

## THE SIGN AND SEAL OF JUSTICE

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The United States Department of Justice often is asked about the origins and history of its seal and its various elements, and in particular, to render in English the Latin motto that figures prominently thereon: *QUI PRO DOMINA JUSTITIA SEQUITUR*. These queries are not of merely academic or historical interest. A motto is more than a supermarket jingle, commercial tag-line, or campaign slogan; its function, rather, is to encapsulate the aspirational intention or purpose of an individual or a sociological group—be it a family or society, a people or nation, an entity or institution—in a word or succinct phrase. Thus, interest in the Department’s motto (and, derivatively, its seal) is

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unsurprising: these are, after all, words it is to live by.<sup>1</sup> What may be surprising is that none of the serious efforts undertaken to date to arrive at definitive responses to these queries has been entirely successful—in fact, the queries have generated some obscure answers that hark back to before the founding of the Republic and to distant reaches of the world.

To go to the heart of these queries, the motto itself has been described as “hopeless: its translation ha[ving] baffled more than one good Latin scholar”;<sup>2</sup> “couched in . . . elliptic [sic] Latin”;<sup>3</sup> “a never-ending source of speculation”;<sup>4</sup> “a puzzle . . . [whose] translation is disputed”;<sup>5</sup> a puzzle that, perhaps “due to sheer ignorance or to carelessness . . . , [was caused by] a mistake . . . in the wording”;<sup>6</sup> “a ‘hopeless’ grammatical construction that defies translation into understandable English,” but “not a mere hapless archaic expression,

1. See Richard Lewis “Dick” Thornburgh, Att’y Gen., Address at the 38th Annual Attorney General’s Awards Ceremony, Washington, D.C. 1 (Jan. 26, 1990) (transcript on file at Dep’t of Justice Main Library) (noting that the “motto . . . bespeaks a great purpose”).

2. JAMES S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE: ITS HISTORY AND FUNCTIONS* 14 (1904).

3. Letter from Albert Levitt, Special Assistant to the Att’y Gen., to Roscoe Pound, Dean, Harvard Law School (Sept. 28, 1933), in *U.S. DEPARTMENT OF JUSTICE, THE SEAL OF THE DEPARTMENT OF JUSTICE* 1, 2 (1940) [hereinafter *THE SEAL OF THE DEPARTMENT*] (on file at Dep’t of Justice Main Library).

4. HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 522b (1937). Mr. Cummings was Attorney General from March 4, 1933, to January 2, 1939.

5. *Justice Department Is Puzzled by Motto, Nearly Century Old*, *SUNDAY STAR* (Wash., D.C.), Feb. 7, 1937, at B5 [hereinafter *Puzzled*]. The news account states that “even Attorney General Cummings can’t say exactly what it means . . . [and] won’t even attempt to translate it.” *Id.* The article further quotes an unnamed Department attorney: “[L]ike much other Latin of that period, if it wasn’t bad Latin, it certainly was inaccurate.” *Id.*

6. Letter from Arthur H. Leavitt, Chief, Div. of Dep’t Archives, The Nat’l Archives, to Homer S. Cummings, Att’y Gen. (Feb. 8, 1937), in *THE SEAL OF THE DEPARTMENT*, *supra* note 3, at 9. Mr. Leavitt explains,

The only conclusion that I have been able to come to is that [the words] should read “Qui pro domina justitiam sequitur” . . . .

I have explained the mistake, if it is a mistake, on one of the following suppositions. The use of the form “justitia” may have been due to sheer ignorance or to carelessness; or the writer, having in mind that certain Latin deponents—utor, furor, etc.—were used with the instrumental ablative, may have assimilated “sequor” into that group.

*Id.* Although *sequor* (meaning *to follow* or *to pursue*) is, of course, a Latin deponent verb (and one *not* used with the ablative case—taking an accusative as an object), the author disagrees that the motto should read “*domina justitiam*” (thus making the former term the dative object of *sequor*, and the latter the accusative) rather than “*domina justitia*” (in which both terms, together, are the dative object). The English-language translation of Mr. Leavitt’s speculative motto would be “*Who pursues (or prosecutes) justice for the sake (or on behalf) of the lady*”—which surely is wrong: who is “the lady”?

[being,] rather[,] a descriptive expression of some classical worth”;<sup>7</sup> a focus of “much speculation and disagreement over [its] origins and meaning”;<sup>8</sup> and “a somewhat strange Latin . . . [that] offers as much of a bafflement to some . . . as [Attorney General Thornburgh] confess[ed] it first did to [him, and that] . . . is one of the great mysteries of the western world—even to scholars who know Latin.”<sup>9</sup>

The primary difficulty in responding accurately to the queries arises from the curious fact that it is not now known exactly when the original of the Department’s current seal was adopted or first came into use, or when the motto first appeared on it. The so-called Judiciary Act of 1789, which created the office of the Attorney General<sup>10</sup> (antecessor of the Department<sup>11</sup>), made no express provision for a seal. This omission was left uncorrected for some sixty years, until the Act for Authenticating Certain Records (February 22, 1849), which provided

[t]hat all books, papers, documents, and records in the . . . Attorney-General’s office, may be copied and certified under seal . . . , and the said Attorney-General shall cause a seal to be made and provided for his office, with such device as the President of the United States shall approve.<sup>12</sup>

On a now-forgotten day between that one and March 6, 1854, a seal, supposed to incorporate the arms of the United States—which are also depicted on the back of the \$1 bill<sup>13</sup>—was adopted for the Attorney General’s office, presumably with the President’s approval.<sup>14</sup>

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7. Joseph A. Sanches, *Origins of the Inscriptions on the Justice Seal*, JUSTICE NEWS, Nov. 1969, at 4, 4 (on file at Dep’t of Justice Main Library).

8. ANTONIO VASAI, JUSTICE MGMT. DIV., U.S. DEP’T OF JUSTICE, THE FIFTIETH ANNIVERSARY OF THE UNITED STATES DEPARTMENT OF JUSTICE BUILDING: 1934–1984, at 48 (1984) [hereinafter FIFTIETH ANNIVERSARY] (on file at Dep’t of Justice Main Library).

9. Thornburgh, *supra* note 1.

10. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (1789) (codified in relevant part as amended at 28 U.S.C. §§ 503, 511–13, 518(a) (2000)).

11. See Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870) (codified generally as amended at 28 U.S.C. § 501 (2000)); see also ALBERT LANGEUTTIG, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES 7–13 (1927) (summarizing the 1870 Act’s history and providing a conceptual survey of the Department’s functions).

12. Act for Authenticating Certain Records, ch. 61, § 3, 9 Stat. 346, 347 (1849) (codified as amended at 28 U.S.C. § 502 (2000)).

13. E.g., RICHARD S. PATTERSON & RICHARDSON DOUGALL, THE EAGLE AND THE SHIELD: A HISTORY OF THE GREAT SEAL OF THE UNITED STATES 402–07 (1976) (exhaustive study); U.S. DEP’T OF STATE, THE GREAT SEAL OF THE UNITED STATES 12–13 (Harriet P. Culley ed., 1980) (fine, concise study). Given the executive branch’s early role in the nearly universal, 150-year-long, practical abandonment (with the exception of Attorney General Cushing’s anomalous use) of the

Despite repeated research in the Department archives since before 1904 by numerous scholars (and later by the author), no record has been found that indicates even the approximate date of creation of this seal, its (presumed) approval by the President, or its adoption by the Attorney

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term “Great Seal,” *see infra* notes 65–67 and accompanying text, it is interesting that, by handwritten order of President Franklin Delano Roosevelt (circa July 1, 1935), that very term was added to the basic design (still in use) of the \$1 bill. *See* E. RAYMOND CAPT, OUR GREAT SEAL: THE SYMBOLS OF OUR HERITAGE AND OUR DESTINY 39–40 (1979) (detailed but eccentric study); PATTERSON & DOUGALL, *supra*; U.S. DEP’T OF STATE, *supra*. This, in all likelihood, propitiated the current and somewhat-illogical revival in its use. *See, e.g.*, U.S. DEP’T OF STATE, *supra, passim*; *see also* PATTERSON & DOUGALL, *supra*, at 4, 570–71 (listing relevant Department of State publications, which all, until recently, referred to the “Seal” but now refer to the “Great Seal”).

Of course, this hardly was President Franklin Roosevelt’s only misguided historical intervention. Pursuant to his express (May 1941) order, the following forty-seven words from the U.S. Declaration of Independence were inscribed (among others) on an interior stone wall of the Jefferson Memorial in Washington, D.C.: “WE . . . SOLEMNLY PUBLISH AND DECLARE, THAT THESE COLONIES ARE AND OF RIGHT OUGHT TO BE FREE AND INDEPENDENT STATES . . . AND FOR THE SUPPORT OF THIS DECLARATION, WITH A FIRM RELIANCE ON THE PROTECTION OF DIVINE PROVIDENCE, WE MUTUALLY PLEDGE OUR LIVES, OUR FORTUNES AND OUR SACRED HONOUR.” PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 211 (1997) (emphasis added). Although it is true that Mr. Jefferson was the principal draftsman of the Declaration, the “problem” (changes in spellings and punctuation aside), as Professor Maier so aptly states,

is that most of those words [i.e., the twenty-eight words above in *italics* (such emphasis, obviously, not carved onto the wall of the Memorial)] were written by Richard Henry Lee or by some anonymous Congressmen between July 2 and 4, 1776, and inserted by Congress in place of Jefferson’s prose. Did no one have the nerve to tell the President . . . that much of the above quotation [which he personally selected], now permanently inscribed on the Jefferson Memorial, was not of Jefferson’s composition? Jefferson became very upset by the way Congress “mutilated” his draft. What would he have said about [the inscription on] the Jefferson Memorial . . . ?

*Id.*; *see also id.* at 209–11 (describing the Jefferson Memorial Commission’s efforts to craft an inscription, of no more than 325 letters, based on a passage from the Declaration of Independence); *id.* at 235–41 (reproducing Mr. Jefferson’s draft of the Declaration of Independence featuring the editorial changes by Congress). Perhaps President Roosevelt simply thought that Saki’s Lady Caroline Benaresq implicitly included “Presidents” in her opinion that “Prime Ministers are wedded to the truth, but like other wedded couples they sometimes live apart.” SAKI [H.H. MUNRO], THE UNBEARABLE BASSINGTON (1912), *reprinted in* THE PENGUIN COMPLETE SAKI 567, 662 (Penguin Books 1987); *see also id.* at 656 (Courtenay Youghal to Lady Caroline: “For the Government to fall on a matter of conscience . . . would be like a man cutting himself with a safety razor.”). In any event, in deciding upon the text for the Jefferson Memorial, President Roosevelt seems to have concluded (to paraphrase Saki’s Clovis Sangrail) that “most of those terms are probably wrong, but a little inaccuracy sometimes saves tons of explanation.” SAKI [H.H. MUNRO], *Clovis on the Alleged Romance of Business*, in THE SQUARE EGG (1924), *reprinted in* THE PENGUIN COMPLETE SAKI, *supra*, at 559, 560.

14. *See* 6 Op. Att’y Gen. 326, 338 (1854) (Caleb Cushing) (providing the first known official mention of the Attorney General’s use of “an official seal”); EASBY-SMITH, *supra* note 2, at 13–14; JUSTICE MGMT. DIV., U.S. DEP’T OF JUSTICE, 200TH ANNIVERSARY OF THE OFFICE OF THE ATTORNEY GENERAL 36 (1989) [hereinafter 200TH ANNIVERSARY].

General.<sup>15</sup> Moreover, in his own page-by-page review of the thirty-five-some bound tomes of filings (many from the Attorneys General) in the U.S. Supreme Court from 1848 to 1857, the author found no evidence of use of any official Attorney General seal.<sup>16</sup> Of course, this absence of evidence may be unremarkable, given that early Attorneys General, while in office, often argued cases before that Court in their *private* capacities, as attorneys for private (paying) litigants:

From the beginning, Presidents were aware that the low salary paid the Attorney General made it difficult to attract high-grade men to the office. They baited the hook with the lure of remunerative private practice. . . .

[The first Attorney General, Edmund Jennings Randolph of Virginia,] burdened with heavy financial obligations . . . took the bait and the job. During his tenure [(1789–1794)], he substantially augmented his income by representing private clients. Twenty-two of his successors followed his example, some of them appearing as counsel in the most noted cases of their times.<sup>17</sup>

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15. See Memorandum by James W. Baldwin, Chief Clerk & Admin. Assistant, U.S. Dep't of Justice, The Seal of the Department of Justice 3–4 (Jan. 24, 1930) (on file at Dep't of Justice Main Library); see also EASBY-SMITH, *supra* note 2, at 13–14; 200TH ANNIVERSARY, *supra* note 14, at 36; LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 30–31 (1967) (“The files of the Department today do not disclose when the seal was designed, when the President approved it, or precisely when it came into use.”); Thornburgh, *supra* note 1, at 1. Neither do the official, published papers of Presidents Zachary Taylor (March 5, 1849–July 9, 1850), Millard Fillmore (July 10, 1850–March 4, 1853), or Franklin Pierce (March 4, 1853–March 3, 1857) appear to have any record of approval of a seal. See 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 2–427 (James D. Richardson ed., Washington, Gov't Printing Office 1897) [hereinafter COMPILATION]; 1 CONG. INFORMATION SERV., CIS INDEX TO PRESIDENTIAL EXECUTIVE ORDERS & PROCLAMATIONS 116–35 (1987) [hereinafter CIS INDEX].

16. This review took place on November 6, 1999, at the Madison Building of the Library of Congress in Washington, D.C.

17. HUSTON, *supra* note 15, at 11; see also 6 REG. DEB. 324 (1830) (Senator John Holmes of Maine observing “that the salary of the Attorney General was now fixed at three thousand five hundred dollars per annum; and the reason why it was not so large as the salaries of other heads of Departments [(then \$6,000)] was, that, by being permitted to pursue his other avocations, which were acknowledged to be profitable, he more than made up to himself the amount of compensation received by the others who were confined to their offices.”); 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 726 (1971) (“Attorney General Randolph[s] . . . official emoluments were so meagre that his living depended upon the effectiveness with which he represented private clients.”); Bernard A. Weisberger, *D.C. Law*, AM. HERITAGE, May–June 1993, at 20–24 (“Randolph . . . continued his private practice without embarrassment or reproach. So did all his successors until 1853, and with good reason. The duties of the office were limited and imprecise at best . . . . So there was time for

As described by Attorney General Caleb Cushing,

When the office of Attorney General was created [in 1789] . . . , inequality existed between his salary and that of other [Cabinet members]. The reason why he received less than the others is given by Washington in his letter to Mr. Edmund Randolph, tendering to him the first appointment of Attorney General, in which he says: “The salary of this office appears to have been fixed at what it is from a belief that the station would confer pre-eminence on its possessor, and procure for him a decided preference of professional employment.”<sup>18]</sup> On this basis things continued[, with] the Attorney General receiving less salary than his associates, but being invited, as it were, by the nature of the office, into private professional practice in the courts, for which his near association with the Government, united to the professional qualifications which, from his being appointed to the office, he may be assumed to possess, would serve to give him great advantages. The published correspondence of the eminent statesmen of the first and second generations of our constitutional history, the reports of legal adjudications, the printed opinions of this office, and the documents on file in it, show that it was the received practice of the Attorney General not only to give opinions in private cases, and argue private causes at the seat of Government, but also to attend, as a practising barrister, at the sittings of courts in the States.

. . . [This] course in office [not only] was not forbidden, but, on the contrary, [was] invited by law, and was justified by official usage, and by the approbation or acquiescence of Washington, Adams, Jefferson, and Madison.<sup>19]</sup>

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earning outside income, and a definite need as well. The pay was small . . . . [There was no] money for office rent or expenses; Randolph had to dig into his own pocket.”)

18. Letter from George Washington, President, to Edmund Randolph (Sept. 28, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON 418, 419 (John C. Fitzpatrick ed., 1939); see also Frank Buckley, *The Department of Justice—Its Origin, Development and Present Day Organization*, 5 B.U. L. REV. 177, 179 (1925); John A. Fairlie, *The United States Department of Justice*, 3 MICH. L. REV. 352, 352 (1905).

19. 6 Op. Att’y Gen. 326, 352–53 (1854) (footnote added). President Pierce commended this seminal opinion, key to understanding the Attorney General’s authority in the executive and the federal government, to the House of Representatives. See H.R. EXEC. DOC. NO. 33-95, at 1 (1854). It is a cardinal text for the establishment of the Department of Justice. See LANGELOTTIG, *supra* note 11, at 7; James M. Beck, *The World’s Largest Law Office*, 10 ABA J. 340, 340 (1924); Buckley, *supra* note 18, at 180; Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 180 (1938). The improvement of the federal government’s law functions was dear to that President, see, e.g., Exec. Order No. 1855-17-2 (July 16, 1855), who is reputed to have been “a scholarly lawyer of distinction [who] enjoyed the advice and counsel of a rarely able Attorney General—Caleb

Until the Attorney General's salary was made equal to that of other Cabinet officers' salaries,<sup>20</sup>

the major supplement to [the official government salary paid to the Attorney General] was still expected to come from private practice. Indeed it was in their private professional capacity that the Attorneys General argued many major constitutional cases. *Dartmouth College v. Woodward*,<sup>[21]</sup> *Gibbons v. Ogden*,<sup>[22]</sup>

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Cushing of Massachusetts." Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 600 (1937) (McReynolds, J., dissenting).

20. See Act of Mar. 3, 1853, ch. 97, § 4, 10 Stat. 189, 212; see also Seth P. Waxman, "Presenting the Case of the United States as It Should Be": *The Solicitor General in Historical Context*, 2 J. SUP. CT. HIST. 3, 5–8 (1998) (discussing the early experiences of the Attorneys General, including failed early attempts by Presidents to achieve parity in the pay of the Attorney General).

21. 17 U.S. (4 Wheat.) 518 (1819) (Att'y Gen. William Wirt, counsel for defendant in error). Mr. Wirt, a native of Maryland, served as Attorney General for twelve years—i.e., for all but the first eight months of President James Monroe's two terms in office and for the entire term of his immediate successor, President John Quincy Adams—a capstone to a brilliant legal career touched off by his 1807 appointment by President Jefferson to be a prosecuting attorney in the sensational trial of Aaron Burr, former Vice President, former Senator from New York, and fast-living and dissolute grandson of the Rev. Jonathan Edwards.

Despite being under indictment in New Jersey for murder and in New York for dueling (both indictments arising from his participation in a duel where he fatally shot Alexander Hamilton on July 11, 1804, at Weehawken)—facts that did not deter him (literally, a fugitive from justice) from presiding over the U.S. Senate in the second session of the Eighth Congress—Burr never was tried on these charges. Rather, his August 3–September 1, 1807, trial before the federal circuit court in Richmond, Virginia, was for treason. See generally RON CHERNOW, ALEXANDER HAMILTON 191, 680–722 (2004). The circumstances of that 1807 trial, including the cast of characters (over and above the defendant himself, who personally conducted most of the cross-examinations of the prosecution's witnesses), almost beggar belief. See generally FRANCIS F. BEIRNE, SHOUT TREASON: THE TRIAL OF AARON BURR 6–17, 170–77, 234–43 (1959). The setting for the event was no place less than the Hall of the Virginia House of Delegates in the State Capitol Building, which was filled to capacity. Presiding were Chief Justice John Marshall, riding circuit, and District Judge Cyrus Griffin (tenth and last President of the Confederation Congress). The trial was the portentous occasion of the June 13th issuance of the first judicial *subpoena duces tecum* to a sitting President (the Chief Justice's despised second cousin (once removed)), Mr. Jefferson, who refused to honor or obey it, on muscular, constitutional separation of powers grounds. See *United States v. Burr*, 25 F. Cas. 30, 32–38 (C.C.D. Va. 1807) (No. 14,692d); *United States v. Burr*, 25 F. Cas. 55, 65–70 (C.C.D. Va. 1807) (No. 14,693); 25 Op. Att'y Gen. 326, 330–31 (1905) (William H. Moody).

Among counsel for the defense were former U.S. Attorneys General Randolph and Charles Lee (first cousins (once removed) of each other, and second/third cousins both of the presiding circuit justice and of the President bringing the prosecution). And this does not even begin to exhaust the family relationships that cropped up at the trial: for example, the foreman of the *petit* jury was Colonel Edward Carrington, brother-in-law of Chief Justice Marshall's wife; the foreman of the *grand* jury was Congressman John Randolph (later U.S. Senator from Virginia), a descendant of Pocahontas and a double-second cousin of the foregoing Messrs. Jefferson, Marshall, Randolph, and Lee, as well as of James Pleasants (also second cousin of the foregoing four), who sat with him on that jury with (among others) John Ambler—first cousin of the Chief Justice's wife (and husband of his sister). Perhaps one ought to be grateful that further family entanglements were avoided

when venireman Peyton Randolph was excused from jury duty, following his assertion of privilege as a member of the bar, *see Burr*, 25 F. Cas. at 79; that he was the only (surviving) son of Attorney General Randolph (the lead counsel for the defense) seems not to have suggested to anyone that perhaps there might be another ground for his not serving. Another defense counsel was Luther Martin (Maryland Attorney General for twenty-eight consecutive years from 1778–1805 and again from 1818–1822). And among those accompanying Mr. Wirt for the prosecution were then-U.S. Attorney General Caesar Augustus Rodney (once and future Congressman from Delaware (1803–1805; 1821–1822), and future Senator from that gallant state (1822–1823)), George Hay (U.S. Attorney for the District of Virginia, and son-in-law of President Monroe), and Alexander MacRae (then sitting Lieutenant Governor of Virginia). The flavor of the indictment alone, from the supposedly aggressively secular Administration of President Jefferson, *see infra* notes 119–21, is well worth recalling:

The grand inquest of the United States of America, for the Virginia district, upon their oath, do present, that Aaron Burr, late of the city of New York, and state of New York, attorney at law, being an inhabitant of, and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, *not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquility of the same United States to disturb and to stir, move, and excite insurrection, rebellion and war against the said United States, on the tenth day of December, in the year of Christ, one thousand eight hundred and six, at a certain place called and known by the name of “Blennerhassett’s Island,” [sic] in the county of Wood, and district of Virginia aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States, and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr, he, the said Aaron Burr, afterwards, to wit, on the said tenth day of December, in the year one thousand eight hundred and six, aforesaid, at the said island called “Blennerhassett’s Island” as aforesaid, in the county of Wood aforesaid, in the district of Virginia aforesaid, and within the jurisdiction of this court, with a great multitude of persons whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit: to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and . . . did array themselves in a warlike manner, with guns and other weapons, offensive and defensive, and did proceed from the said island down the river Ohio in the county aforesaid, within the Virginia district and within the jurisdiction of this court, on the said eleventh day of December, in the year one thousand eight hundred and six aforesaid, with the wicked and traitorous intention to descend the said river and the river Mississippi, and by force and arms traitorously to take possession of a city commonly called New Orleans, in the territory of Orleans, belonging to the United States, contrary to the duty of their said allegiance and fidelity, against the constitution, peace and dignity of the said United States, and against the form of the act of the congress of the United States in such case made and provided.*

*Burr*, 25 F. Cas. at 87–89 (emphasis added). The myriad judicial proceedings associated with Blennerhassett’s Island are conveniently reported in *Burr*, 25 F. Cas. at 1–207; *see also* JOSEPH WHEELAN, *JEFFERSON’S VENDETTA: THE PURSUIT OF AARON BURR AND THE JUDICIARY* (2005) (providing a detailed, somewhat-revisionist, pro-Burr narrative).

*Cohens v. Virginia*,<sup>[23]</sup> *Brown v. Maryland*,<sup>[24]</sup> *Luther v. Borden*,<sup>[25]</sup> and *Bar[r]on v. Baltimore*<sup>[26]</sup> were not government cases. Neither was

22. 22 U.S. (9 Wheat.) 1 (1824) (Att’y Gen. Wirt, for appellant).

23. 19 U.S. (6 Wheat.) 264 (1821) (Att’y Gen. Wirt, counsel for plaintiffs in error). Chief Justice Marshall’s opinion for the Court in *Cohens* backpedals furiously and defensively from the plain implications of the rationale he himself gave for the Court in *Marbury v. Madison*. Compare 5 U.S. (1 Cranch) 137, 174 (1803) (“If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.”), with *Cohens*, 19 U.S. (6 Wheat.) 264, 399–400 (affirming a statutory grant of appellate jurisdiction to the Supreme Court where the Constitution provides for original jurisdiction). The question remains as to whether the holding of *Marbury*, whose rationale its own author dismisses casually as “some dicta of the court,” survives *Cohens*.

The latter case’s official style is curiously at odds with the reported surname—*Cohen*—of the plaintiffs in error; perhaps the plural was used because *two* Cohens were found guilty of selling District of Columbia lottery tickets in Virginia. *Id.* at 266–67. A similar odd discrepancy may be seen in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), whose official style famously differs from the actual surname—*Sanford*—of the defendant in error. The declaration of complaint in this latter case, filed on November 2, 1853, in the U.S. Circuit Court for the District of Missouri by Roswell M. Field, who represented the unfortunate freedom-seeking plaintiff without charge, twice misspelled the surname, and all later misspellings in the case as it wended its way to the fateful morning of March 6, 1857, in the Old Senate Chamber of the U.S. Capitol seem to have sprung from that initial error. Although the defendant’s hastily prepared jurisdictional plea, filed on his behalf on November 16, 1853, while he resided in New York, picked the misspelling up in the boilerplate, his own signature (unsurprisingly) gave his surname correctly, as did the subsequent pleadings filed by his attorney in Missouri, Hugh Garland (who died in October 1854), and his attorney before the U.S. Supreme Court, Senator Henry Sheffie Geyer of Missouri. The circuit court, apparently unconscious of the mistake lurking in the pleadings, vacillated between spellings throughout the proceedings, but its decree of judgment on May 15, 1854, correctly named the defendant. See 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 167–240 (Philip B. Kurland & Gerhard Casper eds., 1978); Transcript of Record in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (No. 137), reprinted in U.S. SUPREME COURT RECORDS AND BRIEFS, 1832–1978, *passim* (Gale 2005).

John S. Vishneski III undoubtedly is mistaken in asserting that “[t]he error was probably due to a confusion between *Dred Scott*’s Sanford and the ‘John F.A. Sandford’ found in another case argued during the December 1855 Term[.]” John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373, 373 n.1 (1988), if only because the defendant in error in both *Dred Scott* and *Willot v. Sandford*, 60 U.S. (19 How.) 79 (1856), was the very same insane man: Maj. John F.A. *Sanford*, brother of Dred and Harriet Scott’s *quondam* mistress, Irene Sanford Emerson Chaffee (whose mortified husband was Dr. Calvin Chafee, abolitionist Congressman from Massachusetts), and widower of Émilie Chouteau (whose family’s various real-estate transactions formed the basis of his ultimately unsuccessful ejectment suit against Sebastian Willot, John McDonald, and Joseph Hunn). Oddly enough, in this last-mentioned case, Sanford’s own attorneys’ filings in the U.S. Circuit Court for the District of Missouri consistently spelled their client’s surname *wrong*. See Transcript of Record, *Willot v. Sandford*, 60 U.S. (19 How.) 79 (1856) (No. 118), reprinted in U.S. SUPREME COURT RECORDS AND BRIEFS, 1832–1978, *supra*, *passim*. The author can only speculate, but the spelling errors may be due merely to the Major’s mental state and great remove (in New York) from the pending legal proceedings in St. Louis and Washington, which would make it unlikely that he actually saw the pleadings (if at all) before they were filed.

24. 25 U.S. (12 Wheat.) 419, 433 (1827) (Att’y Gen. Wirt, counsel for plaintiffs in error).

*Chisholm v. Georgia*, which drew from Edmund Randolph his most brilliant Supreme Court argument.<sup>[27]</sup>

The propriety of private practice had been discussed when the law department bills of 1830<sup>[28]</sup> and 1846<sup>[29]</sup> were before Congress. One of the few points on which Senators Rowan<sup>[30]</sup> and Webster<sup>[31]</sup> agreed in

25. 48 U.S. (7 How.) 1, 34 (1849) (Att’y Gen. Nathan Clifford, counsel for plaintiff in error).

26. 32 U.S. (7 Pet.) 243, 247 (1833) (Att’y Gen. Roger B. Taney, counsel for defendants in error).

27. 2 U.S. (2 Dall.) 419, 419 (1793) (Att’y Gen. Randolph, appearing as counsel for plaintiff).

28. See 6 REG. DEB. 276–77, 323–24, 404 (1830) (considering a bill “to re-organize the establishment of the Attorney General, and erect it into an Executive Department”). Apparently introduced by Senator Rowan (about whom see *infra* note 30), this bill was like that of 1846, see *infra* note 29, in that it was a precursor to the Act that created the Department of Justice, see *supra* note 11, and seems to have been a response to a December 8, 1829, recommendation of President Andrew Jackson’s. See President Andrew Jackson, First Annual Message (Dec. 8, 1829), in 2 COMPILATION, *supra* note 15, at 442, 453–54 (1896); see also President Andrew Jackson, Second Annual Message (Dec. 6, 1830), in 2 COMPILATION, *supra* note 15, at 500, 527–28 (repeating the recommendation); cf. President James Madison, Eighth Annual Message (Dec. 3, 1816), in 1 COMPILATION, *supra* note 15, at 573, 577–78 (1896) (making a similar recommendation); Waxman, *supra* note 20, at 6 & n.21 (incorrectly—and most improbably—giving the year of President Madison’s recommendation as 1814, erroneously citing to pages 577–78 of volume 1 of the 1897 edition of the COMPILATION, *supra* note 15; in fact, the recommendation is found on those pages of the 1896 edition, and on pages 562–63 of volume 2 of the 1897 edition, also reprinted at 30 ANNALS OF CONG. 11, 15 (1816)).

29. See CONG. GLOBE, 29th Cong., 1st Sess. 881 (1846). The bill “relative to, and increasing the duties of, the Attorney General,” was introduced in the House of Representatives by Congressman George Oscar Rathbun of New York, a Democrat, *id.* at 1130–31, and in the Senate by former Attorney General John MacPherson Berrien of Georgia, for the Jacksonian and Whig Parties. *Id.* at 881. This bill was like that of 1830, see *supra* note 28, in that it was a precursor to the Act that created the Department of Justice, see *supra* note 11, and seems to have been a response to a December 2, 1845, recommendation of President James Knox Polk’s. See President James K. Polk, First Annual Message (Dec. 2, 1845), in 4 COMPILATION, *supra* note 15, at 385, 415.

30. John Rowan (1773–1843) was a native of Pennsylvania, and U.S. Senator from Kentucky for the Jacksonian Party, sitting from 1825–1831. He introduced the 1830 bill to establish the office of Attorney General as an executive department. See 6 REG. DEB. 276 (1830). Between 1795 and 1818, he built Federal Hill, near Bardstown, which appears to have inspired his cousin Stephen Collins Foster to write “My Old Kentucky Home,” now the official song of that commonwealth. See RANDALL CAPPS, THE ROWAN STORY: FROM FEDERAL HILL TO MY OLD KENTUCKY HOME 20, 55, 78 (1976) (discussing the history behind “My Old Kentucky Home”); see also Kentucky’s State Song: “My Old Kentucky Home,” [www.kdla.ky.gov/resources/kysong.htm](http://www.kdla.ky.gov/resources/kysong.htm) (last visited Sept. 19, 2008).

31. Daniel Webster (1782–1852) was a New Hampshire native, and U.S. Senator from Massachusetts variously for the Federalist, Anti-Jacksonian, and Whig Parties, sitting from 1827–1850 (excepting from February 22, 1841, to March 4, 1845). In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 551 (1819), as counsel for plaintiff in error, he opposed Attorney General Wirt. Despite the formidable advocacy skills that Gen. Wirt uniformly is reputed to have had, it cannot be doubted (at least if the unofficial record of the proceedings is to be considered accurate, see STEPHEN VINCENT BENÉT, THE DEVIL & DANIEL WEBSTER (1936), reprinted in SELECTED WORKS OF STEPHEN VINCENT BENÉT 32, 32–46 (Farrar & Rinehart, Inc. 1942)) that Mr.

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1830 was that the “no private practice” motion of Senator Forsyth of Georgia<sup>32</sup> ought to fail. Through private practice, said Senator Rowan of Kentucky, the Attorney General’s “intellect would be strengthened, his mind improved, and his legal acquirements increased, so as to enable him to render more efficient and distinguished service to the Government.” Webster spoke with scorn of Forsyth’s suggestion, which he thought was “as reasonable as for a gentleman to tell his physician that he should not feel the pulse of any other human being.”<sup>33</sup>

The House’s sparring over the 1846 bill was no less vigorous than the Senate’s had been over the bill of 1830. Congressman Samuel Finley Vinton of Ohio

moved an amendment to the bill[,] requiring the Attorney General, in case [his annual salary should be increased (as provided in the bill) from \$4,500 to \$6,000 (the amount then authorized by other Cabinet officers)], to devote his whole time to the duties of his office. [Mr. Vinton argued that the Attorney General] enjoyed a large practice in the courts, which must of necessity occupy much of his attention. . . . As he was to be placed on an equal footing in all respects with the heads of the departments, Mr. V[inton] thought he ought to be restricted to the official duties [of] his place as the law officer of the Government.<sup>34</sup>

Although he agreed in part with Mr. Vinton, Congressman Hannibal Hamlin of Maine (later Vice President in President Abraham Lincoln’s first term) vehemently opposed the bill, stating that

[t]here was a very good reason why the Attorney General, though he was a Cabinet officer, should receive a lower salary than the other members of the Cabinet: he enjoyed an extensive and very lucrative practice in his private and personal character as an eminent member of the bar. Mr. H[amlin] saw no reason for the adoption of the

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Webster’s celebrated defense of Mr. Jabez Stone against (Mr.) Scratch’s unsuccessful mortgage-foreclosure action was his most difficult case. See *United States ex rel. Mayo v. Satan and His Staff*, 54 F.R.D. 282, 283 (W.D. Pa. 1971) (referencing Mr. Benét’s account).

