The Great Dissenter No More: Justice Harlan, the Fourteenth Amendment, and *United States v. Shipp*

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Justice John Marshall Harlan made his reputation on the Supreme Court in the late nineteenth and early twentieth centuries as the "Great Dissenter." With a judicial view of the Fourteenth Amendment's protections for newly freed Black Americans that differed from his colleagues, it was Harlan who stood alone in dissent from the Court's opinions in landmark cases which narrowed the impact of that Amendment. For his willingness to stand alone in defense of equal protection of the law for freed Blacks and his willingness to authorize the federal government to step in and vindicate their rights when states would fail to do the same, Harlan doubtless earned the veneration of civil rights activists and his Great Dissenter nickname.

Yet the biographic record of Justice Harlan's role on the Court has largely overlooked a crucial moment in his judicial career, one where Harlan set aside his penchant for dissents and instead built a coalition to protect the rights of Black Americans and the power of the federal government to act on Fourteenth Amendment violations. This historical moment, the case of United States v. Shipp*, sheds new light on Harlan's career and legacy, demonstrating something more than the Great Dissenter's willingness to speak out alone and sound the alarm on equal rights and protections.*

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INTRODUCTION

The Supreme Court of the late nineteenth and early twentieth centuries found itself with three new amendments to the Constitution to dissect and interpret, each with no small degree of importance. The Reconstruction Amendments, the Thirteenth barring slavery,[1] the Fourteenth altering the relationship between the federal government and the states,[2] and the Fifteenth guaranteeing voting rights regardless of race,[3] presented the Court with opportunities for radical alterations to the federal system and meaningful changes to the nature of race relations under the law throughout the country. The long-fought and bloody war changed much about the nation and the nation's Constitution, and scholars can hardly understate the opportunities that these Amendments posed for the Court.

Yet the reality of what followed the adoption of these Amendments was no shining moment in race relations or in the powers of the federal government to protect newly freed Black Americans, as the promises of Reconstruction might have suggested. Despite the opportunity for vigorous federal enforcement of equal protection under the law and due process protections, the Court left little opportunity for federal involvement at all.[4] Through a series of opinions in the post-Reconstruction era, the Court effectively gutted the Thirteenth and Fourteenth Amendments and left the millions of Black Americans waiting for federal involvement to protect their rights without options.[5] This period of the Court's history, sometimes called judicial Reconstruction,[6] was among the worst periods of the Court for civil rights advocates and petitioners.

1. U.S. CONST. amend. XIII.
2. U.S. CONST. amend. XIV.
3. U.S. CONST. amend. XV.
4. *See, generally*, United States v. Cruikshank, 92 U.S. 542 (1876); The Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896); and Hodges v. United States, 203 U.S. 1 (1906), among others.
5. *See id.*
6. *See* Pamela Brandwein, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011).

But the Court did not issue these opinions, in *The Civil Rights Cases*,[7] in *Plessy v. Ferguson*,[8] and in *Hodges v. United States*,[9] unanimously. Indeed, one Justice throughout each of these opinions authored stinging dissents, for which the annals of history have awarded him the name "The Great Dissenter:"[10] Justice John Marshall Harlan. With a reputation for a fierce belief that the Constitution's newest post-war Amendments empowered the federal government to step in between the states and their new Black citizens,[11] Justice Harlan's dissents in each of these cases advocate for vigorous federal protection of Blacks that the Court itself declined to adopt. Justice Harlan's career, marked by dissents that read like shouting into a canyon, left many historians and observers bemoaning the reality that his position on the Fourteenth Amendment was not persuasive to his fellow Justices.[12]

This reading of Justice Harlan's career, though, one which sees his role only as the dissenter on cases of Fourteenth Amendment or Black civil rights importance, overlooks a crucial moment in Supreme Court history where Harlan managed to rally the Court behind a poor Black criminal defendant and carve out a new way to protect Black citizens.[13] The case of *United States v. Shipp*[14] does not fit this fiery dissent approach for which history remembers Harlan.[15] Instead, in *Shipp*, Justice

7. 109 U.S. 3 (1883).

8. 163 U.S. 537 (1896).

9. 203 U.S. 1 (1906).

10. *See, e.g.*, Peter S. Canellos, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO (2021); Loren P. Beth, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 164 (1992); Linda Przybyszewski, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 8 (1999).

11. Canellos, *supra* note 10, at 1−4.

12. *See* note 10 for these kinds of historians and observers.

13. Mark Curriden & Leroy Phillips, CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM 192−96 (1999).

14. Throughout, I use the singular "case" to describe the events of *United States v. Shipp*. In reality, the events of *Shipp* produced three separate opinions throughout the period of 1906 to 1910, each with its own unique case number and citation. When my analysis centers on a single opinion from among the three, I use a numeral to denote which of the three opinions it is: *Shipp* I, 203 U.S. 563 (1906) (detailing the complaint against Shipp and his codefendants and offering the Court's answer to the jurisdictional questions posed in having a criminal trial in the Supreme Court); *Shipp* II, 214 U.S. 386 (1909) (the divided Court opinion finding Shipp and five codefendants guilty of contempt of the Supreme Court); and *Shipp* III, 215 U.S. 580 (1909) (a brief order sentencing the six convicted defendants).

15. Indeed, scholars tend not to discuss *Shipp* at all. While Curriden and Phillips offer a popular narrative of the case and Canellos devotes fourteen pages of his 400+ page text on Justice Harlan to the case, the only other considerations of the case come in footnotes to law review on the nature of contempt. Even the Oliver Wendell Holmes Devise, an authoritative history of the Supreme Court, makes only two passing references in footnotes to *Shipp* in the volume devoted to the relevant period. *See* Owen M. Fiss, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (2006).

