"Father Chief Justice": E. D. White and the Constitution, A Play

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EDWARD DOUGLAS WHITE
CHIEF JUSTICE UNITED STATES
ERECTED BY
THE STATE OF LOUISIANA
A.D. MDCCCLXXVI

Photograph by Louis T. Fritch, Collection the Supreme Court of the United State
"FATHER CHIEF JUSTICE": E. D. White and the Constitution, A Play

Paul R. Baier

Editor's Note:—The LSU Law Center has its first playwright, and the Board of Editors of the Law Review is delighted to spark its Ruminations Symposium with a sampling of Professor Baier's play "Father Chief Justice": E. D. White and the Constitution, which premiered March 8, 1997 to a standing-room only audience at the Theater of the Jean Lafitte National Historic Park in Thibodaux, Louisiana. Justice Harry T. Lemmon, of the Louisiana Supreme Court, portrays Chief Justice White in the play, supported by other notable dramatis personae. A C-Span national television interview with Professor Baier featuring the historic visual effects of his play followed. Chief Justice Dixon's Foreword sets the stage, and Professor Baier's Introduction and Note on Sources walks you into his creative mind. "You have struck a noble blow for White, C.J., not unlike that struck by Emmet Lavery for White's buddy, Wendell Holmes. It is also one which has been long wanting and in bringing it forth you have done a service for American legal history, for the Court, and for Louisiana."

We are proud to join in Playwright Baier and the Louisiana Bar Foundation's noble effort to rekindle Chief Justice Edward Douglass White's great Spirit of the Fireside and of the Hearth for all of Louisiana and the Nation's legal family.

FOREWORD

by John A. Dixon, Jr.,
Chief Justice of Louisiana, Retired

Emmett Lavery's play "The Magnificent Yankee" (1945) preserves Justice Holmes of Boston for all the world, and for all time. Arthur Hopkin's production of the play at the Royale Theatre, New York, featuring Louis Calhern's acclaimed performance as O.W.H., Jr., and Mr. Calhern's repeat triumph in the MGM film of the play certainly add life to the United States

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1. This laurel crown from John S. Managan to P.R.B., September 5, 1997, copy on file, Louisiana Law Review. Mr. Managan is an accomplished Holmes scholar, author of The Grand Panjandrum: The Mellow Years of Justice Holmes (Univ. Press of America 1988). "[T]he only thing that gives one real happiness is when one whose judgment one respects says the few words that are the laurel crown." Oliver Wendell Holmes, Jr. to John C. H. Wu, in Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers 200 (Harry C. Shriver ed. 1936).
Reports. Holmes is well remembered. Not so his Confederate confere on the Court, Louisiana's Edward Douglass White, Associate Justice (1894-1910) and Chief Justice (1910-21) of the Supreme Court of the United States. "Father Chief Justice"—this is how Justice Brandeis addressed his Louisiana colleague on the Court—is aimed at rescuing Thibodaux's beloved son E. D. White from the obscurity of forgotten memory.

The play, written by Professor Paul R. Baier of the LSU Law Center, is really the joint endeavor of the Friends and Board of the Edward Douglass White Historic Site (Act 507, 1993 Reg. Sess.), the United States Civil War Center, and the Louisiana Bar Foundation in pursuit of the statutory objective of educating Louisiana's citizens and the Nation's as to the Site's unique cultural and legal history. "Playwright are you!" said the Court's first woman, Justice Sandra Day O'Connor, as she gave our own Professor Baier a warm welcome to chambers on hearing the news. "I think you know that I support you in all your endeavors," said Justice William J. Brennan, Jr., of Paul's play, "but none more so than when you are illuminating the history of the great institution to which I have devoted 40 years of my life."


I gave Paul the oration assignment knowing he would throw all his might into it. He put White's portrait up on an easel and draped it in the National Flag in our Courtroom. Golden light and a bucket of red roses highlighted the portrait. We heard the story of Chief Justice White and his enemy in arms, Oliver Wendell Holmes, Jr., exchanging red roses every Constitution Day, September 17th—which is also the anniversary of the Battle of Antietam, where Holmes took a Confederate ball through the back of the neck and, by God's grace, lived. With Mr. Baier's play, "Father Chief Justice," the magic continues.

Louisiana hopes by this production to share E. D. White's great Spirit of the Fireside and of the Hearth with her citizens, young and old. And it is a noble thing for the Louisiana Bar Foundation to endorse the play by its sponsorship.

"Father Chief Justice": E. D. White and the Constitution premieres in the Theater of the Jean Lafitte National Historic Park, Thibodaux, Louisiana, Saturday, March 8th, 1997—Holmes' birthday.

—J.A.D., Jr.
Fouth of July, 1996
SHREVEPORT, LOUISIANA
INTRODUCTION

When Chief Justice Dixon asked me to unveil White’s portrait, I knew very little about Louisiana’s E. D. White. True, I teach the Court and the Constitution, and Geer v. Connecticut—vintage Centennial—is a favorite White opinion we cover in class. Geer had to do with shooting woodcock in Connecticut and the Commerce Clause of the United States Constitution. This is an old case, lately overruled, but E. D. White’s large civilian learning on the sovereign’s ownership of property in wild animals is evident to all the world. As to the man himself, I knew nothing. Research in the books revealed a spirit in Chief Justice White that I have come to know myself, living in Louisiana. I have in mind the Spirit of the Fireside and of the Hearth canvassed by Dickens in Cricket on the Hearth, a family tale of home. Chief Justice White himself referred to the book when he told of his change of heart towards “Old Glory” at an American Bar Association gathering in Washington, D.C., celebrating White’s twentieth anniversary on the Supreme Court. This was at the start of the October Term 1914. There is a passage in the book that, to my eye, portrays the essence of “Father Chief Justice” E. D. White:

And all was Caleb’s doing; all the doing of her simple father! But he too had a Cricket on his Hearth . . . . For all the Cricket Tribe are potent Spirits, even though the people who hold converse with them do not know it (which is frequently the case); and there are not in the unseen World Voices more gentle and more true; that may be so implicitly relied on, or that are so certain to give none but the tenderest counsel; as the Voices in which the Spirits of the Fireside and the Hearth, address themselves to human kind.

“Father Chief Justice” we hope will communicate to its audience the “invisible ‘plus’” about White that Chief Justice Rehnquist identified in his Edward Douglass White Lectures at LSU Law Center. Holmes, Hughes, and Frankfurter recognized it in their day. Like Professor Jesse of our play, I think it important to rekindle the flame for all of Louisiana’s and the Nation’s citizens—and for those who are to come.

The characters of the play are as real as the written word, molded bronze, and portraiture allow. Throughout the drama I have used the actual words spoken by these large historic figures—their judicial opinions and letters to

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2. 161 U.S. 519, 16 S. Ct. 600 (1896).
4. Citing, inter alia, the Digest and Institutes of Justinian; Pothier’s Traité du Droit de Propriété; and Merlin’s Répertoire de Jurisprudence. White not only mastered the civil law, but in his early years of practice it was common for him to address a jury first in French, then in Spanish, then in English. He also spoke Italian and read German.
By way of special effects, Chief Justice White, Oliver Wendell Holmes, Jr., and Louis D. Brandeis make a joint appearance themselves—"live and in person," so to speak, on the stage of "Father Chief Justice." I mean the magic of National Archives' Universal Newsreels, radio clips, and a lively photo album of these courtly players.