32. 6 REG. DEB. 323, 404 (1830) (unsuccessfully proposing an amendment that “the Attorney General shall not, during his continuance in office, engage in any private practice in the courts of the United States, or of the States”). John Forsyth (1780–1841), a Virginia native and Jacksonian Party member, sat from 1818–1819 and 1829–1834.

33. CUMMINGS & MCFARLAND, *supra* note 4, at 154–55 (footnotes added) (quoting 6 REG. DEB. 323–24 (1830)).

34. CONG. GLOBE, 29th Cong., 1st Sess. 1130 (1846).

amendment proposed by [Mr. Vinton] in restricting him from the exercise of his talents in the courts as a lawyer. Let him retain his practice, and all he could earn by it; but do not add to his official allowance, which was already sufficiently great.<sup>35</sup>

Congressman James Butler Bowlin of Missouri (a Virginia native) agreed: he thought the salary

enjoyed by the United States Attorney General [was] the best salary under the Government. He received his \$4,500, with liberty to practise as extensively as he pleased in the courts; and his practice alone was probably worth more than \$6,000, which was paid to the other Cabinet officers. Certainly, his salary and his practice together were worth much more than that. There was, then, a very good reason for the existing difference in their allowances. The mere endorsement of a lawyer by appointing him Attorney General was of itself invaluable as a means of obtaining him profitable practice; it was more to him than a thousand other certifications. As to this bill, [Mr. Bowlin] held it to be a mere scheme to cover an increase of salary—as perfect a humbug as he had ever witnessed.<sup>36</sup>

Congressman Robert Dale Owen of Indiana “was at first disposed to vote for” Mr. Vinton’s amendment, but Congressman Charles Jared Ingersoll of Pennsylvania and others persuaded him that it was “inexpedient.”<sup>37</sup> Congressman Allen Granberry Thurman of Ohio indicated that he was “inclined to vote for the amendment restricting the Attorney General to the discharge of his public duties”; otherwise, he would vote against increasing his salary.<sup>38</sup> In the end, neither the amendment nor the underlying bill carried.<sup>39</sup>

Maybe it is just as well that these bills failed.<sup>40</sup> Particularly in the Republic’s early days, when the outlines of the federal government’s

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35. *Id.* at 1131.

36. *Id.*

37. *Id.* at 1133.

38. *Id.* at 1134.

39. *Id.*

40. Mr. Langeluttig states that “[t]here is no provision of law to-day [i.e., 1927] requiring the Attorney General’s exclusive attention to national affairs; but since the beginning of the term of Caleb Cushing (1853), it appears that no Attorney General has engaged in any very extensive private practice, if in any at all.” LANGELUTTIG, *supra* note 11, at 3 (footnote omitted). If Department of Justice lore be correct, the current general ban on the outside practice of law by Department attorneys originally sprang from the Truman and Eisenhower Administrations’ ultimately successful efforts to have additional federal judgeships created. See Act of Feb. 10, 1954, Pub. L. No. 83-294, 68 Stat. 8; Outside Employment, 5 C.F.R. § 3801.106 (2007) (barring

branches and the scope of the Attorney General's authority were unclear, his ability to switch roles could save the day. Thus, on Monday, August 6, 1792, Gen. Randolph "inform[ed] the [Supreme] Court that on Wednesday next he intend[ed to move] for a Mandamus . . . in a certain petition of William Hayburn<sup>41</sup> . . . to be put on the pension list of the United States, as an invalid Pensioner."<sup>42</sup> He then did so move, but the Court doubted "the authority of the Attorney General to make this motion ex officio [and] argument on this point [wa]s adjourned" to give him time to prepare; on the tenth, as its sole item of business, the Court "hear[d] the Attorney General in relation to the powers and extent of his office."<sup>43</sup> When the eleventh showed the six Justices to be evenly "divided in their opinions on the subject of the Attorney General[']s authority ex officio to move the Court for [the] mandamus . . . prayed for" (which prevented his proceeding in his official capacity),<sup>44</sup> Gen. Randolph—in a clever *tour-de-force* unrivaled perhaps until 1949<sup>45</sup>—immediately arranged to be engaged as Hayburn's *private* barrister,<sup>46</sup> and, moments later, "[t]he Court proceeded to hear the Attorney General as counsel for William Hayburn on motion for a mandamus" on the merits.<sup>47</sup>

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Department of Justice lawyers from practicing law outside their regular employment, except in certain limited circumstances). To assure Congress that the *U.S. Attorneys* would not devote their time to private practice (and thus would keep the new judges occupied), with classic bureaucratic overreach, virtually any outside practice of any profession by *any* Department officer or employee was banned. Att'y Gen. Order No. 4231, ¶¶ 1(b), 3(b) (Dec. 15, 1952); *see also* Att'y Gen. Order No. 36-53, ¶ 1(b) (Dec. 31, 1953) (amending Order No. 4231); Att'y Gen. Order No. 46-54, ¶ 1(b) (May 6, 1954) (superseding Order No. 4231, as amended by Order No. 36-53).

41. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

42. 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 201 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter DOCUMENTARY HISTORY] (minutes of August 1792 Term).

43. *Id.* at 203–04.

44. *Id.* at 205. Justices John Blair (of Virginia), James Iredell (of North Carolina), and Thomas Johnson (of Maryland) were in favor. Chief Justice John Jay (of New York) and Justices William Cushing (of Massachusetts) and James Wilson (of Pennsylvania) were opposed. Maeva Marcus & Robert Teir, Hayburn's Case: *A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 538 (1988) (citing FED. GAZETTE (Phila.) Aug. 18, 1792).

45. *See* KIND HEARTS AND CORONETS (Ealing Studios 1949) (in which the late-actor Sir Alec Guinness de Cuffe gloriously plays eight doomed members, male and female, of a single family: the Duke (Ethelred, of Chalfont), the Banker (Lord Ascoyne d'Ascoyne), the Parson (the Rev. Lord Henry d'Ascoyne), the General (Lord Rufus d'Ascoyne), the Admiral (Lord Horatio d'Ascoyne), Young Ascoyne (Mr. Ascoyne d'Ascoyne), Young Henry (Mr. Henry d'Ascoyne), and Lady Agatha d'Ascoyne).

46. *Hayburn*, 2 U.S. (2 Dall.) at 409–10.

47. 1 DOCUMENTARY HISTORY, *supra* note 42, at 205–06, 360–61; *see also* 6 DOCUMENTARY HISTORY, *supra* note 42 at 33–72 (Maeva Marcus ed., 1998) (compiling of the extant primary

Notwithstanding Gen. Randolph's Sellers-like<sup>48</sup> willingness to repeat his role-switching performance as necessary,<sup>49</sup> in at least one other case circumstances foiled him:

In August, 1793, . . . Randolph moved the Court for [another] mandamus . . . [relating to] the pension list of the United States . . . . Randolph did not appear as counsel for any particular applicant, and two of the five justices in court, Randolph reported in a letter to [a colleague], "expressed their disinclination to hear a motion in behalf of a man who had not employed me for that purpose, and I being unwilling to embarrass a great question with little intrusions, it seemed best to waive the motion until some of the invalids themselves should speak to counsel." . . . Although there had been an invalid veteran in court when Randolph made his motion, the invalid had failed to identify himself to the Attorney General until after the Court had adjourned, too late for Randolph to appear as his counsel.<sup>50</sup>

The murkiness as to the character and authority of the Attorney General's office makes gaps in its early records unremarkable. In the absence of concrete evidence, one might advert to an old tradition in the Department, that the seal was devised, and the motto chosen, by

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sources relating to *Hayburn*); GOEBEL, *supra* note 17, at 562–65, 726 (briefly discussing *Hayburn's Case*); Marcus & Teir, *supra* note 44, at 534–41 (discussing the *Hayburn's Case* hearings at the Supreme Court); Waxman, *supra* note 20, at 5 & nn.15–16 (briefly discussing *Hayburn's Case*).

48. In 1959, the late-comic actor, Richard Henry "Peter" Sellers played three roles in *THE MOUSE THAT ROARED* (Open Road Films 1959): Gloriana XII, Duchess of Grand Fenwick (sometimes erroneously given as "Grand Duchess" of that Duchy); Rupert "Bobo," Count of Mountjoy; and Chief Forest Ranger Tully Bascomb. Spurred by the maneuver's success, five years later, in *DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (Hawk Films 1964), Mr. Sellers again played three roles: U.S. President Merkin Muffley, Group Capt. Lionel Mandrake, and Dr. Strangelove himself. Three seems to have been Mr. Sellers's number: in yet another motion picture, Stanley Kubrick's *LOLITA* (A.A. Productions Ltd. 1962), he played the loathsome, chameleon-like television writer, Clare Quilty, who disguises himself as (or otherwise pretends to be), in turn, three different, sinister characters—an unnamed policeman, a school psychologist (Dr. Zempf), and an unnamed agent of the vice/thought-police—all of which leads the no-less-revolting Prof. Humbert Humbert, well played by Mr. James Neville Mason, to give him his just desserts by shooting him dead.

49. This willingness doubtless served him well in discharging the diplomatic duties he entered upon when he succeeded his cousin, Mr. Jefferson, as the second Secretary of State.

50. Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 306–07 (footnotes omitted); *see also* GOEBEL, *supra* note 17, at 564–65 n.57.

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Attorney General Jeremiah Sullivan Black.<sup>51</sup> But this seems now to be refuted, for he did not become

Attorney-General until March 6, 1857, and Attorney-General Cushing in a report to the President dated March 8, 1854, said that the Attorney-General's office "has an official seal . . ." It is possible that the tradition is correct to the extent that Mr. Black added the motto to the seal[,] which had been adopted by one of his predecessors. . . . It is probable that very soon after passage of the law Attorney-General Johnson devised the seal and President Taylor approved it.<sup>52</sup>

Soon after the Department itself was established on July 1, 1870, President Ulysses S. Grant signed into law the 1872 Act Transferring Certain Powers and Duties to the Department of Justice, and Providing a Seal Therefor, pursuant to which

the seal heretofore provided for the office of the Attorney-General shall be the seal of the Department of Justice, with such change in the device as the President of the United States shall approve, and all books, papers, documents, and records in said Department of Justice may be copied and certified under seal . . . .<sup>53</sup>

Mr. Easby-Smith, supplying a drawing, states that the seal of the Attorney General's Office

consisted of the United States shield, with stars (improperly) on the chief,<sup>54</sup> from it an eagle rising, with outstretched wings, bearing in the right talon an olive branch, in the left arrows, beneath which, in a semi-circle was the motto: *Qui Pro Domina Justitia Sequitur*, and in an

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51. 200TH ANNIVERSARY, *supra* note 14, at 36 (discussing the highly questionable theory that Attorney General Black was responsible for the seal and motto's creation); HUSTON, *supra* note 17, at 31 (same).

52. EASBY-SMITH, *supra* note 2, at 13–14 (quoting 6 Op. Att'y Gen. 326, 338 (1854)); *see also* ARTHUR J. DODGE, ORIGIN AND DEVELOPMENT OF THE OFFICE OF THE ATTORNEY GENERAL, H.R. DOC. NO. 510, at 12 (1929) ("Attorney General Reverdy Johnson was directed to cause a seal to be made and provided for his office . . ."); HUSTON, *supra* note 15, at 30–32 ("There may have been several types contrived before the [basic design of the seal] now officially in use was adopted."); Thornburgh, *supra* note 1, at 1 ("We aren't even sure when this seal was designed—probably around 1850, during President Zachary Taylor's administration.").

53. Act of Mar. 5, 1872, ch. 30, § 2, 17 Stat. 35, 35 (codified as amended at 28 U.S.C. § 502 (2000)). The official, published papers of President Grant (March 4, 1869–March 3, 1877) do not appear to contain any record of approval of any Departmental seal. *See* 7 COMPILATION, *supra* note 15, at 3–436 (1898); 1 CIS INDEX, *supra* note 15, at 223–68.

54. *See infra* notes 73, 143.

outer circle: *Attorney-General's Office*; being, in fact, identical with the present seal of the Department (adopted in 1872) except that in the latter the words: *Department of Justice* appear in the outer circle in place of *Attorney-General's Office*.<sup>55</sup>

Thus, the basic elements in the seal used by the Department (or the Attorney General) since before 1872 are the supporter and arms (more properly, or technically, termed the “armorial achievement”) of the United States themselves,<sup>56</sup> but that seal contained errors; that is, differences or departures—presumably unintentional—from that armorial achievement. To discern those errors, one must scrutinize the armorial achievement found in the obverse of the seal of the United States adopted by the Confederation Congress on June 20, 1782.<sup>57</sup> But before beginning that scrutiny, it may be appropriate to attempt to settle some confusion (in the federal government’s three branches) over whether the proper term is “the seal” or “the Great Seal” of the United States.<sup>58</sup>

By statute, the legislative branch from the beginning seems to have disfavored the term “Great Seal,” when it specifically designated the item as “the seal.”<sup>59</sup> Although early federal statutes typically use the

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55. EASBY-SMITH, *supra* note 2, at 14 (footnote added); *see also* 200TH ANNIVERSARY, *supra* note 14, at 36 (noting the same). This 1872 seal also may be seen via the Internet at the very interesting philatelic exhibit, assembled over twenty-five years by Mr. Theodore Lockyear of Evansville, Indiana, of purple (the color traditionally used in academia for the discipline of law) Department of Justice postage stamps in use—instead of franks—from July 1, 1873, to July 5, 1884, such seal having figured prominently on the stamp covers. Ted Lockyear, *The Department of Justice: United States Official Stamps 1873–1884*, <http://www.franadams.com/exhibits/djustice.html> (last visited Sept. 20, 2008).

56. *See generally* EASBY-SMITH, *supra* note 2, at 14 (discussing the basic elements of the seal used by the Department of Justice).

57. *See* PAPERS OF THE CONTINENTAL CONGRESS, 1774–1789, *microfilmed on* National Archives Film no. 247, roll 31, item no. 23, at fols. 113–16 (Nat’l Archives Microfilm Publ’ns 1957) [hereinafter PAPERS NO. 23]; 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 338–40 (Gaillard Hunt ed., 1914) (1782) [hereinafter 22 JOURNALS] (notably, the transcription in the *Journals*, for some reason, differs slightly from the manuscript version in the *Papers*); *see also* GAILLARD HUNT, *THE HISTORY OF THE SEAL OF THE UNITED STATES* 41–43 (1909) (discussing the arms adopted in 1782); PATTERSON & DOUGALL, *supra* note 13, at 83–110 (discussing the armorial achievement found in the obverse of the seal of the United States adopted on June 20, 1782); U.S. DEP’T OF STATE, *supra* note 13, at 5 (reproducing Secretary Thomson’s remarks and explanation of the seal at its adoption).

58. *See, e.g.*, HUNT, *supra* note 57, at 44–47; PATTERSON & DOUGALL, *supra* note 13, at 4–5, 128–47.

59. *See* Act of Sept. 15, 1789, ch. 14, §§ 3–4, 1 Stat. 68, 68–69 (codified at 4 U.S.C. § 41 and, as amended, at 4 U.S.C. § 42 (2000), respectively) (adopting the seal of the United States under the Articles of Confederation (i.e., “the United States in Congress assembled”) as that of the United States under the Constitution).

unadorned term “seal,”<sup>60</sup> even the First Congress’s statutory usage was inconsistent,<sup>61</sup> and subsequent Congresses have done no better.<sup>62</sup> Despite Mr. Hunt’s claim that “the abandonment of the term ‘Great Seal of the United States’ began with the Executive [under President Washington] some months before it received legal sanction” and seemed to have resulted from the fact that no official “lesser” or “privy” seal ever has been authorized,<sup>63</sup> the bare term “seal” is reported to have been used even by the Confederation Congress, which otherwise tended to favor the term “Great Seal.”<sup>64</sup>

Turning to the executive branch, it appears that, hewing to the language of the 1789 adoption/authorizing statute (now codified at 4 U.S.C. § 41) and President Washington’s (and most subsequent Presidents’) practice, the published opinions of the first Attorneys General uniformly refer to the “seal,” rather than “Great Seal.”<sup>65</sup> Gen. Cushing, however, seems almost always to have used “Great Seal” in his published opinions.<sup>66</sup> In keeping with that influential Attorney General’s practice, the only relevant *published* legal opinion from the Department of Justice since his day that the author has found mentions the “Great Seal” in passing; that usage may be inadvertent, however, given that it is inconsistent with that of at least one *unpublished* opinion, from the same

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60. See, e.g., Act of Mar. 3, 1815, ch. 90, § 3, 3 Stat. 230, 230; Act of Feb. 6, 1802, ch. 4, § 3, 2 Stat. 129, 130; Act of July 9, 1798, ch. 68, § 2, 1 Stat. 578, 579; Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318, 321; Act of May 5, 1792, ch. 30, § 1, 1 Stat. 266, 266; Act of Aug. 10, 1790, ch. 40, § 5, 1 Stat. 182, 183.

61. See Act of Apr. 10, 1790, ch. 7, §§ 1, 7, 1 Stat. 109, 110, 112 (using the terms “seal” and “great seal,” respectively).

62. See, e.g., 5 U.S.C. § 2902(a) (2006) (originally enacted as Act of Sept. 6, 1966, Pub. L. No. 89-554, § 2902, 80 Stat. 378, 411) (“seal”); 18 U.S.C. § 713 (2000) (originally enacted as Act of Nov. 11, 1966, Pub. L. No. 89-907, 80 Stat. 1525, and amended as Act of Jan. 5, 1971, Pub. L. No. 91-651, 84 Stat. 1940) (using “great seal” both times); Act of Mar. 3, 1903, ch. 1006, 32 Stat. 1031, 1032 (“Great Seal”); Act of July 1, 1902, ch. 1351, 32 Stat. 552, 552 (same); Act of July 7, 1884, ch. 332, 23 Stat. 194, 194 (“seal”).

63. HUNT, *supra* note 57, at 47. The second committee charged to design the seal, *did* also propose a “less seal of the United States” of the same design but smaller in diameter, but no lesser seal was ever adopted. *Id.* at 44, 46–47.

64. See PATTERSON & DOUGALL, *supra* note 13, at 128–31, 140–45.

65. See, e.g., 1 Op. Att’y Gen. 95, 98 (1801) (Levi Lincoln); 3 Op. Att’y Gen. 569, 569 (1840) (Henry Dilworth Gilpin); 5 Op. Att’y Gen. 476, 479 (1851) (John Jordan Crittenden).

66. See, e.g., 7 Op. Att’y Gen. 186, 211 (1855) (“great seal”); 7 Op. Att’y Gen. 453, 472–473 (1855) (same); 8 Op. Att’y Gen. 281, 284 (1857) (same). *But see* 6 Op. Att’y Gen. 326, 328 (1854) (“seal”). The author does not know if Gen. Cushing’s frequent use of the term “Great Seal” actually betokened a conscious preference on his part.

office (two decades earlier) that refers, in passing, to “the Seal of the United States.”<sup>67</sup>

The inconsistent practice is echoed in the judiciary. To consider solely the Supreme Court, the author knows of at least two opinions in which the Court itself speaks of the “Great Seal,” but even *those* prove false on the point, because the same opinions also refer merely to the “seal” of the United States.<sup>68</sup> Otherwise, the Justices themselves have spoken—in no fewer than fourteen other cases—of the “seal,” rather than the “Great Seal,” of the United States.<sup>69</sup>

The foregoing muddle notwithstanding, it seems that the lack of a privy seal renders the “Great” unnecessary, illogical, or pompous (or perhaps all three). This, and the fact that the most *relevant* statute (i.e., the 1789 adoption/authorizing statute) itself refers only to “the seal,” suggests that the better term may be this latter one.<sup>70</sup>

Returning to the substance of the matter, on June 20, 1782, when the Confederation Congress adopted what was to become the seal of the United States, it used the following legal blazon:

[T]he Device for an Armorial Atchievement [sic] and Reverse of the great Seal for the United States in Congress assembled, is as follows.

Arms

67. Compare 10 Op. Off. Legal Counsel 143, 144 n.4 (1986) (“Great Seal”), with Memorandum from Frank M. Wozencraft, Assistant Att’y Gen., Off. Legal Counsel, to Leo M. Pellerzi, Assistant Att’y Gen. for Administration, on the Reproduction of Seal of Department of Justice on Cups and Mugs (Oct. 21, 1968) (“seal”).

68. *Phila. & Trenton R.R. v. Stimpson*, 39 U.S. (14 Pet.) 448, 450, 458 (1840) (using “seal” and “great seal,” respectively); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 150, 158, *passim* (1803) (using “great seal” three times and “seal” twenty times, respectively).

69. *Myers v. United States*, 272 U.S. 21, 33 (1926); *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 44 (1888); *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 373 (1887); *Campbell v. Laclede Gas-Light Co.*, 119 U.S. 445, 446 (1886); *Stebbins v. Duncan*, 108 U.S. 32, 42 (1883); *United States v. Schurz*, 102 U.S. 378, 402 (1880); *Mimmack v. United States*, 97 U.S. 426, 429 (1878); *Moore v. Robbins*, 96 U.S. 530, 533 (1877); *Mechanics’ & Traders’ Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 279, 284 (1874); *Lapeyre v. United States*, 84 U.S. (17 Wall.) 191, 201, 205 (1872) (Hunt, J., dissenting); *United States v. Le Baron*, 60 U.S. (19 How.) 73, 78 (1856); *United States v. Bank of the United States*, 46 U.S. (5 How.) 382, 383, 399 (1847); *id.* at 403 (McLean, J., dissenting); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 728 (1832); *Evans v. Eaton*, 20 U.S. (7 Wheat.) 356, 368 (1822).

70. See 4 U.S.C. § 41 (2006) (originally enacted as Act of Sept. 15, 1789, ch. 14, § 3, 1 Stat. 68, 68); cf. *Crandon v. United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring in the judgment) (“[S]uperfluous exceptions (to ‘make assurance doubly sure’) are a more common phenomenon than the insertion of utterly pointless language at the very center of a substantive restriction.”).

Paleways of thirteen pieces, Argent and Gules;<sup>[71]</sup> A Chief Azure. The Escutcheon on the breast of the American bald Eagle displayed, proper, holding in his dexter talon an Olive branch, and in his sinister a bundle of thirteen arrows, all proper, and in his beak a scroll, inscribed with this Motto. “*E pluribus Unum.*”<sup>[72]</sup>

71. This technically should be “Argent, six pallets, gules, . . . [b]ut as the number of pales in the arms[] is designed to allude to the number of [original] states in the union, that mode of blazoning would not answer the purpose intended.” See PATTERSON & DOUGALL, *supra* note 13, at 86 (quoting an apparently anonymously authored *Description of the Arms of the United States*, COLUMBIAN MAG., Sept. 1786, at 33–34). William Barton’s explanation of his modification of the first design, see *infra* note 145, by Charles Thomson (also spelled “Thompson” by some, but not by him, as far as the author has seen from his autographs) of Pennsylvania, Secretary of the Confederation Congress: “As the Pales or Pallets consist of an uneven Number, they ought, in strictness, to be blazoned—Arg.<sup>1</sup> 6 Pallets Gules: but as the 13 pieces allude to the thirteen States, they are blazoned according to the Number of *pieces paleways.*” PAPERS NO. 23, *supra* note 57, at fol. 131; PATTERSON & DOUGALL, *supra* note 13, at 79–81.

72. I.e., “Out of many, one.” *But see* Al Kamen, *For Gore, It’s All in the Translation*, WASH. POST, Jan. 10, 1994, at A13 (quoting a statement from then-Vice President Al Gore to the Institute of World Affairs, that Milwaukee’s ethnic mix shows that America “can be *e pluribus unum*—out of one, many”). Up to a point, Mr. Gore. Cf. EVELYN WAUGH, SCOOP 16 (Little, Brown & Co. 1977) (1937). Messrs. Patterson and Dougall have

no doubt that the *immediate* source of the motto *E Pluribus Unum* (Out of many, one) was the *Gentleman’s Magazine*, published in London from 1731 to 1922, which had carried that legend on the title page of each volume from its first until long after 1776. . . .

The *Gentleman’s Magazine* had appropriated the legend *E Pluribus Unum* from an earlier and long defunct publication called the *Gentleman’s Journal*, which had used the motto from January 1692 to November 1694.

PATTERSON & DOUGALL, *supra* note 13, at 22–23 (emphasis added); see also *id.* at 23–25, 88–89 (discussing further the *Gentleman’s Magazine* and the origin of *E Pluribus Unum*); GEORGE EARLIE SHANKLE, STATE NAMES, FLAGS, SEALS, SONGS, BIRDS, FLOWERS, AND OTHER SYMBOLS 228–29 (rev. ed. 1938) (same). Although no *ultimate* source for this motto has been established definitively, there are at least four likely candidates. See PATTERSON & DOUGALL, *supra* note 13, at 23–24. The first is St. Augustine, the great Bishop of Hippo Regius and one of the greatest Occidental Fathers, and Doctor, of the Catholic Church. In chapter eight of the fourth book of his *Confessions* (written circa A.D. 400), one finds the phrase “*conflare animos, et ex pluribus unum facere,*” which translated means “to set our souls ablaze and make one out of many.” See S. AURELIUS AUGUSTINUS, CONFSSIONES 52 (Car. Herm. Bruder ed., Carolus Tauchnitius 1837). This passage refers to the operation of Divine Grace conferred by the Holy Ghost, the Third Person of “the most Holy and undivided Trinity,” in Whose Name the independence of the United States was later legally sealed. See *infra* note 85. A second source may be Sir John Fortescue’s *A Treatise in Commendation of the Laws of England* (written circa 1470), where, in chapter thirteen, he presents the phrase “*quandocunque ex pluribus constituitur unum,*” which means “whenever one thing is constituted out of many.” See DE LAUDIBUS LEGUM ANGLIÆ 235 (Francis Gregor trans., Lawbook Exchange, Ltd. 1999). This phrase from *De Laudibus* is itself a Latin translation of “ὅσα γὰρ ἐκ πλείονων συνέστηκε καὶ γίνεται ἐν τι κοινόν” (i.e., “for whatever out of many have stood together and come to be one common something”), from the first book of Aristotle’s *Politics*, chapter five (written circa 360 B.C.). See ΑΡΙΣΤΟΤΕΛΗΣ, ΤΑ ΠΟΛΙΤΙΚΑ [THE POLITICS OF ARISTOTLE] 15 (Richard Congreve ed., 2d ed., Longmans, Green, & Co. 1874). A third possible source for the

motto is Virgil's short poem entitled *Moretum* (meaning *The Mortar* or *The Salad*, sometimes translated as *The Farmer's Breakfast*), written during the last century before Christ. Line 103 of that poem contains the words "*color est e pluribus unus*," meaning "one color emerges from the many." P. VIRGILIUS MARO, *Moretum*, in *THE ECGUES, GEORGICS, AND MORETUM OF VIRGIL* 99, 102 (George Stuart ed., Eldredge & Brother 1876); see also FLORENCE LOUISE DOUGLAS, *A STUDY OF THE MORETUM* 14–15, 18, 57 n.45, 67, 69–70 (1929) (discussing the relevant line in the larger context). Of note, this poem may, instead, be Virgil's Latin translation of *Μυρτωρός* (i.e., *The Salad*), a first century B.C. poem by Virgil's Greek tutor, Parthenios/Parthenius of Nicæa, which now is lost. See generally *id.* at 69–161 (discussing this proposition and ultimately concluding that it is "highly improbable"). Finally, "*E pluribus unum*" may have been adapted from the second book of *Epistulæ* by Quintus Horatius Flaccus (i.e., Horace's *Letters* or *Epistles*). Line 212 of the second epistle of that book asks, "*Quid te exempta levat spinis de pluribus una?*" This translates as "What relief do you get by plucking out one thorn of many?" See Q. HORATIUS FLACCUS, *EPISTULÆ*, Bk. 2, Ep. 2, in *THE WORKS OF HORACE* 255 (Charles Anthon ed., new ed., Harper & Bros. 1846). For a discussion of history and status of "*E pluribus unum*" as a national motto, see PATTERSON & DOUGALL, *supra* note 13, at 510–14. But see 36 U.S.C. § 302 (2000) (designating "In God we trust"—a Biblical clause, see *Psalm* 56 (55):4–5—as "*the national motto*" of the United States (emphasis added)); PATTERSON & DOUGALL, *supra* note 13, at 514–20 (discussing the history and legal status of the motto "In God we trust"); see also 36 U.S.C. § 301 (2000) (designating as the national anthem "the words and music known as the Star-Spangled Banner," the fourth stanza of which includes the line: "And this be our motto—'In God is our trust'"); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 29–30 (2004) (Rehnquist, C.J., concurring in the judgment) (briefly discussing the legal status of the anthem and the motto); H.R. DOC. NO. 108-97, at 49 (2003); S. DOC. NO. 105-013, at 49 (1998); H.R. DOC. NO. 100-247, at 53 (1989).

The author emphasizes that his use of Greek is chaste and not animated by a desire to veil meaning in the obscurity of a learned language. Cf. 4 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 50 & nn.24 & 26 (Phillips, Sampson, & Co. 1850) (1788) ("After exhausting the arts of sensual pleasure, [Theodora] most ungratefully murmured against the parsimony of Nature; but her murmurs, her pleasures, and her arts must be veiled in the obscurity of a learned language."); EDWARD GIBBON, *THE MEMOIRS OF THE LIFE OF EDWARD GIBBON* 230–31 (George Birbeck Hill ed., G.P. Putnam's Sons 1900) ("My English text is chaste, and all licentious passages are left in the obscurity of a learned language."). Bearing in mind, rather, the wonderful expression, *traduttori traditori* (i.e., "translators [are] traitors [(or unfaithful) to the originals]"), and wishing to avoid what the always-sound brothers Fowler term "the greatest wrong . . . done to readers," HENRY WATSON FOWLER & FRANCIS GEORGE FOWLER, *THE KING'S ENGLISH* 306 (2d ed. 1908), he hopes that his use of unaltered original texts will help to avoid at least some errors. Moreover, he notes that such use is in the happy spirit of the undoubtedly helpful rule recently pronounced in the latest *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 258 tbl.T.2 (Columbia Law Review Ass'n et al. eds., 18th ed. 1st prt. 2005) under "China, People's Republic of" (but not—inexplicably—under what it calls "Taiwan, Republic of China," *id.*, at 317–18 tbl.T.2): "Optionally, . . . provide Chinese script [(i.e., characters)] for authors, titles, and case names." But see, e.g., *id.* R. 20.2.4, at 165 ("Transliterate all titles, names, or words cited that are not in the Roman alphabet . . ."); *id.* at 273–74 tbl.T.2 (no suggested optional use of Greek letters for Greece); *id.* at 284–85 tbl.T.2 (no suggested optional use of Hebrew letters for Israel); *id.* at 304–08 tbl.T.2 (no suggested optional use of Cyrillic letters for the Russian Federation). The author declines to speculate whether this sad inconsistency in the current *Bluebook* may be evidence of mere human error, or of something else, such as some lamentable manifestation of the vestiges of a longstanding cultural insensitivity within that seemingly infinitely plastic publication, now ballooned to 415-some pages, from its original twenty-six. See, e.g., W. Duane Benton, *Developments in the Law—Legal Citations*, 86 *YALE L.J.* 197, 201 & n.24 (1976) (reviewing the twelfth edition of *A Uniform System of Citation*, noting "offensive omissions [that] will outrage billions around the world"); cf. *A UNIFORM SYSTEM OF CITATION passim* (1st ed. 1926) (England the only foreign

jurisdiction mentioned); A UNIFORM SYSTEM OF CITATION *passim* (2d ed. 1928) (England and Ireland the only foreign jurisdictions mentioned); A UNIFORM SYSTEM OF CITATION *passim* (3d ed. 1931) (same); A UNIFORM SYSTEM OF CITATION *passim* (4th ed. 1934) (emphasis on England and Ireland; nothing on non-Western-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 5th ed. 1936) (emphasis on England and Ireland; nothing on non-Western-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 6th ed. 1939) (emphasis on England and Ireland; nothing on non-Western-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 7th ed. 1947) (emphasis on England, Ireland, and British Dominions; nothing on non-Western-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 8th ed. 1949) (emphasis on England, Ireland, and British Dominions; nothing on non-Western-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 9th ed. 1955) (emphasis on England, Scotland, Ireland, the British Commonwealth, and common-law jurisdictions; nothing on non-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 10th ed. 1958) (emphasis on British Commonwealth and common-law jurisdictions; nothing on non-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 11th ed. 2d prt. 1967) (emphasis on British Commonwealth and common-law jurisdictions; nothing on non-European languages); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 12th ed. 6th prt. 1980) (emphasis on the United Kingdom, the British Commonwealth, and European and common-law jurisdictions; mention of only one non-European language—Japanese—on a little more than one page); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 13th ed. 7th prt. 1985) (emphasis on England and common-law jurisdictions; mention of only one non-European language—Japanese—on a little more than one page); A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 14th ed. 6th prt. 1987) (some emphasis on England and common-law jurisdictions; mention of only two non-European languages—Japanese and Chinese—on a little more than two pages); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 15th ed. 2d prt. 1991) (some emphasis on England and common-law jurisdictions; mention of only two non-European languages—Japanese and Chinese—on a little more than two of its unfortunately-renamed pages); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 16th ed. 6th prt. 1998) (no emphasis on those foreign jurisdictions most likely to be cited by American legal practitioners (i.e., England and those under common law); mention of only two non-European languages—Japanese and Chinese—on about five pages); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION *passim* (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) (same).