Harlan took a quieter, more measured approach, one more focused on consensus and agreement than bombastic rhetoric and fervent dissent. In *Shipp*, Justice Harlan set aside his Great Dissenter posture in favor of a new role: coalition-building around significant acts of federal power to protect Black civil rights.[16]

This paper seeks to correct the record on Justice Harlan's legacy. It does so in three parts. Part I describes the background in which *Shipp* arose, including the connections between the Fourteenth Amendment, criminal law, race relations, and Justice Harlan himself. Part II describes how *United States v. Shipp* evolved, relying on a barely examined treasure trove of primary sources,[17] to place Justice Harlan in the center of a fascinating legal conundrum which faced the Court: what to do when a state official willfully violates a Supreme Court order and costs a Black man his life? Part III answers that question, walking through the events of *United States v. Shipp* and the three stages of Supreme Court opinions it produced. Throughout, the paper keeps an eye on Justice Harlan's involvement, behind the scenes and otherwise, in crafting a new path forward for federal enforcement of the Fourteenth Amendment. The paper concludes by suggesting that the conventional label for Justice Harlan's performance on the Court needs to be adjusted for his role in the *Shipp* case. In that case, Harlan functioned instead as The Great Coalition-Builder.

PART I: JUSTICE HARLAN, THE GREAT DISSENTER

A. Early Life and the Duality of Harlan

Justice Harlan, born to a slave-holding family in Kentucky in 1833, began his career as a lawyer and political figure in the immediate pre-war period in what would be a border state between the Union and Confederacy.[18] Although Harlan came from slave-owning roots in an area which would

16. Canellos, *supra* note 10, at 411−24.

17. Only Curriden and Phillips, *supra* note 13, and Callenos, *supra* note 10, discuss *Shipp* in any detail, and neither relies on many of the sources consulted in this paper.

18. Przybyszewski, *supra* note 10, at 14; Steve Luxenberg, SEPARATE: THE STORY OF *PLESSY V. FERGUSON,* AND AMERICA'S JOURNEY FROM SLAVERY TO SEGREGATION 38–39, 44, 108 (2019).

have readily seen his support of the Confederacy as reasonable, he opted instead to fight for and advocate on behalf of the Union effort throughout the Civil War. In many ways, the War caught him between his family heritage of slavery and a belief that a united nation must survive over one divided by slavery and secession.[19]

The duality of Harlan's personal and political beliefs on slavery pervades all corners of his life and career. Throughout the 1850s, Harlan offered criticism of both abolitionists and pro-slavery voices around the nation.[20] Despite living in and finding significant political influence in a Southern state, he ardently opposed secession before resolving to recruit and lead a Union Army infantry unit out of his home state of Kentucky.[21] During the war, he opposed President Lincoln's Emancipation Proclamation, yet did not change his support for the Union or his personal involvement in the war effort.[22] As Attorney General for the state of Kentucky, he opposed ratification of the Thirteenth Amendment, prohibiting slavery throughout the war-weary nation, as a "direct interference, by a portion of the states, with the local concerns of other states." [23] Yet during his tenure on the Court, he fought bitterly with his fellow Justices to insist that the Amendment expanded beyond the mere legal prohibition of slavery and into an empowerment of Congress to prevent the badges and incidents of slavery from continuing to mark formerly enslaved peoples.[24] The title of Great Dissenter, particularly when applied to his post-war Amendments jurisprudence, loses much of the nuance which defined Justice Harlan's life and career.

When Justice Harlan reached the Supreme Court in December of 1877, however, his views on the impact of slavery on American society after the Civil War and on the role of the Reconstruction

19. Luxenberg, *supra* note 18, at 122–24.
20. *Id.* at 38–39, 44.
21. *Id.* at 122–24.
22. *Id.* at 194–96.
23. *Id.* at 202 (quoting John Marshall Harlan, Speech Opposing Ratification of the Thirteenth Amendment in Lexington, KY (1865)); *see also* The Civil Rights Cases, 109 U.S. 3, 35 (Harlan, J., dissenting).
24. *Id.*

Amendments in altering the nation's federal system solidified and cemented in opposition to the Waite Court's approach.[25] The Waite Court of 1874 to 1888[26] carries a reputation for apathy on the civil rights issues plaguing Black Americans in the post-war period and for sharply curtailing federal efforts to enforce the Reconstruction Amendments "by appropriate legislation."[27] It was this period of the Court which saw Justice Harlan's first dissents, in familiar cases like *The Civil Rights Cases*. Yet what may be less familiar is the Court's understanding of how the Fourteenth Amendment interacted with criminal law more generally in this period.

B. The Fourteenth Amendment and the Criminal Law

On its face, the Fourteenth Amendment's interactions with the criminal law seem to flow most obviously from the Amendment's Due Process Clause, found in Section 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[28] This mirrors the Fifth Amendment's Due Process Clause, with one notable distinction: the Fourteenth Amendment specifically targets state powers and actions, which the Fifth Amendment did not. The Fourteenth Amendment's Due Process Clause is the basis for much of the federal Constitution's relationship between criminal law and the several states.

But what is today a given was, for many decades following the addition of the Fourteenth Amendment to the text of the Constitution, not a realistic option. The Court had made as much clear in 1833, when it held the Bill of Rights inapplicable to the states themselves.[29] That ruling carried on even past the adoption of the Fourteenth Amendment, with the *Cruikshank* case reaffirming its central holding in 1876.[30] In short, even the direct admonition that no state can deprive life, liberty, or

25. Przybyszewski, *supra* note 10, at 14, 74.
26. *See, for example*, DONALD GRIER STEPHENSON, JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY (2003).
27. *Id.*; U.S. CONST. amend. XIV., § 5.
28. U.S. CONST. amend. XIV., § 1.
29. Barron v. Baltimore, 32 U.S. 243 (1833)
30. United States v. Cruikshank, 92 U.S. 542 (1876).

property except by due process of law did not clearly establish the Bill of Rights as the kind of process due to criminal defendants in state court.

