ku Klux Klan) appointed themselves as guardians of the law and meted out their own version of justice. Over 100 instances of violence were recorded for the years 1868-1871—lynchings, seizure of prisoners, destruction of property, etc.<sup>53</sup> The activities of outlaw bands persisted for over a decade. They had not ended in mid-summer of 1877 when Louisville was subjected to a series of acts of violence which culminated in a riot involving loss of life and destruction of large property interests.<sup>54</sup>

#### *Appointment to the Supreme Court*

The resignation of Justice David Davis from the U. S. Supreme Court occurred the day before Hayes was inaugurated as President, but Hayes waited a full seven months before a successor was nominated in the person of John M. Harlan on October 16, 1877. Confirmation by the Senate was not forthcoming until 45 days later, the long delay coming from opposition that was totally unexpected by Harlan and his supporters.<sup>55</sup> It was in the Judiciary Committee of the Senate, where the nomination was held for 41 days, that Harlan's fitness and integrity were under scrutiny.<sup>56</sup>

The question of confirmation came in the midst of an intra-party struggle between moderate and radical Republican factions in the Senate. President Hayes' "soft" policy toward the South, dissatisfaction over patronage matters, executive versus legislative leadership, were the principal issues at stake. Thus, Harlan was a Hayes man, and he was a pawn caught in the cross fire of that special session of Congress. In addition, of course, personal enemies of Harlan attacked him and tried to prevent his appointment.

Harlan thought at one point that his work on the Louisiana Commission in March and April would help greatly to make him more acceptable to members of both parties in the Senate.<sup>57</sup> Yet it is clear that the major difficulty in gaining confirmation stemmed from charges growing out of his connection with that Commission. There was deep resentment by certain Republican senators over the loss of Louisiana to the Democrats in the November, 1876 elections. And

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52. FEDERAL WRITERS PROJECT, *MILITARY HISTORY OF KENTUCKY* 248 (1939).

53. *Id.* at 249.

54. *Id.* at 254.

55. Letters between Harlan and J.Y. Brown, Aug. 20-24, 1877, Harlan Family Papers.

56. The best discussion of Harlan's nomination and confirmation is Lewis, *The Appointment of Mr. Justice Harlan*, 29 *IND. L.J.* 46 (1953). This article is built around Harlan's key letter to Senator James B. Beck. The prompting letter, from Beck to Harlan, is in the Harlan Family Papers, and it was not available to Lewis for his article. Material in the Harlan Family Papers casts further light upon the nominating politics and Harlan's efforts on his own behalf.

57. Letters, Harlan to Brown, Aug., 1877, in Harlan Family Papers.

at the very time of Harlan's confirmation, the Senate had before it the question of seating either Kellogg (a Radical Republican) or Spoford (a Democrat) as the rightfully-elected senator from Louisiana. Within a few hours after Harlan's confirmation, Kellogg was sworn in for the disputed seat.<sup>58</sup>

In part, Harlan's attitude toward the Civil War Amendments was called into question. This, in turn, brought up his denunciation of Lincoln's Emancipation Proclamation, his reason for resigning from the army, and his feelings about slavery and the Negro. In a long letter to Senator James B. Beck, Harlan supplied his principal Senate advocate with rebuttal material on all these matters. This letter says nothing about his feelings toward the Negro or slavery, but to the charge that he resigned his army commission because of dissatisfaction with the Emancipation Proclamation Harlan quoted in full his application for resignation and branded the story as "utterly false." On the Civil War Amendments he had this to say:

In 1871, 1872 & 1875 & again in 1876, I defended all of the Amendments as just & proper, as the law of the land, to which everybody owed obedience & urged their enforcement by all necessary legislation.

In my two contests for Governor the platforms upon which I stood endorsed the Amendments. From 1868 to 1877 inclusive I have uniformly sustained the Republican candidates in all political contests, and I have, perhaps, made for that party as many sacrifices of time & labor as any other Republican in the South.<sup>59</sup>

In the middle of a Thanksgiving football game with his sons at Louisville, Harlan learned that the Judiciary Committee had approved his nomination. On December 10, 1877, he was sworn in as Associate Justice of the Supreme Court.

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58. Lewis, *supra* note 56, at 59, 74.

59. Letter, Harlan to Beck, Oct. 31, 1877, Lewis, *supra* note 56, at 65, 66.