Although the authors of the foregoing citation manual are quite capable of defending themselves, *see, e.g.*, THE BLUEBOOK, *supra*, at 117 (16th ed.) (using illustratively the unsigned Book Note, *Manual Labor, Chicago Style*, 101 HARV. L. REV. 1323 (1988), which it describes as “discussing why users of *The University of Chicago Manual of Legal Citation* are hopelessly marooned”), *this* author has no wish to pile on to the criticisms of others. *See, e.g.*, Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1010 & nn.3–4 (1990) (discussing (among many other things) the merits of “forfeit[ing] good beer time” for the “discipline of cite checking and of adherence to the complexities of the *Bluebook*”); Gil Grantmore, *Commentary, The Death of Contra*, 52 STAN. L. REV. 889 (2000) (a fine article whose author’s ostensible name, *this* author is strongly inclined to think an assumed and fictitious name); J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 325 n.25 (1988) (cautioning readers that “Judge Posner is capable of wildly radical, even subversive, attacks upon the most hallowed and venerable of our legal institutions”—*The Bluebook*); Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986) (to date, more hopeful than accurately predictive in its title); Floyd Abrams, *A Worthy Tradition: The Scholar and the First Amendment*, 103 HARV. L. REV. 1162, 1162 n.11 (1990) (reviewing HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988)) (“Those who believe in freedom of speech should

## For the Crest

Over the head of the Eagle which appears above the Escutcheon, a Glory, Or, breaking through a cloud, proper, and surrounding thirteen Stars,<sup>[73]</sup> forming a Constellation, Argent, on an Azure field.

Reverse<sup>[74]</sup>

begin by rejecting the tyranny of the *Uniform System of Citation*.” (approvingly quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH, at vii (1984)); Benton, *supra*, at 197–202 (reviewing the twelfth edition); Richard L. Bowler, Book Review, 44 U. CHI. L. REV. 695 (1977) (reviewing the twelfth edition); Paul F. Campano, *A Kinder, Gentler Bluebook?*, 22 SETON HALL L. REV. 627, 628 n.2 (1992) (reviewing the fifteenth edition) (“*The Bluebook* can, and arguably should, be viewed as a unitary whole evolving from a single (and uninvestigated) origin known only to its creators. Alternatively, it can be considered musically as a suite or composition in fifteen movements. In more belligerent terms, it may be thought of as an amphibian invasion in fifteen separate waves.”); James C. Chen, *Something Old, Something New, Something Borrowed, Something Blue*, 58 U. CHI. L. REV. 1527 (1991) (reviewing the fifteenth edition); Donald H. Gjerdingen, Book Review, 4 WM. MITCHELL L. REV. 499 (1978) (reviewing the twelfth edition); James D. Gordon III, *Oh No! A New Bluebook!*, 90 MICH. L. REV. 1698 (1992) (reviewing the fifteenth edition); Peter Lushing, Book Review, 67 COLUM. L. REV. 599, 599 (1967) (reviewing the eleventh edition) (“*The Blue Book* is the *Kama Sutra* of legal citation. Both tomes exhibit all the variations one is likely to come across. But, as the man said, the similarity ends there.” (footnote omitted)); Geoffrey C. Mangum, Book Review, 18 WAKE FOREST L. REV. 645 (1982) (reviewing the thirteenth edition) (arranged in cantos, per Dante Alighieri’s *Divina Commedia*, though, alas, not in *terza rima*); Bruce E. Parmley, Book Review, 27 CATH. U. L. REV. 449, 450 n.4 (1978) (reviewing the twelfth edition) (“Somewhere, someone other than ourselves has decided what the ‘perfect’ citation is. Would we like this person? Would we have lunch with it?”); James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780 (1992) (reviewing the fifteenth edition); William R. Slomanson, *Bluebook Review*, 28 ARIZ. L. REV. 47 (1986) (reviewing the fourteenth edition, in verse); Stanley E. Tobin, Book Review, 11 STAN. L. REV. 410 (1959) (reviewing the tenth edition); Kevin G. Gralley & John C. Aisenbrey, Book Note, 65 GEO. L.J. 871 (1977) (reviewing the twelfth edition); Alan Strasser, Book Note, *Technical Due Process: ?*, 12 HARV. C.R.-C.L. L. REV. 507, 507 (1977) (reviewing the twelfth edition) (“[T]he new *Blue Book* will increase the speed at which the legal enterprise slows down.”).

73. According to heraldic law, “stars” (or “*estoils*” in the medieval French common in blazoning) are *six*-pointed (i.e., shaped like “stars-of-David”); *five*-pointed “stars”—which, strictly speaking, are not “stars” at all, but stylized spur-rowels—are typically called “*mullets*.” See STEPHEN FRIAR, A DICTIONARY OF HERALDRY 139, 248 (1987). The “stars” shown in Francis Hopkinson’s drawing of his second design, *see infra* note 131 and accompanying text, and in Secretary Thomson’s drawing of his first (unmodified) design, *see infra* note 137 and accompanying text, unmistakably are *six*-pointed, and the official dies of the seal in use until 1841 also depicted *six*-pointed “stars.” See PAPERS NO. 23, *supra* note 57, at fols. 133, 180; PATTERSON & DOUGALL, *supra* note 13, at 123–27, 201–04, 274–75. It is all-but certain, however, that the 1841 die’s engraver, John Peter van Ness Throop, did not possess the blazon of the seal, but worked instead solely from an impression of the worn 1782 die; lack of clarity in the details (and perhaps an unconscious imitation of Old Glory, *see, e.g.,* CAPT, *supra* note 13, at 54) may account for his failure to copy the *six*-pointed stars from the 1782 die and his use of *five*-pointed stars in his new die—an innovation that has been copied from die to die through the one currently in use. PATTERSON & DOUGALL, *supra* note 13, at 525–26, 562–66; U.S. DEP’T OF STATE, *supra* note 13, at 8; *see also* N.D. CENT. CODE § 54-02-02 (2008) (expressly prescribing for the flag of North Dakota that “[o]ver the scroll carried through the eagle’s beak must be shown thirteen five-pointed stars”).

A Pyramid unfinished. In the Zenith, an Eye in a triangle, surrounded with a glory proper. Over the Eye these words “*Annuit cœptis*.”<sup>[75]</sup> On the base of the pyramid the numerical letters MDCCLXXVI & underneath the following motto “*Novus Ordo Seclorum*.”<sup>[76]</sup>

74. Notwithstanding the legal adoption of the *reverse* of the seal, no proper die of it seems ever to have been made, a fact all-the-more remarkable because funds have specifically been appropriated to make one. See, e.g., Act of July 7, 1884, ch. 332, 23 Stat. 194, 194; see also CAPT, *supra* note 13, at 39 (noting the same). Additionally, pendant seals (on whose back side, of course, a *reverse* is supposed to be impressed) actually were in use here for solemn treaties between February 17, 1815, see, e.g., Treaty of Peace and Amity [Treaty of Ghent], U.S.-Gr. Brit., Feb. 17, 1815, 18 Stat. 287, 287 (ending the War of 1812), and May 8, 1871, see, e.g., Treaty [Treaty of Washington], U.S.-Gr. Brit., May 8, 1871, (2) 18 Stat. 355, 355 (settling the so-called *Alabama* claims arising from the “Recent Unpleasantness,” as well as various other disputes having to do with Canada, which then was a British Royal Dominion). See 20 ENCYCLOPÆDIA BRITANNICA 128A (1971); HUNT, *supra* note 57, at 51–52; PATTERSON & DOUGALL, *supra* note 13, at 171–94; 13 THE ENCYCLOPEDIA AMERICANA 353 (int’l ed. 2000); U.S. DEP’T OF STATE, *supra* note 13, at 8, 12. These pendant seals, it seems, were impressed on one side only, with the *obverse* die; the other side being left blank (there being no *reverse* die to impress upon it). See ENCYCLOPÆDIA BRITANNICA, *supra*, at 128B; HUNT, *supra* note 57, at 50–61; PATTERSON & DOUGALL, *supra* note 13, at 171, 278–79, 521–23; THE ENCYCLOPEDIA AMERICANA, *supra*, at 353; U.S. DEP’T OF STATE, *supra* note 13, at 12.

75. I.e., “He [God] has favored our undertakings,” or “It [the Eye of Providence] is favorable to our undertakings.” Messrs. Patterson and Dougall state that the ultimate source for this motto is one of two works by Virgil, either book nine, line 625 of *The Æneid* (written circa 19 B.C.), where Virgil writes “*Jupiter omnipotens, audacibus annue cœptis*” (i.e., “All-powerful Jupiter, favor [my] daring undertakings”), P. VIRGILIUS MARO, *AENEID*, Bk. 9, in 2 VIRGIL 112, 154 (H. Rushton Fairclough trans., new and rev. ed. 1996); or book one, line forty of the *Georgics* (written circa 29 B.C.), where Virgil states, “*Da facilem cursum, atque audacibus annue [or adnue] cœptis*” (i.e., “Give [me] an easy course, and favor [my] daring undertakings”), P. VIRGILIUS MARO, *GEORGICON*, Bk. 1, in 1 VIRGIL, *supra*, at 80, 82. HUNT, *supra* note 57, at 34; PATTERSON & DOUGALL, *supra* note 13, at 89–93. They add that “the imperative *annue* [was changed] to *annuit*, the third person singular form of the same verb in either the present tense or the perfect tense. In the motto *Annuit Cœptis* the subject of the verb must be supplied, and the translator must also choose the tense”—hence, the slight variations in the meaning of the motto. PATTERSON & DOUGALL, *supra* note 13, at 89; see also SHANKLE, *supra* note 72, at 229 (alluding to the difference in verb forms).

76. See PAPERS NO. 23, *supra* note 57, at fols. 113–14 (footnotes added); 22 JOURNALS, *supra* note 57, at 338–39 (transcription of *Papers No. 23*); see also HUNT, *supra* note 57, at 41–43 (reproducing the blazon and depiction of the first seal); PATTERSON & DOUGALL, *supra* note 13, at 83–110 (reproducing and discussing the blazon); U.S. DEP’T OF STATE, *supra* note 13, at 5 (reproducing Secretary Thomson’s remarks and explanation of the seal at its adoption).

The motto *Novus Ordo Seclorum* translates as: “A new order of the ages.” The ultimate source for this motto appears to be Virgil’s *Eclagues* (written circa 40 B.C.): “[*M*]agnus ab integro sæclorum nascitur ordo” (i.e., “A great series of ages begins anew”). SHANKLE, *supra* note 72, at 229 (citing P. VIRGILIUS MARO, *ELOGUES*, Bk. 4, ln. 5, in 1 VIRGIL, *supra* note 75, at 2, 28). Messrs. Patterson and Dougall, state further:

The spelling of the word *seclorum* as used in the second motto requires explanation. [Today, t]here are three normal spellings for the word, all permissible—*saeculorum*, *sæculorum*, and *seculorum*—but the four syllables of the full word would have distorted the meter in Virgil’s line quoted above. To preserve the meter, the poet resorted to the device known as syncope, dropping the first *u* from the word. In Latin poetry the use of

In conventional English, the blazon may be rendered thus: The seal of the United States has two faces. The *front* face consists of a white background, containing a shield bearing the arms of the United States; i.e., a shield whose top third is blue, and whose bottom two thirds consists of thirteen equal vertical stripes, alternating white (first) and red. The shield is positioned straight up, facing the viewer, and in front of the breast of an American (i.e., bald) eagle that stands erect, underside facing the viewer, with wings outstretched and its head facing its own right. The eagle's *right* talon or claw (visible below or alongside the shield) holds an olive branch (typically bearing thirteen leaves and thirteen olives), and its *left* one (also visible below or alongside the shield) holds thirteen arrows (often shown with the tips pointing upwards). The eagle, olive branch, and arrows all are in their natural colors. The eagle's beak holds an unfurled scroll with the words "*E PLURIBUS UNUM*." Over the eagle is a burst of yellow sunrays at whose center is a blue field on which are thirteen white stars (now typically depicted with *five* points each, even though each certainly ought to have *six*<sup>77</sup>). Surrounding the sunrays is a circle of white clouds (now typically shown as thirteen, or more, round "puffs"). The *back* face consists of a white background, contains a pyramid (typically shown as being constructed of thirteen rows of bricks) without a capstone. Suspended just above where the top should be is a triangle, which would complete the pyramid if placed atop it, containing an open eye. Surrounding the triangle is a burst of yellow sunrays, and over the triangle are the words "*ANNUIT CŒPTIS*." The bottom row of bricks bears the letters "*MDCCLXXVI*," and underneath the pyramid is a scroll with the words "*NOVUS ORDO SECLORUM*."<sup>78</sup>

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syncope—that is, the dropping of a vowel or syllable in the middle of a word so as to fit the word into the meter—was very common. With the first *u* omitted, the word could be spelled *saeclorum* . . . , *sæclorum*, or *seclorum*—all three spellings are to be found in eighteenth-century editions of Virgil.

PATTERSON & DOUGALL, *supra* note 13, at 90 (footnotes omitted). Secretary of Congress Charles Thomson, a Latin teacher who selected the motto (*see infra* note 136 and accompanying text), chose "*seclorum*," apparently because it was the spelling in the edition of *Eclogues* that he owned. *See* HUNT, *supra* note 57, at 34.

77. Given the confusion as to the number of points, *see supra* note 73, interestingly enough, the *constellation* formed by the stars usually is shown in the shape of a large *six*-pointed star, although this is not required by the legal blazon.

78. In the few exemplifications that are made of the reverse of the seal (such as on the back of the \$1 bill), the pyramid often is shown standing on a ground of grass, but the author is aware of no authority for this practice, which appears to be unwarranted by the blazon.

There is consensus among historians that, on adopting this seal, the Confederation Congress also adopted the following explanation of its various devices:

Remarks and explanation

The Escutcheon is composed of the Chief & pale, the two most honorable Ordinaries. The Pieces, paly, represent the Several States all joined in one solid compact entire, supporting a Chief, which unites the whole & represents [the Confederation] Congress. The Motto alludes to this Union. The pales in the arms are kept closely united by the chief and the Chief depends on that Union & the strength resulting from it for its support, to denote the Confederacy of the United States of America & the preservation of their Union through [the Confederation] Congress. The colours of the pales are those used in the flag of the United States of America; White signifies purity and innocence, Red, hardiness & valour, and Blue, the colour of the Chief signifies vigilance perseverance & justice. The Olive branch and arrows denote the power of peace & war which is exclusively vested in [the Confederation] Congress. The Constellation denotes a new State taking its place and rank among other sovereign powers. The Escutcheon is borne on the breast of an American Eagle without any other supporters, to denote that the United States of America ought to rely on their own Virtue.

Reverse.

The pyramid signifies Strength and Duration: The Eye over it & the Motto allude to the many signal interpositions of Providence in favour of the American cause. The date underneath is that of the Declaration of Independence and the words under it signify the beginning of the New American Æra, which commences from that date.<sup>79</sup>

Approximately fourteen men worked on the design of the seal, while the War of Independence raged. So important was a proper national

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79. PAPERS NO. 23, *supra* note 57, at fols. 114–16; 22 JOURNALS, *supra* note 57, at 339–40 (transcription of *Papers No. 23*); see also HUNT, *supra* note 57, at 42 (reproducing and discussing the remarks); PATTERSON & DOUGALL, *supra* note 13, at 79–82 (reproducing and discussing the remarks). Mr. Shankle elaborates further:

The mystic triangle above the pyramid with the eye and the fringe of sun's rays signifies the Creator of the Universe, and that He is the supreme builder. The triangle itself stands for perfection and is the symbol of the Deity. The all-seeing eye denotes "the ever-watchful providence" and power of God. His eternal glory is set forth in the rays of the sun. The Holy Trinity, Father, Son, and Holy Spirit, are represented by the form of the equilateral triangle.

SHANKLE, *supra* note 72, at 228.

seal considered to be, that a committee was first appointed and given the task of designing one on July 4, 1776, only two days after the independence of the thirteen American colonies was formally and publicly proclaimed by the delegates of the Continental Congress.<sup>80</sup> The almost humdrum, twelve-to-zero vote (New York abstaining) on the formal Declaration of Independence, which took place earlier on the same day the seal committee was appointed, attests that that Declaration merely was a public statement of reasons—designed in main to assert a moral ground, quicken the public imagination, and sway the twenty-one-year-old Most Christian King<sup>81</sup> (i.e., Bourbon King Louis XVI of France and Navarre) to the American side—for the action already taken.<sup>82</sup> As

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80. See PATTERSON & DOUGALL, *supra* note 13, at 6.

81. Although this style was sporadically used from time immemorial for the Kings of France (if one considers, for example, the spectacular conversion to Catholicism of the Merovingian Frankish King Clovis I on Christmas Day 498), it came into common use during the 1380–1422 reign of the Valois King Charles VI *le Bien-Aimé* (i.e., “the Well-Beloved”), or *le Fol* (i.e., “the Mad”). In a December 1469 audience, the ambassadors of his grandson, King Louis XI *le Prudent* (i.e., “the Prudent”), son of King Charles VII *le Victorieux* (i.e., “the Victorious”), or *le Bien Servi* (i.e., “the Well Served”)—allusions to his having been crowned due to the intercession of St. Joan of Arc, upon her captaining the amazing rout of the English—were advised by Pope Paul II that thenceforth the Holy See would address and cite him (and his successors, each in turn) exclusively as *Rex Christianissimus* (i.e., *Roi Très-Chrétien*). Similarly, Popes have granted exclusive styles to other Kings. Thus, for example, the style of *Rex Catholicus* (i.e., *Rey Católico*—“Catholic King”) first was applied informally to a Spanish Monarch during the 739–757 reign of King Alfonso I *el Católico* (i.e., “the Catholic”) of Asturias, and thereafter came increasingly to be applied by custom to his successors variously in the Iberian Kingdoms of Leon, Castile, Navarre, and Aragon. The title was formally granted by Pope Leo X by bull of April 1, 1516, to the pious Habsburg King Charles I of Spain (more commonly known as Holy Roman Emperor Charles V; see *infra* note 168) and to his successors on the throne of Spain, to whom it appertains to the present day. Similarly, the style of *Rex Fidelissimus* (i.e., *Rei Fidelissimo*—“Most Faithful King”) was bestowed by Pope Benedict XIV by bull of April 21, 1749, upon Braganza King John V of Portugal and his successors on that throne. And the style of *Rex Apostolicus* (i.e., *Apostoli Királya* or *Apostolischer König*—“Apostolic King”), allegedly first applied to a King of Hungary during the 997–1038 reign of the magnificent Árpád King St. Stephen I, was formally conferred by Pope Clement XII by bull of October 1, 1758, upon the incomparable Habsburg Queen/Empress Maria Theresa and her successors on that throne (all of the Arch-House). See François Velde, *Royal Styles*, <http://www.heraldica.org/topics/royalty/royalstyle.htm> (last visited Oct. 4, 2008). The author (alas, not a student of Polish, and thus one to whom Polish texts largely are inaccessible; and not having ready access to the Vatican Archives, either) has not been successful in discovering proper confirmation (still less, the date) of Pope Alexander VII’s reported grant of the style of *Rex Orthodoxus* (i.e., *Król Prawowierny*—“Orthodox King”) to the devout *quondam* Jesuit and Cardinal, Vasa King John II Casimir of Poland, and his successor kings there. In all likelihood, if at all, this occurred between 1661 and 1667.

82. See MAIER, *supra* note 13, at 41–46, 160–61 (discussing the symbolism and meaning of the Declaration of Independence); WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 75–95 (1995) (same). Justice Chase further remarked the following:

From the moment the people of Virginia exercised this power [of establishing a government], all dependence on, and connection with Great Britain absolutely and forever ceased; and no formal declaration of Independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes, which impelled the separation; and was proper to give notice of the event to the nations of Europe.

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 223 (1796) (emphasis omitted). *Ware* is the first case known to the author in which the U.S. Supreme Court appears to have declined, pursuant to an exercise of the judicial power, to enforce or apply a statute. Of course, no fewer than five times before *Ware*, that Court seems to have assumed or asserted that it could so decline, but did not actually do it. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409–14 (1790); *Chandler's Case* (1794), in 1 DOCUMENTARY HISTORY, *supra* note 42, at 222–23, 226, 375–76, 378 (minutes of the August Term); *United States v. Todd* (1794) (unpublished), in 1 DOCUMENTARY HISTORY, *supra* note 42, at 228, 379–80, 494, 585–86 (minutes of the August Term); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175, 181 (1796) (Chase, J.); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18–20 (1800) (Chase, J.; Paterson, J.; Cushing, J.); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398–99 (1798) (Iredell, J., concurring) (asserting that the Court possessed the power); 12 ANNALS OF CONG. 52, 70–71 (1803) (remarks of Sen. James Ross). *But see* CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 301 (1930) (disputing this characterization of *Todd*). The Court in *Adkins v. Children's Hospital* admirably and concisely described the judicial power:

From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law.

261 U.S. 525, 544 (1923). For a recent subtle and provocative discussion of the concept of judicial review within the structure of the U.S. Constitution, however, see generally ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989), and see also WARREN, *supra*, at 2–127 (providing an extensive historical discussion of the concept). Chief Justice Marshall's falsification of history and precedent to support his great *Marbury* holding is recounted by Bloch and Marcus:

Marshall[] . . . could have made most of his points even with an accurate portrayal of the proceedings. Nonetheless, . . . Marshall apparently chose not to give [the 'case' he cited] a name, did not specifically mention the name "John Chandler" anywhere in the opinion, and portrayed a composite case that offered more effective precedent than an accurate depiction of the three proceedings [he cited] would have provided. . . .

By scrambling several proceedings . . . Marshall created useful precedent. However, even more remarkable is the way he disregarded the same precedent only a few paragraphs later when it undermined his jurisdictional argument.

Bloch & Marcus, *supra* note 50, at 318. All this is over and above his misquotation and forced misreading of Article III, Section 2 of the U.S. Constitution. See Winfield H. Rose, *Marbury v. Madison: How John Marshall Changed History by Misquoting the Constitution*, 36 PS: POL. SCI. & POL. 209 (2003). *But see* Jeffrey H. Anderson, *John Marshall's Opinion in Marbury v. Madison Does Not Rely on a Misquoting of the Constitution: A Reply to Rose*, 37 PS: POL. SCI. & POL. 199 (2004); Christopher B. Budzisz, *Marbury v. Madison: How History Has Changed John Marshall's Interpretation of the Constitution—A Response to Winfield H. Rose*, 37 PS: POL. SCI. & POL. 385 (2004). Chief Justice Marshall's opinion also represents a misreading of the Judiciary Act of 1789, §

13, 1 Stat. at 80–81. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 443, 453–63 (1989); Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 255–81 (2003) (discussing *Marbury*'s historical context and the role of "facts" in judicial decision-making); see also Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMMENT. 343, 343 (2003) ("Just about everything in *Marbury* is wrong, including the holding.").

For another example of this Chief Justice's manipulation of precedent and/or misquotation to support his judicial opinions, see *supra* note 21, and compare *Ex parte Bollman* with *Burr*, decided seven months later. In *Bollman*, speaking for the Court, he held that all parties to otherwise treasonable activity are principals, whatever their location:

It is not the intention of the court to say that no individual can be guilty of [treason] who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.

*Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 126 (1807). In *Burr*, Marshall at least once misquotes his own opinion in *Bollman* by conveniently reducing "or however remote from the scene of action," to "&c.," and then (with breathtaking cheek) cites to it as a *basis* for holding that Col. Burr legally could *not* be guilty of treason if he was not "present" with the other conspirators, or "if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance." *United States v. Burr*, 25 F. Cas. 55, 161–80 (C.C.D. Va. 1807) (No. 14,693).

The foregoing makes Chief Justice Marshall's gross conflict of interest in *Marbury* (whose precipitating cause was his own inaction as Secretary of State, an office he continued to hold for one fateful month after his February 4, 1803, confirmation as Chief Justice) almost not worth recalling, but see Paulsen, *supra*, at 350–51 (describing Marshall's conflict of interest), especially because it occurred before Lord Bowen (i.e., Charles Syng Christopher Bowen) laid down that "judges, like *Caesar's* wife, should be above suspicion," *Leeson v. Gen. Council of Med. Educ. & Registration*, 43 Ch. D. 366, 385 (C.A. 1889) (Bowen, L.J.), although this phrase is often misquoted as ". . . *must* be above suspicion." Bearing in mind the unimpeachable Source of the pronouncement that those who live by the sword shall die by it, see *Genesis* 9:6; *Matthew* 26:52; *Revelation* 13:10, perhaps Justice William Rufus Day, writing for the Court in *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918), may be excused for incorrectly paraphrasing the Tenth Amendment to the U.S. Constitution ("the powers not expressly delegated to the National Government are reserved" (emphasis added)), just after citing to a paragraph in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819), in which Chief Justice Marshall, writing for the Court, specifically, forcefully, and persuasively argues the significance of the undeniable fact that the Tenth Amendment "omits the word 'expressly,' . . . probably . . . to avoid" certain problems "resulting from the insertion of this word [in the provision analogous to Article II of the U.S. Constitution] in the [A]rticles of [C]onfederation." Of course, the *Dagenhart* Court might also seek refuge in the excuse that it was not the first court to paraphrase that Amendment incorrectly. See, e.g., *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868).

A more prominent example of the twisting of Chief Justice Marshall's words may be observed in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), where Chief Justice Charles Evans Hughes—with appalling mendacity—referred to his antecessor's "memorable warning—"We must never forget, that it is a *constitution* that we are expounding" (*McCulloch v. Maryland*, 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.'" *Blaisdell*, 290 U.S. at 443 (quoting secondly *McCulloch*, 17 U.S. (4 Wheat.) at 415). Of course, the purported quote's two halves are separated by *eight* pages of text and have entirely different subjects; it is "true," therefore, that Chief Justice Marshall said those words, but only in the sense that it is "true" that President Lincoln urged his listeners to act "[w]ith

the members of the first seal committee were the very drafters of that formal Declaration (surely, no accident), it may be well to describe the principal events preceding their appointment.

As every schoolboy knows, on May 15, 1776, the Virginia Convention, appealing to the “Searcher of hearts” as proof of their “sincerity,” instructed its delegates to the Second Continental Congress to propose the following three resolutions:<sup>83</sup>

1. The declaration of the independence of the thirteen colonies, as “free and independent States, absolved from all allegiance to . . . the Crown or Parliament of *Great Britain*.”<sup>84</sup> This declaration ultimately was, *as to the Commonwealth of Virginia*, legally unnecessary, for on June 29, 1776 she declared her independence from, and “TOTALLY DISSOLVED” her connection to, “the crown of Great Britain.”<sup>85</sup>

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malice . . .” President Abraham Lincoln, Second Inaugural Address (March 4, 1865), *in* 6 COMPILATION, *supra* note 15, at 276, 277. Shame has not stopped other Justices from peddling the ruse ever more slickly. *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 148 (1982) (Brennan, J., dissenting) (“[I]t is a *constitution* we are expounding, . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 407, 415)); *Bell v. Maryland*, 378 U.S. 226, 315 (1964) (Goldberg, J., concurring) (same); *Hirabayashi v. United States*, 320 U.S. 81, 100–01 (1943) (Stone, C.J.) (same); *cf.* *Consol. Rail Corp. v. United States*, 896 F.2d 574, 578 (D.C. Cir. 1990) (Ginsburg, J.) (“For we must never forget that it is a statute that we are expounding . . .”).

83. *See* H.R. DOC. NO. 398, at 19–20 (1927); 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 397 (Worthington Chauncey Ford ed., 1906) (1776) [hereinafter 4 JOURNALS].

84. H.R. DOC. NO. 398, at 19–20.

85. VA. CONST. (1776). About this, Justice Chase commented,

In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, [et]c. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, [et]c., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any controul [sic] from any other power upon earth.

*Ware*, 3 U.S. (3 Dall.) at 224 (emphasis omitted); *see also* THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) (declaring the thirteen colonies to be “Free and Independent States”); Definitive Treaty of Peace [Treaty of Paris] art. 1, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, 80–81 (stating “[i]n the Name of the Most Holy and Undivided Trinity,” and by the “pleas[ure of] the Divine Providence,” the King of Great Britain acknowledges the thirteen colonies “to be free, sovereign, and independent States”); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 502 (1857) (Campbell, J., concurring) (“The American Revolution was . . . a political revolution, by which thirteen dependent colonies became thirteen independent States. The Declaration of Independence was not . . . a declaration that the United Colonies jointly, in a collective capacity, were independent States, . . . but that each of them was a sovereign and independent State . . .” (internal quotation

2. The formation of “foreign alliances” to help effect that independence.<sup>86</sup> This resolution ultimately bore fruit<sup>87</sup> after considerable diplomatic effort in the vigorous, armed entry into the war against Great Britain of both King Louis XVI of France<sup>88</sup>

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marks omitted) (quoting *Ware*, 3 U.S. (3 Dall.) at 199; *McIlvaine v. Coxe’s Lessee*, 8 U.S. (4 Cranch) 209, 212 (1808)); *McIlvaine*, 8 U.S. (4 Cranch) at 212 (“[T]he several states which composed this union, . . . became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and . . . they did not derive them from concessions made by the British king.”). *But see* *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 315–17 (1936) (“[T]he powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”). All this is rather at odds with Delaware’s curious pretensions to being “the First State.” See, for example, DEL. CODE ANN. tit. 21, §§ 2121(b) & (h)(3), 2123(b)(4), 2139F(e), 2159(b)(3), 2197(c), and tit. 29, § 318 (2005), which seem to be based solely on the December 7, 1787, date of her ratification of the U.S. Constitution (a *datum* whose relationship to statehood appears—at best—to be unclear). H.R. DOC. NO. 398, at 20; *cf.* Delaware Facts and Symbols, <http://portal.delaware.gov/delfacts/gov.shtml> (last visited Sept. 23, 2008) (official state website stating that “Delaware became a state in 1776, just two months after the signing of the Declaration of Independence”; then adding, inconsistently, that Delaware “is known as ‘the First State’ by being the first of the 13 original states to ratify the U.S. Constitution”).

86. H.R. DOC. NO. 398, at 19–20.

87. See, e.g., 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 419–58 (Worthington Chauncey Ford ed., 1908) (1778); 13 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 239–44 (Worthington Chauncey Ford ed., 1909) (1779); 15 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1340 (Worthington Chauncey Ford ed., 1909) (1779).

88. However little Americans now may remember it, the young King and his family (to say nothing of the French people generally) paid dearly for this alliance. As noted in SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 60–71 (1st ed. 1989), “without much exaggeration, it can be said that costs of Vergennes’ global strategy policy [(i.e., in large part, the enormous expenses of France’s intervention in the American Revolution)] brought on the terminal crisis of the French monarchy” in the 1789 French Revolution. Once the crisis was precipitated, King Louis XVI “stead[il]ly refus[ed] to allow one drop of French blood to be shed, thereby sealing his own fate and that of his wife and children.” NANCY MITFORD, *The Great Little Duke*, reprinted in THE WATER BEETLE 131, 135 (1962). After a farcical trial, he was guillotined on January 21, 1793, some five months after turning thirty-nine. His exquisite Habsburg Queen Marie-Antoinette, born Maria Antonia, an Imperial Archduchess of Austria and Royal Princess of Hungary and Bohemia, on November 2, 1755 (sixteenth child of the great Apostolic Queen/Empress Maria Theresa, see *supra* note 81), after a similarly rigged trial, suffered the same ghastly fate on October 16, 1793, at thirty-eight. Further, the King’s gentle, fearless, and well-beloved sister, known as the saintly *Madame Élisabeth* (born May 3, 1764) innocently perished *simili modo* on May 10, 1794, only thirty years old. His little son, the Dauphin, Louis Charles (born March 27, 1785, and reckoned as King Louis XVII), avoided the scaffold by dying of starvation or neglect on June 8, 1795, ten weeks after his tenth birthday, having been a prisoner in close confinement (apparently for racialist reasons) since he was four. Only *Madame Royale* (i.e., the Princess Royal, Marie-Thérèse, born to the Royal couple on December 19, 1778) survived the maelstrom; imprisoned at ten (for no crime), she was released from her solitary captivity (at the price of banishment from her country) on her seventeenth birthday and died in exile on October 19, 1851.

For daring (voluntarily) to defend his King at trial, the chivalrous attorney, Chrétien de Lamoignon de Malesherbes, was given his own show trial and condemned to watch on April 23, 1794, as his daughter, son-in-law, and grandchildren, one by one, were decapitated, before their

guillotine ended his own earthly misery. His remaining granddaughter, Louise Madeleine le Peletier de Rosambo, was not killed, but witnessed the horror from prison. Her execution having been set for after the 9th Thermidor (i.e., for after July 27, 1794), providentially she survived the Terror, and on July 29, 1805, gave birth to Viscount Alexis Clérel de Tocqueville, author of *De la Démocratie en Amérique* [*Democracy in America*] (1835–1840), among many other works. See ERIK VON KUEHNELT-LEDDIHN, *LEFTISM REVISITED: FROM DE SADE AND MARX TO HITLER AND POL POT* 80 (1990). As Mme. Roland de la Platière (born Marie-Jeanne Philipon)—certainly in a position to know—so aptly stated from the scaffold, moments before being guillotined on November 9, 1793, “*Ô liberté! que de crimes on commet en ton nom!*” (i.e., “O Liberty! What crimes are committed in thy name!”). See 5 ADOLPHE THIERS, *HISTOIRE DE LA RÉVOLUTION FRANÇAISE* [HISTORY OF THE FRENCH REVOLUTION], ch. 15 (1825), available at <http://www.gutenberg.org/files/10953/10953-h/10953-h.htm>.