—P.R.B.

Constitution Day,
September 17, 1996
Baton Rouge, Louisiana
"FATHER CHIEF JUSTICE"

DRAMATIS PERSONAE:

CHIEF JUSTICE EDWARD DOUGLASS WHITE  Justice Harry T. Lemmon, Luling
MRS. CHIEF JUSTICE WHITE ........ Justice Jeannette T. Knoll, Marksville
THE WIDOW LEITA WHITE .......... Councilwoman Ethel Knobloch,  
                                City of Thibodaux
JUSTICE OLIVER WENDELL HOLMES, JR . Judge (Ret.) William V. Redmann, 
                                  New Orleans
FANNY HOLMES ...... Judge Mary Ann Vial Lemmon, U.S.D.C., New Orleans
JUSTICE LOUIS D. BRANDEIS ...... Dr. James R. Peltier, Thibodaux
CAPTAIN OLIVER WENDELL HOLMES, JR .... Denis Gaubert, Thibodaux
CONFEDERATE SOLDIER BOY E. D. WHITE, BUGLER ... Kalon Thibodeaux, 
                                         Raceland
WHITE'S MOTHER, pleading her son's release from
                                 capture at PORT HUDSON ................. Charlene Cain, Houma
UNION OFFICER, dead line ............ Judge John Weimer, Thibodaux
JUSTICE JOHN MARSHALL HARLAN ......... Kenneth Watkins, Houma
CHIEF JUSTICE WILLIAM HOWARD TAFT .... Garland R. Rolling, Metairie
ATTORNEY GENERAL GEORGE W. WICKERSHAM .......... Harvey C. Koch, 
                                              New Orleans
ATTORNEY GENERAL HARRY M. DAUGHERTY .. .. .. .. Harry S. Hardin, III, 
                                         New Orleans
HENRY PLAUCHÉ DART, Esq .............. Donald A. Hoffman, New Orleans
SCULPTOR P. BRYANT BAKER ............ Judge (Ret.) Bernard L. Knobloch, 
                                      Thibodaux
PROFESSOR RICHARD HENRY JESSE .... Professor Paul R. Baier, Baton Rouge

PROLOGUE
Bryant Baker Statue, Royal Street, April 1926

ACT I. PORTRAIT AND HEARTH  
Professor Jesse's office; E. D. White Home

ACT II. SOLDIER BOYS  
In the Valley of Antietam, September 17, 1862;  
Prisoner at Port Hudson, July 6, 1863

ACT III. AT HOME  
1720 I St., Washington, D. C., Holmes' Home

ACT IV. "BY THE LIGHT OF REASON"  
Pollock and Precedent; Standard Oil Octopus

ACT V. CRICKET ON THE HEARTH  
1717 Rhode Island Ave.; Memorial Proceedings; Willard Hotel, Wash. D. C.
PROLOGUE

The great BRYANT BAKER Bronze statue of E. D. WHITE looms large on the stage; the year is 1926, Monday, April 8th. A crowd has gathered on Royal Street, in the Vieux Carré, in front of the old civil courts building. A voice is heard, that of a professor-type, musing over the scene.

PROFESSOR JESSE: [From his desk, corner left, small lighted candle.] Royal Street fluttered with flags, we are told, when they unveiled the statue of Edward Douglass White, in the heart of old New Orleans, in 1926. Confederate Veterans, still wearing the gray of '61, stood about the scaffolding. Above them rose Mr. Baker's great bronze statue of Chief Justice White, heroic in size, draped in the national flag. [Band playing.] Somewhere in the crowd a band played old Southern airs, soft and sweet in the April sunshine. It was an impressive occasion, reported The Times-Picayune, notable because so many venerable men and women had gathered to pay tribute to a man whose career brings honor to Louisiana and to the Nation.

Seventy years separate us from that occasion, seventy-five from White's death. Louisiana's Great Chief Justice is only an ember on the hearth. We meet anew to rekindle the flame.

Lights.

ACT I. PORTRAIT AND HEARTH

SCENE 1.—PROFESSOR JESSE'S OFFICE

PROFESSOR JESSE is at his desk. It is cluttered with books and a small lighted candle. JESSE teaches the Court and the Constitution long after WHITE's death. An oil portrait of CHIEF JUSTICE WHITE, tattered by time, rests on an easel. JESSE knew E. D. WHITE during his twenty-seven years on the Supreme Court. But, alas, his friend is gone and well near forgotten.

JESSE: [Rising from desk, with Carlyle's Essays, walking to the portrait.] Carlyle in his Essay on Portraiture says he would give more for a single picture of a man, whatever it was, than for all the books that might be written of him. [Reading.]

"Often I have found a portrait superior in real instruction to half a dozen written 'Biographies,' as Biographies are written;—or rather, let me say, I have found that the portrait is a small lighted candle by which Biographies could for the first time be read, and some human interpretation be made of them."

[Addressing WHITE's portrait.] Well, Father Chief Justice:—What do you think of the fix I'm in? And what is that, you say? Oh well, I ask my Louisiana students to identify your portrait and—by Jove, they flunk!—nobody
remembers any more that Louisiana put a Confederate soldier boy on the Supreme Court of the United States. [Exasperated.]: Oh, they remember Oliver Wendell Holmes, Jr., well enough; even made a play about him, can you imagine,—called it "The Magnificent Yankee." Oh, they remember Mr. Justice Holmes of Massachusetts all right! [doubly exasperated]—Union Blue Coat—of Boston!

But they forget the Confederate Gray of Bayou Lafourche—I mean you, Ned,—Louisiana's Great Chief Justice [with emphasis, pointing to portrait] E. D. White!

CURTAIN

ACT II. SOLDIER BOYS

Scene I.—Captain Oliver Wendell Holmes, Jr.

September 17, 1862, 3 A.M., in the Valley of Antietam. Captain Holmes of the Twentieth Massachusetts is keyed up for battle and the charge ahead. He uses a lap-top desk to write home.

CAPTAIN HOLMES: Dearest Parents . . . I don't talk seriously for you know all my last words if I come to grief. You know my devoted love for you. Why should I say any more? It's rank folly pulling a long mug every time one may fight or may be killed. Very probably we shall in a few days and if we do, why, I shall go into it not trying to shirk the responsibility of my past life by a sort of death bed abjuration. I have lived on the track on which I expect to continue travelling if I get through—hoping always that, though it may wind, it will bring me up the hill once more.

Lights fade on CAPTAIN HOLMES.

JESSE: [At desk, lighted candle, corner left.] Before this letter reached his parents, a telegram informed Dr. and Mrs. Holmes that their Captain had been wounded through the back of the neck at the Battle of Antietam.

The sounds of shot and shell and the killing at Antietam are heard off stage. Then a hush . . . and peace, the banner won.