Today, that position has been fully reversed by the Court, although not all at once. Instead of concluding that *Barron* and *Cruikshank* were wrongly decided and that Fourteenth Amendment's Due Process Clause made the Bill of Rights a series of limitations on state powers as well, the Court created the doctrine of "selective incorporation." Via selective incorporation, certain rights listed in the Bill of Rights might be applicable against the states under the Fourteenth Amendment, but certain others might not; the Court would have to decide on a case-by-case basis. The underpinnings of this doctrine emerged, over Justice Harlan's dissent, in the case of *Twinning v. New Jersey* in 1908.[31] There, the Court considered whether the Fifth Amendment's protection against self-incrimination applied against the states such that arguments to the jury on the defendants' election not to testify tainted their conviction.[32] Despite holding that it did not,[33] the Court via Justice Moody did articulate the groundwork for selective incorporation to follow:

> It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.[34]

Thus, while possible that a right from the first eight Amendments might be protected against the states via the Fourteenth Amendment's Due Process Clause, the right against self-incrimination was not one of those ready for incorporation just yet. It would not be applied against the states until the 1964 case of *Malloy v. Hogan*.[35] Dissenting in *Twining,* Harlan argued first that the Court ought not to have reached the question of incorporation if the right against self-incrimination was not truly at issue, as the Court

31. 211 U.S. 78 (1908).
32. *Id.* at 81.
33. *Id.* at 114.
34. *Id.* at 99.
35. 378 U.S. 1 (1964).

had "assumed" the self-incrimination issue was actually present.[36] But beyond this procedural complaint, Justice Harlan also objected to the failure to incorporate the Bill of Rights outright. In his view, the Fourteenth Amendment necessarily protected against self-incrimination, as it would necessarily protect against other violations of the Bill of Rights, as part of the "birthright" of the Framers of the Constitution and all Americans since.[37]

Justice Harlan had already suggested total incorporation of the Bill of Rights via the Fourteenth Amendment in his solo dissent in *Hurtado v. California*.[38] There, the Court found the Fifth Amendment's guarantee of a grand jury indictment did not extend to the states under the Reconstruction Amendment, eviscerating a claim of due process violations for a state defendant. In dissent, as in the *Twinning* dissent, Justice Harlan turned to history to show the role the formal indictment guaranteed by the Fifth Amendment played in "due process," insisting the Fourteenth Amendment necessarily meant the states had to play by the same rules as the federal criminal system.[39] Harlan's approach in *Twining* and *Hurtado* to the application of Bill of Rights provisions to the states would have advanced the relationship of the Fourteenth Amendment and the criminal law by a half century or more.

Yet in 1906, when the stories of Ed Johnson and *US v. Shipp* began, incorporation of rights guaranteeing a fair trial, effective counsel, or impartial juries were still decades off. The Court's treatment of the Fourteenth Amendment as a response to Civil War racial violence and, perhaps, an attempt to make a more equal nation on the basis of race, did little more for Black Americans.

36. Twinning, 211 U.S. at 115–17 (Harlan, J., dissenting).
37. *Id.* at 117–19.
38. 110 U.S. 516, 547–48 (1884) (Harlan, J., dissenting).
39. *Id.*

C. Race, the Court, and Justice Harlan

Justice Harlan's time on the Supreme Court coincided with a low point in race relations since the end of the Civil War. This "nadir" of race relations, a term used by prominent historians of race in America to describe the post-Reconstruction period, infected the country's social outlook on race as well as the Court's legal posture toward it.

"Nadir" was a term coined by Black historian Rayford Logan in his 1954 book *The Negro in American Life and Thought: The Nadir, 1877–1901*. The book's title makes a claim as to when the nadir truly came: from the end of Reconstruction to just after the turn of the twentieth century. Other historians have argued for later end dates, inclusive of the re-emergence of the Klu Klux Klan to a strength of four million in 1924[40] or of the first "Great Migration" of Black Americans out of the American South, with some 1.6 million Black Americans relocating to the North and Midwest by 1930.[41] By these accounts, the nadir wraps all of Justice Harlan's time on the bench into its reach, and not without good reason. The Court on which Harlan sat found so few cases in favor of a Black petitioner that one would not be wrong to be skeptical of the Court's commitment to the post-War Amendments. One such rare exception, where the Court did apply a post-War Amendment to the benefit of a Black petitioner, was the case of *Neal v. Delaware* in 1880.[42]

In a majority opinion by Justice Harlan himself, the Court held that the Fifteenth Amendment's guarantee of the right to vote to Black Americans meant that the state constitution of Delaware, which limited the pool of potential grand and trial jurors to only those able to vote, was required to embrace Black jurors.[43] This had the effect of compelling new trials for the Black defendant who had petitioned the Court to recognize the right of Black Americans to serve on juries in light of

40. RICHARD N. CURRENT *ET AL*, AMERICAN HISTORY: A SURVEY, 7TH EDITION 693 (1987).

41. Lakisha Odlum, *The Great Migration*, DIGITAL PUBLIC LIBRARY OF AMERICA (last accessed Jan. 24, 2024), https://dp.la/primary-source-sets/the-great-migration.

42. 103 U.S. 370 (1880).

43. *Id.* at 370.

the Fifteenth Amendment's change in who was actually able to vote.[44] The holding of *Neal*, however, did not extend to forbidding the exclusion of Black Americans on the basis of their race from jury service *in toto*. Instead, the case merely decided that, where a state aligned jury service with voter eligibility, it must embrace Black jurors. Despite the limited success which *Neal* created for Black Americans, the Court's approach to state action doctrine under the Fourteenth Amendment more broadly stood starkly opposed to increased federal protections for those same citizens.