“*L’homme est bien insensé. Il ne sauroit forger un ciron, et il forge des Dieux à douzaines.*” MICHEL EYQUEM, *SEIGNEUR DE MONTAIGNE, 2 ESSAIS* [ESSAYS] 530 (1580), available at <http://artfl.uchicago.edu/cgi-bin/philologic/getobject.pl?c.0:3:11.montaigne> (“Man is quite insane: He wouldn’t know how to create a maggot, and he creates Gods by the dozens.”). But “[m]aterialists and madmen never have doubts.” G.K. CHESTERTON, *ORTHODOXY* 24 (Image Books 1990) (1908). The bloodlust of the French Revolutionaries was not confined to the Royal Family and its associates: with ghoulish savagery, they slaughtered innumerable Catholic bishops, priests, nuns, and faithful (the martyrdom of the sixteen holy Carmelite nuns of Compiègne (beatified by Pope St. Pius X on May 17, 1906), to take but one spectacular example, is trenchantly recounted in William Bush’s *To Quell the Terror* (1999), and served as the basis for Gertrud von Le Fort’s beautiful novella *Die Letzte am Schafott* (i.e., *The Last One on the Scaffold* (typically rendered in English as *The Song at the Scaffold*) (1931)), which, in turn, inspired George Bernanos’s screenplay (1949), from which came the libretto for the wondrous Francis Poulenc opera, *Dialogues des Carmélites* (i.e., *Dialogues of the Carmelites*) (1957). Perhaps only 10% of those guillotined were noblemen; a full third of them, at least, came from the peasantry. Much like their socialist descendants in Germany, Russia, China, Cambodia, North Korea, Cuba, etc., the French Revolutionaries intended the complete elimination of whole populations; the French too, experimented with poison gas, and among their amusements was to roast their victims in ovens. KUEHNELT-LEDDIHN, *supra*, at 86; see also STÉPHANE COURTOIS ET AL., *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* (Jonathan Murphy & Mark Kramer trans., 1999); Erik von Kuehnelt-Leddihn, *Monarchy and War*, 15 J. LIBERTARIAN STUD. 1, 1–41 (2000). When the good people of the Vendée rose up in defense of Altar and Throne and their traditional way of life, the Revolutionaries responded with demonic ferocity: popular sports included throwing children out of windows and catching them with bayonets, slicing pregnant women open in order to chop their unborn children into pieces and then let the mothers bleed to death, crushing pregnant women to death in wine and fruit presses, and burning victims alive in houses and churches. See KUEHNELT-LEDDIHN, *supra*, at 57–84; SCHAMA, *supra*, at 786–92, 860. “Imagined paradises generate real hells,” to quote a favorite dictum of the great Spanish Marquess of Valdegamas, Juan Donoso Cortés (1809–1853). See R.A. HERRERA, *DONOSO CORTÉS: CASSANDRA OF THE AGE* 76 (1995). The shrewd realism of the sober Spaniard is reflected in a saying widely attributed to him: “*Lo importante no es escuchar lo que se dice, sino averiguar lo que se piensa.*” (i.e., “The key is to learn their thoughts, not to listen to their words,” or, more literally, “The important thing is not to hear what is said, but to discern what is thought.”).

Members of the founding generation of the United States looked aghast on the grisly death of their “Great, Faithful, and Beloved Friend and Ally” (the all-but universal salutation used in diplomatic correspondence from the United States to King Louis XVI, which correspondence usually closed with a “pray[er] that the Almighty may always keep you and yours in his holy protection”). A portrait of the “good, sad” King, Nancy Mitford, *A Queen of France*, *SUNDAY TIMES* (London), May 22, 1955, reprinted in *A TALENT TO ANNOY* 111, 113 (Charlotte Mosley ed., Oxford Univ. Press 1988) (1986), still hangs prominently at Monticello, the magnificent

and his royal cousin, the Catholic King (i.e., King Charles III of Spain).<sup>89</sup>

Charlottesville, Virginia, home of Mr. Jefferson (who knew him well), even though Jefferson was among the coolest to the mere idea of monarchy in that generation. In remarks reminiscent of Edmund Burke's seminal *Reflections on the Revolution in France* (1790), the sophisticated, urbane, and unsentimental American envoy to France from 1792 to 1794, Gouverneur Morris of New York (delegate to the Second Continental Congress, signer of the Declaration of Independence, and principal draftsman of the U.S. Constitution)—hardly a man to harbor false illusions about the French Revolution—told Gilbert du Motier, Marquess of Lafayette (1757–1834): “I am opposed to the [French Revolutionary] democracy from regard to liberty.” KUEHNELT-LEDDIHN, *supra*, at 58. Gouverneur Morris also stated in a letter to Thomas Jefferson:

The late King of this country has been publicly executed. He died in a manner becoming his dignity.

Mounting the scaffold, he expressed anew his forgiveness of those who persecuted him, and a prayer that his deluded people might be benefited by his death. On the scaffold he attempted to speak, but the commanding officer, Santerre, ordered the drums to beat. The King made two unavailing efforts, but with the same bad success. The executioners threw him down, and were in such haste to let fall the axe before his neck was properly placed, so that he was mangled. It would be needless to give you an affecting narrative of particulars; I proceed to what is more important, having but a few minutes to write by the present good opportunity.

The greatest care was taken to prevent an affluence of people. This proves a conviction, that the majority was not favorable to that severe measure. In effect, the great mass of the Parisian citizens mourned the fate of their unhappy Prince. I have seen grief, such as for the untimely death of a beloved parent. Every thing wears an appearance of solemnity, which is awfully distressing.

Letter from Gouverneur Morris to Thomas Jefferson, Secretary of State (Jan. 25, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 348–49 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833).

“*L’homme est, je vous l’avoue, un mechant animal*” (i.e., “man, I must say, is a vicious beast”), as even Orgon was capable of observing. MOLIÈRE, *TARTUFFE*, act 5, sc. 6 (Richard Wilbur trans., Harcourt Brace & Company bilingual ed. 1997) (1664). Perhaps to this same playwright (in the easygoing person of Philinte) should go the final word: “*Et c’est une folie à nulle autre seconde / De vouloir se mêler de corriger le monde.*” MOLIÈRE, *LE MISANTHROPE*, act 1, sc. 1 (William F. Giese trans., Houghton Mifflin 1928) (1666) (i.e., “There’s no human folly that’s greater than / That of trying to fix our fellow man.”).

89. Although the glorious heroism during the War of American Independence—and especially thereafter—of its noblest soldier (General the Marquess of La Rouërie (i.e., Armand-Charles Tuffin de La Rouërie de Villiers)) sadly has been forgotten by most Americans, see KUEHNELT-LEDDIHN, *supra* note 88, at 62, the French Crown’s vast and indispensable contribution to that war generally remains green in their memory—as it should, if only because of monstrous ingratitude the contrary would betray. In sharp contrast, however, the smaller yet crucial contribution of the Spanish Crown undeservedly has all-but disappeared from memory. At times jointly with American and/or French forces, the Spanish Royal Navy and Royal Army (into which her Louisiana colonial militia forces were integrated for the Mississippi Valley and “Florida” campaigns) clashed with the British often throughout the war. To list merely the principal campaigns and engagements that occurred in the Americas: Fort Manchac-Baton Rouge (Louisiana), August 27–September 21, 1779; Natchez (now Mississippi), August 27–October 5, 1779; Belize, September 15–20, 1779; Omoa (Honduras), October 16–November 28, 1779; Belize, October 28–November 2, 1779; Mobile (now Alabama), January 11–March 12, 1780; San Juan River (Nicaragua), March 24–April 29, 1780; St.

3. The formation of a “Confederation of the Colonies”—this proposal carefully and expressly conditioned upon each colonial legislature’s retaining full power to form its own government and

Louis (now Missouri), May 26, 1780; St. Joseph (now Michigan), February 12, 1781; Pensacola (now Florida), February 28–May 10, 1781; Natchez, April 22 & June 22, 1781; Belize, March 14, 1782; and Providence (the Bahamas), April 22–May 8, 1782 & March 30–April 13, 1783. *See generally* JOHN WALTON CAUGHEY, *BERNARDO DE GÁLVEZ IN LOUISIANA, 1776–1783* (1972); WILLIAM S. COKER & HAZEL P. COKER, *THE SIEGE OF MOBILE, 1780*, in *MAPS* (1982); WILLIAM S. COKER & HAZEL P. COKER, *THE SIEGE OF PENSACOLA, 1781*, in *MAPS* (1981); MANUEL CONROTTE, *LA INTERVENCIÓN DE ESPAÑA EN LA INDEPENDENCIA DE LOS ESTADOS UNIDOS DE LA AMÉRICA DEL NORTE* (1920); JACK D.L. HOLMES, *HONOR AND FIDELITY: THE LOUISIANA INFANTRY REGIMENT AND THE LOUISIANA MILITIA COMPANIES, 1766–1821*, at 9–11, 22–36, 238 (1965); GRANVILLE W. HOUGH & N.C. HOUGH, *SPANISH, FRENCH, DUTCH, AND AMERICAN PATRIOTS OF THE WEST INDIES DURING THE AMERICAN REVOLUTION 1–36, 53, 61, 101* (2001); DAVID F. MARLEY, *WARS OF THE AMERICAS: A CHRONOLOGY OF ARMED CONFLICT IN THE NEW WORLD, 1492 TO PRESENT 303–46* (1998); HERMINIO PORTELL-VILÁ, *LOS “OTROS EXTRANJEROS” EN LA REVOLUCIÓN NORTEAMERICANA* (1978); CARMEN DE REPARAZ, *YO SOLO: BERNARDO DE GÁLVEZ Y LA TOMA DE PANZACOLA EN 1781* (1986); *THE AMERICAN REVOLUTION 1775–1783: AN ENCYCLOPEDIA 85–87, 1155–59* (Richard L. Blanco ed., 1993); Eric Beerman, *José Solano and the Spanish Navy at the Siege of Pensacola*, in *ANGLO-SPANISH CONFRONTATION ON THE GULF COAST DURING THE AMERICAN REVOLUTION 125* (William S. Coker & Robert R. Rea eds., 1982) [hereinafter *ANGLO-SPANISH CONFRONTATION*]; Light T. Cummins, *Spanish Historians and the Gulf Coast Campaigns*, in *ANGLO-SPANISH CONFRONTATION, supra*, at 194; Jack D.L. Holmes, *French and Spanish Military Units in the 1781 Pensacola Campaign*, in *ANGLO-SPANISH CONFRONTATION, supra*, at 145; A.P. Nasatir, *The Legacy of Spain*, in *ANGLO-SPANISH CONFRONTATION, supra*, at 1; Francisco de Borja Medina Rojas, *José de Ezpeleta and the Siege of Pensacola*, in *ANGLO-SPANISH CONFRONTATION, supra*, at 106.

It was the Spanish military authorities’ secret promise to assume the defense of France’s American colonies against the British that enabled practically the entire French fleet in the Americas (twenty-four ships of the line, under the command of Adm. the Count of Grasse-Tilly (i.e., François-Joseph-Paul de Grasse de Rouville (also Marquess of Tilly), who reportedly mortgaged his own estates to help finance the War of Independence)) to sail north from the West Indies. This voyage accomplished two things: (1) delivery of a vast sum (in hard currency) to Gen. Washington that was provided by the people of Havana, Cuba, thus averting a threatened mutiny by his long-unpaid American troops; and (2) denial of entry to the Chesapeake (September 5–6, 1781) to the British fleet (nineteen ships of the line, under the command of Adm. Thomas Graves (later created a Baron))—doubtless surprised at its opponent’s superior numbers—and so to seal the doom of Gen. the Earl Cornwallis (i.e., Charles Cornwallis (later created a Marquess)), who was forced to surrender the last significant mobile British army in North America on October 19, 1781, at Yorktown, Virginia, and turned the world upside down.

On June 3, 1976, at Virginia Avenue and 22nd Street, NW, in Washington, D.C., His Catholic Majesty officially unveiled a gift from the Spanish Crown to the United States to commemorate the bicentennial of American independence: an equestrian statue (by Juan de Ávalos) of Field Marshal the Count of Gálvez (Bernardo de Gálvez, 1746–1786), principal Spanish commander during the War of Independence, and gloriously distinguished by both his tactical brilliance and personal bravery. The Bourbon King’s remarks that day—“*Que la estatua de Bernardo de Gálvez sirva para recordar que España ofreció la sangre de sus soldados para la causa de la Independencia norteamericana*”—are inscribed in English on the plinth: “May this statue of Bernardo de Galvez serve as a reminder that Spain offered the blood of her soldiers for the cause of American independence.” REPARAZ, *supra*, at 265.

“regulat[e its own] internal concerns.”<sup>90</sup> This resolution ultimately produced the Articles of Confederation, approved on March 1, 1781, when Maryland finally acceded to them, after having refused to join in a political union until Virginia should agree to give up her northwestern county, Illinois County, from which ultimately were carved the States of Illinois, Indiana, Michigan, northeastern Minnesota, Ohio (or nearly all of it), and Wisconsin.<sup>91</sup> For the common good,<sup>92</sup> on January 2, 1781, the Virginia General Assembly adopted resolutions<sup>93</sup> offering cession, to the United States, of what became (with a few additional parcels) the Northwest Territories. The cession ultimately was effected by further act (October 20, 1783) of the Virginia General Assembly,<sup>94</sup> and a deed of conveyance by the Virginia delegates to the Confederation Congress, accepted by it on March 1, 1784.<sup>95</sup>

Further to this instruction,<sup>96</sup> on Friday, June 7, 1776, Richard Henry Lee of Virginia (who later became the sixth President of the Confederation Congress and, later still, Senator from that Commonwealth) rose in the Second Continental Congress and, immediately seconded by John Adams of Massachusetts, dutifully moved as follows:

*Resolved*, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

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90. See H.R. DOC. NO. 398, at 27 & n.1 (1927); 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 213–14, 223 (Gaillard Hunt ed., 1912) (1781). With seven sister states, and invoking “the Great Governor of the world,” Virginia acceded to the engrossed Articles on the very day they became available (July 9, 1778); her pretensions notwithstanding, see *supra* note 85, Delaware did not do so until the following year (February 22 and May 5). H.R. DOC. NO. 398, at 37.

91. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 432–33 (1857) (opinion of the Court delivered by Taney, C.J.); see *id.* at 502–05 (Campbell, J., concurring); *id.* at 520–22 (Catron, J., concurring); *id.* at 538–39 (McLean, J., dissenting); *id.* at 605–06 (Curtis, J., dissenting).

92. *Id.* at 434–35 (majority opinion).

93. 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 564–66 (William Waller Hening ed., Richmond, 1822) [hereinafter LAWS OF VIRGINIA].

94. 11 LAWS OF VIRGINIA, *supra* note 93, at 326–28 (1823).

95. 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 89–90, 112–17 (Gaillard Hunt ed., 1928) (1784).

96. See H.R. DOC. NO. 398, at 19.

That it is expedient forthwith to take the most effectual measures for forming foreign Alliances.

That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.<sup>97</sup>

Mr. Lee's first resolution was debated the next day, and on the tenth; whereupon further debate was postponed to July 1, 1776.<sup>98</sup> "[I]n the mean while, that no time be lost, in case the Congress agree [to the resolution,] a committee [of five was appointed] to prepare a [formal] declaration to the effect of the . . . resolution"; that is, to proclaim the independence officially and offer reasons for it.<sup>99</sup> This committee was composed of Thomas Jefferson of Virginia, John Adams of Massachusetts, Benjamin Franklin of Pennsylvania, Roger Sherman of Connecticut, and Robert R. Livingston of New York (who, in the end, declined to sign it). Because he was a Virginian and Mr. Adams thought (among other things) that "a Virginian ought to appear at the head of this business,"<sup>100</sup> Mr. Jefferson was chosen to prepare a rough draft<sup>101</sup>—a

97. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 425 & n.2 (Worthington Chauncey Ford ed., 1906) (1776) [hereinafter 5 JOURNALS]; H.R. DOC. NO. 398, at 21.

98. See 5 JOURNALS, *supra* note 97, at 425–26 n.2, 427–29.

99. *Id.* at 425–26 n.2, 428–29; H.R. DOC. NO. 398, at 21 & n.2.

100. DAVID MCCULLOUGH, JOHN ADAMS 119 (2001). The author owes much to pages 89–139 of this magisterial (if somewhat hagiographical) book, as well as to MAIER, *supra* note 13, at 41–46, 97–161, whose engaging narratives provide many of the (otherwise-unattributed) details in the text accompanying notes 81–112.

That Virginia should have figured so prominently in the Founders' counsels is to be expected, given the remarkable virtues—heroism, sophistication, learning, grit, character, and resolve—of her most prominent citizens in that generation, to say nothing of her colossal size (objectively and relatively), *see, e.g., supra*, text accompanying notes 100–05, which text does not even mention what now is Kentucky and West Virginia, the latter of which (unlike the former) was carved from Virginia with some irregularity. *See generally* U.S. CONST. art. 4, § 3, cl. 1; 10 Att'y Gen. 426 (1862) (Edward Bates); Act of Dec. 31, 1862, ch. 6, 12 Stat. 633–34, (1862) ("Act for the Admission of the State of 'West Virginia' into the Union"); *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 41–42 (1870). Virginians' own legendary love of their native soil, *cf. MCCULLOUGH, supra*, at 116 (quoting John Adams: in Virginia, "all geese are swans"), is rivaled perhaps only by South Carolinians' regard for theirs. Not for nothing has North Carolina affectionately been described as a valley of humility between two mountains of conceit.

101. Doubtless, Mr. Jefferson was selected because of his undeniable hortatory gifts, to say nothing of his useful tendency to exaggeration, both of which shone in the stirring cadences of his now (unfortunately) little remembered Declaration of the Causes and Necessity of Taking Up Arms, adopted (with many amendments; though the words below are his) by the Second Continental Congress on July 6, 1775:

We are reduced to the alternative of ch[oo]sing an unconditional submission to the tyranny of irritated [British-government] ministers, or resistance by force.—The latter is our choice.—We have counted the cost of this contest, and find nothing so dreadful as

task he finished in about two weeks, after which Dr. Franklin and Mr. Adams made myriad changes to it.<sup>102</sup> On Friday, June 28, 1776, the committee submitted its stirring draft to the Second Continental Congress.<sup>103</sup>

The vigorous debate (principally between Col. John Dickinson of Pennsylvania and Mr. Adams)—among the most momentous in history—on Mr. Lee’s resolution of independence, resumed on Monday, July 1,<sup>104</sup> and lasted for much of that day. After a straw vote,<sup>105</sup> action thereon was postponed to the following day, during which it passed without objection (New York, once again, abstaining) at about 10:00 a.m.<sup>106</sup> Commenting on this pivotal second vote, by which the resolution of independence from Great Britain actually was adopted, on July 3 an obviously moved John Adams wrote to his wife:

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voluntary slavery.—Honour, justice, and humanity, forbid us tamely to surrender that freedom which we received from our gallant ancestors, and which our innocent posterity have a right to receive from us. We cannot endure the infamy and guilt of resigning succeeding generations to that wretchedness which inevitably awaits them, if we basely entail hereditary bondage upon them.

Our cause is just. Our union perfect. Our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable.—We gratefully acknowledge, as signal instances of the Divine favour towards us, that his Providence would not permit us to be called into this severe controversy, until we were grown up to our present strength, [and] had been previously exercised in warlike operation, and possessed of the means of defending ourselves. With hearts fortified with these animating reflections, we most solemnly, before God and the world, *declare*, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of our liberties; being with one mind resolved to die freemen rather than live slaves.

....

With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.

H.R. DOC. NO. 398, at 15–17.

102. See 5 JOURNALS, *supra* note 97, at 491–502.

103. *Id.*

104. *Id.* at 504–06 & n.1.

105. Virginia and eight of her sisters voted in favor. Although Delaware was not among these “first,”—notwithstanding that state’s curious pretensions, see *supra* note 85—she did join them the following day, along with South Carolina and Pennsylvania, leaving only New York still undecided. See MAIER, *supra* note 13, at 44–45.

106. 5 JOURNALS, *supra* note 97, at 505 n.1, 506–07. The Virginia Convention assented in advance to the united resolution of independence, thus dating her ratification of it back to not later than the very instant of its adoption by the Second Continental Congress on July 2, 1776.

Yesterday the greatest Question was decided, which ever was debated in America, and a greater perhaps, never was or will be decided among Men. A Resolution was passed without one dissenting Colony “that these united Colonies, are, and of right ought to be free and independent States, and as such, they have, and of Right ought to have full Power to make War, conclude Peace, establish Commerce, and to do all the other Acts and Things, which other States may rightfully do.” You will see in a few days a Declaration setting forth the Causes, which have impell’d Us to this mighty Revolution, and the Reasons which will justify it, in the Sight of God and Man. A Plan of Confederation will be taken up in a few days.

...It is the Will of Heaven, that the two Countries should be sundered forever. It may be the Will of Heaven that America shall suffer Calamities still more wasting and Distresses yet more dreadfull [sic]. If it is to be the Case, it will have this good Effect, at least: it will inspire Us with many Virtues, which We have not, and correct many Errors, Follies, and Vices, which threaten to disturb, dishonour, and destroy Us. —The Furnace of Affliction produces Refinement, in States as well as Individuals. And the new Governments we are assuming, in every Part, will require a Purification from our Vices, and an Augmentation of our Virtues or they will be no Blessings.<sup>[107]</sup> The People will have unbounded Power. And the People are extreemly [sic] addicted to Corruption and Venality, as well as the Great. —I am not without Apprehensions from this Quarter. But I must submit all my

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107. This moral cautionary note has been a constant theme, sounded by many astute observers over the centuries. See, e.g., ST. THOMAS AQUINAS, DE REGIMINE PRINCIPUM AD REGEM CYPRI [ON PRINCELY GOVERNMENT], in AQUINAS: SELECTED POLITICAL WRITINGS 2, 28–35 (A.P. D’Entrèves ed., J.G. Dawson trans., Basil Blackwell 1948) (“*Sed ut hoc beneficium populus a Deo consequi mereatur, debet a peccatis cessare . . . Tollenda est igitur culpa, ut cesset a tyrannorum plaga.*” (i.e., “But to deserve to secure this benefit [i.e., of not being ruled by a tyrant] from God, the people must desist from sin . . . Sin must therefore be done away with, in order that the scourge of tyrants may cease.”)); CARL LOTUS BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 122 (1945) (“[T]he preservation of our freedom depends less upon the precise nature of our constitutions and laws than it does upon the character of the people. In the last analysis everything depends upon the possession by the people of that *virtue* [that is] . . . the fundamental principle, the indispensable guarantee, of the republican form of government.”); JAMES HUTTON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 1–44 (2003); DAVID LOWENTHAL, NO LIBERTY FOR LICENSE: THE FORGOTTEN LOGIC OF THE FIRST AMENDMENT 87–107 (1997); JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 27–43 (1960).

Hopes and Fears, to an overruling Providence, in which, unfashionable as the Faith may be, I firmly believe.<sup>108</sup>

The Second Day of July 1776, will be the most memorable Epoque, in the History of America. —I am apt to believe that it will be celebrated, by succeeding Generations, as the great anniversary Festival. It ought to be commemorated, as the Day of Deliverance by solemn Acts of Devotion to God Almighty. It ought to be solemnized with Pomp and Parade, with Shews, Games, Sports, Guns, Bells, Bonfires and Illuminations from one End of this Continent to the other from this Time forward forever more.

You will think me transported with Enthusiasm but I am not. —I am well aware of the Toil and Blood and Treasure, that it will cost Us to maintain this Declaration, and support and defend these States. — Yet through all the Gloom I can see the Rays of ravishing Light and Glory. I can see that the End is more than worth all the Means. And that Posterity will triumph [sic] in that Days Transaction, even altho [sic] We should rue it, which I trust in God We shall not.<sup>109</sup>

Over the next two days, the Continental Congress debated and amended the draft declaration. Late Thursday morning (New York, again, abstaining), acting “with a Firm reliance on the Protection of Divine Providence” and “appealing to the Supreme Judge of the world,” the Second Continental Congress adopted the amended draft without objection, as authenticated by the signature of John Hancock, its President, and attested by Secretary Thomson.<sup>110</sup> On July 19 (New York finally having assented to independence on July 9<sup>111</sup>), Congress ordered the Declaration to be engrossed on parchment, with the heading altered from “A Declaration by the Representatives of the United States of America in General Congress assembled” to the now-familiar “[t]he unanimous Declaration of the thirteen United States of America,” and

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108. Letter from John Adams to Abigail Adams (July 3, 1776), in *THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762–1784*, at 138, 139–40 (L.H. Butterfield et al. eds., 1975) (footnote added) (first letter of July 3, 1776).

109. Letter from John Adams to Abigail Adams (July 3, 1776), in *THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762–1784*, *supra* note 108, at 140, 142 (second letter of July 3, 1776).

110. See 5 *JOURNALS*, *supra* note 97, at 509–16. Remarkably, the original of this signed instrument appears to be lost. See MAIER, *supra* note 13, at 263 n.9.

111. See 5 *JOURNALS*, *supra* note 97, at 560.

that every delegate sign.<sup>112</sup> The engrossed Declaration was opened for signature on August 2, 1776.<sup>113</sup> On that day,

John Hancock, the President of the Congress, was the first to sign the sheet of parchment measuring 24¼ by 29¾ inches. He used a bold signature centered below the text. In accordance with prevailing custom, the other delegates began to sign at the right below the text, their signatures arranged according to the geographic location of the states they represented. New Hampshire, the northernmost state, began the list, and Georgia, the southernmost, ended it. Eventually 56 delegates signed, although all were not present on August 2. Among the later signers were Elbridge Gerry, Oliver Wolcott, Lewis Morris, Thomas McKean, and Matthew Thornton, who found that he had no room to sign with the other New Hampshire delegates. A few delegates who voted for adoption of the Declaration on July 4 were never to sign in spite of the July 19 order of Congress that the engrossed document “be signed by every member of Congress.” Nonsigners included John Dickinson, who clung to the idea of reconciliation with Britain [(though he served bravely as an officer in the ensuing war, laboring gallantly for the independence whose proclamation he had so eloquently sought to defeat)], and Robert R. Livingston, one of the Committee of Five, who thought the Declaration was premature.<sup>114</sup>

In later years, of course, Thursday, July 4, 1776, would acquire almost-mythical status (and the vote of July 2—John Adams’s predictions notwithstanding—strangely would be all-but forgotten).<sup>115</sup>

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112. *See id.* at 590–91.

113. *Id.* at 626.

114. The Declaration of Independence: A History, [http://www.archives.gov/exhibits/charters/declaration\\_history.html](http://www.archives.gov/exhibits/charters/declaration_history.html) (last visited Nov. 18, 2008).

115. As even foreign observers have noted, *see, e.g.*, JOSÉ IGNACIO RUBIO LÓPEZ, LA PRIMERA DE LAS LIBERTADES: LA LIBERTAD RELIGIOSA EN LOS EE.UU. DURANTE LA CORTE REHNQUIST (1986–2005): UNA LIBERTAD EN TENSIÓN 84 n.100 (2006) (“*En realidad, hay un profundo desconocimiento . . .*” (i.e., “In fact, there is a profound lack of knowledge . . .”)), the widespread modern ignorance of even the rudimentary details of the nation’s basic law and the Founding appears boundless and almost beyond parody. *See, e.g.*, Kamen, *supra* note 72 (quoting statement of then-Vice President Al Gore); *Rhetorical Misstep Follows Failure to Check the Address*, WASH. POST, Oct. 18, 1996, at A30 (quoting remarks made by President William Jefferson Clinton—a Rhodes Scholar, graduate of Georgetown University and of Yale Law School, and Arkansas Attorney General and constitutional law instructor at the University of Arkansas School of Law—to Orange County, California, Democratic Party supporters: “The last time I checked, the Constitution said, ‘of the people, by the people and for the people.’ That’s what the Declaration of Independence says”; of course, neither of the purported sources “sa[ys]” the quoted matter (or anything like it), which famously was penned (though not on the back of an envelope; nor while its author was riding on a train) some four score and seven years after the earlier of them, in remembrance of one of the saddest days in the history of the world); Jim McKinley, Letter to the Editor, OGDEN UTAH

But on the day itself, soon after the vote on the formal Declaration, the Second Continental Congress

proceeded directly to other business [such as appointment of a committee to devise a seal for the United States, discussed immediately below]. Indeed, to all appearances, nothing happened in Congress on July 4, 1776. Adams, who had responded with such depth of feeling to the events of July 2, recorded not a word of July 4. Of Jefferson's day, it is known only that he took time off to shop for ladies' gloves and a new thermometer that he purchased at John Sparhawk's London Bookshop for a handsome 3 pounds, 15 shillings.<sup>116</sup>

The three principal draftsmen of the Declaration, Messrs. Jefferson, Franklin, and (John) Adams officially constituted the *first* committee to

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STANDARD EXAMINER, Apr. 27, 1998, at 7A (a self-described "very strong supporter of the United States Constitution," suggests that an earlier contributor "read the Constitution very carefully, especially where it says one is innocent until proven guilty"). One is reminded of the constitutional musings of Sir Boyle Roche (1743–1807): "It would surely be better to give up, not only a part but, if necessary, the whole of our constitution, to preserve the remainder." Brian Maye, *An Irishman's Diary*, IRISH TIMES, Feb. 14, 2000, at 17.

In any event, according to Professor Maier:

[H]olding our great national festival on the Fourth makes no sense at all—unless we are actually celebrating not just independence but the Declaration of Independence. . . .

. . . .

But what exactly [are we] celebrating? The news, not the vehicle that brought it; independence and the assumption of self-government, not the document that announced Congress's decision to break with Britain. Considering how revered a position the Declaration of Independence later won in the minds and hearts of the people, Americans' disregard for it in the first years of the new nation verges on the unbelievable. . . .

The adoption of independence was . . . from the beginning confused with its declaration. Differences in the meaning of the word *declare* contributed to the confusion. Before the Declaration of Independence was issued—while, in fact, [the Second Continental] Congress was still editing Jefferson's draft—Pennsylvania newspapers announced that on July 2 the Continental Congress had "declared the United Colonies Free and Independent States," by which it meant simply that it had officially accepted that status. Newspapers in other colonies repeated the story. In later years the "Anniversary of the United States of America" came to be celebrated on the date [the Second Continental] Congress had approved the Declaration of Independence. That began, it seems, by accident. In 1777 no member of [the Continental] Congress thought of marking the anniversary of independence at all until July 3, when it was too late to honor July 2. As a result, the celebration took place on the Fourth, and that became the tradition. At least one delegate spoke of "celebrating the Anniversary of the Declaration of Independence," but over the next few years references to the anniversary of independence and of the Declaration seem to have been virtually interchangeable.

Pauline Maier, *Making Sense of the Fourth of July*, AM. HERITAGE, July–Aug. 1997, at 54, 54–58; see also MAIER, *supra* note 13, at 160–61 (making a similar point).

116. MCCULLOUGH, *supra* note 100, at 136.

devise a seal for the United States in Congress Assembled; Mr. Pierre-Eugène du Simitière of Pennsylvania (a Swiss) assisted them as a technical consultant.<sup>117</sup> This committee proposed a seal in large part based on powerful and unambiguously Biblical and religious themes. For the reverse (i.e., the face of the seal not containing the first committee's proposed arms of the United States), Mr. Jefferson initially recommended to the committee a depiction of the "Children of Israel in the Wilderness, led by a Cloud by Day, and a Pillar of Fire by night,"<sup>118</sup> but Dr. Franklin counterposed the following:

Moses . . . standing on the Shore, and extending his Hand over the Sea, thereby causing the same to overwhelm Pharaoh who is sitting in an open Chariot, a Crown on his Head and a Sword in his Hand. Rays

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117. See PAPERS NO. 23, *supra* note 57, at fol. 128; 5 JOURNALS, *supra* note 97, at 517–18 (transcription of *Papers No. 23*); HUNT, *supra* note 57, at 7–9.

118. See LIBRARY OF CONGRESS, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC, EXHIBITION IV: RELIGION AND THE CONGRESS OF THE CONFEDERATION 1774–1789 (James H. Hutson cur., 1998), available at <http://lcweb.loc.gov/exhibits/religion/rel04.html> [hereinafter RELIGION AND THE CONFEDERATION]. Mr. Jefferson's suggestion—made just after the adoption of the Declaration, and clearly showing the "manifest[ation of] partiality" by "the God of the Old Testament" for "one people or nation over others," shortly before giving the former the Ten Commandments, see *Exodus* 15, 20—alone casts doubt on the oft- and dogmatically made assertion that the God "Jefferson referenced in the Declaration was not the God of the Bible (and thus the Ten Commandments), but the God of deism." *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 452 & n.6 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005) (citing ALLEN JAYNE, *JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY* 24 (1998) ("Jefferson's God of the Declaration is . . . antithetical to any God who would manifest partiality by choosing one people or nation over others, as did the God of the Old Testament." (quoting JAYNE, *supra*, at 38)). In any event, the point would seem to be resolved by the final wording of the proposal, written by Mr. Jefferson himself and reported by the committee, see *infra* note 119; *McCreary County*, 354 F.3d at 468–69 (Ryan, J., dissenting), as well as by President Jefferson's Second Inaugural Address, where he describes his "need" of:

[T]he favor of that Being in whose hands we are, who led our fathers, as *Israel of old*, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in 1 COMPILATION, *supra* note 15, at 378, 382 (emphasis added); cf. *Exodus* 33:1–3 ("And the Lord said unto Moses, 'Depart, and go up hence, thou and the people which thou hast brought up out of the land of Egypt, unto the land which I swore unto Abraham, to Isaac, and to Jacob, saying, Unto thy seed will I give it: . . . Unto a land flowing with milk and honey . . . ."). Maybe Mr. Jefferson thought that—despite the qualities usually ascribed to Him—it was the "God of deism" (and not the "God of the Old Testament") who said those interesting things to Moses and led the children of Israel ("impartially," no doubt) out of slavery in Egypt?

from a Pillar of Fire in the Clouds reaching to Moses, . . . to express that he acts by . . . Command of the Deity.

Motto, Rebellion to Tyrants is Obedience to God.<sup>119</sup>

Mr. Jefferson agreed with Dr. Franklin's counterproposal and reworded it thus:

Pharaoh sitting in an open chariot, a crown on his head and a sword in his hand passing thro' the divided waters of the Red sea [sic] in pursuit of the Israelites: rays from a pillar of fire in the cloud, expressive of the divine presence, . . . and command, reaching to Moses who stands on the shore and, extending his hand over the sea, causes it to over whelm Pharaoh [sic].