Hit through the neck by a Confederate ball, CAPTAIN HOLMES is yet fatefuly alive. Bandaged about the neck but still dashing, he dutifully rises from his cot, faces his audience, and recites aloud his account home to Boston.

HOLMES: It would be easy after a comfortable breakfast to come down the steps of one's home putting on one's gloves and smoking a cigar, to get on a horse and charge a battery up Beacon Street, while the ladies waved handkerchiefs from a balcony—but the reality was to face a night on the ground in the rain and your bowels out of order and then after no particular breakfast to wade a stream and attack the enemy.

Usual luck—ball entered at the rear passing straight through the central seam of the coat & waistcoat collar coming out toward the front on the left hand side.—Yet it don't seem to have smashed my spine or I suppose I should be dead
or paralyzed or something—It's more than 24 hours and I have remained pretty cocky.

**JESSE:** Antietam broke the Twentieth's proud boast that Massachusetts troops had never been hit in the back.

*Lights focus on HOLMES.*

**HOLMES:** We have stood side by side in a line—[*proudly*] we have charged and swept the enemy! . . .—and [*honestly*] we have run away like rabbits! . . . which is all right—but [*confessedly*] . . . not so good for the newspapers.

*Lights fade on CAPTAIN HOLMES.*

*Family Photo Album:* The Gambrel-roofed House in Cambridge; The Holmes children: Edward, Amelia, Wendell; Graduation, Harvard University, 1861; Fanny Bowditch Dixwell; Fanny Dixwell at Seventeen Reading to Five Brothers and Sisters.

**JESSE:** [*Walking up center.*] Captain Holmes served through the siege of Vicksburg and the Wilderness Campaign. Then, exhausted and telling himself that his duty lay in pursuing his philosophy, he left the Army when his three-year term of enlistment was up. Dr. Holmes, Sr. [*with emphasis, as though introducing H.R.M.*], "AUTOCRAT OF THE BREAKFAST TABLE," urged the boy to reenlist for the duration of the war, but Wendell returned home to Boston. Whatever romance war held for him had by this time gone up in the smoke of realities.

**Scene II.—Prisoner at Port Hudson**

*Union naval forces bombard Port Hudson. The roar of the 100-pound Parrott Gun of the U.S. Richmond is heard off stage. Port Hudson falls July 6, 1863. NED WHITE, a strapping Confederate soldier boy, has been taken prisoner. WHITE'S MOTHER has come to the guard-house to plead for her son's release.*

**WHITE'S MOTHER** [*Catherine Sidney Lee Ringgold, with a sweet, but determined, Southern air*]: You have my boy in prison, SIR!, and I should like to see him.

**UNION OFFICER:** Madam, I am very sorry. My orders, [*with emphasis*] MY ORDERS, do not allow me to give you the permission. [*With a tone of hope*] Where do you live?

**WHITE'S MOTHER:** [*With disdain*] In ruins! . . . what used to be a thriving sugar plantation. The White Family Home barely survives . . . . What good is my youngest son to you? Sigh! Ned is only a boy of nineteen!

**UNION OFFICER:** Madam, please come with me.

**OFFICER escorts MRS. WHITE off left whispering to her; returns up center; stands at attention.**

**UNION OFFICER:** [*Calling out WHITE's name, loudly.*] "Edward Douglass White, Thibodaux!"
White is marched up center along the dead line. He has nothing on but a thin gray flannel shirt and trousers.

**UNION OFFICER:** Come along with me.

**Further march up center; the OFFICER notices WHITE has no coat on.**

**UNION OFFICER:** My boy, you have no coat on!

**WHITE:** [Anxiously.] Yes, Sir, that is so.

**UNION OFFICER:** Go back and get your coat.

**WHITE:** Sir, I cannot go back and get what I have not got.

**UNION OFFICER:** [Unbuttoning his coat, button by button.] Oh, . . . My boy, I am more warmly clad than you are. . . . [Placing coat over the boy's shoulders.] Put on my coat.

Lights fade.

**PROF. JESSE:** [At desk, corner left.] Fifty years later, in 1912, Princeton University conferred upon White an honorary degree of Doctor of Laws. The audience heard the details of White's capture as a Confederate Soldier Boy at Port Hudson from the lips of [with emphasis] THE CHIEF JUSTICE OF THE UNITED STATES:-

Lights up.

E. D. WHITE, CHIEF JUSTICE, enters up center in black robe and academic regalia. 68 years of age, he cuts a large, bold figure. At the front of the stage, center, radiant footlights and a podium await THE CHIEF JUSTICE.

**WHITE:** Like everybody else in my environment, as a little boy I went into the army on the side that didn't win. I know I did myself more harm than I did to anybody else. I was taken prisoner and carried to the town where I lived, and my mother went to the officer in charge of the prison and asked permission to come in and see me. He said it could not be done.

On the next morning, I had a prison number, and my number was called out, and I was marched by the corporal of the guard along the dead line, where if a man tries to cross, he is shot. I was taken into the guardroom, and there stood an officer. He asked my name, and he said, "Come along with me," and we passed out into the street. I noticed the sentries bringing up their arms and the officers saluting, and when we got out into the street—it was a cold February day—there stood a hansom. There was an orderly holding the horse, and the gentleman said, "My boy,"—and he looked at me—he said, "You have no coat on." I had nothing on but a thin flannel shirt.

I said, "Yes, that is so." But he said, "Go back and get your coat." I said "I cannot go back and get what I have not got."

"Oh," he said, and putting up his hand to the long heavy blue braided coat which kept the cold from his vitals, he unbuttoned it, [with emotion, slowly] button by button, took it off his own shoulders and said, [pause, with great poignancy] "My boy, I am more warmly clad than you are. [WHITE's voice is trembling.] Put on my coat."

Lights.
Scene iii.—Selective Draft Law Cases

The Supreme Court, 1918: WHITE, C.J., robe draped languidly over large, rounded shoulders; HOLMES, J. at his side, sitting at attention, hands neatly coupled; BRANDEIS, J., corner left, hair cropped close, comparative youth.

JESSE: Well, Ladies and Gentlemen, you can see for yourself: These two soldier boys later served side by side on the Supreme Court of the United States. "The C.J. and I had been enemies," Holmes liked to quip. But on the Supreme Court they sat as Brothers seeing eye to eye in what I teach my students are the Selective Draft Law Cases [holding up volume], 245 U.S. 366—1 mean volume and page of the UNITED STATES REPORTS. This is vintage law, written by Chief Justice White for Captain Holmes and Court in 1918 when the Nation was at war. It will not surprise you to learn that Congress may conscript young men, make them soldiers, and ship the boys overseas to face death.

The Court rejected claims of draft evaders who said Congress was without power to conscript men to fight for their Country. To Chief Justice White and Captain Holmes, such claims were nonsense. They knew better. Port Hudson and Antietam burned in their memories!

This was during World War I, a time in which the Germans introduced the 75-millimeter field gun and E. D. White stood awake at night haunted again by the anguish of war.

Enter CHIEF JUSTICE WHITE—commanding presence, tousled hair, black robe. He nods in recognition at JESSE, comes up center, addressing audience.