D. State Action in the Harlan Years: Hodges v. United States

The most famous examples of the Supreme Court's limitations of the Fourteenth Amendment under the state action doctrine emerge in *The Civil Rights Cases* and *Plessy*. Equally so, Justice Harlan's dissents against those opinions, which stripped Fourteenth Amendment tools of protection from the federal government, are his most notable and quotable. Yet a final dissent, less studied or notable than the previous two, rounds out Justice Harlan's work in fighting for racial equality from the voting minority. The case of *Hodges v. United States*,[45] a 1906 opinion of Justice Brewer for a 7-2 Court, deserves special attention here for its similarity, both in underlying legal issues and in time, to *United States v. Shipp*.

In *Hodges*, the federal prosecutor in the Eastern District of Arkansas sought and obtained indictment and conviction against three white defendants, who owned and operated a lumber mill in that state, for conspiring to violate the civil rights of a group of Black Americans by intimidating their pursuit to vindicate their contractual right to payment for the work they performed in the mill.[46] Under the Enforcement Act of 1870, which the Court had already weakened in *Cruikshank*, such a conspiracy was unlawful, and forcing Black Americans to work without pay in the absence of criminal conviction was almost certainly the kind of slavery the Thirteenth Amendment prohibited. Indeed, the Court

44. *Id.*
45. Hodges v. United States, 203 U.S. 1 (1906).
46. *Id.* at 2–5.

itself had made certain to include interference with the right to make contracts as among the "badges and incidents of slavery" that it explicitly enumerated in *The Civil Rights Cases*,[47] making federal prosecution for the infliction of that badge a logical conclusion from the facts that those prosecutors must have believed to be Supreme Court approved.

Yet when the Court examined the case, the state action doctrine once again frustrated federal enforcement. This time, the Court hardly addressed the reality: that the Fourteenth Amendment did not authorize the federal government to target private citizen behavior was "beyond dispute."[48] Perhaps Justice Brewer had not read Justice Harlan's earlier work disputing that same point exactly and ferociously. Nevertheless, the Court focused its majority opinion only on whether the Thirteenth Amendment authorized Congressional legislation against (and federal prosecution arriving from) private white citizens conspiring to intimidate Black Americans into effective slavery. Yet, despite the "badges and incidents of slavery" argument which the Court accepted in *The Civil Rights Cases* as including such interference with contract rights, the *Hodges* Court was not convinced.

Instead, the Court held that it was "not the intent of the [Thirteenth] Amendment to denounce every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation."[49] And since the "[Thirteenth] Amendment operates only to protect the African race," and "nowhere in the record does it appear that the parties charged to have been wronged by the defendants had ever been themselves slaves, or were the descendants of slaves," then the alleged victims in the case "took no more from the Amendment than any other citizens of the United States."[50] By this logic, by comparison to the federally-legislated racial restrictions on immigrants from China under the Chinese

47. The Civil Rights Cases, 109 U.S. 3, 22 (1883).
48. 203 U.S. 1, 14 (1906).
49. *Id.* at 19.
50. *Id.* at 18.

Exclusion Act,[51] and by noting that the Fourteenth Amendment made Black Americans "citizens" as distinct from wards of the federal government or akin to tribal Native American nations,[52] the Court reversed the conviction and tossed the case.[53] As citizens instead of wards or separate sovereign nationals, Black Americans must, then, "tak[e] their chances with other citizens in the states where they should make their homes," without Congressional protections against what those citizens may do to harm them.[54] States alone could stand in the gap between white and Black Americans, and state action won the day yet again.

Justice Harlan, obviously, disagreed, although this time with the support of Justice William Day, who joined the Court in 1903. His dissent, also multiple times longer than the majority opinion,[55] threw *Cruikshank* and *The Civil Rights Cases* back at the Court majority in palpable disgust at the Court's reversal on the right to contract issue.[56] After describing the proposition under which the Court majority had reached its conclusion, Harlan cautioned that "such a proposition, I submit, is inadmissible, if regard be had to former decisions."[57] No reasoned or principled reading of the Court's precedents in *Cruikshank*, *The Civil Rights Cases*, and others could genuinely support the conclusion of the Court in *Hodges*, and even those prior cases did not go far enough to protect Black Americans like the Reconstruction Amendments had intended.

In the *Hodges* dissent, as in each of his earlier civil rights dissents, Harlan seemed to do little more to affect his fellow Justices than whispering his judicial philosophies and constitutional interpretations into a seashell before tossing it into the sea. Across nearly the whole of his Supreme Court tenure, from *The Civil Rights Cases* dissent in 1883 to *Hodges* dissent in 1906, only one Justice

51. *Id.* at 19.
52. *Id.*
53. *Id.* at 20.
54. *Id.*
55. Hodges v. United States, 203 U.S. 1, 20–38 (1906) (Harlan, J., dissenting).
56. *Id.* at 29–32.
57. *Id.* at 36.

adopted Harlan's views as his own. No matter how great these dissents were, nor how important it was for the Black community of the nation to see a man robed in supreme power fighting for their rights and equalities from on high, Justice Harlan's views did not and seemingly could not translate into real and effective exercises of power from the bench.

Another route, however, appeared in front of the Justice, one which he had no success in before on matters of race relations: coalition-building by careful and scrupulous work behind the scenes. No opportunity for such an approach had better presented itself to Justice Harlan and the Court than the events of 1906 in Chattanooga, Tennessee, starting with the wrongful conviction of Ed Johnson and ending with a once-in-history exercise of Supreme Court power over a state official. That opportunity, *United States v. Joseph F. Shipp*, is the subject of this paper's next section.