Motto. Rebellion to tyrants is obed<sup>ce</sup>. to god [sic].<sup>120</sup>

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119. See 5 JOURNALS, *supra* note 97, at 691 (internal quotation marks omitted); JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 50–51 (1998); HUNT, *supra* note 57, at 9–10. *But cf.* RELIGION AND THE CONFEDERATION, *supra* note 118 (attributing authorship of the latter quotation (surely in error) to *Mr. Jefferson*). The author is no handwriting expert, but his own personal comparison of the handwritten manuscript of this latter quotation with what are unquestionably Dr. Franklin's own holographic notes, from which he delivered his moving June 28, 1787, proposal at the Constitutional Convention, satisfies the author that the quotation is written in Dr. Franklin's very elegant (if somewhat florid), markedly angled hand. Although the proposal ultimately failed for want of funds, when the Convention appeared to be breaking apart as a result of internal dissension, Franklin proposed that each session thenceforth begin with prayer "imploing the Assistance of Heaven, and its Blessing upon [the Convention's] deliberations," because

[T]he longer I live, the more convincing proofs I see of this Truth, that *God governs in the Affairs of Men*. And if a Sparrow cannot fall to the Ground without his Notice [see *Matthew* 10:29], is it probable that an Empire can rise without his Aid? We have been assured . . . in the Sacred Writings that except the Lord build the House, they labour in that build it. [See *Psalms* 127 (126):1.] I firmly believe this; and I also believe that without his concurring Aid, we shall succeed in this political Building no better than the Builders of Babel. [See *Genesis* 11:1–9.] We shall be divided by our little partial local Interests, our Project will be confounded and we ourselves shall become a Reproach and a By-word down to future Ages. And what is worse, Mankind may hereafter, from this unfortunate Instance, despair of establishing Government by human Wisdom, and leave it to Chance, War & Conquest.

Benjamin Franklin, Address at the Constitutional Convention (June 28, 1787), in LIBRARY OF CONGRESS, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC, EXHIBIT VI: RELIGION AND THE FEDERAL GOVERNMENT (James H. Hutson cur., 1998), available at <http://www.loc.gov/exhibits/religion/vc006642.jpg> [hereinafter RELIGION AND THE FEDERAL GOVERNMENT].

120. See 5 JOURNALS, *supra* note 97, at 691 (internal quotation marks omitted); HUNT, *supra* note 57, at 10; HUTSON, *supra* note 119, at 50. *But cf.* RELIGION AND THE CONFEDERATION, *supra* note 118 (attributing this quotation—surely inadvertently—to *Dr. Franklin*). The author is satisfied

that the quotation is in Mr. Jefferson's businesslike, almost straight-up-and-down handwriting (whose initial upper-case lettering for nouns is *much* less frequent than Dr. Franklin's), based on his personal comparison of the manuscript with several documents unquestionably by Mr. Jefferson. Such comparison included: (1) his storied and much-ballyhooed "wall-of-separation" letter of January 1, 1802, to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury, Connecticut, Baptist Association; and (2) his nearly contemporaneous, but *sharply* different, and all-but ignored and unknown official letter of August 22, 1804, to a Roman Catholic Ursuline convent operating the oldest Catholic school in the United States:

[H]oly sisters . . . the charitable objects of your [religious convent school for girls] . . . and it's [sic] furtherance of the wholesome purposes of society, by training up it's [sic] younger members in the way they should go, *cannot fail to ensure it the patronage of the [federal] government* . . . [and] all the protection which my office can give it.

Letter from Thomas Jefferson, President of the United States, to Sœur Thérèse de St. Xavier Farjon, Superior, and the Nuns of the Order of St. Ursula at New Orleans (Aug. 22, 1804) [hereinafter Order of St. Ursula Letter], in 1 CHARLES E. NOLAN, A SOUTHERN CATHOLIC HERITAGE: COLONIAL PERIOD, 1704–1813, at fol. 8 (verso), following unnumbered page xxxv (1976) (emphasis added) (showing the incorrect date of May 15, 1804, written in another hand than President Jefferson's, cf. Brief on Behalf of Appellee at 17, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (No. 583)). This letter was written in response to a March 21, 1804, letter to him by the Ursulines, who were anxious to know if they would still, under the federal government, be able with certainty to count on the continued enjoyment of their revenues, which were necessary to enable them to fulfill their obligations as a convent school. See THÉRÈSE WOLFE, THE URSULINES IN NEW ORLEANS AND OUR LADY OF PROMPT SUCCOR: A RECORD OF TWO CENTURIES, 1727–1925, at 59–65 (1925) (reprinting the letter from the Ursuline Sisters to President Jefferson); see also Brief on Behalf of Appellee, *supra*, at 17; JAMES A. BURNS, THE PRINCIPLES, ORIGIN AND ESTABLISHMENT OF THE CATHOLIC SCHOOL SYSTEM IN THE UNITED STATES 81–83 (reprint ed., Arno Press & N.Y. Times 1969); JANE FRANCES HEANEY, A CENTURY OF PIONEERING: A HISTORY OF THE URSULINE NUNS IN NEW ORLEANS (1727–1827), at 219–24 (1993); Edward McGlynn Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491, 505–06 & nn.51–52 (2001); Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 37 n.147 (2001). The author is indebted to Mr. Nathaniel S. Stewart, for pointing out that the "revenues" that the sisters had written President Jefferson to "protect," see Order of St. Ursula Letter, *supra*, included—as he well knew—"an annual allowance of six hundred dollars from the treasury," from which the Ursuline convent school "support[ed] and educate[d] twelve female orphans." Thomas Jefferson, Report to Congress on Compendium of Information Concerning Louisiana (1803), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 344, 353 (Walter Lowrie & Walter S. Franklin eds., Gales & Seaton 1834). This communication gives a fuller context to his assurance of federal-government "patronage" and "protection," and on what he may or may not have meant by his "wall of separation" metaphor. In addition to describing the foregoing allowance for the Ursulines, Mr. Jefferson notes without comment that the public treasury also paid for the "salar[ies] of . . . two [Catholic] canons . . . and twenty-five [Catholic] curates, [whose salaries], together with an allowance for [Catholic] sacristans and [Catholic] chapel expenses, . . . amount[ed] annually to thirteen thousand dollars" all paid from the public treasury. *Id.*

Mother Thérèse's history also reprints Secretary of State James Madison's letter of July 20, 1804 to the Most Rev. John Carroll, Bishop of Baltimore, in connection with the correspondence with the Ursulines of Louisiana (then newly purchased by the United States, and still a federal territory). In the letter he states that the President "views with pleasure the public benefit resulting from" their religious convent school and asks them to

[b]e assured that no opportunity will be neglected of manifesting the real interest which [President Jefferson] takes in *promoting the means of affording the youth of this new portion*

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*of the American dominion, a pious and useful education* and of evincing the grateful sentiments due to those of all religious persuasions who so laudably devote themselves to its diffusion.

WOLFE, *supra*, at 59 (emphasis added). This curious correspondence with the Ursuline Sisters is difficult to square with Justice William Joseph Brennan's bald assertion that "Jefferson seems to have opposed sectarian instruction at any level of public education . . ." *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 235 n.4 (1963) (Brennan, J., concurring).

It is also difficult to square with the statement by Justice Wiley Blount Rutledge, Jr. (in dissent, and joined by Justices Felix Frankfurter, Robert Houghwout Jackson, and Harold Hitz Burton), in *Everson v. Board of Education*, 330 U.S. 1 (1947), that he could not "believe that [Thomas Jefferson] . . . could have joined in [a] decision" by the U.S. Supreme Court that found it permissible under the U.S. Constitution's First Amendment, whose "purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion," to provide aid to "parochial schools" with "funds raised by general taxation." *Id.* at 29–32 (Rutledge, J., dissenting). Justice Rutledge cites all-but exclusively to Messrs. Jefferson and Madison; the latter (he claims) "opposed every form and degree of official relation between religion and civil authority," because he thought "religion was a wholly private matter beyond the scope of civil power . . . to support." *Id.* at 39–40. Justice Rutledge adds:

With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon [religious] freedom. . . .

....

. . . Certainly . . . , if the [First Amendment] test remains undiluted as Jefferson and Madison made it, . . . money taken by taxation from one [person] is not to be used or given to support another's religious training or belief, or indeed one's own. Today as then the furnishing of contributions of money for the propagation of opinions which he disbelieves is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

The funds used here were raised by taxation . . . . [And] their use does in fact give aid and encouragement to religious instruction.

....

. . . [This] therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck.

*Id.* at 40, 44–46 (internal quotation marks omitted) (footnote omitted).

Bishop Carroll, the intermediary of much of the executive-branch correspondence with the Ursuline Sisters of Louisiana, was the first Catholic bishop of a see in the United States, a younger brother of Daniel Carroll of Rock Creek (signer of the Articles of Confederation and the U.S. Constitution, and a Representative from Maryland in the First Congress), and a second cousin (twice removed) of Charles Carroll of Carrollton (signer of the Declaration of Independence (and last survivor of those signers, dying November 14, 1832, shortly after his ninety-fifth birthday) and first Senator from Maryland). For an excellent history of this remarkable family, see generally RONALD HOFFMAN, *PRINCES OF IRELAND, PLANTERS OF MARYLAND: A CARROLL SAGA, 1500–1782* (2000).

The committee embraced Mr. Jefferson's expressly religious rewording of the design for the reverse<sup>121</sup> and submitted it, with slight revisions, to the Continental Congress on August 20, 1776:

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121. For detailed historical discussions of the incorporation of the "wall of separation" from Mr. Jefferson's January 1, 1802, letter to the Danbury Baptist Association, *supra* note 120, into American constitutional jurisprudence, see generally DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002), and PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002) (also discussing the gross anti-Catholic bigotry that gave rise to, and has long been associated with, that incorporation). For more discussions of the prejudice built into that "wall of separation," see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 190, 365–69 (2000) (highlighting the important and acrid anti-Catholic bigotry of Justices Hugo Lafayette Black and William Orville Douglas), and ALBERT J. NEVINS, AMERICAN MARTYRS FROM 1542, at 111–14 (1987) (detailing Mr. Black's infamously racist, anti-Catholic, and successful October 17, 1921, defense of fellow Ku Klux Klansman Edwin R. Stephenson, on trial for the April 11, 1921, murder of Father James Edwin Coyle, shot while sitting in a rocking chair on the porch of his Mobile, Alabama, rectory, praying the Divine Office a shooting to which Stephenson had confessed during which trial the future Supreme Court Justice, among other things, denounced two of the State's Catholic eyewitnesses to the jury as "brothers in falsehood as also in faith").

That Mr. Jefferson should have "view[ed] with pleasure the public benefit resulting from" a religious convent school and promised it the "patronage of the [federal] government" is unsurprising, as he (as President—and later, President Madison, as well) often attended Sunday religious services in the "hall of the House of Representatives." Letter from James Madison, Secretary of State, to Sœur Thérèse de St. Xavier Farjon, Superior, and the Nuns of the Order of St. Ursula at New Orleans (July 20, 1804), in Brief on Behalf of Appellee, *supra* note 120, at 16–17; James H. Hutson, James Madison and the Social Utility of Religion: Risks vs. Rewards, Address at a Library of Congress Symposium (May 16, 2001), available at <http://www.loc.gov/loc/madison/hutson-paper.html>; see also BEIRNE, *supra* note 21, at 235 (describing the practice of permitting church services in the Virginia Capitol Building); HUTSON, *supra* note 107, at 128 (2003) ("Jefferson permitted Christian congregations to use executive office buildings, especially the Treasury and War Office, for church services, including four-hour communion services. Not to be outdone, Chief Justice John Marshall welcomed Christian services in the Supreme Court chambers. On Sundays in Washington the state literally became the Christian church." (footnote omitted)); RELIGION AND THE FEDERAL GOVERNMENT, *supra* note 119, at § 6, available at <http://www.loc.gov/exhibits/religion/rel06-2.html>; WHEELAN, *supra* note 21, at 232 (same).

Further, on October 31, 1803, President Jefferson urged the Senate to ratify a treaty with the Kaskaskia Indians concluded at Vincennes on August 13, 1803, under his authority, by future President William Henry Harrison, then-Governor of the Indiana Territory. See Letter from Thomas Jefferson to the Senate on the Kaskaskia and Other Tribes (Oct. 31, 1803), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 687, 687 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832). The treaty's third article provides, in pertinent part:

*And whereas, The greater part of the said tribe have been baptised and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for said tribe the duties of his office, and also to instruct as many of their children as possible, in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.*

Treaty, U.S.-Kaskaskia Tribe of Indians, art. 3, Aug. 13, 1803, 7 Stat. 78, 79 (emphasis added). Once the Senate ratified the treaty (by vote of 29-0) sixteen days later, 1 JOURNAL OF EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES 451–52, 455–56 (Washington, Duff Green 1828), on November 25, 1803, Jefferson proceeded to ask the Congress to appropriate funds to

Pharaoh sitting in an open Chariot, a Crown on his head & a sword in his hand passing through the divided Waters of the Red Sea in Pursuit of the Israelites: Rays from a Pillar of Fire in the Cloud, expressions of the divine Presence & Command, beaming on Moses who stands on the Shore and extending his hand over the Sea causes it to overwhelm Pharaoh.

implement it. See, e.g., 3 JOURNAL OF THE SENATE OF THE UNITED STATES 315 (Washington, Gales & Seaton 1821); see also Act of Mar. 3, 1805, ch. 36, 2 Stat. 338 (making appropriations for carrying into effect certain Indian treaties); 13 ANNALS OF CONG. 640 (1852) (the Committee of the Whole House of Representatives, agreeing that “provision ought to be made for carrying into effect the treaty concluded at Vincennes, in the Indiana Territory, on the thirteenth of August . . .”); Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in 1 COMPILATION, *supra* note 15, at 378, 380 (declaring that one of the principal purposes of Jefferson’s Indian policy was “to prepare them in time for that state of society which to bodily comforts adds the improvement of the mind and morals”). And of course, this all stands sharply at odds with the image of Jefferson that is so religiously propagated. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 878–79 & n.25 (2005); *Schempp*, 374 U.S. at 235 nn.3–4 (Brennan, J., concurring); *Everson*, 330 U.S. at 8–18; *id.* at 33–43, 53–54 (Rutledge, J., dissenting).

What might charitably be called the “train of analysis” in much of the modern jurisprudence relating to this and other areas of the law may be understood best, perhaps, by reference to a motion-picture dialogue on political science between “King Arthur” (played by the late English comic actor Graham Chapman) and “Dennis” (played by the great English comic actor Michael Palin), in response to a question on how the former became King:

The King: The Lady of the Lake, her arm clad in the purest shimmering samite, held aloft *Excalibur* from the bosom of the water signifying by Divine Providence that I, Arthur, was to carry *Excalibur*. That is why I am your king!

Dennis: Listen. Strange women lying in ponds distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses, not from some farcical aquatic ceremony.

The King: Be quiet!

Dennis: Well, but you can’t expect to wield supreme executive power just ‘cause some watery tart threw a sword at you!

The King: Shut up!

Dennis: I mean, if I went ‘round saying I was an emperor just because some moistened bint had lobbed a scimitar at me, they’d put me away!

The King: Shut up! Will you shut up?

Dennis: Ah, now we see the violence inherent in the system.

The King: Shut up!

Dennis: Oh! Come and see the violence inherent in the system! Help! Help! I’m being repressed!

The King: Bloody peasant!

Dennis: Oh, what a give-away. Did you hear that? Did you hear that, eh? That’s what I’m on about. Did you see him repressing me? You saw it, didn’t you?

MONTY PYTHON AND THE HOLY GRAIL (Michael White Productions 1975).

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THE SIGN AND SEAL OF JUSTICE

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Motto[:] Rebellion to Tyrants is Obedience to God.<sup>122</sup>

For the actual arms of the United States, which were to be the device for the *obverse* of the seal, the committee proposed a very complicated shield, containing the initial letters of each of the original thirteen states and separate symbols for England, Scotland, Ireland, France, Germany, and the Netherlands, to “point[] out the Countries from which these States have been peopled.”<sup>123</sup> For supporters, crest, and motto, the committee proposed the following:

Supporters[:] dexter the Goddess Liberty in a corselet of armour alluding to the present Times, holding in her right Hand the Spear and Cap and with her left supporting the Shield of the States [described immediately above]; sinister, the Goddess Justice<sup>[124]</sup> bearing a Sword in her right hand, and in her left a Balance.

Crest[:] The Eye of Providence in a radiant Triangle whose Glory extends over the Shield and beyond the Figures.

Motto[:] E PLURIBUS UNUM.

122. See PAPERS NO. 23, *supra* note 57, at fols. 143–143b; see also 5 JOURNALS, *supra* note 97, at 690–91 (transcription of *Papers No. 23*). The transcription of this quotation in the *Journals*, however, gives “Pillow of Fire” (whatever *that* may be), which surely must be incorrect, see *Exodus* 13:21–14:30 (repeated use of “עַמֻּוּד” (*ammuwd*, meaning *pillar*)); there is no use (that the author could see) of “כְּבִיר” (*kebiyr*, meaning *pillow* or *cushion*), see 1 *Samuel* 19:13–16, or of “כָּר” or “כְּרִית” (*kar* or *karit*, meaning *pillow*). (The author notes that he has typed the foregoing Hebrew letters correctly (from right to left) into the immediately preceding approximately 4700 times (the count, admittedly, may be somewhat imprecise, being based largely on the author’s memory, as specifically informed by his frustration level), but the Microsoft Word® program he has been asked (much against his will) to use herefor, whose writers (or engineers, or programmers, or whatever they are) appear to have been under the extravagant impression that typists do not intend what they type and that programs are more useful and amusing when they contain undocumented features, repeatedly and without notice (and upon no apparent signal or command) “auto-corrects” the order of those letters (something that WordPerfect® never does) so that they “suffer a sea-change / Into something [wretched] strange,” WILLIAM SHAKESPEARE, *THE TEMPEST*, act 1, sc. 2, appearing—bizarrely, to the author’s mind—from left to right; at this point, the author, whose myriad efforts to discover some means of halting this particular species of “auto-correction” seem to have proven unavailing, disclaims any responsibility if the Hebrew letters ultimately appear from right to left here. (*¡Sálvese quien pueda!*)) Although the author is no expert in reading eighteenth-century handwriting, his review of the manuscript congressional text satisfies him that the scribe in fact wrote “Pillar.” See also HUNT, *supra* note 57, at 11–12.

123. HUNT, *supra* note 57, at 11–12.

124. See *infra* note 192 and accompanying text.

Legend[:] Round the whole atchievement [sic]: “[Seal of the United States of America MDCCLXXVI.]”<sup>125</sup>

The first committee’s design, obviously, was very unlike the current seal and arms of the United States, save for two elements of the current seal’s *obverse*: (1) the concept of a shield itself, within the seal; and (2) the motto, “*E Pluribus Unum*” (the selection of which has variously been attributed to Messrs. Jefferson, Franklin, or du Simitière (the last of whom appears to be the most likely candidate));<sup>126</sup> and two elements of its *reverse*: (1) the “Eye of Providence in a radiant Triangle”; and (2) the year (in Roman numerals) “*MDCCLXXVI.*”<sup>127</sup>

Dissatisfied with the first proposal (which lay on the table for nearly four years),<sup>128</sup> on March 25, 1780, the Continental Congress appointed a *second* committee,<sup>129</sup> whose members were Messrs. William Churchill Houston of New Jersey, James Lovell of Massachusetts, and John Morin Scott of New York, with Mr. Hopkinson of New Jersey as consultant. This committee considered two designs by Mr. Hopkinson and, on May 10, 1780, proposed the second of them; both designs, also, were quite different from the current seal and arms of the United States, except for the following elements in the current *obverse*: (1) the colors (i.e., red, white, and blue) on the shield (but *not* the actual *pattern*; the committee proposed *diagonal* “stripes”); (2) the olive branch (*without* specifying the number of leaves or the presence of any olives), which the committee had placed in the hand of a proposed supporting figure, Peace;<sup>130</sup> (3) the

125. PAPERS NO. 23, *supra* note 57, at fols. 143–143b (footnote added); 5 JOURNALS, *supra* note 97, at 689–91 (transcription of *Papers No. 23*); HUNT, *supra* note 57, at 11–12.

126. See *supra* note 72 (providing details of the history of the motto).

127. See PAPERS NO. 23, *supra* note 57, at fols. 143–143b; 5 JOURNALS, *supra* note 97, at 689–91 (transcription of *Papers No. 23*); 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128; HUNT, *supra* note 57, at 7–17; PATTERSON & DOUGALL, *supra* note 13, at 6–31, 92; U.S. DEP’T OF STATE, *supra* note 13, at 1–2.

128. See, e.g., 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 58–59 (Worthington Chauncey Ford ed., 1907) (1777).

129. See PAPERS NO. 23, *supra* note 57, at fol. 128 (repeatedly giving the year as “1779,” but this surely is an error given the correct characterization on folio 129); 16 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 287 (Gaillard Hunt ed., 1910) (1780) [hereinafter 16 JOURNALS] (transcription of *Papers No. 23*); HUNT, *supra* note 57, at 18–19.

130. The addition of olives (often called “berries,” for some reason) seems to have been an innovation in the die of 1841, whose engraver appears to have worked from an image, rather than the blazon, of the arms of the United States. See *supra* note 73. The fixing of the number of leaves at thirteen (which is not improper, because the blazon implicitly calls for leaves, but does not specify their number) appears to have been a felicitous innovation that began with the die of 1885 (in use from approximately April 21, 1885, until January 27, 1904) made by Tiffany & Co. of New York, and has continued ever since. See PATTERSON & DOUGALL, *supra* note 13, at 269, 274–75, 303. The

crest of “a radiant constellation of 13 Stars”;<sup>131</sup> and (4) the bundle of arrows (possibly derived from the supporting American Indian of Mr. Hopkinson’s first design for the obverse, armed with bow and arrows).<sup>132</sup>

Still dissatisfied after consideration of the second committee’s report, on May 17, 1780, the Continental Congress appointed a *third* committee, consisting of two South Carolinians (Messrs. Arthur Middleton and John Rutledge (later Chief Justice of the United States, who seems to have taken little part and was informally replaced by Mr. Arthur Lee of Virginia)), and Elias Boudinot of New Jersey (later, the third President of the Confederation Congress), with Mr. Barton of Pennsylvania serving as consultant.<sup>133</sup> At the request of the committee, this consultant prepared two designs, the second of which was reported out by the committee on May 9, 1782. His second design also was quite different from the current seal and arms of the United States, except for: (1) the “eagle displayed” on the *obverse* (without specifying or even suggesting that it should be an American (i.e., bald) eagle); and (2) the unfinished pyramid under the Eye of God on the *reverse*.<sup>134</sup>

Finally, on June 13, 1782, the Confederation Congress referred the whole matter to its Secretary.<sup>135</sup> Consciously drawing at least in part from the three previous reports,<sup>136</sup> Secretary Thomson prepared a basic

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addition of “berries,” however, *arguably* is improper, as not strictly being warranted by the blazon—particularly if depicted as being red (*not* a color (as far as the author knows) of any olive on the branch in nature), as often happens. *See, e.g.*, N.D. CENT. CODE § 54-02-02 (2008) (prescribing, among the elements in North Dakota Flag (which presumably attempts to contain a depiction of the armorial achievement of the United States), that there “must be . . . an eagle . . . [whose] right foot [(talons?, claw?)] shall grasp an olive branch showing three red berries.”). Yet, this begs many questions: Why three? Why red? Why call the fruit of an olive tree “berries”? Do apple trees have “berries”? Do grapefruit trees?

131. 17 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 434 (Gaillard Hunt ed., 1910) (1780) [hereinafter 17 JOURNALS].

132. *See* PAPERS NO. 23, *supra* note 57, at fols. 128–29, 133, 135, 144; 17 JOURNALS, *supra* note 131, at 434 (transcription of *Papers No. 23*); 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128; HUNT, *supra* note 57, at 18–22; PATTERSON & DOUGALL, *supra* note 13, at 32–43, 92; U.S. DEP’T OF STATE, *supra* note 13, at 3. *But see infra* note 136.

133. HUNT, *supra* note 57, at 23–24.

134. *See* PAPERS NO. 23, *supra* note 57, at fols. 117, 137–41, 181–84; 22 JOURNALS, *supra* note 57, at 340 n.1 (transcription of *Papers No. 23*); 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128; HUNT, *supra* note 57, at 23–32; PATTERSON & DOUGALL, *supra* note 13, at 44–70, 92; U.S. DEP’T OF STATE, *supra* note 13, at 4; *see also infra* note 136.

135. *See* 22 JOURNALS, *supra* note 57, at 338–40; HUNT, *supra* note 57, at 31–33.

136. Messrs. Patterson and Dougall deem it “probable” that Secretary Thomson’s design of the eagle in a dominant position, a shield on its breast, and symbols of peace and war in its talons, actually came *not* from any of the three committees’ designs, but from *independent* sources. *See* PATTERSON & DOUGALL, *supra* note 13 at 93–102. First, among these likely sources is Philipp Jakob Spener, *Historia Insignium Illustrium* (i.e., *The History of Famous Insignia*), a monumental

design,<sup>137</sup> which Mr. Barton reviewed and modified for him.<sup>138</sup> This modified design, after further (slight) modification by Mr. Thomson, was the one finally adopted by the Confederation Congress (together, all-but certainly, with his explanation for it).<sup>139</sup> By statute, “[t]he seal . . . used by the United States in Congress assembled [(i.e., by the Confederation Congress)] is declared to be the seal of the United States.”<sup>140</sup>

work on Continental heraldry (where the eagle-and-shield device is relatively common, unlike in English heraldry) published in 1680, a copy of which was owned by the Library Company of Philadelphia, of which Secretary Thomson was a member. Secondly, another likely source for the design includes the numismatic collection of Mr. du Simitière’s (who was an acquaintance of Secretary Thomson’s), which is known to have contained coins minted by Russia, Spain, and the Holy Roman Empire, many of which contained the eagle-and-shield device. Finally, another likely source may have been Dr. Franklin’s copy of the 1702 Mainz edition of *Joachim Camerarius, Symbolorum & Emblematum ex Volatibus et Insectis Desumptorum Centuria Tertia* (i.e., *The Third Century [meaning The Third Book of One-Hundred Items] of Symbols and Emblems, Taken from Birds and Insects*), a large work originally published in 1597 on emblems, symbols, and mottoes based upon birds and insects, whose very first illustrated emblem is an eagle, displayed, with an olive branch and a thunderbolt symbolizing peace and war. This last design piqued the notice of Messrs. Patterson and Dougall, who state that except for the fact “that Thomson specified an American bald eagle and substituted arrows for the thunderbolt, here in this emblem is one of the most prominent features of the Great Seal device proposed by Thomson, with much of its symbolism as well.” PATTERSON & DOUGALL, *supra* note 13, at 99–102 (footnote omitted).

Secretary Thomson may have substituted a tied splay (or sheaf) of arrows for the thunderbolt as a symbol of war, because (unlike a thunderbolt) it symbolizes war *and* unity. For this reason, a tied splay of five arrows was adopted as an heraldic symbol and made a notable feature on coins, among other places, by the great and pious Trastámara Queen Isabella I *la Católica* (i.e., the Catholic) of Castile and Trastámara King Ferdinand II *el Católico* (i.e., the Catholic) of Aragon (who also was King Ferdinand III of Sicily), who ultimately united their separate Iberian Kingdoms into the one Kingdom of Spain through their October 9, 1469, marriage. The tied splay of arrows—one for each of the principal Kingdoms that make up Spain (Castile, Leon, Aragon, Navarre, and Granada)—remains a feature in the armorial achievement of the Kingdom of Spain to this day. Although there were other (less prominent) examples of the heraldic use of a tied splay of arrows with this dual symbolism, Secretary Thomson, who was a scholar and who seems to have been keen on making his design peculiarly *American* (hence, for example, his use of the American bald eagle, rather than the classical heraldic eagle in frequent use on the Continent), may well have been inspired by the Spanish example, if only because of its connection to the Americas through Queen Isabella’s personal patronage of Adm. Christopher Columbus. Cf. PATTERSON & DOUGALL, *supra* note 13, at 99 n.58 (noting that the use of a tied splay of arrows was often used as a symbol of unity). The Queen’s patronage is breezily recalled in Cole Albert Porter’s glorious song, “Just One of Those Things,” from his musical comedy, *JUBILEE* (1935): “*As Columbus announced / When he knew he was bounced, / ‘It was swell, Isabel, swell. . . .’*”

137. See PAPERS NO. 23, *supra* note 57, at fols. 179–80; 22 JOURNALS, *supra* note 57, at 340 n.1 (transcription of *Papers No. 23*); HUNT, *supra* note 57, at 33–35.

138. See PAPERS NO. 23, *supra* note 57, at fols. 131–132b; 22 JOURNALS, *supra* note 57, at 340 n.1 (transcription of *Papers No. 23*); HUNT, *supra* note 54, at 35–40.

139. See PAPERS NO. 23, *supra* note 57, at fols. 113–16; 22 JOURNALS, *supra* note 57, at 340 n.1 (transcription of *Papers No. 23*); 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128; HUNT, *supra* note 57, at 33–35; PATTERSON & DOUGALL, *supra* note 13, at 71–82, 93–102; U.S. DEP’T OF STATE, *supra* note 13, at 4–5.

140. 4 U.S.C. § 41 (2006).

Notwithstanding their simplicity of design, the national arms have been misdepicted from the start. A frequent error shows them with seven red and six white “stripes”<sup>141</sup>—for example (embarrassingly) on the face of all \$100-, \$50-, \$20-, \$10-, and \$5-bills in the 1996, 1999, 2004, and 2006 series. To the left (from the viewer’s perspective) of the portrait on the front side, the “new” bills are said to display a modified version of the Federal Reserve System seal, whose principal elements, unchanged to the present day, were adopted pursuant to article five of the August 26, 1914, bylaws of its Board of Governors: *The arms of the United States* (with seven white, and six red, “stripes”),<sup>142</sup> *differenced by: (1) twelve mullets in the chief* (probably for the twelve regional Federal Reserve Banks); (2) *supporters* (sinister, an oak branch, and dexter, an olive branch); and (3) *an American eagle, splayed, atop the whole*. But the purported Federal Reserve System seal on the new bills has seven red, and six white, “stripes”—a difference in *ordinaries* (i.e., a difference as to an *essential* characteristic), as discussed below. Therefore, if only because of the “stripes,”<sup>143</sup> the arms thus shown on the seal on the new currency emphatically are *not* those of the United States, and neither, therefore, is that seal that of Federal Reserve System. The Bush Administration continued to use this incorrect device, issued with such

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141. See, e.g., FRED J. MAROON & SUZY MAROON, *THE UNITED STATES CAPITOL* 101, 126, 137, 139, 164 (1993) (showing many erroneous depictions throughout the Capitol Building in Washington, D.C.). One such erroneous depiction can be famously found in no less a place than the canopy of the dome of the Capitol Rotunda itself, where in painter Constantino Brumidi’s *The Apotheosis of George Washington*, immediately under President Washington’s feet, the figure of Armed Liberty Trampling Tyranny and Kingly Power is unmistakably shown holding a shield with the incorrect arms. *Id.* at 101. Another notable error may be found directly over the door to the Attorney General’s office in the Department of Justice Main Building in Washington, D.C., where in Louis Bouché’s mural, *Activities of the Department of Justice*, the arms are incorrectly depicted. FIFTIETH ANNIVERSARY, *supra* note 8, at 98–99. Only a few feet away from this mural, just over the door to the Attorney General’s official suite (Room 5111), Henry Varnum Poor (painting at about the same time, 1934–1941) portrayed the arms *correctly*. See *id.* at 67, 97. Although the author has been unable to discover (or obtain, despite many requests) a sufficient or proper legal description or blazon for them, the state seal of Illinois (adopted in 1868 and incorporated into her 1970 state flag), see BENJAMIN F. SHEARER & BARBARA S. SHEARER, *STATE NAMES, SEALS, FLAGS, AND SYMBOLS: A HISTORICAL GUIDE* 46, 78–79, 214 (rev. and expanded ed. 1994), and the Great Seal of Wyoming (also incorporated into her state flag), WYO. STAT. ANN. §§ 8-3-101 to -102 (2007); SHEARER & SHEARER, *supra*, at 67, 97, 214, both appear to incorporate the arms of the United States, but depict them (apparently unconsciously) with seven red and six white “stripes.” See also N.D. CENT. CODE § 54-02-02 (2008) (expressly prescribing for the North Dakota flag, which is supposed to contain a depiction of the arms of the United States: “On the breast of the eagle must be displayed a shield, the lower part showing seven red and six white stripes placed alternately.”).

142. PATTERSON & DOUGALL, *supra* note 13, at 537–38.

143. The device on the new currency is so small that the author literally cannot see if the Federal Reserve’s differencing mullets in the chief are depicted there or not; suffice it here to say that they do not *appear* to be there.

fanfare by the Administration of President Clinton, as part of an ongoing effort to make counterfeiting more difficult. Consequently, the face of the “new” \$5 bill (issued on March 13, 2008), which *correctly* shows the national arms to the *right* of President Lincoln’s portrait, anomalously shows them *incorrectly* to the *left* of it; if a “new” \$1 bill ever were to be issued, it would have the national arms *correctly* depicted on the *back*, and *incorrectly* depicted on the *front*.<sup>144</sup>

144. The \$20 bill in the 2004 series has its own special error (causing it to depict the national arms twice incorrectly, and in each place differently), by adding a small depiction (apparently) of the national arms to the lower right of the portrait on the face, with *five* red and *four* white “stripes” (doubtless for the famous “Nine Colonies”), thus mistaking both the number *and* the order of the “stripes”; mercifully, the depiction contains neither mullets nor estoils.