WHITE: Is civilization going down in barbarism? Will not these German guns shot across the channel destroy Great Britain and lay the world in ruin? Has all the long, long fight for civilization come to naught?

JESSE: This was at a time when Chief Justice White found it difficult to do any work at all.

WHITE: I have constantly ringing in my ears the noise of the awful conflict along the Belgian and French border and the appalling thought of the splendid men who are giving up their lives haunts me day and night. "How long, O Lord, how long!" is the cry which naturally comes, but I can see no end. I trust in God when the end does come it will come right.

JESSE: One week before the Selective Draft Law Cases were announced in Court, White wrote to a friend:—

WHITE: I do not like to talk about the war situation. I hate to be pessimistic, I dare not be hopeful, and I am afraid I am not good enough to pray. I am too old to fight.... [Looking up, with a smile, to his Thibodaux audience.] I am in a bad fix, ain't I?"

JESSE: Chief Justice White's deep patriotism broke through during the argument of the lawyers attacking the draft. The Chief Justice burst out that it was [sternly]: "Improper and unpatriotic!"—those were his words—to say the war was unconstitutional.
"FATHER CHIEF JUSTICE"

Jesse now stands side by side his old friend E. D. White. The Chief Justice embraces Jesse like a father—a warm hug with a big right arm.

White: [With great joy.] Mon cher professeur! ... Jesse! Are you here to take Thibodaux to school?

Jesse: Oh no, Father Chief Justice, that’s for you! ... You know how to take the Nation to school much better than I. My part is only to state what the draft-evaders argued. We will trust to your memory of the Draft Law Cases as to the Court’s ... Responsa.

White: "Responsa!"—why Jesse I haven’t heard such Roman learning in years! Good for you! Well, now, let’s see if this old Jurisconsult is up to the task. “You may proceed,” as I tell the lawyers at Court.

Jesse: [Constitution in hand.] If the audience please: Article I, § 8 of the Constitution, clause 12, gives Congress the power—and here I’m quoting—: "To raise and support Armies." Well, Chief Justice White’s first response to the nay-sayers was to take note of this power and its logical implication:—

White: [Reciting from his opinion perfectly, entirely from memory.] As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice.

Jesse: [With enthusiasm.] You can judge for yourself Chief Justice White’s flawless logic!

Chief Justice White waves approvingly at Jesse and his Thibodaux audience.

Jesse: Oh, said the lawyers, Congress has the power to raise Armies all right, but it must rely on volunteer enlistments; the provision cannot include the power to exact enforced military duty by the citizen:—

White: This however but challenges the existence of all power, for a governmental power which has no sanction to it and which, therefore, can only be exercised provided the citizen consents to its exertion is in no substantial sense a power.

Jesse: "Compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty!” pleaded the lawyers:—

White: But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion.

Jesse: The Chief Justice, if I may say so, learned a contrary premise at Port Hudson.

White: [Exclaiming.] And My Brother Holmes at Antietam!

Jesse: The Thirteenth Amendment was invoked as a sword against the draft. It outlaws slavery and involuntary servitude:—

White: [Again, perfectly, from memory.] Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great
representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, [long pause, to catch breath] we are constrained to the conclusion that the contention to that effect . . . [pause, then summarily] is refuted by its mere statement!

JESSE: These robust passages exhibit Chief Justice White for what he was: An ardent patriot who knew no emotion equal to his devotion to Country.

WHITE warmly embraces JESSE; they exit stage left.

Supreme Court Robing Room, 1918.

JESSE: [Voiceover.] The Supreme Court’s Robing Room, 1918, in the bowels of the United States Capitol. A portrait of John Jay, first Chief Justice, hangs above the hearth.

Enter CHIEF JUSTICE WHITE into the Robing Room of the Court following announcement of the Selective Draft Law opinion. He slowly removes his robe.

Enter HOLMES, stage right, carrying his robe.

HOLMES: [Up center, to Thibodaux’s audience, with gusto.] “The Chief Justice and I had been enemies!” I like to tell my friends. [Retreating to WHITE.] Now he ranks as the Constitution’s Chief . . . [to audience, with double gusto] . . . Bugle Boy!

WHITE: Captain Holmes!—Permit me to say you chirp like a mighty cricket yourself on this Court!

HOLMES: Whoa, there! . . . GENERAL WHITE! Your opinion in the Draft Cases took me back to Antietam and to Fredericksburg. What a charge! . . . It will take more than the Thirteenth Amendment to convince me the Draft Law is compulsory servitude!

Like a soldier from a deep, dark grave, I say,—“I am content.”

The CHIEF JUSTICE and HOLMES exit arm in arm. JUSTICE HOLMES has been called home by his wife FANNY. As they exit the stage, HOLMES pulls a Baccarat Rothschild cigar from his coat pocket and says to the C.J.:

HOLMES: [Solemnly, then with a twist.]: MR. CHIEF JUSTICE: Your jurisdiction has expired . . . and [flaunting the cigar] . . . Mrs. Holmes’ has begun!

Lights.

Universal Newsreels, National Archives’ film footage—captioned “HOLMES PASSES”—shows HOLMES ducking out of the Capitol, where the Court sits, speedily on his way home to FANNY.

CURTAIN

ACT III. AT HOME

Scene i.—1720 I Street

HOLMES’ home: 1720 I St., N.W., Washington, D.C.

Four-story brick; slate shingles, Mansard roof; two dormers jut out over fourth floor; framed in tree branches; second- and third-story windows
are propped open in pursuit of fresh air. HOLMES likes fresh air. Two early motor cars—a coupe and what looks to be a rag-top—are parked curbside. It is Constitution Day, September 17th, Anniversary of the Battle of Antietam. CHIEF JUSTICE WHITE is expected for what is a yearly exchange of red roses between CAPTAIN HOLMES and his Confederate enemy in Arms, NED WHITE.

JESSE: [Voiceover.] The Audience is advised that Mr. Justice and Mrs. Holmes are “at home.” They expect the Chief Justice to come calling for what is a yearly exchange of red roses between Captain Holmes and his Confederate enemy in Arms, Ned White. Chief Justice White is given to leaving a rose for Fanny and Baccarat cigars for Holmes—gladly received—but on Constitution Day, September 17th, he always brings a long-stemmed red rose for “MY BROTHER HOLMES OF THE TWENTIETH MASSACHUSETTS” as the yearly card reads.

Mr. Justice Brandeis, having greeted Fanny, is already on the domestic scene. He is now with Holmes, in the study on the second floor.

HOLMES’ desk: drawers, law books, reading lamp, vase of flowers; easy chair; book cases—packed floor to ceiling; mantel and hearth; mirror; Civil War sword in its scabbard. A cozy setting in which to read, write, and “jaw” the law.

HOLMES is sitting in a horse-hair arm chair, pondering the audience. His legs are crossed—book case at his elbow—a copy of his book SPEECHES (Little, Brown, and Co.) held open in his lap. This is the fifth edition, which dates the scene sometime after 1913. He is reciting to BRANDEIS from his speech “The Soldier’s Faith,” a Memorial Day address, which takes HOLMES back to Antietam, September 17th—Constitution Day—1862.