PART II: JUSTICE DENIED AND A JUSTICE INSPIRED[58]

To bring the involvement of Justice Harlan in *United States v. Shipp* to light requires some factual background to that matter, particularly given the lack of scholarly discussion of the case. Though the story does not begin with Justice Harlan, the events underlying *Shipp* warrant historical attention they have not yet received to illustrate how Justice Harlan's actions in *Shipp* differed from his prior work. To provide this background, what follows is reconstructed from the trial records of *Tennessee v. Ed Johnson*, the habeas proceeding of *Ed Johnson v. Tennessee*, and the Supreme Court records for *United States v. Shipp*. These records, housed in the National Archives' Supreme Court collections, offer vast and fascinating insights into the *Shipp* case, including a full transcript of the testimony taken on behalf of the Supreme Court by its appointed Commissioner in Chattanooga. To underscore Justice

58. This Part offers a brief introduction to the events which brought Sheriff Joseph F. Shipp into the Supreme Court as a criminal defendant making an initial appearance. The full narrative of the case, including Ed Johnson's constitutionally deficient trial in Chattanooga, the tales of his appeals through all levels of state and federal courts, his horrifying lynching and the public response to the Court's execution stay in the city, and Shipp's role in all of these steps, are more fully explored in Mark Curriden and Leroy Phillips' narrative history, *supra* note 13. I encourage readers to explore the story of *Shipp* through Curriden and Phillips, as I try here to offer only the most essential facts needed to establish Justice Harlan's interest and role in the case through the trial records available today.

Harlan's role, the story focuses on three main phases: the initial trial, Johnson's appeals, and the reaction in Chattanooga to the Supreme Court's stay of Johnson's execution.

A. The Attack, the Arrest, and the Trial

The story of *United States v. Shipp* began in Chattanooga, Tennessee, with the alleged rape of Nevada Taylor, a young white woman in the city. Joseph F. Shipp, former Captain in the Confederate Army and then-current elected Sheriff of the county which houses Chattanooga, saw the rise of crime in the city as coming to a head with this attack.[59] The largely white population of Chattanooga was quick to blame the Black community for any crime at all, but especially for one so heinous as a rape. With headlines like "Desperadoes Run Rampant in Chattanooga; Negro Thus Reach Climax of Boldness"[60] describing the environment in the months before the January 1906 attack, and with one of the two city newspapers announcing the morning after the attack, "Brutal Crime of Negro Fiend: Details Shock the City,"[61] the racial animus of the white city against its Black community was clear. As it related to this particular attack, however, there was only one problem: the victim did not identify her attacker as Black before Sheriff Shipp suggested it.[62] Indeed, the victim by her own admission could not identify her attacker, who came behind her in a graveyard and of whom she never claimed to have gotten a look.[63]

With a reelection campaign faltering throughout the crime wave, Sheriff Shipp grew desperate for a conviction in the alleged rape case.[64] So when a tip came willing to inculpate Ed Johnson, a young Black man in the city, the Sheriff readily took steps toward an arrest and Johnson's conviction which

59. Curriden, *supra* note 13, at 28.
60. THE CHATTANOOGA TIMES, Dec. 26, 1905.
61. THE CHATTANOOGA NEWS, Jan. 24, 1906.
62. Sworn Test. of Nevada Taylor, *Tennessee v. Ed Johnson*, Feb. 6, 1906; Sworn Test. of Sheriff Joseph F. Shipp, *Tennessee v. Ed Johnson*, Feb. 6, 1906.
63. Taylor Test., *supra* note 62.
64. Curriden, *supra* note 13, at 35–37.

would certainly follow. Yet the atmosphere in the city seemed not inclined to tolerate a slow-moving judicial process for Johnson. *The Chattanooga News* declared:

> The fiendish and unspeakable crime committed . . . by a Negro brute . . . is the sample of the crimes which heat southern blood to the boiling point and prompt law abiding men to take the law into their own hands and mete out swift and horrible punishment.[65]

Whether Shipp could keep his defendant alive long enough to see trial was a genuinely open question in a white community filled with fear by recent criminal activity and by their newspapers, which stoked that fear into a frenzy. Within hours of getting his tip, and just days after the alleged attack itself, Shipp took Johnson into custody and spirited him away to Knoxville by train in an effort to prevent those same "law abiding men" from taking the law "into their own hands."[66] When a mob formed that same evening to seize and hang Johnson through the exact kind of vigilante justice *The Chattanooga News* had arguably either predicted or called for, they came up empty of their target and grew displeased with Shipp. Facing electoral defeat, Shipp wouldn't make the same mistake again.[67]

But the furious mob in Chattanooga did not have to wait long to see if the courts would deliver unto Johnson the execution that it fervently sought. Johnson's capital trial began less than two weeks after his arrest, with a set of court-appointed counsel who had never tried a criminal case (let alone a death penalty eligible one like Johnson's) and a community of spectators waiting for the hammer to fall.[68] The trial itself was a spectacle of constitutional errors by modern standards: no one from the Black community was drawn into the pool of prospective jurors, an almost certainly intentional move on the part of Chattanooga Criminal Court Judge Samuel McReynolds;[69] members of the public who

65. *Brutal Crime of Negro Fiend*, *supra* note 61.

66. *Id*; Curriden, *supra* note 13, at 48–50.

67. Curriden, *supra* note 13, at 48–50.

68. Sworn Test. of Robert Cameron, *Ed Johnson v.* Tennessee, Habeas Pet. Hr'g, Mar. 10, 1906. Cameron was one of the three appointed trial counsel for Johnson.