Errors on money can be serious business, as Richard Lalor-Sheil (1791–1851) could attest, were he alive. This gentleman was an orator, dramatist, and longtime Member of the British Parliament, as well as a fiery Irish patriot and co-founder of the Catholic Association (spearhead of Catholic Emancipation and, ultimately, of Irish independence) with his cousin, the great Sir Thomas Wyse, and the even-greater paladin, Daniel O’Connell. In 1846, Mr. Lalor-Sheil was made Master of the (British) Mint under Prime Minister Lord John Russell (later the first Earl Russell; believed by Andrew Roberts, *An Unknown Prime Minister*, SALISBURY REV., Summer 2004, at 12, 13, to be the model for Anthony Trollope’s Prime Minister Mildmay, who appears in his *Phineas Finn*, *Phineas Redux*, and *The Prime Minister*). As Master of the Mint, Mr. Lalor-Sheil resolved to issue a new coin, the *florin*, to be worth two shillings, or one-tenth of a British pound. British currency was not placed fully on the decimal system until February 15, 1971 (a sad day), despite Mr. Trollope’s many efforts, in the person of Plantagenet Palliser. See 2 ANTHONY TROLLOPE, CAN YOU FORGIVE HER? 417 (Oxford Univ. Press 1977) (1865); ANTHONY TROLLOPE, THE DUKE’S CHILDREN 622–23 (Oxford Univ. Press 1977) (1880); 2 ANTHONY TROLLOPE, THE EUSTACE DIAMONDS 68, 140–43 (Oxford Univ. Press 1977) (1872); 1 ANTHONY TROLLOPE, PHINEAS FINN 39 (Oxford Univ. Press 1977) (1869); 1 ANTHONY TROLLOPE, PHINEAS REDUX 359 (Oxford Univ. Press 1977) (1873); 2 ANTHONY TROLLOPE, PHINEAS REDUX 360 (Oxford Univ. Press 1977) (1873); 1 ANTHONY TROLLOPE, THE PRIME MINISTER 161 (Oxford Univ. Press 1977) (1876); 2 ANTHONY TROLLOPE, THE PRIME MINISTER 386; ANTHONY TROLLOPE, THE SMALL HOUSE AT ALLINGTON 473 (James R. Kincaid ed., Oxford Univ. Press 1980) (1864). Messrs. Richard Mullen and James Munson say the fictional Palliser (the “young Duke” of Omnium) is modeled at least in part on the fifth Duke of Newcastle (Henry Pelham Pelham-Clinton (1811–1864), also twelfth Earl of Lincoln). RICHARD MULLEN & JAMES MUNSON, THE PENGUIN COMPANION TO TROLLOPE 375 (1996).

In any event, the Mint’s first Lalor-Sheil florin issue (1848 and 1849), designed by its Chief Engraver, William Wyon (an exceptionally skilled member of a remarkable family that numbered, over four generations, no fewer than nine excellent engravers and sculptors), failed to include the letters “F.D. D.G.” after the legend, “VICTORIA REGINA” (i.e., “QUEEN VICTORIA”), on the obverse, probably for want of room around the edge. But because Mr. Lalor-Sheil was a fervent and faithful Catholic, and because those missing letters, of course, were abbreviations of “*Fidei Defensatrix*” and “*Dei Gratia*” (i.e., “Defender of the Faith” and “By the Grace of God”), anti-Catholic Protestant firebrands professed to see a “popish plot” in his issuance of the Protestant Wyon’s “Godless [or “Graceless”] Florin,” and Mr. Lalor-Sheil was forced, in the hysteria generated by baseless political and media bigotry, to resign in disgrace in 1850. “*Plus ça change—plus c’est la même chose.*” Alphonse Karr, *Les Guêpes* [*The Wasps*], Jan. 1849, reprinted in 6 ALPHONSE KARR, LES GUÊPES 305 (Calmann Lévy ed., Nouvelle ed. 1883) (“The more things change, the more they are the same.”). For some obscure reason, this monthly periodical of M. Karr’s—obviously allusive of Σφήκες by Αριστοφάνης (*Wasps*, by Aristophanes (circa 448–380 B.C.)), written circa 422 B.C.—

The errors in the 1872 Department seal are readily seen from the blazon of the armorial achievement of the United States. First, as described above, there are thirteen “stripes”<sup>145</sup> in the national arms, but

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often is misdescribed as a novel. It remains to be seen what reaction there may be to the U.S. Mint’s recent (2007) presidential \$1.00 coins, where the legends, “IN GOD WE TRUST” and “E PLURIBUS UNUM,” see *supra* note 72, are incused on the edge, rather than found (more obviously) on the obverse and reverse, respectively, as on the Sacagawea \$1.00 coins (2000).

145. EASBY-SMITH, *supra* note 2, at 14; Memorandum by James W. Baldwin, *supra* note 15, at 6. The thirteen “stripes” on the national arms are also found on the original (i.e., “Continental”) flag of the United States, whose basic design (save for the number of stars in the union, or canton) is continued today. See 4 U.S.C. §§ 1, 2 (2006); 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 464 (Worthington Chauncey Ford ed., 1907) (1777) [hereinafter 8 JOURNALS]. Interestingly, the thirteen “stripes” in the flag alternate *red, white, red*, etc. (i.e., seven red “stripes,” six white “stripes” (which is appropriate for a *flag*, white edges being more easily soiled (and less visible) than colored ones)), see 4 U.S.C. § 1, but those in the arms alternate *white, red, white*, etc. (i.e., seven white “stripes,” six red “stripes”). See 22 JOURNALS, *supra* note 57, at 338–39. The second congressional seal committee ultimately proposed thirteen *diagonal* “stripes” (alternating *white, red, white*, etc. (i.e., *seven white, six red*)), on a blue field, for the arms. See 17 JOURNALS, *supra* note 131, at 434; 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128; HUNT, *supra* note 57, at 18–23; PATTERSON & DOUGALL, *supra* note 13, at 35–341; U.S. DEP’T OF STATE, *supra* note 13, at 3. The *third* congressional committee (perhaps in conscious imitation of the flag, HUNT, *supra* note 57, at 18, 22; PATTERSON & DOUGALL, *supra* note 13, at 81; U.S. DEP’T OF STATE, *supra* note 13, at 3–4, and/or the already approved design of the arms of the Admiralty of the United States (“thirteen bars [i.e., horizontal “stripes”] mutually supporting each other, alternate red and white [i.e., *seven red, six white*], in a blue field,” 16 JOURNALS, *supra* note 129, at 412)) prescribed *horizontal* “stripes,” alternating *white, red, white*, etc. (i.e., seven white “stripes,” six red “stripes”), set within a blue bordure. HUNT, *supra* note 57, at 23–32; PATTERSON & DOUGALL, *supra* note 13, at 56–70; U.S. DEP’T OF STATE, *supra* note 13, at 4. Secretary Thomson’s original design prescribed alternating *chevrons*, which Mr. Barton changed to thirteen pallets (i.e., thin *vertical* “stripes,” alternating white and red (i.e., *seven white, six red*)). 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128–29; HUNT, *supra* note 57, at 33–38; PATTERSON & DOUGALL, *supra* note 13, at 71, 74–82; U.S. DEP’T OF STATE, *supra* note 13, at 4–6; see also HUNT, *supra* note 57, at 38–40 (discussing whether changes to the seal are attributable to Sir John Prestwick); PATTERSON & DOUGALL, *supra* note 13, at 102–10, 523–35 (discussing the historical disputes of whether Mr. Barton’s change to thirteen pales with a blue chief should or may be attributed to Sir John Prestwick, or to the family arms of George Washington, as well as various other historical disputes over the inspiration for various elements in the seal); SHANKLE, *supra* note 72, at 225 (attributing the changes to “Prestwick”). Messrs. Patterson and Dougall explain the matter thus:

[I]n heraldry a color such as red (*gules*) is placed upon a metal such as silver (*argent*), but never vice versa. The field or background of the seal is therefore *argent* (silver or white) with six red stripes on it, but with the tincture of the field showing at the sides. Theoretically[,] the field is solid white or silver, but the six red stripes on it make it look instead like seven white or silver stripes.

PATTERSON & DOUGALL, *supra* note 13, at 81. Although he claims no heraldic expertise (and is loath to challenge such excellent scholars), the author questions the accuracy of the first part of this explanation, if only because of the many historic and glaring counterexamples in which a metal ordinary *is* placed on the color, rather than vice versa. Four examples should suffice to illustrate this. First, the “modern” arms of Austria, which are *Gules a Fess Argent* (i.e., on a red field, a single silver stripe across the center). FRIAR, *supra* note 73, at 40. These arms date back to the 1199–1230 reign of the Babenberg Duke Leopold VI *der Glorreiche* (i.e., *the Glorious*). Second, the arms of

the seal adopted for the newly created Department of Justice in 1872 and purporting to incorporate those arms depicted only *eleven*.<sup>146</sup> Second, the chief in the national arms has *no* stars on it; in contrast, the 1872 seal—along with many erroneous nineteenth-century depictions of those arms<sup>147</sup> (and drawing, in all likelihood, from the popularly

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Savoy (later the arms of the modern Kingdom of Italy), which are the arms also of the magnificent, glorious, and indomitable Sovereign Military Hospitaller Order of St. John of Jerusalem, of Rhodes, and of Malta (commonly known as the Order of Malta). These arms are *Gules a Cross Argent* (i.e., on a red field, a plain, silver Greek cross that extends to the edges of the field), which date back to the 1189–1233 reign of Duke Thomas I with respect to Savoy, and perhaps even earlier with respect to the Order of Malta. *Id.* at 204, 296–297 (discussing the Royal Arms of Italy and the arms of the Order of Malta, respectively); *see also* JIRÍ LOUDA & MICHAEL MACLAGAN, *HERALDRY OF THE ROYAL FAMILIES OF EUROPE* 238 (1981) (describing the arms of Savoy as “a silver cross on red”). Third, the arms of Greece (without escutcheon of pretence) are *Azure a Cross couped Argent* (i.e., on a blue field, a plain, silver Greek cross that does not quite extend to the edges of the field). FRIAR, *supra* note 73, at 173. These arms date back to the 1832–1862 reign of the Wittelsbach King Otto I. Finally, the arms of Serbia are *Gules a Cross Argent between four Furisons addorsed Argent* (i.e., on a red field, a plain, silver Greek cross that extends to the edges of the field, with a silver “flint” or “steel” in each quadrant, each facing away from the vertical bar of the cross). *Id.* at 382 (providing the blazon, but describing the furisons as *addorsed Or* rather than *addorsed Argent* (i.e., gold in color, rather than silver or white)). *But see* GOV'T OF SERB., NATIONAL SYMBOLS AND ANTHEM OF THE REPUBLIC OF SERBIA (2004), <http://www.srbija.gov.rs/pages/article.php?id=5412> (clearly depicting the national arms with *white* steels); *see also* BURKE'S PEERAGE & GENTRY INT'L REGISTER OF ARMS, H.R.H. PRINCE MIHAILO KARAGEORGEVICH (2007), <http://www.armorial-register.com/arms-serb/karageorgevich-m-hrh.html> (providing for *argent steels* on the escutcheon of the arms of Prince Michael of Yugoslavia, which incorporates the arms of Serbia). These arms date back approximately to the reign of Prince Stephen Nemanja (circa 1151–1196), and are based on the nearly identical arms (replacing *or* (i.e., gold) with *argent* (i.e., silver)) attributed by high-medieval Western heralds to the later Eastern Roman (or Byzantine) Empire (where true heraldry, of course, was unknown). *See* LOUDA & MACLAGAN, *supra*, at 296; *see also id.* tbl.90, at 176 (depicting the arms of both King Stephen Dragutin of Serbia (d. 1316) and Emperor Andronicus II Paleologus of Byzantium (d. 1332)).

146. The Great Seal of Mississippi (1817), incorporated into the state coat of arms in 1894, appears (the author has been unable to find or obtain a proper legal description) to purport to incorporate the U.S. arms, but depicts them with six white and five red “stripes,” apparently unintentionally. *See, e.g.*, SHEARER & SHEARER, *supra* note 141, at 67, 214b.

147. *See* PATTERSON & DOUGALL, *supra* note 13, at 252–54 & n.63; MAROON & MAROON, *supra* note 141, at 29, 84, 115, 116, 132, 134 (showing many exemplifications, in the U.S. Capitol Building, of the national arms, with stars on the chief). Although Mrs. Maroon does not mention it, the “shield of the United States” borne by the figure in Thomas Crawford's statue (variously known as “Freedom,” “Armed Liberty,” or “Freedom Triumphant in War and Peace,” *see* MAROON & MAROON, *supra* note 141, at 40) atop the Capitol dome has thirteen mullets on the chief, as the author saw (with considerable surprise) when he viewed it when it was lowered for restoration from May 9 through October 23, 1993. A current example of this earlier practice may be seen in the badge of the White House Historical Association, a nonprofit organization formed under the laws of the District of Columbia and enjoying what somewhat-loosely might be termed semi-official, or quasi-governmental status. *See, e.g.*, 44 U.S.C. § 1320A (2000); 1992 White House Commemorative Coin Act, Pub. L. No. 102-281, § 104, 106 Stat. 133, 133 (1992); Exec. Order No. 11,145, § 3(b), 3 C.F.R. 184, 186 (1964–1965), *reprinted as amended in* 3 U.S.C. § 110 (2006). The Association currently uses as a badge the national arms, differenced with thirteen mullets in the chief, in the

accessible example of Old Glory,<sup>148</sup> which, of course, *does* have stars on the canton (or “union”)<sup>149</sup>—showed the chief spangled *with* (five-pointed) stars.<sup>149</sup> Finally, the American eagle, far from *supporting* the shield as it

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shape of a six-pointed star. From the distinctive pattern, the author supposes the differencing to be conscious. Cf. *supra* text accompanying note 143 (discussing the deliberate differencing, in the seal of the Federal Reserve Board of Governors, of the national arms, by adding twelve mullets (in two horizontal rows of six), apparently for the twelve regional Federal Reserve Banks).

The national arms apparently incorporated within the Great Seal of Mississippi (and thus also incorporated within her coat of arms) and the state seal of Illinois (and thus within her flag), are depicted in each (apparently unintentionally) with thirteen mullets in the chief. See SHEARER & SHEARER, *supra* note 141, at 46, 53, 78, 214a–b, 214f; cf. *id.* at 214d (depicting the Great Seal of Wyoming, which apparently incorporates the arms of the United States, but deliberately differenced by the addition of a single mullet); see also WYO. STAT. ANN. § 8-3-101 (2007) (requiring the shield on the state’s Great Seal “to have engraved thereon a star”).

148. Compare 8 JOURNALS, *supra* note 145, at 464 (prescribing that the canton of the “Continental” flag, which basically is continued (with the exception of the number of stars) in the current flag of the United States, “be thirteen stars, white in a blue field, representing a new constellation”), with 22 JOURNALS, *supra* note 57, at 338–39 (prescribing that the crest in the armorial achievement of the United States be “thirteen stars, forming a constellation, argent [i.e., white or silver], on an azure [i.e., blue] field”). Because the legal description of the flag (and thus the “stars” in the flag) obviously is not a *blazon* (i.e., a formal description of *arms*, using heraldic terms of art), the term “star” therein is ambiguous as to the number of points. Thus, the use of six- or five-pointed stars on the flag seems (notionally) to be equally proper, and, in fact, “stars with six points were common in the early history of the American flag and . . . six-pointed stars were used on some United States coins as late as 1933.” PATTERSON & DOUGALL, *supra* note 13, at 127. In marked contrast, the legal description of the seal *is* a formal blazon; thus, the word “star” therein presumably means the heraldic term of art: “star” (i.e., a six-pointed star or “estoil”). See *supra* note 73.

149. EASBY-SMITH, *supra* note 2, at 14; Memorandum by James W. Baldwin, *supra* note 15, at 6. The placement of these mullets in the chief also has been criticized as contravening *heraldic* practice, because heraldic law forbids a chief to be debriused or surmounted by any ordinary. FRIAR, *supra* note 73, at 86–87; Memorandum by James W. Baldwin, *supra* note 15, at 6. This criticism is misplaced, however, because a star (of however many points) is *not* an *ordinary*, but an heraldic *charge*. FRIAR, *supra* note 73, at 85–86, 258–60. As such, a star *may* be placed on a chief. See, e.g., *id.* at 37–39 (note especially the blazon of the first augmented arms of Lord Nelson of Trafalgar and of Merton); RODNEY DENNY [SOMERSET HERALD OF ARMS], HERALDRY AND THE HERALDS 52–55 (1982) (note especially the depiction of the first augmented arms of Lord Nelson of Trafalgar and of Merton, and the blazon and depiction of the arms of Lady Hamilton). A difference in *ordinaries* necessarily constitutes a *fundamental* distinction in arms, but a mere difference in charges does not *necessarily* constitute such a distinction. Thus, to alter the number, order, or color of the “stripes” in the national arms necessarily makes them no longer those of the United States; however, merely to add mullets or estoils to the chief in the national arms simply make them those of the United States, differenced by mullets (or estoils, as the case may be). An analogy (using flags) may serve to illustrate this point: if one were to switch the red and blue in the Cuban flag, leaving all its other elements the same, one no longer would have the flag of Cuba (in fact, one would have the flag of Puerto Rico (slight differences in hue aside)). But if one were to add a black riband to the middle of the Cuban flag (in keeping with a traditional Hispanic practice), again, leaving all its other elements the same, one still would have flag of Cuba, but differenced to indicate national or popular mourning.

is supposed to do,<sup>150</sup> actually and improperly was shown surmounting and obscuring it and was itself displayed inappropriately (i.e., in a manner that is contrary to heraldic principles).<sup>151</sup>

To correct the 1872 seal's grosser errors<sup>152</sup> (those relating to the shield itself), President Franklin Roosevelt, by authority of what is now codified as 28 U.S.C. § 502 and on the recommendation of Gen. Cummings, ordered the following blazon for it:

On a shield paleways of thirteen pieces argent and gules, a chief azure, an eagle rising and standing on the middle of the shield holding in his dexter talon an olive branch consisting of thirteen leaves and

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150. Although it still had the shield on the eagle's breast, Secretary Thomson's original design for the seal of the United States had the eagle "on the Wing & rising," rather than "displayed" (i.e., with wings outstretched, and standing), as had been recommended by the *third* congressional seal committee. PAPERS NO. 23, *supra* note 57, at fol. 179; 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128; HUNT, *supra* note 57, at 33–35; PATTERSON & DOUGALL, *supra* note 13, at 60–62, 92; U.S. DEP'T OF STATE, *supra* note 13, at 4–5. Although the posture originally proposed by Secretary Thomson is somewhat unusual and awkward—if not improper—for a *supporter* in a coat of arms (if only because of its lack of balance and relationship to the shield, which it would not *appear* physically to support, *see infra*), it is similar in principle to the posture adopted for the eagle in the Department's seal (the only difference being that the rising eagle in the Department's seal is positioned in profile, while the rising eagle in the other designs is positioned "*affronté*"; i.e., with head and underside facing the viewer, *see* HUNT, *supra* note 57, at 34–35; PATTERSON & DOUGALL, *supra* note 13, at 79; U.S. DEP'T OF STATE, *supra* note 13, at 5; Memorandum by James W. Baldwin, *supra* note 15, at 7). The apparent awkwardness of having a *supporter* "on the Wing & rising" seems to have been mitigated in the Department's arms by changing the position of the *shield*, so that there is no pretense that the eagle physically supports it.

151. *See* FRIAR, *supra* note 73, at 330; Memorandum by James W. Baldwin, *supra* note 15, at 6–7.

152. At least three of the seven official dies of the obverse of the seal of the United States made since its 1782 adoption have *also* contained significant heraldic errors. For example, on the die of 1782 (almost certainly by engraver Robert Scot, of Philadelphia, Pennsylvania, in official use from September 16, 1782, until at least April 24, 1841): a crested eagle (although the American eagle has none), an eagle's head protruding through the cloud, and an olive branch and arrows touching and being obscured by the outside border of the seal; on the die of 1841 (by John Peter van Ness Throop, in official use from April 23, 1841, until at least October 29, 1877) and on the die of 1877 (by Herman Baumgarten, in official use from approximately November 14, 1877, until about April 21, 1885), which seems to have been an almost-exact duplicate of the die of 1841: eagle grasping six arrows (rather than thirteen—an error doubtless attributable to the very-likely fact that the engraver of 1841 was working from a worn impression of the die of 1782, rather than the legal blazon, *see supra* note 73), red "stripes" wider than the white "stripes," and crest (i.e., the whole constellation and glory above the motto) touching and being obscured by the outside border of the seal. 20 ENCYCLOPÆDIA BRITANNICA, *supra* note 74, at 128A–B; HUNT, *supra* note 57, at 42–43, 53–64; PATTERSON & DOUGALL, *supra* note 13, at 111–16, 123–26, 202–04, 226–31, 270, 274; 13 THE ENCYCLOPEDIA AMERICANA, *supra* note 74, at 353–54; U.S. DEP'T OF STATE, *supra* note 13, at 7–10. The foregoing discussion of errors does not include the use in the obverse of the seal, since April 24, 1841, of *five*-pointed stars, or of olives on the branch—subjects perhaps long-since exhausted. *See supra* notes 73, 130 & 148.

berries and in his sinister talon thirteen arrows, all proper. In an arc below the device the motto, “Qui Pro Domina Justitia Sequitur.” On an annulet surrounding this device the words “Department of Justice” and three mullets, all contained within a corded edge.

When the device is rendered in colors the background of the seal to be buff, the shield, eagle, olive branch, and arrows as described above, with the motto and annulet in blue and the name of the Department, mullets, edges of annulet and corded edge in gold . . . .<sup>153</sup>

In conventional English, the blazon may be rendered thus: the Department’s seal consists of a white background, containing a shield bearing the arms of the United States; i.e., a shield whose top third is blue, and whose bottom two-thirds consists of thirteen equal vertical stripes, alternating white (first) and red. The shield is positioned almost parallel to the floor, angled slightly toward the viewer, in the bottom half of the seal, with the bottom of the shield pointing stage-right (toward eight o’clock). Standing in profile on the shield and facing stage-right (toward nine o’clock) is an American (i.e., bald) eagle with wings elevated, holding in its right claw an olive branch with thirteen leaves and thirteen olives, and in its left claw thirteen arrows with the tips pointing toward the bottom of the seal, all of which figures are in their natural colors. Surrounding the white background containing this shield and eagle is a thick blue ring edged in gold on the inside and outside. Just inside the blue ring (and conforming to its shape), and centered at the bottom (below the shield), are the words, in blue capital letters, “QUI PRO DOMINA JUSTITIA SEQUITUR.” The ring itself bears the words “DEPARTMENT OF JUSTICE” in bold, gold capital letters, centered on the top half; and three five-pointed gold stars, centered on the bottom. The thick blue ring is surrounded by a corded-edged gold ring.

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153. Exec. Order No. 6692 (Apr. 27, 1934), *reprinted in* DOJ Order No. 2400.3, ¶ 128.1-5007(a) (Aug. 6, 1998). Gen. Cummings’s suggestion followed hard upon an administrative correction made to the Departmental seal by Attorney General William DeWitt Mitchell shortly before leaving office, after being “informed by authorities on the subject [that the old seal] was not correct from an heraldic standpoint, though it had been used by th[e] Department for a great many years.” Letter from D.J. Heffernan, Assistant Chief Clerk, to C.C. Zantzinger (Apr. 10, 1933) (on file at Dep’t of Justice Main Library). The 1934 blazon remains the official design of the seal of the Department to this day. By order of the Attorney General, the die struck pursuant to this Executive Order is given to the custody of the Assistant Attorney General for administration. See 28 C.F.R. § 0.146 (2007); see also 41 C.F.R. § 128-1.5007 (2007) (addressing the reproduction of the Departmental seal). The basic elements of the seal are found in the official flags and emblems of several of the Department’s principal officers and components. See, e.g., DOJ Order No. 2400.3, *supra*, ¶ 128.1-5008.

The 1934 official blazon decrees what the Department's seal *is*, but it gives no additional information. As indicated above, no evidence has been unearthed (despite repeated searches in the last hundred years by numerous scholars and by the author) indicating clearly how, why, when, or by whom the seal originally was designed or approved;<sup>154</sup> thus, it is not now known how, why, when, or by whom the motto was chosen and incorporated into it—which makes definitive interpretation difficult. There is a longstanding, officially sanctioned<sup>155</sup> Department tradition, however (which is neither supported nor contradicted by any contemporaneous evidence of which the author is aware), that the motto was suggested

by a passage in Lord Coke's *Institutes*, Part 3, folio 79<sup>[156]</sup> which reads thus: And I well remember, when the Lord Treasurer Burleigh [sic] told Queen Elizabeth, [“]Madame, here is your Attorney-General (I being sent for) *qui pro domina regina sequitur*,[”<sup>157</sup>] she said she would have the records altered; for it should be [“]attornatus generalis *qui pro domina veritate sequitur*,[”<sup>158</sup>] The first of these phrases is believed to have been quoted by Burleigh [sic] from a Latin form then in use (all judicial proceedings were at that time required to be recorded in Latin) in making up the record of actions brought by the Attorney-General on behalf of the Crown. It is translated, “who (the Attorney-General) sues

154. See *supra* note 15 and accompanying text.

155. See, e.g., FIFTIETH ANNIVERSARY, *supra* note 8; CUMMINGS & MCFARLAND, *supra* note 4; Thornburgh, *supra* note 1.

156. The reference is to chapter twenty-two of Sir Edward Coke's *The Third Part of the Institutes of the Laws of England, Concerning High Treason and Other Pleas of the Crown, and Criminal Causes*—one of a four-part or -volume series, the so-called *Institutes*, or *Institutes of the Laws of England*. The first volume of this work was published in 1628, with the last three volumes published posthumously by order of the English Parliament between 1641 and 1642. The *Institutes* is the most famous of his highly controversial but influential writings, including judicial decisions, legal abstracts, and treatises on English law, written over the course of his long, storied, and stormy career in high office. Sir Edward (1552–1634) was Attorney General of England from 1594 to 1606. From his 1613–1616 tenure as Lord Chief Justice of England (i.e., Chief Justice of the Court of King's Bench), he is often referred to as “Lord Coke.” The traditional titles of English judges could lead to memorable exchanges. The first Lord Beaverbrook (i.e., William Maxwell Aitken (1879–1964)) is said to have testified once at trial that someone had been “drunk as a judge;” and, when corrected by the presiding judge—“You mean, ‘drunk as a lord’”—to have answered quite properly, “Yes, my lord.”

157. I.e., “. . . who sues (or prosecutes) on behalf of our lady, the Queen.”

158. I.e., “. . . Attorney General, who sues (or prosecutes) on behalf of our lady, the Truth.” Queen Elizabeth I—who (much like her infamous father, Tudor King Henry VIII) seems never to have permitted such things as conscience to give her pause or squeamishness about using perjury, torture, show trials, and the Star Chamber's procedures to cloak her activities in a film of legality—apparently uttered this remark without irony.

for (or on behalf of) our lady the Queen.” “Sequor” is employed in the same sense (i.e., to sue or bring suit) in the Statute of Westminster 2, Chap. 18, as follows: “in elections illius qui sequitur pro hujusmodi debito” (see Coke’s Institutes, Part 2, folio 394). In fact our word “sue” comes from “sequor.”<sup>159</sup>

Lord Coke refers here to the first Lord *Burghley*;<sup>160</sup> i.e., to Sir William Cecil, (1520–1598), Lord *High* Treasurer of England (1572–1598), who thus, along with Queen Elizabeth I—to whom he was principal minister and closest advisor—may be a remote source of the Department’s motto. If only for the sake of completeness, a brief account of this man—who may not be well known to the reader—may be in order.

Shrewd, soulless, scheming, tremendously talented, boundlessly avaricious and grasping, pitiless, and without ruth or scruple, Lord Burghley is considered possibly one of the ablest, and certainly one of the vilest, men who has ever lived.<sup>161</sup> Justice John Paul Stevens flatly asserts that “[i]n *Hamlet*, the character Polonius is unquestionably a

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159. *The Story of the Seal of the Department of Justice*, reprinted in THE SEAL OF THE DEPARTMENT, *supra* note 3, at 4–6 (footnotes added) (quoting Harmon to Hopkins (Mar. 27, 1896), Misc. Bk. No. 22,535); CUMMINGS & MCFARLAND, *supra* note 4 (quoting D.J. Misc. Bk. No. 22,353) (providing a different citation for the quote, which is reprinted in both sources); *see also* 200TH ANNIVERSARY, *supra* note 14, at 36–37; EASBY-SMITH, *supra* note 2, at 14; FIFTIETH ANNIVERSARY, *supra* note 8, at 48; HUSTON, *supra* note 15, at 31–32; Thornburgh, *supra* note 1, at 1–2; *cf. Puzzled*, *supra* note 5 (providing a garbled version of same story).

160. Pronounced /bɔː li/ (i.e., the same as “burly”), hence the frequent variations in spelling. Queen Elizabeth I created him Baron of Burghley, in the Peerage of England, in 1571.

161. To this author’s mind, his only rival—assuming such a thing actually to be possible—in consciencelessness, greed, corruption, faithlessness, cruelty, brains, craftiness, hypocrisy, and deceit (pick any—or all), perhaps, is Sir Thomas Cromwell (circa 1485–1540), sometime Earl of Essex and grim holder of too many offices. The many crimes of these two men are amply detailed in works varied politically, religiously, and temporally. *See generally* PETER ACKROYD, THE LIFE OF THOMAS MORE (Anchor Books 1999) (1998); HILAIRE BELLOC, CHARACTERS OF THE REFORMATION (1936) (the author (asking the reader to allow him a brief digression) is reminded of Mr. Belloc’s sovereign *Lines for a Christmas Card*: “May all my enemies go to Hell / Noël, Noël, Noël, Noël.”); R.W. CHAMBERS, THOMAS MORE (Jonathan Cape 1953) (1935); WILLIAM COBBETT, A HISTORY OF THE PROTESTANT REFORMATION IN ENGLAND AND IRELAND (London, Simpkin, Marshall & Co., Stereotype ed. 1857) (1824) (in the great reformer’s typical hyperbolic style); EAMON DUFFY, THE STRIPPING OF THE ALTARS (1992); EAMON DUFFY, THE VOICES OF MOREBATH: REFORMATION AND REBELLION IN AN ENGLISH VILLAGE (2001); ANTONIA FRASER, MARY QUEEN OF SCOTS (Dell Publ’g Co., Inc. 1971) (1969); CHRISTOPHER HAIGH, ENGLISH REFORMATIONS (1993); 1 PHILIP HUGHES, A POPULAR HISTORY OF THE REFORMATION: THE KING’S PROCEEDINGS (1957); PHILIP HUGHES, THE REFORMATION IN ENGLAND (1956); H.F.M. PRESCOTT, MARY TUDOR (1953); E.E. REYNOLDS, SAINT JOHN FISHER (1955); E.E. REYNOLDS, THE TRIAL OF ST. THOMAS MORE (1964); EVELYN WAUGH, EDMUND CAMPION (3d ed. 1980); HUGH ROSS WILLIAMSON, THE BEGINNING OF THE ENGLISH REFORMATION (1957).

caricature of [Lord] Burghley.”<sup>162</sup> And Virgil’s portrait of Radamanthus,<sup>163</sup> judge of Hell, well might apply to him, for, as Lord Leicester<sup>164</sup> famously suggested in his March 17, 1586, letter to him, Lord Burghley was a great dispenser of “Halifax Law”<sup>165</sup>—“condemning first, and inquiring upon after.” Jaundiced in outlook and cynical in the extreme, he “kn[ew] the price of everything and the value of nothing,” as the no-less jaundiced and cynical Lord Darlington might have noted.<sup>166</sup> After ostentatiously pretending (as the future Queen Elizabeth did) during the joint reign of Queen Mary I<sup>167</sup> and King Philip<sup>168</sup> to have embraced Catholicism,<sup>169</sup> Lord Burghley was the single person most

162. John Paul Stevens, Essay, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1378–79 (1992).

163. P. VIRGILIUS MARO, AENEID, Bk. 6, ln. 567, in 1 VIRGIL, *supra* note 75, at 507, 544–45 (1994) (“*castigatque auditque dolos subigitque fateri*” (i.e., “he chastises [first, and then] hears the tale of guilt, exacting [compelling] confession of crimes.”)).

164. Robert Dudley (circa 1532–1588).

165. Also known as “Jedburgh-,” “Jeddart-,” “Jedwood-,” or “gibbet-” Justice. BLACK’S LAW DICTIONARY 619, 643, 749 (5th ed. 1979); *cf.* LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND 187 (William Morrow & Co., Inc. 1992) (1866) (“No! No! . . . Sentence first[verdict afterwards.” (internal quotations omitted)).

166. OSCAR WILDE, LADY WINDERMERE’S FAN 113 (7th ed., Methuen & Co. Ltd. 1911) (1893).

167. Queen Elizabeth’s half-sister. Queen Mary was the daughter of King Henry VIII, by his terribly wronged but devoted first wife (and double-third cousin), Queen Catherine, born the Infanta Catalina of Aragon (i.e., of Spain), daughter of Ferdinand and Isabella (*los Reyes Católicos* (i.e., *the Catholic Sovereigns*)). See *supra* note 136. The reputedly polydactyl Anne Boleyn was the mother of Queen Elizabeth, who was conceived out of wedlock.

168. I.e., King Philip II *el Prudente* (i.e., *the Prudent*) of Spain (after whom the Philippines are named); son and heir of Emperor/King Charles V, I, and IV, and thus his second wife’s first and fourth cousin, once removed. King Philip’s *first* wife, the Infanta Mary Emmanuella of Portugal, was his double-first cousin, who died shortly after giving birth to their son; his *third* wife, the Valois Princess Elizabeth of France, was his fourth cousin, who died shortly after giving birth to their son; and his *fourth* wife, Archduchess Anne of Austria, was his niece and his first cousin (once removed), who left him a sad widower after ten years of marriage, having borne him five children. The dizzying elite family alliances almost remind one of Virginia. See *supra* note 21.