HOLMES: Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war.

[Rising from chair, up center.] War, when you are at it, is horrible and dull. It is only when time has passed that you see its message was divine. But some teacher of the kind we all need. [To audience.] Out of heroism grows faith in the worth of heroism. The proof comes later, and even may never come.—

HOLMES snaps SPEECHES shut, lays the book in his chair, and approaches BRANDEIS, standing left, at desk.

HOLMES: Now there, Louie, is a faith for the ages! Yesterday my belly kissed the ground at Antietam and Ned White was a prisoner at Port Hudson. [With gusto.] “The Chief Justice and I had been enemies,” I like to say to friends. . . .

Now look at us! C.J. WHITE and CO. want to put [with double gusto] “PUNY ANONYMITIES” in jail for uttering a few doubts about Woodrow Wilson and the War . . . —and you and I, Louie, must fight ’em off!

BRANDEIS: The First Amendment is a dull sword these days, Wendell,—I am sorry to say! . . . Our faith is different. Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. Those who won our independence knew that it is hazardous to
discourage thought, hope, and imagination. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form!

HOLMES: That's our Abrams dissent, Louie!

HOLMES, really roused, charges his desk, picks up a page of manuscript opinion, and recites from his draft dissent in Abrams v. United States, 250 U.S. 616 (Nov. 10, 1919):

MR. JUSTICE HOLMES dissenting: [Up center, addressing audience.] Congress certainly cannot forbid all effort to change the mind of the country!

Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger.

I believe the defendant has as much right to publish these two leaflets as the Government has to publish the Constitution of the United States now vainly invoked by them.

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . .—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.—

BRANDEIS: [Up center, to audience.] "MR. JUSTICE BRANDEIS CONCURS!"

HOLMES, still on his steed, returns to his desk, addressing BRANDEIS.

HOLMES: [A bugler blowing the charge.]—Why, it's battle, I tell you, Louie—the CAMPAIGN OF THE CONSTITUTION!—; the JOUST OF THE FIRST AMENDMENT! And we've got to fight like hell to win the banner back!—never mind C. J. White and Mrs. Holmes want me to shut up!

Enter FANNY, carrying a long stemmed red rose. She has heard HOLMES, J. roaring like a lion.

FANNY: Captain Holmes! . . . calm yourself. [Putting her foot down.] The Chief Justice is expected and it is MRS. [with her own gusto] . . . it is MRS. JUSTICE HOLMES' opinion that you should fight your War on the Bench, not at home.

BRANDEIS: [With wit, aimed at WENDELL.] MRS. JUSTICE HOLMES is authorized to say that MR. JUSTICE BRANDEIS joins her opinion!

FANNY: It's Constitution Day, Wendell, and there will be peace and quiet on the Holmes' domestic front. You will not charge the enemy all over again at 1720 I St.

FANNY presents the red rose to her husband. WENDELL melts.

HOLMES: My sincere apology, LADY HOLMES, and to you, Louie. [Sweetly, purring like a kitten.] Not a bad thing a rose [placing it on his desk] . . . and romance! [Kisses FANNY on the cheek, bows to her as though a Knight to a Fairy Tale Princess.]
A doorbell sounds off stage. FANNY exits left. HOLMES expects it is the CHIEF JUSTICE. He thinks aloud on his Confederate friend.

HOLMES: Before you came on the Court, Louie, White was my most constant associate among our judges. He is a very able man, and the fact that he thinks more like a legislator than as a pure lawyer is no objection where there are a lot of other judges who have an equal voice.

There are profound differences in the interest of my friend the C. J. and myself—so profound that I never talk about my half. The Chief has Irish blood—he is naturally a politician and a speaker.

BRANDEIS: I assure you, Wendell, the C. J. talks about your half!—on our trots home from Court. "Captain Holmes has fallen out of line!" he exclaims. Then he threatens to put his big arm around you and apply what he calls "THE PHYSICAL APPLICATION OF THE LAW!"

HOLMES: I would run away like a Union jack rabbit!

BRANDEIS: White is an immense man physically, but his step is as light as a boy’s. He is quick and agile and his walk is a trot! He is like Howard Taft in that—the object of admiration by many a fair ballroom partner!

HOLMES: White is a great pal of mine, but he is always thinking what will be the practical effect of a decision—which of course is the ultimate justification of condemnation of the principle adopted! I think of its relation to the theory and philosophy of the law—if that isn’t too pretentious a way of putting it.

I like to read a little philosophy into the law, Louie,—like an olive after lunch purifies the palate. Of course, this means loneliness. But White is a great comfort to me in that regard. My notion of the philosophic movement is simply to see the universal in the particular. I abhor speculation in vacuo—what I call "churning the void to make cheese!" Kant’s and Hegel’s systems seem to me to have gone into the waste paper basket!

BRANDEIS: I should rather stick to facts, Wendell. "Ex facto jus oritur."—"From the facts arises the law." That ancient rule must prevail in order that we may have a system of living law.

HOLMES: Louie!—You sound like our Chief White—with his big Latin Digest!

Chief Justinianus and I generally come out the same way by very different paths. He believes in a priori ultimates. I don’t, except in the way of human can’t helps in the way of thinking, which may or may not have cosmic validity. But we sometimes come together head on [driving his fists together] with a whack!

BRANDEIS: As in the Abrams case! But White has the grand manner and is of the 18th Century: "Ley est resoun."—"Law is reason."

HOLMES: That’s White exactly: "Law is reason." . . . "By the light of reason" . . . this! . . . "By the light of reason" . . . that! He is a great Jesuit all right! I believe in reason with all my heart, but I think its control over the actions of men when it comes against what they want is not very great. But our Chief has secular insights! White’s thinking is profound!
The other day when I was speaking of the logic of persecution White agreed but said that none of us live logically. "You profess skepticism," he told me, "and yet act on dogma." He recognized my "CAN'T HELPS"—"I can't help but believe that"...—as "dogma in disguise." "Those who profess dogma," he said, "could not carry it out dogmatically—the spirit of the times is too strong for us."

BRANDEIS: The War spirit invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do, any police officer may summarily arrest them. I dissent!

HOLMES: Yet I believe, Louie, our Confederate Chief is a big high-minded man, worthy of the place. His qualities always appeal to one's affections.

BRANDEIS: He has a warm hug with a big right arm and heart. [Looking at his pocket watch.] I wonder what is keeping our BROTHER THE CHIEF JUSTICE?

HOLMES: Probably kiddies on the street! They like pocket candy from the Chief Justice of the United States! C.J. White rides a bicycle you know—not a pretty picture on a wheel! But I admire his regimen of daily exercise. Next to philosophy, it's important to keep one's bowels clean!

FANNY: Her voice is heard off stage, left. She is coming up the stairs with the C.J.

FANNY: [As though a Bugler at Antietam.] "THE CHIEF JUSTICE OF THE UNITED STATES AND MRS. CAPTAIN HOLMES!"

Enter FANNY and CHIEF JUSTICE WHITE, arm in arm, in peace and quiet. WHITE is carrying two red roses; he has not forgotten MR. JUSTICE BRANDEIS and, in turn, Mrs. Brandeis.