69. Curriden, *supra* note 13, at 230 ("[The *Chattanooga News* editor J.G. Rice] unashamedly contradicted Judge McReynolds and Sheriff Shipp in regard to the allegation that black people were intentionally kept off juries. 'The allegation is a fact. The South long ago decided this to be a white man's government. . .'").

sought to support Johnson at trial were excluded from the gallery;[70] and in an unusual scene on the third day of trial during the State's rebuttal evidence, a juror himself asked to and was permitted to examine the alleged victim about the certainty of her identification.[71] When, through tears, she admitted she could not be sure, but that she believed Johnson to be her attacker, another juror leapt to his feet, pointed at Johnson, and screamed in court: "If I could get at him, I'd tear his heart out right now."[72] That juror, along with the two who physically restrained him from attacking Johnson in the courtroom, remained as active members of the jury panel and contributed their votes to Johnson's conviction.

Trial concluded shortly thereafter with the final rebuttal from the District Attorney, Matt Whittaker: "Send that black brute to the gallows."[73] That is, of course, precisely what the jury voted to do. Conviction came after brief deliberations on the evening of the third day of trial and even more brief deliberations before announcing the verdict the following morning.[74] In thanking the jury for their service, Judge McReynolds unintentionally highlighted one of the most unthinkable aspects of the sham trial against Johnson by modern standards: "It is now seventeen days since the crime for which Johnson was today convicted was committed."[75] In just seventeen days, the entire adversarial trial process of which the Sixth Amendment speaks churned over and produced a death sentence for a man with nine separate and exonerating alibi witnesses, all of whom testified on his behalf.[76]

B. Johnson on Appeal and the Supreme Court's Intervention

By this point, however, Johnson's legal team had found an ally in Noah Parden, a prominent Black attorney in Chattanooga with experience in criminal defense work at all levels, including appeals

70. *Id.* at 99.
71. *Id.* at 108–09; Sworn Test. of Nevada Taylor, *Tennessee v. Ed Johnson*, Feb. 8, 1906.
72. Taylor Test., *supra* note 72.
73. Closing Arg. of Matt Whittaker, *Tennessee v. Ed Johnson*, Feb. 8, 1906.
74. Curriden, *supra* note 13, at 118–20.
75. Judge Sam McReynolds, Reading of the Verdict, *Tennessee v. Ed Johnson*, Feb. 9, 1906.
76. Trial Tr., *Tennessee v. Ed Johnson*, Feb. 6–7, 1906; Curriden, *supra* note 13, at 95–105.

throughout the state courts.[77] With Parden taking over from the trial-weary appointed counsel, Johnson's defense now turned to aggressive appellate practice, seeking to right the multitude of perceived errors which, to Parden then and to courts today, amounted to a deprivation of the right to a fair trial. Those appeals began almost immediately, first with a motion for a new trial before Judge McReynolds. Rejecting the claim that Johnson's trial had been anything less than fair, Judge McReynolds did not hold back:

> The court has never witnessed a trial that was conducted more fairly. . . . What can two Negro lawyers do that the defendant's previous three attorneys were unable to achieve? . . . Do you think a Negro lawyer could possibly be smarter or know the law better than a white lawyer?[78]

Unsurprisingly, in light of Judge McReynolds response to the idea that Johnson's trial was constitutionally deficient, the Judge denied the motion for a new trial. Johnson's appellate team then turned to the Supreme Court of the state of Tennessee, in Nashville, for an emergency stay of execution and a chance to argue the case for Johnson's release or retrial.[79] One week after the defeat in Judge McReynolds' courtroom, Parden submitted his motion to the state's highest court. Parden argued that the conviction could not be sustained against the weight of the evidence presented at trial, that the denial of motions for a new venue and an out-of-town jury constituted reversible error given the tense and bloodthirsty atmosphere amongst the white population of Chattanooga, and that the outburst of the juror described above denied Johnson a fair trial by an impartial jury when it came time to deliberate.[80] Less than two weeks later, the Tennessee Supreme Court unanimously responded, dismissing the case on both technical and meritorious grounds and paving the way for Johnson's prompt and public execution.[81]

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77. Curriden, *supra* note 13, at 6–8, 131–35.

78. Judge Sam McReynolds, Hr'g on the Mot. for a New Trial, *Tennessee v. Ed Johnson*, Feb. 13, 1906. The "two Negro lawyers" to which Judge McReynolds refers are Parden and his law partner Style Hutchins.

79. Curriden, *supra* note 13, at 145.

80. Noah Parden, Mot. for Writ of Error, *Tennessee v. Ed Johnson*, Feb. 20, 1906.

81. Order Den. Mot. for Writ of Error, *Tennessee v. Ed Johnson*, Mar. 3, 1906.

Yet Parden was not through with the fight to spare Johnson's life. Instead, four days after the Tennessee Supreme Court tossed Johnson's appeal, Parden approached the clerk of the United States District Court in Knoxville (whose geographic jurisdiction covered Chattanooga) and filed a petition for a writ of habeas corpus, a last-ditch effort to protect Johnson from the gallows.[82] In his petition, Parden alleged that Johnson's trial contained so many errors of fundamental and constitutional fairness as to make his detention and pending death sentence illegal and unconstitutional.[83] Filed pursuant to the Habeas Corpus Act of 1867,[84] Parden's petition has been regarded by one commentator as "nothing more than a tactic to delay punishment"[85] given how rarely such petitions yielded any positive results for the defendants whose counsel sought them.

All the same, Parden filed the petition. To provide the federal District Court with the time needed to conduct the review of Johnson's case and the present petition, United States District Court Judge Charles Clark issued a show-cause order to Sheriff Shipp, preventing Johnson's execution and placing Johnson under the care of the federal marshal until such time as the petition could be disposed of.[86] Three days later, the federal court convened a hearing on the petition, where both Parden and Johnson's team and Shipp and the state's counsel offered testimony and evidence surrounding the trial procedures and practices. At the conclusion of the hearing, which lasted through the night and into the early morning hours of the next day, Judge Clark could neither provide Parden the relief he sought for Johnson nor Shipp the permission he needed to proceed with Johnson's execution.[87] Clark's verbal order from the bench rejected the claims of systematic exclusion of Black citizens from the jury pool for a lack of evidence, and while he believed that Johnson's trial may very well have been unfair,

82. Noah Parden, Pet. for Writ of Habeas Corpus, *Ed Johnson v. Tennessee*, Mar. 7, 1906.
83. *Id.*
84. 14 St. 385.
85. Curriden, *supra* note 13, at 151.
86. Show Cause Order, *Ed Johnson v. Tennessee*, Mar. 7, 1906.
87. Curriden, *supra* note 13, at 167.