169. See, e.g., BELLOC, *supra* note 161, at 198 (“He outwardly conformed to the national religion during the Catholic Queen’s reign, and he used to make a parade of carrying an enormous pair of rosary beads to emphasize his zeal. Then, when Mary died in 1558, it was he who got Elizabeth on to the throne . . .” where he helped gradually derail England from her Catholic course.); see also *id.* at 172 (“[Elizabeth] was quite ready to profess enthusiasm for the Catholic Church . . . when her sister Mary was on the throne; but secretly enjoying the influence given her by the fact that the religious revolutionaries looked to her as a counter-weight against her sister . . .”); HUGHES, A POPULAR HISTORY OF THE REFORMATION, *supra* note 161, at 304 (“During her sister’s reign, [Elizabeth] had gone through the form of living like a Catholic. What her own personal ideas were about religious dogma is a secret none has ever penetrated.”); PRESCOTT, *supra* note 161, at 209–10 (describing Elizabeth’s “conversion” after a private meeting with the Queen, as well as what must have been the Queen’s later displeasure “that any woman should use a profession of religion

responsible for that Queen Elizabeth's forty-four-year campaign of religious persecution, torture, and execution of numberless English, Welsh, Irish, and Scots Catholics, priests and layfolk alike, during her 1558–1603 reign.<sup>170</sup> He amassed an immense sum, ultimately derived from the loot of despoiled Catholic hospitals, almshouses, monasteries, and nunneries, and from the property he arranged to have confiscated from his enemies and the many people he coolly betrayed.<sup>171</sup> A greater incongruity than that subsisting between him and the Department of Justice's motto is hard to imagine. Nonetheless, given the suggestion here of the man's enormities, simple justice prompts the author to point out that the descendants of his two sons, distinguishing themselves magnificently in countless public offices (including Cabinet, colonial, and military posts, (elected) seats in the House of Commons, and seats

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as a counter in a game, making it a thing of convenience, while keeping, untouched and apart, her own private beliefs, at which anyone might guess and guess again").

170. For example (to name but three): the bold, peerlessly scholarly Jesuit priest, St. Edmund Campion, executed at Tyburn gallows on December 1, 1581, after repeatedly being stretched on the rack; the gentle but indomitable "Pearl of York," St. Margaret Clitherow, young housewife and mother, executed March 25, 1586, by being crushed under 800 pounds of stones; and the generous and gallant St. Philip Howard, twentieth (or thirteenth (depending on whether the Earldom descends—as some maintain—by feudal tenure of Arundel Castle, or descends by inheritance, as others suppose)) Earl of Arundel and *de jure* Duke of Norfolk (both of which titles still are held by his descendants in the male line), who died of neglect, October 19, 1595, in his tenth year of imprisonment in the Tower of London. To St. Philip's impossibly ancient family does Alexander Pope's immortal couplet refer: "*What can enoble Sots, or Slaves, or Cowards? / Alas! not all the blood of all the Howards.*" ALEXANDER POPE, *Of the Nature and State of Man with Respect to Happiness*, in AN ESSAY ON MAN, lns. 211–12, at 147 (The Scholar Press Ltd. 1969) (1734).

In the foregoing, as in other things, Queen Elizabeth well-resembled her fell and monstrous father, who—wholly apart from his marital infamies—was directly responsible for the judicial murders of many individuals solely on malignant religious grounds, unless one credits it also to ambition, greed, and malice. To name a few: the King's wise and devout cousin, St. Margaret Pole, beloved Countess of Salisbury and last Dame of the royal Plantagenet House, repeatedly hacked until dead with an axe by a clumsy novice executioner, May 27/28, 1541, aged about seventy, on an hour's notice after some two years imprisonment in the Tower without trial; two of her sons—Sir Henry Pole (Lord Montagu) and Sir Geoffrey Pole—were arrested when she was, and the elder was beheaded in the Tower some sixteen months before his mother; the blameless and brilliant ascetic and reformer, St. John Fisher (a Cardinal and Bishop of Rochester) was beheaded in the Tower, June 22, 1535, at almost eighty; the unmatched humanist, husband, father, attorney, and statesman, St. Thomas More (a Knight and sometime Lord Chancellor) was beheaded in the Tower, July 6, 1535, at nearly sixty; and numberless other Catholic martyrs, beginning with the honest and learned St. John Houghton, proto-martyr, and first of eighteen holy English Carthusians to die—after unspeakable tortures—at King Henry's instigation (two hanged; seven hanged, drawn, and quartered, and nine starved to death). The contemporaneous (1554) German proverb puts it well: "*Der Apffel fällt nicht weit vom Baum*" (i.e., "The apple does not fall far from the tree"). Wolfgang Mieder, "*The Apple Doesn't Fall Far from the Tree*": A Historical and Contextual Proverb Study Based on Books, Archives, and Databases, 1 DE PROVERBIO 1, 1 (1995), available at <http://www.deproverbio.com>.

171. See, e.g., BELLOC, *supra* note 161, at 193–206.

(hereditary and otherwise) in the House of Lords), for *four full centuries* have largely beneficially influenced British religious (Anglican), political, moral, cultural, and social life greatly to the present day. A brief sketch of the more prominent of those descendants may suffice to put something into his credit ledger, in an effort to salvage at least something of the spirit of the maxim, *de mortuis nihil nisi bonum*,<sup>172</sup> which (it must be confessed) has not been honored very well here.

The *second* Baron,<sup>173</sup> the *elder* son (by Mary Cheke), was made *Earl of Exeter*<sup>174</sup> in 1605 by the Stuart King James I of England and VI of Scotland. His senior descendant (in the eighth generation) by male primogeniture, Henry Cecil (1754–1804), was made *Marquess of Exeter*<sup>175</sup> in 1801 by the Guelph (or Hanoverian) King George III of the United Kingdom of Great Britain and Ireland, largely for his acts of charity. The first Marquess's senior descendant (in the fifth generation) by male primogeniture, Lt. Col. Sir David George Brownlow Cecil (1905–1981), the *sixth* Marquess, was a great athlete, being the first person ever to run around the Great Courtyard of Trinity College, Cambridge, in the time it takes the Trinity Clock truly to strike 12:00,<sup>176</sup> a feat shown in *Chariots of Fire*<sup>177</sup> (but falsely credited, with full knowledge of the error—perhaps out of invidious class prejudice—to Olympic champion Harold Abrahams), and who once raced entirely around the upper promenade

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172. I.e., “speak not ill of the dead,” or, more literally, “speak only well of the dead.” Unfortunately (for him, anyhow), a similar “family credit” may not be given to Lord Essex, *see supra* note 161, great-great-great-uncle of the dark and icy rebel, usurper, regicide, and tyrant, Oliver Cromwell (1599–1658), betrayer both of his King and his Country, and *quondam* “Lord Protector” of England, Scotland, and Ireland, the memory of whose depredations, massacres at Drogheda (whose governor (Sir Arthur Aston), for example, savagely was beaten to death with his own wooden leg) and at Wexford, and gratuitous inhumanity are unlikely to perish “Now and in time to be, / Wherever green is worn.” W.B. YEATS, *Easter, 1916*, in *THE COLLECTED POEMS OF W.B. YEATS* 207, 209 (1933). Still, the Earl (Cromwell) bests the Baron (Burghley) at least in that *he* is known actually to have performed one sincere act; i.e., one act not motivated by lucre or calculated to curry political favor. *Pace* the incongruous mention of Thomas as a martyr for Protestantism in John Foxe's screed, *see* JOHN FOXE, *ACTES AND MONUMENTS* (1563), *available at* <http://www.hrionline.ac.uk/johnfoxe/index.html>, and the depiction of him on the massive and austere 1909 *Mur des Réformateurs* in Geneva's *Parc des Bastions*, Thomas Cromwell at the last publicly confessed his Catholicity from the scaffold (July 28, 1540), much to the annoyance of the Protestant King Henry VIII, who had engineered his execution.

173. Sir Thomas Cecil (1542–1623).

174. Peerage of England.

175. Peerage of the United Kingdom.

176. Sir Walter Borey Fletcher's seemingly successful run in the 1890s, of course, must be discounted because it occurred when the old clock took five seconds longer to strike 12:00.

177. (Warner Bros. 1981). The accomplished actor, Mr. Nigel Havers, plays the role of a fictitious “Lord Andrew Lindsay,” which is based loosely on the life of the sixth Marquess.

deck of the *Queen Mary*, in street clothes, in just under sixty seconds.<sup>178</sup> Under his courtesy title of Lord Burghley, he competed in the 1924 Paris Summer Olympic Games in the 110-meter hurdles, won a gold medal in the 400-meter hurdles on July 30, 1928, in the Amsterdam Summer Olympic Games,<sup>179</sup> and, in the 1932 Los Angeles Summer Olympic Games (while a Member of Parliament), finished fourth in the 400-meter hurdles<sup>180</sup> and helped to win a silver medal in the 4 x 400-meter hurdles relay. Among his many offices, he was elected to the House of Commons (1931–1943), served as Royal Governor of Bermuda (1943–1945), and was Vice President of the International Olympic Committee (1954–1966).

Sir Robert Cecil (born in 1563)—dwarf, hunchback, and immensely able *younger* son of the first Lord Burghley,<sup>181</sup> than whom he was, perhaps, *slightly* less sinister—was the Crown’s principal minister from 1598, holding several offices until his death in 1612, and was created *Baron Cecil of Essendon* in 1603 by King James I and VI, of whom he was a favorite and who created him *Viscount Cranborne* in 1604 and *Earl of Salisbury* in 1605.<sup>182</sup> His senior descendant (in the sixth generation) by male primogeniture, Sir James Cecil (1748–1823), the *seventh* Earl, held several public offices, for which King George III created him *Marquess of Salisbury* in 1789.<sup>183</sup> His senior descendant (in the second generation) by male primogeniture, Robert Arthur Talbot Gascoyne-Cecil (born February 3, 1830), the redoubtable *third* Marquess, served brilliantly as Prime Minister of the United Kingdom three times,<sup>184</sup> and as Foreign Secretary thereof four times,<sup>185</sup> and held a

178. See *Hurdler in a Hurry*, TIME, Sept. 6, 1943, <http://www.time.com/time/printout/0,8816,802951,00.html>.

179. Setting an Olympic record at 53.4 seconds.

180. Besting his own 1928 record at 52.2 seconds.

181. By his second wife, Mildred Cooke, whom he married after the death of Mary Cheke, his first wife.

182. All three in the Peerage of England. This last title was bestowed upon him in the morning of the day his half-brother was created Earl of Exeter.

183. Peerage of Great Britain.

184. June 23, 1885–January 28, 1886; July 25, 1886–August 11, 1892; and (with an intervening general election in October of 1900, popularly known as the “Khaki Election,” in which his (Conservative) party obviously won) June 25, 1895–July 11, 1902, for a total of 13 years, 252 days—the fourth-longest total period of service of any British Prime Minister. Andrew Roberts concludes that Lord Salisbury is the model for Mr. Trollope’s Prime Minister Lord Drummond, who appears in his works *The American Senator*, *Phineas Redux*, *The Prime Minister*, and *The Duke’s Children*. Roberts, *supra* note 144, at 13; see generally ANTHONY TROLLOPE, *THE AMERICAN SENATOR* (David Skilton ed., The Trollope Soc’y ed. 1994) (1876).

The longest twentieth-century tenure for a British Prime Minister (11 years, 209 days; having led her Conservatives to victory in three consecutive general elections) was that of Margaret

string of other high public offices.<sup>186</sup> During Lord Salisbury's tenures as Prime Minister some *six million* square miles and *one hundred million*

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Thatcher, whose name (for some reason, unfathomable to the author) is frequently given incorrectly. When Miss Margaret Hilda Roberts married Mr. Denis Thatcher in 1951, she assumed her husband's name as "Margaret, Mrs. Denis Thatcher" (or "Margaret Thatcher," for short). Upon being admitted to the Privy Council in 1970 (and being a Member of Parliament), she became known legally as "The Right Honourable Margaret Thatcher, MP." In 1991, Mr. Thatcher was created a baronet, and she (having retired from the House of Commons and received the Order of Merit) thereupon became legally "The Right Honourable Dame Margaret Thatcher, OM, PC" (and, less formally, "Lady Thatcher"), as wife of Sir Denis Thatcher, Bart., MBE. Following her elevation by Her Majesty to the peerage of the United Kingdom of Great Britain and Northern Ireland in 1992, she acquired the legal style "The Right Honourable The Baroness Thatcher of Kesteven, OM, PC" (less formally, "The Lady Thatcher," or "Baroness Thatcher," or simply "Lady Thatcher"), in her *own* right (i.e., without reference to her late husband's baronetcy), which style remains hers today (other than for "LG" before the "OM," which she obtained in 1995, when she was made a Lady Companion of the Order of the Garter). Some, perhaps unfamiliar with British usage, mistakenly refer to her as "Lady Margaret Thatcher," a style to which (of course) she is not and never has been entitled, not being the great-granddaughter, in the male line, of a sovereign; or the daughter of a duke, or of a marquess or an earl (by right or by courtesy).

185. April 2, 1878–April 21, 1880 (under Prime Minister Benjamin Disraeli (i.e., the first Earl of Beaconsfield)); June 23, 1885–January 28, 1886; January 1887–August 11, 1892; and June 25, 1895–November 12, 1900 (these last three, obviously, when he was also Prime Minister).

Over and above his long catalogue of written witticisms, Lord Beaconsfield was a master of the riposte. Although the (apparent) non-written character of these witticisms makes their authenticity (and, sometimes, their precise wording) difficult to establish conclusively, the sayings widely attributed to him (which occasionally are also attributed to others, *see, e.g.,* THE YALE BOOK OF QUOTATIONS 281–82 (Fred R. Shapiro ed., 2006); in any event, he may have re-coined them), seem to ring essentially true. For example, a heckler's catcall—"Vote for you! I'd rather vote for the Devil!"—when he was on the hustings, standing for election to Parliament early in his career, being met with the unfazed: "Quite so. . . . And if your friend is not standing?" Or, after a large public banquet at which all the solid fare had arrived cold at table, his comment on first tasting the just-poured champagne: "At last, something warm." Or his droll reply to a political opponent's "I predict, Sir, that you will die either by hanging or of some vile disease": "That all depends, Sir, upon whether I embrace your principles or your mistress." Or his observations about his archrival, Sir William Ewart Gladstone of the Liberal Party: "If Gladstone fell into the Thames, that would be a misfortune; and if anybody pulled him out, that, I suppose, would be a calamity," and "William Gladstone has not a single redeeming defect." Or his bland pronouncement: "The most dangerous strategy is to jump a chasm in two leaps."

The author could extend the foregoing list indefinitely, but declines to do so, lest he distract the gentle reader from the topic of this work. *Cf.* ERNEST BRAMAH, KAI LUNG'S GOLDEN HOURS 200 (1972) ("But however entrancing it is to wander unchecked through a garden of bright images, are we not enticing your mind from another subject of almost equal importance?"). Nor (of course) does the author wish otherwise to lay himself open to a suggestion of lack of discipline in his writing or—still less—engage in what Professor Arthur Austin rightly calls "Footnote Skulduggery and Other Bad Habits." Austin, *supra* note 72, at 1016–21. Unfortunately—Christopher Wren's epitaph in St. Paul's comes to mind—it may be too late. *Compare id.* at 1024 (categorically describing the "worst manifestation" of one species of those Bad Habits), *with id.* at 1010 n.2 (a particular (and inspirational) example of the "manifestation"). *See also* Charles A. Sullivan, *The Under-Theorized Asterisk Footnote*, 93 GEO. L.J. 1093, 1116 n.© (2005) (herein used as a model).

186. Lord Salisbury was succeeded, the day after his last resignation as Prime Minister (on July 11, 1902), shortly before his death (August 22, 1903), by his own nephew, Sir Arthur James

subjects were added to the Crown. Additionally, Salisbury,<sup>187</sup> the capital of the former British colony of Southern Rhodesia,<sup>188</sup> was named after

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Balfour (1848–1930), who served as Prime Minister until December 4, 1905, who (on May 5, 1922, the day of his retirement from the House of Commons) was created *Viscount Traprain* and *Earl of Balfour*, in the peerage of the United Kingdom, by King George V, and who received the further (extraordinary) distinction of an encomium from the great Msgr. Knox: “History will revere the name of one of our present statesmen, whose *obituary dictum* used often to be quoted, ‘I never read the papers.’” RONALD KNOX, *A SPIRITUAL AENEID* 151 (new ed. 1958) (footnote omitted). As Foreign Secretary (1916–1919), he authored the fateful, so-called “Balfour Declaration,” contained in a November 2, 1917, letter to Lionel, second Baron Rothschild (1868–1937), stating:

His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

Letter from Arthur James Balfour to Lord Rothschild (Nov. 2, 1917), in RONALD SANDERS, *THE HIGH WALLS OF JERUSALEM: A HISTORY OF THE BALFOUR DECLARATION AND THE BIRTH OF THE BRITISH MANDATE FOR PALESTINE*, at xvii (1984).

187. Now called “Harare.” The peerage designation did not change when the official name of this city was altered. In connection with this almost-surprising observation (given the modern self-congratulating affectation that the *English* have for certain (often foreign) terms should change (or be spelled or pronounced differently) from traditional practice), the author can hardly improve upon Henry Watson Fowler’s entry for “Mahomet, Mohammedan, &c.” in his *A Dictionary of Modern English Usage*:

The popular forms [in England] are *Mahomet(an)* . . . ; the prevailing printed forms are *Mohammed(an)*.

The worst of letting the learned gentry bully us out of our traditional *Mahometan* & *Mahomet* (who ever heard of *Mohammed* & the *mountain*?) is this: no sooner have we tried to be good & learnt to say, or at least write, *Mohammed* than they are fired with zeal to get us a step or two further on the path of truth, which at present seems likely to end in *Muhammad* with a dot under the h; see DIDACTICISM, PRIDE OF KNOWLEDGE. The literary, as distinguished from the learned, surely do good service when they side with tradition & the people against science & the dons. *Muhammad* should be left to the pedants, *Mohammed* to the historians & the like, while ordinary mortals should go on saying, & writing in newspapers & novels & poems & such general reader’s matter, what their fathers said before them.

The fact is that we owe no thanks to those who discover, & cannot keep silence on the discovery, that *Mahomet* is further than *Mohammed*, & *Mohammed* further than *Muhammad*, from what his own people called him. The Romans had a hero whom they spoke of as *Aeneas*; we call him that too, but for the French he has become *Énée*; are the French any worse off than we on that account? It is a matter of like indifference in itself whether the English for the Prophet’s name is *Mahomet* or *Mohammed*; in itself, yes; but whereas the words *Aeneas* & *Énée* have the Channel between them to keep the peace, *Mahomet* & *Mohammed* are for ever at loggerheads; we want one name for the one man; & the one should have been that around which the ancient associations cling. It is too late to recover unity; the learned, & their too docile disciples, have destroyed that, & given us nothing worth having in exchange.

H.W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 338–39 (1926).

him. With the singular exception of Lord Home (October 19–23, 1963),<sup>189</sup> Lord Salisbury is the last British Prime Minister to date to have

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188. Now officially calling itself “Zimbabwe,” and originally named for Mr. Cecil John Rhodes (1853–1902), diamond-mining magnate, Empire builder, and founder of the Rhodes Scholarships.

189. The four-day tenure as Prime Minister of Alexander Frederick Douglas-Home (born July 2, 1903), from the House of Lords was very different from Lord Salisbury’s, but quite noteworthy nonetheless: On July 11, 1951, when his father died, this Scots nobleman was dispossessed of his seat in the House of Commons (to which he first had been elected on October 27, 1931) by operation of law, and became, by right of succession, the fourteenth *Earl of Home* and fourteenth *Lord Dunglass* (both in the peerage of Scotland, by creation of King James I and VI in 1605), third *Baron Douglas* (peerage of the United Kingdom, by creation of the Hanoverian Queen Victoria in 1875), and twentieth *Lord Home* (peerage of Scotland, by creation of the Stuart King James III of Scotland in 1473), as well as (the author believes) *Lord Home* (or *Hume*) of *Berwick* (creation of King James I and VI in 1605; whether this peerage legally is an English Barony or a Scots Lordship is a matter of some dispute, although the latter appears to be more likely). Shortly after succeeding to these titles, by writ of summons he took his ancestral seat in the House of Lords, which seat he occupied, quite comfortably, for twelve years. This soon was to change. When Prime Minister Maurice *Harold* Macmillan’s thitherto-firm grip on the electorate began slipping in late-1961/early-1962, on July 13, 1962, he sacked seven members of his own Cabinet in an effort to shore up his ministry. This dramatic effort, however (whose principal lasting consequence seems to have been Liberal Party opponent John *Jeremy* Thorpe’s pitch-perfect quip about it (“Greater love hath no man than this, that he should lay down his friends for his life” (*cf. John* 15:13))), succeeded miserably. Thus, it was a weak and ill-braced government that received the body-blow, not long after, of the infamous scandal of forty-six-year-old Secretary of State for War John Dennis Profumo’s adultery with nineteen-year-old Christine Keeler (and subsequent lying about it): In the wake of these events came the stunning October 18, 1963, resignation of the Prime Minister, followed the very next day by Lord Home’s suddenly finding himself in that office. But the Left pronounced itself incapable of bearing a Prime Minister from the Upper House, and intense political pressure forced him to disclaim all of his peerages for life, which he did on October 23, so that he might govern from the House of Commons rather than the House of Lords. For fifteen days thereafter he was in the remarkable and unprecedented position of being Prime Minister, but having *no* seat in *either* House, until November 7, when he won a special by-election as a Conservative Party member for a seat from the constituency of Kinross and West Perthshire. He served as Prime Minister (being known as Sir Alec Douglas-Home) until October 16, 1964. On November 7, 1974, after his second retirement from the House of Commons (September 18, 1974), Her Majesty created him *Baron Home of the Hirsell* (in the peerage of the United Kingdom), for life, and thus restored him to a seat in the House of Lords until his death in 1995.

Mention having been made of the fifth Baron Profumo’s tawdry scandal, simple justice requires mention also of his gallant service and distinguished bravery on the battlefield in World War II (while a sitting Member of Parliament) and of how he edifyingly spent the remaining near-half-century of his life. Filled with shame and remorse for his adulterous liaison (which lasted a few weeks in early 1961) and for falsely having denied the fact of it to his family, to Parliament, to the government, and to the public, he confessed all—first to his wife (the popular, talented, and exceptionally beautiful actress, Babette Valerie Louise Hobson, who played Edith d’Ascoyne in *Kind Hearts and Coronets*, see *supra* note 45, and to whom he was married from 1954 until her death in 1998), and then to the government. He then immediately applied for, and was appointed to, the purely nominal office of Crown Steward and Bailiff of the three Chiltern Hundreds of Stoke, Desborough, and Burnham, by which action he legally was able to resign his seat in the House of Commons (which he did on the same day), thereby leaving public life forever. Shortly after his humiliating disgrace, and seeking to atone for his actions, he quietly made his way to Toynbee Hall (the original settlement house, in London’s East End, which serves drug addicts and the urban poor

governed from the House of *Lords*, rather than the *Commons*.<sup>190</sup> Four of his sons reached the House of Lords (only one by inheritance, and he arguably was the most able of them), two were elected to the House of Commons, and all seven of his children who lived to adulthood (and several grandchildren and great-grandchildren) are reckoned eminences in British religious (Anglican), public, military, literary, political, social, and academic life.<sup>191</sup>

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and mentally ill) and volunteered specifically to clean toilets and floors, wash dishes, and do other menial work. He continued there in various capacities (but always as a tireless hands-on volunteer without any compensation whatsoever), several days each week, *for forty-three years*, until his death at ninety-one, greatly revered and loved by those who knew him (including his longtime friends, Lady Thatcher and Her late Majesty, Queen Elizabeth, the Queen Mother). For as long as he lived, the press and other media frequently and aggressively hounded him over the scandal, baying incessantly and playing it over and over again in the public eye. But never once in all that time did he or his wife (also an indefatigable volunteer for charity) ever speak of the matter in public or ask that it be dropped, or—still less—attempt any justification or defense or pitch for public sympathy, choosing instead to bear all in silence and with stoic dignity.

190. Of the thirty-two individuals who served as British Prime Minister from the first Lord Orford (i.e., Sir Robert Walpole) (served 1721–1742, and generally reckoned as the first Prime Minister, in the modern sense) to Lord Salisbury, *twenty-one* (including many of the most distinguished) served some or all of their tenures as Prime Minister from the House of Lords. “Never more, never more”—it seems. Cf. H. Belloc, *Tarantella*, *THE CENTURY*, Apr. 1921, at 767. The gratuitous violence (and incalculable injury) done to the British Constitution through Prime Minister Anthony Charles Lynton “Tony” Blair’s repeated, unnecessary, and arbitrary (and, alas, all-too successful) attacks on the Crown, and on the independence and the very institution of the House of Lords—with no clear replacement contemplated, despite the ready availability of considerable scholarly, lucid, and careful reflection on the subject, *see, e.g.*, P.A. BROMHEAD, *THE HOUSE OF LORDS AND CONTEMPORARY POLITICS: 1911–1957* (1958)—during his ten years in Downing Street, cannot fail to elicit sadness and worry in lovers of liberty, constitutional law, and structural checks on government power. *See* Quentin Letts, Editorial, *Lights Out for the Lords*, *WALL ST. J.*, Mar. 9, 2007, at A15.

191. Several *other* sons in the two branches of the Cecil family also were created peers for their services to the Crown: e.g., *Baron Cecil of Putney* and *Viscount Wimbeldon* (English peerages bestowed, respectively, by the Stuart King Charles I of England and Scotland, in 1625 and 1626, upon the Hon. Sir Edward Cecil (1572–1638), third son of the first Earl of Exeter); *Viscount Cecil of Chelwood* (United Kingdom peerage bestowed by King George V in 1923 upon Lord (Edgar Algernon) Robert Gascoyne-Cecil (1864–1958), third son of the third Marquess of Salisbury, and recipient of the Nobel Peace Prize in 1937); *Baron Rockley* (United Kingdom peerage bestowed by King George V in 1934 upon Sir Evelyn Cecil (1865–1941), eldest son of Lt. Col. Lord Eustace Brownlow Henry Cecil (1834–1921), third son of the second Marquess of Salisbury); and *Baron Quickswood* (United Kingdom peerage bestowed by the “Windsor” King George VI of the United Kingdom of Great Britain and Northern Ireland in 1941 upon Lord Hugh Richard Heathcote Gascoyne-Cecil (1869–1956), fifth son of the third Marquess of Salisbury). Also, through the 1885 marriage of Col. Lord William Cecil (1854–1943), second son of the third Marquess of Exeter, to the eventual *Baroness* (in her own right) *Amherst of Hackney* (i.e., Mary Rothes Margaret Tysen-Amherst) (1857–1919), the Cecils acquired *that* United Kingdom peerage as well (created by Queen Victoria in 1892), in the person of William Alexander Evering Cecil, (1912–1980) (who, as the eldest son of the couple’s eldest son (Capt. the Hon. William Amherst Cecil (1886–1914), killed in action in World War I), became the third Baron upon his paternal grandmother’s death), and still hold it.

Anyhow, elaborating on Lord Coke's recollection of Lord Burghley's exchange with Queen Elizabeth, Dean Roscoe Pound, offered this explanation of the motto:

The matter is very simple indeed. The "pro" goes both with the noun and the verb. The motto is taken from the commencement of a pleading in a proceeding by the Attorney-General at common law. . . . [U]ntil the reign of George the Second, all pleadings were in Latin. The Attorney-General began, "Now comes so and so, Attorney-General, who prosecutes on behalf of our Lord, the King." In the reign of Elizabeth, of course, this would have been "who prosecutes on behalf of our Lady, the Queen." Domina Justitia—our Lady Justice<sup>[192]</sup>—was substituted for our Lady the Queen, or our Lord the King. In other words, the seal asserts that the Attorney-General prosecutes on behalf of justice. This would seem a very appropriate motto for the Federal Department of Justice.

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The foregoing catalogue does not include those who, on their own merits, were called to the House of Lords in one of their fathers' subsidiary peerage titles; for example, the current (seventh) Marquess of Salisbury (i.e., Robert Michael James Gascoyne-Cecil), whom the Queen created a peer in his own right (as the thirteenth Baron Cecil of Essendon (though he remained more commonly known by his courtesy title of Viscount Cranborne)), by writ of acceleration (April 29, 1992), conferring on him a second (life) peerage (as the Baron Gascoyne-Cecil (United Kingdom) on November 17, 1999), all before he succeeded to all of his father's peerages on the latter's death (July 11, 2003).

192. The Lady (or goddess of) Justice, whose administration was called by President Washington in his letter to Edmund Randolph, *see supra* note 18, "the firmest pillar of good government," and who is frequently depicted as a blindfolded woman carrying scales in one hand and a drawn sword in the other, is a Greek mythological character whose name is *Themis*, which means "right," "order," or "custom" (i.e., what is or is not done), and who personifies Divine (i.e., perfect) Justice. Hesiodic theogony (late eighth century B.C.) describes her as daughter of *Uranus* (meaning *Heaven*), and his mother *Gaia* (meaning *Earth*), and thus, of course, one of the *Titans* (meaning *elder/great/giant gods*); she was the wife, before *Hera* (probably meaning *the Lady*), of her nephew *Zeus* (meaning *God*), was his constant counselor, and by him was the mother of the *Horai* (meaning the *Hours*, one of whom was *Dikē* (meaning *Human* (i.e., *imperfect*) *Justice*, a figure sometimes confused with her mother)) and the *Moirai* (meaning the *Fates*). *See FIFTIETH ANNIVERSARY, supra* note 8, at 33; 22 NEW INTERNATIONAL ENCYCLOPÆDIA 177 (2d ed. 1930); Michael E. Gehringer, *Questions and Answers*, 73 LAW LIBR. J. 740, 744–46 (1980); John W. Heckel & Kathleen G. Farmann, *Questions and Answers*, 52 LAW LIBR. J. 232, 233–34 (1959); Lorraine A. Kulpa, *Questions and Answers*, 64 LAW LIBR. J. 246, 249–50 (1971); Letter from Rachel Hecht, Librarian, Tax Div. Library, to William French Smith, Att'y Gen. (Feb. 18, 1981) (on file at Dep't of Justice Main Library) (quoting Ivan Sipkov, Chief of the European Law Division in the Law Library at the Library of Congress). Interestingly, the *first* Congressional committee to devise the seal of the United States, *see supra* note 117 and accompanying text, proposed, as the supporter *sinister* of their device for the arms of the United States, "the Goddess Justice bearing a Sword in her right hand and her left a Balance." PAPERS NO. 23, *supra* note 57, at fol. 143; 22 JOURNALS, *supra* note 57, at 690 (transcription of *Papers No. 23*); HUNT, *supra* note 57, at 115.

I remember reading Mr. Easby-Smith's account of this and it seemed to me very baffling on this point. The passage in Coke's Third Institute means that when the Lord Treasurer introduced Coke as Attorney-General to Queen Elizabeth he said in Latin, "Here is your Attorney-General qui pro domina regina sequitur", that is, who prosecutes for our Lady the Queen[.] Elizabeth, who was an excellent scholar, answered, "It should be, Attorney-General who prosecutes for our Lady the Truth."<sup>193</sup>

Alternative interpretations of the motto—some grammatically suspect, others more-or-less literal, but none inappropriate for the Department—have been advanced.<sup>194</sup> Following Dean Pound, however, and the Department's tradition, the most authoritative Departmental

193. Letter from Roscoe Pound, Dean, Harvard Law School, to Albert Levitt, Special Assistant to the Att'y Gen. (Oct. 2, 1933), in *THE SEAL OF THE DEPARTMENT*, *supra* note 3, at 3 (footnote added); see *CUMMINGS & MCFARLAND*, *supra* note 4, at 522b; see also *200TH ANNIVERSARY*, *supra* note 14, at 36–37; *FIFTIETH ANNIVERSARY*, *supra* note 8, at 48; *The Story of the Seal of the Department of Justice*, *supra* note 159 (citing postscript signed "P.A.C." and dated Feb. 5, 1930, to "D.J. File 44-9-2," possibly a later version of Memorandum by James W. Baldwin, *supra* note 15, which contains no such postscript; the author did not find any copy of "D.J. File 44-9-2" in his personal, page-by-page search of the most likely Departmental files held by the Nat'l Archives and Records Administration); *Puzzled*, *supra* note 5, at B5 (recounting Dean Pound's explanation of the meaning of the motto); Thornburgh, *supra* note 1, at 1–2; cf. Robert H. Jackson, *The Federal Prosecutor*, 31 *J. CRIM. L. & CRIMINOLOGY* 3, 6 (1940) ("a good prosecutor . . . seeks truth and not victims").

194. E.g., *200TH ANNIVERSARY*, *supra* note 14, at 37 ("[Who] prosecutes on behalf of justice."); *EASBY-SMITH*, *supra* note 2, at 14 ("Who sues for the Lady Justice" or "Who follows Justice for mistress."); *FIFTIETH ANNIVERSARY*, *supra* note 8, at 48 ("[W]ho pursues (justice) on behalf of Lady Justice (the Queen)."); *OFFICE OF THE ADMIN. ASSISTANT TO THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE BUILDING*, at app. (1960) [hereinafter *JUSTICE BLDG.*] ("[H]e who rules aids justice."); Kenneth Bresler, "I Never Lost a Trial": *When Prosecutors Keep Score of Criminal Convictions*, 9 *GEO. J. LEGAL ETHICS* 537, 545 n.31 (1996) ("Those Who Strive for the Sake of Lady Justice."); Robert J. DeSousa, *Opening Remarks*, 9 *WIDENER J. PUB. L.* 207, 207 (2000) (stating "He Who Does Justice in the Name of the Queen or in the Name of Lady Justice," although acknowledging it as "roughly translated" and stating that it shows "that government lawyers were thought to be pursuers of justice."); Sanches, *supra* note 7 ("Who prosecutes on behalf of the sovereign power" or "Who prosecutes on behalf of the people."); Letter from Rachel Hecht to Att'y Gen. William F. Smith, *supra* note 192 ("[I]n whole compliance . . . with the lady Justice . . .") (quoting Ivan Sipkov, Chief of the European Law Division, Law Library, Library of Congress)); Letter from Arthur H. Leavitt to Att'y Gen. Homer S. Cummings, *supra* note 6, at 9 ("Who follows justice as his mistress."); Letter from Albert Levitt to Roscoe Pound, *supra* note 3, at 2 ("[W]ho strives after justice for the sovereign."); Thornburgh, *supra* note 1 ("[W]ho do 'follow justice for a mistress.'"). The "who" in all the foregoing, overall, refers to the Attorney General, and thus, by extension, the Department of Justice. See Thornburgh, *supra* note 1, at 2; see also Robert B. Troutman, Address to the Judicial Conference for the Fifth Circuit: The United States as a Litigant (May 30, 1952), quoted in *Parr v. United States*, 225 F.2d 329, 338–39 n.12 (5th Cir. 1955) (Cameron, J., dissenting) ("Liberally translated, 'The Department of Justice Prosecutes in Behalf Of Our Lady Justice[.]'").

opinion<sup>195</sup> is that the motto refers to the Attorney General, and thus, by extension, to the entire Department,<sup>196</sup> “*who prosecutes on behalf of justice*” (or, more literally, “*who prosecutes for Lady Justice*”)—an apt declaration of the Department’s basic purpose and ideal.