WHITE: Ah, my Boston Boys! I assume you were talking behind my back. What was it, Law or Fact?

HOLMES: [With gusto.] Your blessed "Domain of Theory!"... "Celestial Reason!"

WHITE: Ah, swell, Boys! It shows how great minds lift themselves up above the mist and pettiness of things low into the region of things supernal! I suppose you were in joint dissent!

[To HOLMES.] In the domain of theory minds may differ. The moment we advance an abstraction, one mind takes one view, and the other takes another, and the union of the two minds becomes impossible because of the divergent premises or the contradictory deductions which the minds make.

HOLMES: Louie, are you taking notes!

WHITE: [To BRANDEIS.] But when we enter the domain of absolute and unchallengeable fact, then the only question which remains is first to ascertain the truth and then follow it!

BRANDEIS: [To the audience.] "MR. JUSTICE BRANDEIS concurs separately."... Sometimes, if we would guide [with emphasis, aimed at WHITE] "BY THE LIGHT OF REASON," we must let our minds be bold!
WHITE: The Court will take the matter under advisement!—God help us!... [Presenting rose to BRANDEIS.] My Brother Brandeis of Boston, I give you [as though proposing a toast]: "The Constitution—all wrapped up in a rose."

HOLMES: [With gusto, up center.] By Jove!... that's poetry,—... from a Jesuit! I told you, Louie, our Chief has insights.... Now he shows himself a Goethe come round on Constitution Day!

BRANDEIS: [To WHITE, with emphasis.] "FATHER CHIEF JUSTICE," ... I concur.

HOLMES: Whoa! [Riding at Antietam again.] What's that?—"FATHER CHIEF JUSTICE"? I dissent:—"Congress shall make no law respecting an establishment of religion" [he is quoting the First Amendment], why Louie...—

FANNY: [Breaking in.] Wendell, be still! Aren't you the one always advising the world to "Think things, not words!" There is such a thing, my dear Mr. JUSTICE, as a hearth and a home,..., even at the Supreme Court!

HOLMES: By DICKENS! Fanny, you got me! [HOLMES is tickled pink with his literary retort.] I plum forgot Cricket on the Hearth.

Let's see: [Mockingly.] Do we have it on the shelf? [Looking over the bookcases.]... The glory of a library, Louie, is an empty slot on the shelf! [Not finding it, addressing the audience up center with gusto.] I shall call our Brother White,... "CHIEF OF THE CRICKET TRIBE"!

HOLMES is doubly tickled with himself. He turns from the audience and addresses BRANDEIS and the CHIEF JUSTICE.

HOLMES: And, whoa!, have I heard Chirps in the Conference Room!... Except for my [loudly] LIONHEARTED FRIEND, BROTHER HARLAN.... He doesn't chirp.... He only roars!

FANNY: [Sternly.] Wendell, will you please dismount your STEED! Remember... it's Constitution Day.

HOLMES picks up the rose from his desk and presents it to the CHIEF JUSTICE.

HOLMES: [Peacefully, with reverence.] "FATHER CHIEF JUSTICE" [HOLMES has yielded!]: I give you [HOLMES' toast]: "THE UNITED STATES OF AMERICA."

WHITE: [Exchanges rose; a toast.] "MY BROTHER HOLMES OF THE TWENTIETH MASSACHUSETTS AND... THE BLUE AND THE GRAY AS ONE."

WHITE turns to BRANDEIS as though on the U.S. Senate floor again. He is on a gray steed of his own now,—a favorite Constitution Day theme.

WHITE: Brother Brandeis [with emphasis] of BOSTON:—The men who took part in the war on the Southern side were not careless of constitutional obligations. I am fain to believe that the heart of the American people is capable of recognizing the courage and heroism of the American citizen displayed in the discharge of a sacred duty, as he understood his duty at the time. I have seen somewhere a thought of your great war governor of Massachusetts, saying that whatever might be the judgment of history upon the wisdom of the Southern people, history would hold that, mistaken though they were, they were heroes
because of their devotion to their constitutional mistake. [With jowls shaking.] Their blood sealed their fidelity to their duty as they conceived it!

HOLMES: [Up center, with red rose, addressing audience.] It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet its red is our life-blood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.

WHITE: [Aside his BROTHER HOLMES, up center, to audience.] I can recollect the day when to me Old Glory was but the emblem of darkness, of misery, of suffering, of despair and despotism. But ah! in the clarified vision in which it is now given to me to see it, as I look upon its azure field, it is glorious not only with the north star’s steady light, but is resplendent with the lustre of the southern cross; and as I contemplate its stripes, they serve to mark the broad way for the advance of a mighty people blessed with that plentitude of liberty tempered with justice and self-restraint essential to the protection of the rights of all. And thus again I see, although the stars and bars have faded away forever, the fundamental aspirations which they symbolized find their imperishable existence in the stars and stripes.

CHIEF JUSTICE WHITE retreats to HOLMES’ desk and is greeted warmly by BRANDEIS.

BRANDEIS: [Approvingly, to WHITE.] “The restraints that make men free!”

HOLMES returns to his arm chair and bows to his BROTHERS WHITE AND BRANDEIS. Like a Prince to his Princess, HOLMES gives the red rose to FANNY. He picks up SPEECHES, eases in, and resumes reading from “The Soldier’s Faith”:

HOLMES: We do not save our traditions in this country. The regiments whose battle-flags were not large enough to hold the names of the battles they had fought, vanished with the surrender of Lee, although their memories inherited would have made heroes for a century. Perhaps it is not vain for us to tell the new generation what we learned in our day, and what we still believe. That the joy of life is living, to ride boldly at what is in front of you, be it fence or the enemy; to pray, not for comfort, but for combat; to keep the soldier’s faith against the doubts of civil life; to love glory more than the temptations of wallowing ease, but to know that one’s final judge and only rival is oneself.

We learned also, and we still believe, that love of country is not yet an idle name.

As for us, our days of combat are over. Our swords are rust. Our guns will thunder no more. The vultures that once wheeled over our heads are buried with their prey. We have shared the incommunicable experience of war; we have felt, we still feel, the passion of life to its top.

HOLMES rises from his armchair, comes up center, and recites with a hushed voice.

HOLMES: Three years ago died the old colonel of my regiment, the Twentieth Massachusetts. He gave our regiment its soul. No man could falter who heard his “Forward, Twentieth!” I went to his funeral. From a side door of the church a body of little choir-boys came in like a flight of careless doves.
At the same time the doors opened at the front, and up the main aisle advanced his coffin, followed by the few gray heads who stood for the men of The Twentieth, the rank and file whom he had loved, and whom he led for the last time. The church was empty. No one remembered the old man whom we were burying, no one save those next to him, and us. And I said to myself, The Twentieth has shrunk to a skeleton, a ghost, a memory, a forgotten name which we older men alone keep in our hearts. And then I thought: It is right. It is as the colonel would have it. This is also a part of the soldier's faith: Having known great things, to be content with silence.