Judge Clark was unable to overturn the state court's judgment on federal constitutional grounds.[88] The Sixth Amendment to the Constitution only provided federal defendants the right to a fair trial, not state defendants.[89]

The last point bears emphasis. At the time of Johnson's trial, the federal Constitution's guarantee of a right to a fair trial, found in the Sixth Amendment, did not protect Johnson's right to a fair trial in state court. Instead, it only protected *federal* defendants in *federal* court, and Johnson was neither. Even though the Fourteenth Amendment had ensured no state would deprive someone of their life "without due process of law," what process was due remained an open question. Not until 1968's case of *Duncan v. Louisiana* did the Supreme Court incorporate the right of a fair trial against the states from the Sixth Amendment via the Fourteenth Amendment.[90] Prior to that time, the failure of a state to provide a fair trial by an impartial jury would not prevent punishment by that state of its accused. Johnson, in filing his habeas petition, essentially asked the District Court to incorporate that right some sixty-two years before the Supreme Court actually would. On the law as it stood, Johnson's appeal had to fail.

All the same, Judge Clark's order was no victory for Shipp: Judge Clark also ordered that the execution of Johnson be delayed an additional ten days (later modified down to seven) to allow Johnson and his legal team to appeal the denial of the writ of habeas corpus to the Supreme Court of the United States.[91]

With the invitation of the federal judge to appeal his order upwards, and with the stay of execution keeping Johnson alive past the next week, Parden got to work preparing his appeal. Despite

88. Verbal Order Den. Pet. for Writ of Habeas Corpus, *Ed Johnson v. Tennessee*, Mar. 8, 1906.
89. *Id.*
90. 391 U.S. 145 (1968).
91. *Id.*

the fact that neither Parden nor his law partner had ever practiced before the Supreme Court,[92] the pair were determined.[93] With the assistance of another Black attorney, one who had been co-counsel on a case before the Supreme Court and could help Parden cross the procedural hurdles that his representation of Johnson posed, the last effort to save Johnson began.[94]

With his preparations in place, and the petition for a writ of certiorari and emergency motion for a stay of execution drafted and finalized, Parden, after a train ride from Chattanooga to Washington, entered the Supreme Court on March 17, 1906, for the most important presentation of his career.[95] Once inside the courthouse, Parden came face to face with the circuit Justice for the Sixth Circuit of the United States, which included Tennessee and Chattanooga. That Justice, John Marshall Harlan, sat intently, questioning Parden on points of law and the trial record and betraying no emotion one way or the other.[96] To end of their short time together, Parden reminded the Justice of the urgency of the case: Johnson would hang in three days without the Supreme Court's interference.[97] Yet Justice Harlan also knew what Judge Clark in the District Court acknowledged: the federal Constitution's Sixth Amendment did not apply to the states at that time. To give Johnson the reprieve he sought would require Harlan convincing enough of his fellow Justices, with whom he had long been feuding on matters of protections for Black Americans, to consider whether to use the Fourteenth Amendment to incorporate the Sixth Amendment against the states—the same argument which had failed in *Hurtado* and which would fail again in *Twining*.[98]

92. Indeed, exceedingly few Black attorneys ever had; when Parden spoke to Justice Harlan seeking a stay of execution and writ of certiorari to have Johnson's appeal heard before that High Court, he was the first Black attorney to ever appear before a Justice in that procedural posture. *See* Curriden, *supra* note 13, at 11–12.

93. Curriden, *supra* note 13, at 11–12, 173.

94. *Id.* at 174.

95. *Id.* at 1.

96. *Id.* at 9–16.

97. *Id.* at 16.

98. *See* Part I.B above.

Despite the difficulty this proposition posed for Justice Harlan, something about Johnson's case inspired a change in tactic. With a draft order staying Johnson's execution in hand, Justice Harlan proceeded to Chief Justice Melville Fuller's home in D.C., where a majority of the Court's members had gathered at Harlan's request.[99] Harland argued to his colleagues that Johnson had suffered an unfair trial, pleading with them to authorize the stay and take the case.[100] Over what Curriden reports to be an hour-long discussion, which was not made part of the record in *United States v. Shipp*, as the meeting was an informal one in Chief Justice Fuller's home, Harlan succeeded where before he had failed. He created not just a consensus of enough Justices required to issue the stay, but indeed created a unanimous coalition to spare Johnson that week and hear the case in full as the months would pass.[101]

C. The Lynch Mob and the "Committee" Note to Justice Harlan

On March 18, 1906, word arrived in Chattanooga of the Court's decision: "All further proceedings [against Johnson] be stayed and the custody of the accused retained pending an appeal in Washington."[102] The white community's response to the interjection of the Supreme Court in what they viewed as local business was immediate and angry. The local paper declared, "[a]ll of this delay is aggravating to the community. The people of Chattanooga believe that Johnson is guilty and that he ought to suffer the penalty of the law as speedily as possible . . . Such delays are largely responsible for mob violence all over the country."[103] That aggravation and the "mob violence" the paper spoke of came to fruition the next evening.

This time, however, Sheriff Shipp did something unusual. As early as noon in the downtown parts of the city, conversation about a mob forming to lynch Johnson began to spread.[104] Yet despite

99. Curriden, *supra* note 13, at 193–95. Curriden reports on the nature of this meeting using memos and notes from the Justices involved to provide the bones for the narrative which Curriden recounts.