The motto’s conception of the prosecutor (or government attorney) as being the servant of justice itself finds concrete expression in English in a much-celebrated inscription—*THE UNITED STATES WINS ITS POINT WHENEVER JUSTICE IS DONE ITS CITIZENS IN THE COURTS*—in the above-door paneling in the ceremonial rotunda anteroom just outside the door to the Attorney General’s office in the Department of Justice Main Building in Washington, D.C. Surrounding this inscription (despite its brevity) is a cloud of confusion as to its source, its text, its location or appearance, and its authority or weight. Before proceeding, the author stresses that he personally went to that anteroom at 3:35 p.m. on March 20, 2003, and copied the text above into his notebook; anything else aside, he attests that *that* text may be found, carved into plain, unpainted wood, all in upper-case letters (about four inches tall), immediately above the doors, at *that* location, starting on the south panel of the octagon and proceeding clockwise, literally as follows (including the mullets): (1) (south panel) “THE ★ UNITED”; (2) (south-west panel) “STATES ★ WINS”; (3) (west panel) “ITS ★ POINT”; (4) (north-west panel) “WHENEVER”; (5) (north panel) “JUSTICE ★ IS”; (6) (north-east panel) “DONE ★ ITS”; (7) (east panel) “CITIZENS ★ IN”; and (8) (south-east panel) “THE ★ COURTS[.]”

As with the motto on the Department’s seal, the *source* of the inscription appears never to have been fully established. Solicitor General Simon Ernest Sobeloff said the inscription came from a *dictum* of Solicitor General Lehmann’s that “the Government wins its point when justice is done in its courts,” but he cites to no source.<sup>197</sup> Although

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195. See 200TH ANNIVERSARY, *supra* note 14, at 36–37; CUMMINGS & MCFARLAND, *supra* note 4, at 522b; see also FIFTIETH ANNIVERSARY, *supra* note 8; JUSTICE BLDG., *supra* note 194; Letter from Roscoe Pound to Albert Levitt, *supra* note 193.

196. See *supra* note 194.

197. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 ABA J. 229, 229 (1955) (“The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client’s chief business is not to achieve victory, but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.”); see also *Brady v. Maryland*, 373 U.S. 83, 87 & n.2 (1963) (same assertion, citing Gen. Sobeloff); *Trout v. Garrett*, 780 F. Supp. 1396, 1420–21 & nn.59–60 (D.D.C. 1991) (same, and noting in passing the difference (otherwise unmentioned upon by Gen. Sobeloff or the *Brady* Court) between the *dictum* and the carved

long associated with his beloved heartland State of Missouri, Gen. Lehmann was Prussian-born and a native speaker of German (a language whose verb conjugations are much more articulated than those of modern English), coming to English only as a formally learnt, second language. The author does no more than speculate, but the grammatical correctness of the verb conjugation and possessives in the dictum quoted by Gen. Sobeloff (unlike the grammatical state of carved inscription), coupled with its greater simplicity in comparison with the inscription, may argue for the accuracy of the dictum's attribution to Gen. Lehmann and as the original source for the text of the inscription.

Varying on this theme, some authors assert that "it was . . . Solicitor General . . . Lehmann[] who wrote" the text of the carved inscription.<sup>198</sup> Supreme Court Justice Felix Frankfurter was content to suggest merely: "I believe [that Gen. Lehmann] was the author" of that text.<sup>199</sup> The court in *King v. United States*<sup>200</sup> went further, asserting that Gen. Lehmann used the text of the inscription in a brief filed in the Supreme Court, and citing Justice Frankfurter's article for that proposition, although that article does *not* support it. Lincoln Caplan makes the same assertion the *King* court does, citing as apparent support an interview with "Mark Sheehan, Office of Public Affairs, Justice Department, on October 22, 1986."<sup>201</sup> James L. Cooper's *The Solicitor General and the Evolution of Activism*<sup>202</sup> echoes Mr. Caplan's assertion, and, in turn is followed by David M. Rosenzweig's note, *Confession of Error in the Supreme Court by*

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inscription); Bresler, *supra* note 194, at 538–39 & nn.7 & 9, 545 n.31 (providing a short, but careful discussion).

198. 1 Op. Off. Legal Counsel 228, 231 (1977) (citing no source); Waxman, *supra* note 20, at 17 & 25 n.113 (same assertion, citing *Brady*—which does *not* support it—with some acknowledgment of paraphrase); *see also* LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 17 & 287 n.43 (1987); Drew S. Days [Solicitor General], *The Interests of the United States, the Solicitor General and Individual Rights*, 41 ST. LOUIS U. L.J. 1, 1–2 (1996) [hereinafter Days, *The Interests of the United States*] (same assertion, but misspelling "Lehmann" as "Lehman" throughout); Drew S. Days III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 691 (1998) [hereinafter Days, *Executive Branch Advocate*] (same); Jeremy L. Carlson, Commentary, *The Professional Duty of Prosecutors to Disclose Exculpatory Evidence to the Defense: Implications of Rule 3.8(d) of the Model Rules of Professional Conduct*, 28 J. LEGAL PROF. 125, 126 & n.13 (2004) (same assertion, citing *Brady*—which does *not* support it); James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 676 n.8 (1990) (which citations, though without much foundation, *do* support it).

199. Felix Frankfurter, *The Government Lawyer*, 18 FED. B.J. 24, 27–28 (1958) (emphasis added).

200. 372 F.2d 383, 396 n.10 (D.C. Cir. 1966).

201. *See* CAPLAN, *supra* note 198, at 17, 287 n.43.

202. Cooper, *supra* note 198, at 676 n.8.

*the Solicitor General*<sup>203</sup> and Judge William M. Hoeverler's *Ethics and the Prosecutor*.<sup>204</sup>

The author's own page-by-page review<sup>205</sup> of the ninety-four bound volumes containing the Department of Justice's filings before the Supreme Court in the October Terms of 1910, 1911, and 1912 (Mr. Lehmann was Solicitor General from December 1910 to July 1912), undertaken in an effort to clarify this matter, revealed no evidence of use of the dictum, or of the text of the inscription, or of any recognizable variant of either. Additionally, the author's review of Gen. Lehmann's more-prominent published obituaries yielded no mention of any authorship of the dictum or any variant of it.<sup>206</sup> Possibly, a review of this Solicitor General's papers, housed in the Special Collections section of the Washington University Library in St. Louis, Missouri, could dispel the mystery. On the other hand, perhaps *not*: a 1929 House of Representatives document, for example, quotes "a recent statement" by Attorney General John Garibaldi Sargent (apparently uttered without attribution to or mention of Gen. Lehmann) thus: "The idea is sought to be maintained in the Department [of Justice] that the United States is in a different position when litigating with its citizens than is an ordinary litigant, the Department proceeding on the theory that *the United States wins a case whenever justice is done one of its citizens in the courts.*"<sup>207</sup>

Or one might as well turn to Supreme Court Justice Alexander George Sutherland, Jr., as possibly being the ultimate source of the inscription, given his 1934 dictum that

[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is *not that it shall win a case, but that justice shall be done.* As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt should not escape or innocence suffer. He may prosecute with

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203. David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2092 & n.84 (1994).

204. William J. Hoeverler, Essay, *Ethics and the Prosecutor*, 29 STETSON L. REV. 195, 198 & n.14 (1999).

205. November 6, 1999, at the Madison Building of the Library of Congress.

206. See, e.g., *End to F.W. Lehmann*, KANSAS CITY STAR, Sept. 13, 1931, at 10A; *F.W. Lehmann Dies*, ROCHESTER DEMOCRAT & CHRON., Sept. 13, 1931, at 1; *F.W. Lehmann Dies*, ST. LOUIS POST-DISPATCH, Sept. 13, 1931, at 1A; *F.W. Lehmann Dies in St. Louis at 78*, N.Y. TIMES, Sept. 13, 1931, at 28; *F.W. Lehmann Is Dead at St. Louis*, WASH. POST, Sept. 13, 1931, at 1.

207. DODGE, *supra* note 52, at 78 (emphasis added).

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## THE SIGN AND SEAL OF JUSTICE

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earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>208</sup>

*Or* one could reasonably suspect Attorney General (and later Supreme Court Justice) Robert Houghwout Jackson, who, on April 1, 1940, addressed the Second Annual Conference of United States Attorneys in Washington, D.C., as follows:

[Prosecutorial] authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

....

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. *Although the government technically loses its case, it [really has] won if justice [is] done. . . .*

....

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.<sup>209</sup>

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208. *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). For a thoughtful study of this brilliant but controversial Justice, from the perspective of a no-less-brilliant political philosopher, see generally HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994).

209. Jackson, *supra* note 193, at 3–4, 6 (emphasis added). Although the address post-dates the apparently circa-1934 carving of the inscription, it is reasonable to speculate that it may reflect the speaker's earlier thoughts.

Of course, the source of the inscription could be Attorney General William DeWitt Mitchell,<sup>210</sup> who (it has been alleged) “is reputed to have said, ‘The government wins when justice is done.’”<sup>211</sup> Finally, one might be justified in reaching back to the 1908 ethical standard for attorneys that “[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”<sup>212</sup> This standard, of course, itself has very old antecedents.<sup>213</sup>

For reasons unknown, the *text* of the inscription—verifiable (surely) without too much difficulty—has been the occasion, marvelous to

210. Attorney General for the whole of President Herbert Clark Hoover’s term (1929–1933), having been Solicitor General under President John Calvin Coolidge, Jr. (1925–1929).

211. Abram Chayes & Antonia Handler Chayes, Commentary, *Testing and Development of “Exotic” Systems under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1971 (1986) (unfortunately offering no source or citation). This interesting, but somewhat histrionic, doomsaying, and alarmist article has not worn well, given the collapse of the Soviet system after the wondrous fall of the Berlin Wall only three years after its publication.

212. CANONS OF PROF’L ETHICS Canon 5 (1908). The principle informing this canon happily still animates the rules governing the bar, as it has over time. See, e.g., ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 150 (1936) (“The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done.”); ABA STANDARDS FOR CRIM. JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); *id.* at EC 7-14 (“A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record . . . .”); MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); NAT’L PROSECUTION STANDARDS Standard 1.1 (2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”); RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 12-4.2 (2002) (“Furthermore, in criminal cases, the duty of a government lawyer is different than the ethical duty of a private lawyer. . . . The sovereign wins whenever justice is done.”).

213. For example, the ancient *Petition de Droit* (i.e., *Petition of Right*), available under English law upon personal endorsement by the Sovereign: *fiat iustitia*, or *soit droit fait als parties* (i.e., let right be done to the parties). This endorsement by King Edward VII, on the face of the Petition drawn up by Sir Edward Carson (later Baron Carson, of Duncairn), permitted the latter’s unfortunate and disgraced fifteen-year-old half-American client, George Archer-Shee, at last (July 27, 1910) to receive a proper trial on the accusation of having stolen a five-shilling postal order from fellow Osborne Royal Navy cadet Terence H. Back in October 1908—a four-day trial at which he was utterly vindicated and literally pronounced “innocent” (as opposed to merely “not guilty”) of the charge, which seems to have originated in (or been aggravated by) anti-Catholic prejudice. These events, well reported by trial-attendee Edwin R. Keedy, in *A Petition of Right: Archer-Shee v. The King*, 87 U. PA. L. REV. 895 (1939), were recalled by Terence Rattigan (with some fictionalization) in his rightly celebrated 1946 play, *THE WINSLOW BOY*; and (in a different context), on February 8, 1999, by the late Rep. Henry Hyde of Illinois, in mesmerizing words on the floor of the U.S. Senate. See 145 CONG. REC. 2025 (1999) (statement of Rep. Hyde). Young Archer-Shee gallantly left the safety of his New York City home in 1914 to volunteer for the British Army in World War I; he was killed in action a few weeks later, on October 31, a nineteen-year-old Lieutenant, in the horrific slaughter at Ypres, shortly after arriving in France.

behold, of chronic inaccuracy. As has been said, the inscription reads: “*The United States wins its point whenever justice is done its citizens in the courts.*” Of course, many sources get it *right*.<sup>214</sup> Somewhat bewildering, however, are those that get it *wrong*: at least one tweaks it into plural (“... points ...”),<sup>215</sup> another offers that the inscription reads “... wins its case ...”;<sup>216</sup> in this vein, yet another amends it further to state “... wins its case when justice is done its citizens in *its* courts”;<sup>217</sup> and one, who got it right in 1996, later that year got it wrong when she said that “... *when* justice is done ...” is what is inscribed.<sup>218</sup> Some—including the Department of Justice (twice) itself,<sup>219</sup> the author is mortified to say—have said it reads: “... wins its case whenever justice is done one of its citizens ...”<sup>220</sup> Without express reference to one

214. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 & n.2 (1963); *United States v. Moreno*, 991 F.2d 943, 953 (1st Cir. 1993) (Torruella, J., dissenting); *Withers v. United States*, 602 F.2d 124, 127 (6th Cir. 1979) (correctly noting that “the slogan [is] carved in wood at the entrance to the office of the Attorney General of the United States”); *King v. United States*, 372 F.2d 383, 396 n.10 (D.C. Cir. 1966); *Trout v. Garret*, 780 F. Supp. 1396, 1420–21 & n.60 (D.D.C. 1991); *Koby v. United States*, 47 Fed. Cl. 99, 106 n.6 (Fed. Cl. 2000); CAPLAN, *supra* note 201, at 17; Bresler, *supra* note 194, at 537, 539 & n.9, 545 & n.31; Days, *Interests of the United States*, *supra* note 198, at 1–2; Days, *Executive Branch Advocate*, *supra* note 198, at 691; Frankfurter, *supra* note 199, at 27 (emphasis added); Hoeveler, *supra* note 204, at 198; Panel Discussion at the Fourteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit: The Role of the Government Lawyer: Mission Impossible? (May 23, 1996), in 170 F.R.D. 560, 575 [hereinafter *Role of the Government Lawyer*] (comments of Deputy Att’y Gen. Jamie S. Gorelick); Kenneth W. Starr, *Christian Life in the Law*, 27 TEX. TECH. L. REV. 1359, 1359 (1996); Cooper, *supra* note 198, at 676 & n.8; Rosenzweig, *supra* note 203, at 2092; Janet Reno, *Legal Service for Poor Needs Vigilance*, THE CHAMPION, May 1998, at 32, 32.

215. Anabelle Rodríguez y Rodríguez, *Abogando ante el Tribunal Supremo: Deberes y Obligaciones de la Oficina del Procurador General*, 62 REV. JUR. U.P.R. 87, 94 n.23 (1993).

216. Rex E. Lee, Solicitor General, Address at the Ninth Annual Judicial Conference of the United States Court of Customs and Patent Appeals (May 25, 1882), in 94 F.R.D. 388, 389 (1982) (qualifying that he *thinks* that is what the inscription says).

217. J.C. Collet, Judge, Address at the Missouri Bar District Meeting in St. Louis on the Federal Tort Claims Act (Feb. 27, 1948), in 8 F.R.D. 1, 6 (1948) (emphasis added).

218. Compare *Role of the Government Lawyer*, *supra* note 214, at 575 (comments of Deputy Att’y Gen. Jamie S. Gorelick), with Panel Discussion at the Fifty-Sixth Judicial Conference of the District of Columbia Circuit: Ethics and the Government Lawyer—Do the Rules Apply? (June 13, 1996), in 174 F.R.D. 142, 145 (1996) (emphasis added) (comments of Deputy Att’y Gen. Jamie S. Gorelick); see also Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687 n.18 (1992) (also asserting (without citation) the inscription to say “when justice is done”).

219. See 200TH ANNIVERSARY, *supra* note 14, at 37; JUSTICE BLDG., *supra* note 194, at app.

220. See, e.g., *In re Doe*, 801 F. Supp. 478, 488–89 (D.N.M. 1992) (adding—erroneously, and just before misquoting the text—that “Attorney General Thornburgh would have done well to have taken a few steps from his office to contemplate the inscription on the rotunda wall *where it is cast in stone . . .*” (emphasis added)); *EEOC v. New Enter. Stone & Lime Co., Inc.*, 74 F.R.D. 628, 632 (W.D. Pa. 1977); *In re Howes*, 940 P.2d 159, 169 (N.M. 1997) (citing *Doe*, to which it is a successor case); HUSTON, *supra* note 15, at 32; Michael M. Berger & Gideon Kanner, *The Need for Takings*

another, the court in *Barnes v. Mississippi Department of Corrections*<sup>221</sup> and Judge Eugene R. Sullivan, concurring in *United States v. Pomarleau*,<sup>222</sup> ventured that it reads “. . . wins its case whenever justice is done to one of its citizens in the courts”; but the truncating court in *Inslaw, Inc. v. United States* contemplated a shorter inscription, thereby extending it beyond the confines of the courtroom: “. . . wins its point whenever justice is done to one of its citizens.”<sup>223</sup> Douglas Letter also shortened the inscription, but differently, to say “. . . done its citizens in Court,”<sup>224</sup> thus enabling Richard Zanfardino to assert the same.<sup>225</sup>

When, during closing argument, the defense counsel in *United States v. Schaffer*<sup>226</sup> suddenly (and illegitimately) impugned his integrity, the Department of Justice prosecutor—thinking quickly on his feet (and with commendable knowledge of Department lore)—recalled to the jury an inscription, “on the building of the Department of Justice in Washington . . . [, which] says: ‘The Government wins when justice is done its citizens in the court.’” No less timid were Professor Michael Tigar, who advised the Colorado jury—in the sensational December 1997 trial of Terry Lynn Nichols for his monstrous truck bombing of the Alfred P. Murrah Federal Building in Oklahoma City—that “[t]he

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*Law Reform: A View from the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837, 870 n.131 (1998) (preceding its misquotation with words (apparently unintentionally ironic) critical of the Department of Justice: “[p]erhaps familiarity breeds disregard, but . . . ,” and citing to *Brady* in support of the proposition, although that opinion does not support it); Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 240 (2000) (citing *New Enter. Stone & Lime*).

221. 907 F. Supp. 972, 979 n.13 (S.D. Miss. 1995) (emphasis added).

222. 57 M.J. 351, 366 n.2 (C.A.A.F. 2002) (Sullivan, J., concurring) (emphasis added). Notwithstanding the judge’s error, the author delightedly notes that in the space afforded by a single footnote in his four-paragraph concurrence, the judge cites to two wonderfully quotable equestrians who are not usually paired: Marcus Tullius Cicero’s *De Legibus* (*On the Laws*) (begun in 52 B.C. but published soon after his decapitation in Rome on December 7, 43 B.C.) and Sir W.S. Gilbert’s *The Mikado* (opened in 1885, twenty-six years before his May 29, 1911, drowning in his lake at Grim’s Dyke, near Hertfordshire, England, while attempting to save a young lady who had lost her footing and cried for help). See *id.* at 365 n.1. Fr. Rutler, one thinks, would be pleased with Judge Sullivan here (which is very high praise). See GEORGE WILLIAM RUTLER, *COINCIDENTALLY* (2006) (discussing many amusing coincidences).

223. *Inslaw, Inc. v. United States*, 83 B.R. 89, 142 (Bankr. D.D.C. 1988) (emphasis added).

224. Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I Ask for Is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1298–99 (1993).

225. Richard Zanfardino, *Leveling the Playing Field for Federal Prosecutors or an End Around Ethics? An Evaluation of the Thornburgh Memorandum and the Reno Rule*, 43 NAVAL L. REV. 137, 162 & n.178 (1996).

226. 266 F.2d 435, 443–44 (2d Cir. 1959).

government never loses when justice is done” were its “very words”;<sup>227</sup> Professor Peter Strauss, who quotes “the government wins *its case in court* whenever justice is done”;<sup>228</sup> and the defense counsel in *United States v. Battiato*, who, according to the court, informed the jury that inscribed on “the building which houses the Department of Justice, in the Nation’s Capitol” (overlooking the obviously troubling implications on the separation of powers) were the words “The Government wins when justice is done.”<sup>229</sup>

The very *location* of the inscription frequently is given erroneously, as is its *appearance*. For starters, no less an authority than Supreme Court Justice Thomas Campbell Clark, riding circuit, stated that, “[w]hile Attorney General of the United States [from 1945 to 1949, he] noticed an inscription that was carved in the oak panel of [his] anteroom and *embossed in gold . . .*”<sup>230</sup> If the inscription ever *was* so “embossed,” the author has no evidence of it, even as he has no evidence, *pace Doe*, of its ever having been “cast in *stone*” (assuming such a process to be physically possible).<sup>231</sup> Of course, one may not be looking in the right place: the *New Enterprise Stone & Lime* court suggests that a search of the “facade of the building housing the Department of Justice in Washington, D.C.,” would be fruitful;<sup>232</sup> if the beset prosecutor in *Eley* be

227. Ray E. Moses, *Oklahoma City Bombing: Persuasive Defense Arguments from Nichols*, THE CHAMPION, April 1998, at 27, 33.

228. Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, LAW & CONTEMP. PROBS., Spring 1998, at 155, 170 (emphasis added); *accord* *United States v. Eley*, 723 F.2d 1522, 1526 (11th Cir. 1984) (quoting, from the trial transcript, a harried but quick-thinking U.S. prosecutor’s words to the jury: “I can’t quote it exactly, but [the inscription] says the United States wins whenever justice is done. . . . [W]e win whenever justice is done.”).

229. *United States v. Battiato*, 204 F.2d 717, 719 (7th Cir. 1953); *see also* *Henderson v. United States*, 218 F.2d 14, 23 (6th Cir. 1955) (McAllister, J., dissenting) (discussing the reference to the motto in *Battiato*). As to the placement of formal executive-branch offices within the home buildings of other branches, *see* Waxman, *supra* note 20, at 3, 17 n.4.

230. *United States v. Mele*, 462 F.2d 918, 926 (2d Cir. 1972) (emphasis added). Of course, Attorney General Clark (not to be confused with his son, Attorney General William Ramsey Clark) does appear to have had a difficult relationship with the Department of Justice Main Building in Washington, D.C. A story still is told in the Department of his once finding himself, alone, and without his Departmental pass, outside one of the massive aluminum doors to the Building, at a time when it was guarded by Federal Bureau of Investigation agents. On being denied entry, he protested that he was the Attorney General; but the unrecognizing sentry saw his duty clearly: “Mister, I wouldn’t let you into this building without a pass if you were J. Edgar Hoover himself.”

231. *In re Doe*, 801 F. Supp. 478, 488–89 (D.N.M. 1992) (emphasis added). One must hope that the court intended no pun. *Cf. John 8:7* (“Let the one among you who is without sin be the first to cast a stone . . .”).

232. *EEOC v. New Enter. Stone & Lime Co., Inc.*, 74 F.R.D. 628, 632 (W.D. Pa. 1977); *accord* Green, *supra* note 220, at 240.

correct, that search should begin at “the front of [that] Building.”<sup>233</sup> Should these endeavors fail, further exploration might be profitable either “on the wall inside the inner courtyard of the Justice Department in Washington, D.C.”<sup>234</sup> or “in the lobby of the Solicitor General’s office,” where the *dictum* is “allegedly inscribed.”<sup>235</sup> The effort to find the inscription may not be worth the inevitable soiling of hands or clothes, however, if there be truth in Professor James Joseph Duane’s assertion that it is found on “an old<sup>[236]</sup> dusty<sup>[237]</sup> wall in downtown Washington.”<sup>238</sup>

Finally, there is the issue of the *authority*, or *weight*, of the inscription. The prosecutor in *Eley*, forced (as his brother-at-law in *Schaffer* was) in trial to respond quickly to an unanticipated argument by the defense, assured the jury that the inscription (which he paraphrased, because he “c[ould]n’t quote it exactly”) was “the motto of the government, and . . . the motto of the [arresting federal law-enforcement] agents, and . . . the motto of my office also,”<sup>239</sup> an assurance partly confirmed by the court, which (mistakenly) implied it to be “the Department of Justice’s motto.”<sup>240</sup> This mistaken notion

233. *Eley*, 723 F.2d at 1526.

234. Moses, *supra* note 227, at 33 (quoting Professor Tigar, who appears then to have been under great strain, as, soon thereafter, he “is said to have shed a tear at the very end of summation when he put his hand on his client’s [Terry Lynn Nichols’s] shoulders and uttered the final word: ‘Members of the jury, I don’t envy you the job that you have. But I tell you that *this is my brother*. He’s in your hands.’”). The Department of Justice Main Building has five separate courtyards, all roughly equidistant, *mutatis mutandis*, from Pennsylvania Avenue, 9th Street, Constitution Avenue, and 10th Street, NW, in Washington, D.C.; thus, it is unclear which courtyard (if any), fairly could be described as “the inner” one, and—regardless—none contains anything remotely like the text alleged.

235. David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 277 (1989) (citing Mr. Caplan’s book, *supra* note 198, at 17, for the proposition; but that book (as far as the author can discern) makes no such allegation). In any event, in early 2005 the author searched the lobby outside the Solicitor General’s office and found no evidence of any such inscription there.

236. The Department of Justice Main Building was constructed between March 1931 and September 1934. FIFTIETH ANNIVERSARY, *supra* note 8, at 16.

237. At least as of 3:35 p.m. on March 20, 2003, the author detected no dust on or about the inscription.

238. James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor’s Supposed ‘Right’ to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in Old Chief v. United States*, 168 F.R.D. 405, 440 n.151 (1996) (footnotes added); *see also In re Howes*, 940 P.2d 159, 169 (N.M. 1997) (stating that the inscription is “on the rotunda wall in Washington, D.C.,” without even attempting to specify of what building or which rotunda).

239. If the words of the inscription (or anything like them) are, in fact, the motto of the Office of the United States Attorney for the Northern District of Georgia, the author has unearthed no evidence of it.

240. *United States v. Eley*, 723 F.2d 1522, 1526 (11th Cir. 1984).

bedevils more than one person currently (or formerly) on the bench,<sup>241</sup> as well as some people never on it (or not yet, anyhow).<sup>242</sup> Other commentators remain satisfied with the assertion that the inscription is the motto of the Solicitor General,<sup>243</sup> or perhaps that of his office.<sup>244</sup> These last two, practically indistinguishable assertions actually may have the virtue of being true, though the author knows of no official or authoritative declaration of the same.<sup>245</sup> Lest there be any

241. See, e.g., *United States v. Moreno*, 991 F.2d 943, 953 (1st Cir. 1993) (Torruella, J., dissenting); Starr, *supra* note 214, at 1359.

242. See, e.g., Elizabeth Anne Fuerstman, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 COLUM. J.L. & SOC. PROBS. 169, 200 n.186 (1991).

243. See, e.g., CAPLAN, *supra* note 198, at 17.

244. Rodríguez y Rodríguez, *supra* note 215, at 94 n.23 (asserting that the inscription is “*el lema de la Oficina del Procurador General de los Estados Unidos*”).

If only for the sensible reasons indicated in KINGSLEY AMIS, *THE KING’S ENGLISH: A GUIDE TO MODERN USAGE* 67–68 (1998) (noting that because “feminist propaganda” is still a reality, he always uses “plural or passive constructions” rather than “face the chore of perpetually remembering to write ‘he or she’ in appropriate contexts,” lest he find himself “the occasion of some feminist outburst about unconscious (or conscious) chauvinism”), the author wishes to clarify that the third provision of 1 U.S.C. § 1 (“words importing the masculine gender include the feminine as well”) applies to this work. *But see* Rosenzweig, *supra* note 203, at 2080 (referring to the Solicitor General generally as “she”).

245. Thomas A. Hagemann would give the inscription little, if any, weight, as he demonstrated in a hard-boiled but thoroughly commonsensical recent article, Thomas A. Hagemann, *Essay, Confessions from a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151 (1996). Torqued at “Kenneth Bresler’s . . . thoughtful, thought-provoking and profoundly naive essay,” *supra* note 194, “on winning, losing, and why you should have a lobotomy,” and thus also at “the Georgetown Journal of Legal Ethics [for publishing] another exemplar of a purportedly legal article about angels on the heads of pins, bearing scarce relationship to the practitioner’s reality and scarce effects, too[, and] stand[ing] tall as another lighthouse to illuminate why practitioners have stopped reading law journals,” Hagemann suggests that to follow Bresler’s advice would be to “say hello to a lot of unmotivated bureaucrats muttering the infantile pabulum, ‘the government always wins when justice is done, the government always wins when justice is done . . .’ as they bounce merrily along from acquittal to acquittal.” Hagemann, *supra*, at 152–53, 157. In some sense at least, doubtless Judge Royce C. Lamberth would disagree, referring favorably, as he does, to “the old philosophy that . . . the government lawyer wins the case when he or she sees that justice is done, not winning at all costs.” *Role of the Government Lawyer*, *supra* note 214, at 570 (comments of Judge Royce C. Lamberth); *see also* Starr, *supra* note 214, at 1359 (correctly and approvingly describing the motto as “morally-infused”). The author is careful to note, in fairness, that Hagemann’s gimlet-eyed essay clearly rejects the notion that “winning at all costs” is or should be any part of a government attorney’s business; perhaps his quarrel really has less to do with the motto itself than with its use by Bresler:

[W]hen I was a federal prosecutor, I tried really hard to obtain convictions. There was a reason for that: the people I was trying to convict were, based on appearances, evidence, reasonable inferences, and my and my supervisors’ best judgment, factually guilty of the crimes charged. So, in a fit of hubris, I thought it an important part of

misunderstanding, the author wishes to emphasize that he does not mean anything by the foregoing,<sup>246</sup> being as given to error, in this and most other things, as the next man.<sup>247</sup> “It’s such a fine line between stupid . . . and clever.”<sup>248</sup>

If, as indicated here, judges, law professors, and practicing attorneys—and even Department personnel—have found it difficult to state correctly the source, text, location, appearance, authority, and legal weight of an English-language inscription on a seventy-four-year-old public building in the nation’s capital, small wonder ought there to be that doubt should swirl about the source, meaning, and adoption of a

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my job assignment to assist them in being found legally guilty as well. Therefore, I, on the government’s behalf, sought convictions.

Convictions, of course, were precisely what my fellow prosecutors and I were supposed to seek, and where Mr. Bresler’s essay . . . has gone wildly astray is in the false dichotomy between justice on the one hand and seeking convictions on the other. Unless the government is consistently and randomly charging the wrong people with crimes, then obtaining a large percentage of convictions is an essential part of justice. Our justice system assumes, and confidence in our system rests on, a certain correlation with objective reality and truth: indicted, factually guilty defendants should usually lose, and factually innocent people (a) should not get charged at all, or (b) should not lose. To be sure, from time to time, the government loses and justice wins. But, just as often, when the government loses, justice loses, too, because “justice” must mean more than any outcome generated by the process we’ve designed. The quality of those outcomes, the correlation of those outcomes to something like reality, matters.

While it is an answer (by prosecutors with precious little else to say) that “justice was done” when a factually guilty defendant walks, it’s an incomplete answer that the system cannot afford too often. Most defendants who are indicted need to be convicted—convicted fairly, but convicted nonetheless—or there is something deeply wrong with the system itself.

Hagemann, *supra*, at 153.

246. The author leaves it to the reader to determine whether *this* work is itself a manifestation of the “two things” Professor Rodell famously thought “wrong with almost all legal writing,” Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) (“One is style. The other is its content.”), and thus yet another “link[] in a chain of causal calamity.” Fred Rodell, Comment, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 288 (1962).

247. Cf. *In re Haseldine*, (1886) 31 Ch. D. 511, 517 (C.A. 1889) (Bowen, L.J.) (“I have the misfortune to differ from the Lord Justice Cotton, and I do so with a deep sense of the probability that he is right.”); Q. HORATIUS FLACCUS, *Epistola ad Pisones* [i.e., *Letter to the Pisos*, commonly known as *Ars Poetica* (*The Art of Poetry*)], ln. 359, in SATIRES, EPISTLES AND ARS POETICA 477, 480 (H. Rushton Fairclough ed., Harvard Univ. Press 1936) (circa 10 B.C.) (“*quandoque bonus dormitat Homerus*” (i.e., “even the worthy Homer sometimes nods”), a reference to the perhaps-blind, classical epic poet, author of *The Iliad* and *The Odyssey*); [THOMAS (HAEMERKEN) À KEMPIS], *THE IMITATION OF CHRIST* 28 (Albert Hyma ed., Century Co. 1927) (published anonymously 1418) (“*Nam homo proponit, sed Deus disponit.*” (i.e., “For man proposes, but God disposes . . .”)).

248. THIS IS SPINAL TAP (Embassy 1983) (observation by actor Michael McKean (playing the role of “David St. Hubbins”) to actor Christopher Guest (i.e., the fifth Lord Haden-Guest, playing the role of “Nigel Tufnel”)).

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similarly ordered *Latin* motto, nearly a hundred years older and with ancient roots in the common law. Who fashioned that motto into its present shape and bequeathed it to the Department of Justice, and when, are facts now utterly forgotten. Nor is it now known what *precise* English meaning the motto was intended to convey. *Perfect* knowledge being unavailable on this last point, one must be content with a likely meaning: the motto refers to the Attorney General (and those under him in service to the public weal) “*who prosecutes on behalf of justice*”—surely, a fine vocation, and entirely worth recalling. Divine, perfect justice can hardly be expected in this vale of tears; *human justice*, however, remains within reach, when the servants of the law seek diligently, humbly, and faithfully to pursue justice and prosecute their duty on her behalf. Let’s roll.