FANNY approaches WENDELL, up center, with her own copy of SPEECHES in hand. She has her part in a moment. It is evident that they have recited "The Soldier's Faith" together many times before.

HOLMES: Just then there fell into my hands a little song sung by a warlike people on the Danube, which seemed to me fit for a soldier's last work, another song of the sword [looking at his own sword and scabbard above the hearth], . . . but a song of the sword in its scabbard, a song of oblivion and peace. . . .

HOLMES breaks off. It is FANNY's turn.

FANNY: [Reciting, at HOLMES' side.]

A soldier has been buried on the battle field.
And when the wind in the tree-tops roared,
The soldier asked from the deep dark grave:

HOLMES: "Did the banner flutter then?"

FANNY: "Not so, my hero," the wind replied,
"The fight is done, but the banner won,
Thy comrades of old have borne it hence,
Have borne it in triumph hence."

HOLMES: Then the soldier spake from the deep dark grave:
"I am content."

FANNY: Then he heareth the lovers laughing pass,
And the soldier asks once more:

HOLMES: "Are these not the voices of them that love,
That love—and remember me?"

FANNY: "Not so, my hero," the lovers say,
"We are those that remember not;
For the spring has come and the earth has smiled,
And the dead must be forgot."
HOLMES: Then the soldier spake from the deep dark grave:
"I am content."

The front doors of 1720 I St., looking like a deep dark grave, fling open—as if by magic—before the audience’s eyes. Out pops FANNY's hero, the old soldier himself—courtesy of National Archives' Universal Newsreels. Unearthed from oblivion and peace, MR. JUSTICE HOLMES surveys his viewers as if to ask, "Are these not them that love and remember me?" HOLMES eases down the front steps, law clerk on his arm, slips into a waiting coupe, and is off to Court, to face the motion picture cameras on his 90th birthday, March 8, 1931, at home in chambers with Chief Justice Charles Evans Hughes.

CURTAIN

A NOTE ON SOURCES

Professor Richard Henry Jesse's tribute to his friend "Chief Justice White" in the May-June, 1911 number of The American Law Review, with its facing portal portrait signed "Yours, E. D. White," is convincing proof that Jesse's admiration and affection for Chief Justice White are real and that the Professor belongs in the play. Holmes' reflection, "Good thing—a play, ... like a molded bronze, or a painted portrait ... helps to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget," is drawn from Holmes' "Remarks at the Unveiling of Memorial Tablets at Ipswitch" (1902), in Mark Howe's Occasional Speeches, and is The Muse, so to speak, of "Father Chief Justice."

The scenes, dialogue, and drama of "Father Chief Justice" are drawn from the author's twenty years of study and teaching of the Supreme Court, with perennial appearances, his students would tell you, of the Constitution's Blue and Gray oracles—Holmes, Brandeis, and White, JJ. Our reading list includes the endless chain of Holmes biographies, from Francis Biddle's playmaking Mr. Justice Holmes (1942), spark and tinder of Emmett Lavery's "The Magnificent Yankee," to Catherine Drinker Bowen's biographical drama Yankee From Olympus (1944) ("We want to see him fighting and we want to see him living, day by day. We want to hear him talking."); through, most recently, Sheldon Novick's Honorable Justice (1989) and Liva Baker's The Justice From Beacon Hill (1991)—all of which are a picture frame for "Father Chief Justice."

Sister Marie Carolyn Klinkhamer's biography, Edward Douglas White, Chief Justice of the United States (1943), details E. D. White's deep learning and Southern humanity, his faith in God, his daily rose for Leita, his favorite locutions—both on and off the Court. Sister Marie is essential reading for anyone who would know, or portray, Chief Justice White.

Holmes' Speeches (5th ed. 1913) plays a part. "The Soldier's Faith" (1895) is heard anew after a hundred years—with its "song of the sword in its scabbard,
a song of oblivion and peace.” Holmes’ address on “John Marshall” (1901) tells
listeners-in, “It is all a symbol, if you like, but so is the flag. The flag is but
a bit of bunting to one who insists on prose.” The Holmes-Pollock Letters (Mark
deW. Howe ed. 1941) and Justice Holmes’ revealing correspondence with his
Chinese friend Dr. John C.H. Wu, Recent Letters to Dr. Wu, in Justice Oliver
Wendell Holmes: His Book Notices and Uncollected Letters and Papers (Harry
C. Shriver ed. 1936), are the fount of Holmes’ talk about White in ACT III, “At
Home,” with Justice Louis Brandeis and Fanny Holmes. Justice Brandeis’
confidential conversations with Felix Frankfurter, unearthed by Melvin Urofsky,
The Brandeis-Frankfurter Conversations, 1985 Supreme Court Review 299, 333,
include L.D.B.’s telling perception that White “had the grand manner and was
of the 18th Century.” This is a good example of the truth spoken by the courtly
figures of “Father Chief Justice.”

States”—“Big, Genial, and a True Type of Southern Gentleman”—Sunday,
December 18, 1910, quotes White’s immortal utterance: “The quintessence of
a Judge’s fame lies in labor.” White’s nephew-in-law Preston Gibson tells us of
the Chief Justice’s self-deprecating worry: “I can remember nights in his library
at 1717 Rhode Island Avenue, when he walked up and down the room and
would stop and say, ‘I am afraid the position is too big for me.’” “The Human
Side of the Late Chief Justice White,” The New York Times, May 22, 1921. The
New Orleans Times-Picayune sets the stage for the Prologue’s ceremony of
unveiling: “Somewhere in the crowd a band played old Southern airs, soft and
sweet in the April sunshine.” “Speakers Laud Character of Justice White as
Statue in His Memory is Unveiled,” The Times-Picayune, April 9, 1926, section
1, p. 3.

Attorney General George Wickersham, Sculptor Bryant Baker, and the
Widow Leita White’s remarks are preserved in a little pamphlet, bound in
Confederate Gray, On the Unveiling of a Statue of Edward Douglass White,
Ninth Chief Justice of the United States, At New Orleans, April 8, 1926. This
fleck of gold is carefully tucked away in Hill Memorial Library, Louisiana State
University.

The author himself sat in silent admiration in the audience of the Louisiana
Supreme Court as Archbishop Philip Hannan told us the Sunday School story of
President Grover Cleveland’s appointment of White to the Court: “I made up
my mind that there was a man who was going to do what he thought was right;
and when a vacancy came, I put him on the Supreme Court.” Archbishop
Hannan’s part in our play, his prayer and blessing of “Father Chief Justice,”
derive from these earlier Bicentennial remarks, Commemorative Proceedings for
the Bicentennial of the Supreme Court of the United States, 573-574 So.2d xi-xli

Historic Building Consultant Sid Gray’s ghost story of hearth and home on
Bayou Lafourche, ACT I, sc. ii, is lifted whole (with permission) from Mr.
The curious-minded can acquire a colorful video of Gray himself crawling in the
rafters of "The Old St. Gabriel Church" by writing Sid Gráy at 601 St. Joseph Street, Baton Rouge, Louisiana 70802.

The front page of Thibodaux's Daily Comet for Monday, March 14, 1994, proudly catches Antonin Scalia's centennial throw from the porch of the Edward Douglass White Home: "Our history is what makes us who we are. And if we forget our history we've lost a part of ourselves." These words will not lightly fade from the memory of those faithful of White's people who gathered about his boyhood porch to hear Justice Scalia. Another Muse for "Father Chief Justice."

Of course, Holmes, Brandeis, and White, JJ., are voices of the Constitution—I mean officially speaking. Thus the United States Reports is wired for sound, so to speak, in "Father Chief Justice": e.g., MR. JUSTICE HOLMES, dissenting: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75 (1905); and again, MR. JUSTICE BRANDEIS, dissenting: "Ex facto jus oritur. That ancient rule must prevail in order that we may have a system of living law." Adams v. Tanner, 244 U.S. 590, 600 (1917); "Sometimes, if we would guide by the light of reason, we must let our minds be bold." Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (1924) (MR. JUSTICE BRANDEIS, joined by MR. JUSTICE HOLMES, dissenting); and from E. D. White we hear plain political truth: "The influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men [except Holmes!] that the proposition may be left to destroy itself by its own statement." Newberry v. United States, 256 U.S. 232, 263 (May 2, 1921) (MR. CHIEF JUSTICE WHITE, dissenting).

Newberry was White's last judicial breath. Lest it be thought that Professor Jesse's enthusiasm for Chief Justice White is inflated, let us listen to contemporary scholars sizing up White:

There are moments in the history of the Supreme Court when the transcendent force of the Constitution seems to dispel the confines of parish and class, and when a Justice evokes a panorama of constitutional development across eras in the nation's history. As the shadows lengthened for Edward Douglass White in the summer of 1921, the Newberry case fired his usually circumlocutory and doubting mind with a passionate eloquence and conviction. Can anyone not be moved by the poignancy of the ex-Confederate's nationalist thunder against "the phantoms of attenuated and unfounded doubts concerning the meaning of the Constitution, which have long perished."


The red rose motif of "Father Chief Justice" is more the author's idea, I suppose, than reality. It is the fact, though, that each afternoon, on his daily walk home from Court, White invariably brought Leita a single long-stemmed

The symbol of “The Constitution—all wrapped up in a rose” and Holmes’ ejaculation, “By Jove, that’s poetry,—. . . from a Jesuit! I told you, Louie, our Chief has insights. . . . Now he shows himself a Goethe come round on Constitution Day” are the author’s invention, I confess. But permit me to paraphrase another of our protagonists, Mr. Justice Holmes, to silence the stone of heart: “Not a bad thing, a rose . . . and romance’s license!”

And as Judges speak truth, I beg you hear Judge James L. Dennis, himself a member of The Cricket Tribe, recount the story of Holmes and White adopting a tradition, on September 17th each year, of exchanging a single scarlet red rose. There is no authentic account of the reason for this ritual. Chief Justice White was a great man for ritual. . . . So White may have started the tradition involving Holmes and the rose also, but the reason for it is not spelled out anywhere. It is believed that because the two Justices had fought on opposite sides in the Civil War and because September 17th was the date of the battle of Antietam in which Justice Holmes had been wounded, that the scarlet rose symbolized the renewal of brotherhood after the shedding of brotherly blood. But September 17th is also Constitution Day, the day of the signing of our great charter of government. Thus, it may be that White and Holmes also wished to signify the renewed strength of the Constitution and the unity of the Nation following the strife of civil war.

Commemorative Proceedings for the Bicentennial of the Supreme Court of the United States, 573-574 So.2d XLIV (Feb. 2, 1990). This is good enough for me.

The Memorial Proceedings of ACT V, “Cricket on the Hearth,” cast light through Henry P. Dart’s Homeric lens (“the children of the paving stones and those of the field and farm”) and Chief Justice Taft’s large focus: “White had a great heart, full of sympathy for mankind.” Memorial Address, 149 La. vii, x (1921); Proceedings on the Death of Chief Justice White, 257 U.S. xi, xxviii (1921).

The Justice Sam A. LeBlanc Papers in the Louisiana Collection, Hill Memorial Library, LSU, bear witness to Chief Justice and Mrs. White’s returning home to Bayou Lafourche, to White’s birthplace, and to the White sugar plantation “come to life after the Civil War.” The Memorial Gate of the Knights of Columbus stands proudly in these Memorial manuscripts. But, alas, Chief Justice White himself left us none of his papers; they have vanished like the ghost of the ironwork eagle atop his Thibodaux Memorial Gate. Thus biographers and playwrights alike must come at E. D. White sideways, through the manuscript collections of his side judges. In one golden particular, “Father Chief Justice” owes E. D. White’s final appearance, his confession to Captain Holmes of pending surgery: “tomorrow 11:30 A.M.”—ACT V, sc. i, “Dance with the Music,”—to Sheldon Novick’s brilliant panning of The Holmes Papers.

Holmes' wit, his "light touch and humor of a man of the world," is put at your fingertips in Ed Bander's Justice Holmes Ex Cathedra (1966) and Harry Shriver's What Gusto (1970). Both are on the author's reference shelf. As to Teddy Roosevelt and Taft's appearance in the play ("By Jove, here are two very large crickets indeed!") and his "Cricket on the Hearth" tale of his change of heart toward Old Glory, 7 A.B.A.J. 341 (1914)—these are the wax and wick of Professor Jesse's small lighted candle: "We meet anew to rekindle the flame."

As to Father Chief Justice White's trust in God, even at Conference—"Here is a hard case. God help us!"—Merlo Pusey's interview with Chief Justice Hughes sits us at the table. 1 Charles Evans Hughes 282-83 (1951). Solicitor General John W. Davis reports Chief Justice White's conviction that "Somewhere, sometime I must give an account of the deeds done in the body. My brother Holmes doesn't believe in anything: If you say to him, this is right and that is wrong, he will say, 'Now you are using terms that I don't know anything about.'" William H. Harbaugh, Lawyer's Lawyer: The Life of John W. Davis 108 (1973).

Mr. Davis himself tells us that "It is true to say" was one of White's favorite phrases; thus we hear it from our "Father Chief" in the play. And, adds Davis about our protagonist E. D. White:

much of the man himself escapes the printed page: the dignity of his judicial bearing, his unfailing courtesy to the bar, his patience during argument, the swift thrust of his questions, his extraordinary memory which rendered him wholly independent of written notes, and in oral deliverance the fluency and beauty of his diction and the deep and melodious tones in which he spoke—all these are for memory alone. Nor do any books record the simple beauty of his private life, his gentle kindliness to all around him and the personal modesty which covered him with the cloak that only true greatness wears.

These are acute stage directions from behind the scenes. John W. Davis, "Edward Douglass White," 7 A.B.A. J. 377, 382 (1921).

One more source and I am done. This may seem a trifle to you. Each semester I walk with my seminar students to Hill Memorial Library on LSU's campus. We request a manuscript file, I forget which. It holds a small scrap of paper, a hand-penciled note to the Supreme Court's Reporter of Decisions
apropos some little correction of page proof, I forget what. It is signed, "Yours E. D. White."

We realize with Holmes: "He lived."