100. *Id.*

101. *Id.*

102. James H. McKenney (Clerk of the Supreme Court), Administrative Order Staying Execution, *Ed Johnson v. Tennessee*, Mar. 18, 1906.

103. THE CHATTANOOGA NEWS, Mar. 18, 1906.

104. Sworn Test. of George Brown, *United States v. Shipp, et al*, June 20, 1907.

these credible rumors of impending vigilante violence against Johnson, Sheriff Shipp dismissed all but one deputy from their posts at the jailhouse for an evening off.[105] Indeed, the only deputy he left at the courthouse was the night watchman, a seventy-three year old man called Jeremiah Gibson.[106] When that lynch mob did form and did enter the jail to seize and murder Johnson, only Gibson stood in their way.[107] By his own admission during the collection of evidence against the *Shipp* defendants, Deputy Gibson had a duty to protect Johnson and was capable to do so, armed with a pistol and an able body.[108] Instead of intervening, though, Deputy Gibson largely stood by and watched, without using or threatening violence against the jailhouse invaders as a multiple-hour attack on the building slowly but surely brought the mob through the iron gates separating the courthouse from the inmates.[109] The only "inmates" in sight on the entire floor were Johnson and a white woman.[110] All other prisoners in Shipp's care had been moved into the courthouse basement for the night, safe from the mob that Shipp knew was coming.[111] When the mob finally broke through the gate, the task of identifying and capturing their victim was simple. Indeed, the hardest part about the operation was tearing through the wrought iron hinges of the gate: despite Gibson offering the invaders a key after a few moments of their assault on the gate, they had already irreversibly damaged the keyhole.[112]

During the assault, Shipp was largely unaccounted for. That is, until he appeared at the jailhouse to speak to the mob.[113] Calmly asking the mob not to damage the courthouse property and weakly suggesting that they disband, Shipp's true intentions were hardly hidden from the crowd.[114] Neither did Shipp raise his voice nor brandish his weapon to attempt to break up the mob, facts which

105. Compl., *United States v. Shipp, et al*, May 28, 1906.
106. *Id.*
107. Sworn Test. of Jeremiah Gibson, *United States v. Shipp, et al*, June 26–27, 1907.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*; Compl., *supra* note 105.
112. Gibson Test., *supra* note 107.
113. *Id.*
114. *Id.*

the Court eventually heard through the testimony of Deputy Gibson.[115] Instead, when the mob suggested that Shipp wait in the bathroom with Gibson, he politely complied.[116]

The mob took Johnson, placed a rope around his neck, and led him through the city streets to the Walnut Street Bridge, which still stands in Chattanooga. Once at the midway point of the bridge, the mob hoisted Johnson up to complete their act. Onlookers in the mob captured Johnson's now-famous last words: "God bless you all. I am a [sic] innocent man."[117] The crowd opened fire on Johnson's dangling body until it fell to the ground below, where someone took it upon themselves, as a representative of the "Committee" (ostensibly the lynch mob which has just murdered Johnson), to express to their motives: "To Chief Harlan [sic]. Here is your Negro. Thanks for your kind consideration of him. You can find him at the morgue."[118]

PART III: THE GREAT COALITION-BUILDER

A. Harlan Behind the Scenes and the Court's Next Move

The public reaction to Johnson's lynching was swift and mixed. Chattanooga's two largest newspapers took opposite positions on the matter. The *Chattanooga Times* proclaimed that, "[i]n the presence of the mob spirit rampant in the land, we have nothing to expect but anarchy and ruin."[119] The *Chattanooga News*, however, had only Johnson, his counsel, and the Supreme Court itself to blame for the lynching:

> The lynching is a direct result of the ill-advised effort to save the Negro from the just penalty of the laws of Tennessee. . . . There is no community south or north which will submit to delay in punishment for this particular crime. The Supreme Court of the United States ought in its wisdom to take cognizance of this fact.[120]

115. *Id.*
116. *Id.*
117. Curriden, *supra* note 13, at 213.
118. *Saucy Note for Justice Harlan*, THE KNOXVILLE SENTINEL, Mar. 26, 1906; *Negro Lynched by Chattanooga Mob*, BIRMINGHAM NEWS, Mar. 20, 1906.
119. THE CHATTANOOGA TIMES, Mar. 20, 1906.
120. THE CHATTANOOGA NEWS, Mar. 20, 1906.

Even the Governor of Tennessee, James Cox, had a position on the lynching. In an interview with the *Nashville Banner* after the lynching, the Governor too blamed the Supreme Court: "No lynching would have occurred had the case not been taken from the Tennessee courts into the federal courts."[121]

The Justices of the Supreme Court, upon reading the news of Johnson's lynching and of the note from the "Committee" pinned to his corpse on the Walnut Street Bridge which directly impugned Justice Harlan, were stunned. The *New York Times* reported on the mood in the Court:

> The event has shocked the members of the Court beyond anything that has ever happened in their experience on the bench. . . . No justice can say what will be done. All, however, agree in saying that the sanctity of the Supreme Court shall be upheld if the power resides in the Court and the government to accomplish such a vindication of the majesty of the law.[122]

Justice Harlan, speaking to the *Washington Post*, further expounded on his view of the indignity done upon the Court: ". . . the mandate of the Supreme Court has for the first time in the history of the country been openly defied by a community."[123] Even President Theodore Roosevelt weighed in, describing the lynching as "contemptuous of the court" and "an affront to the highest tribunal in the land that cannot go without proper action being taken."[124]

That proper action did not take long to come into view. The Attorney General, William Moody, quickly sent letters to the United States Attorney in Knoxville, James R. Penland, authorizing federal investigation into the lynching.[125] The Department of Justice began exploring the possible indictment and trial of Shipp, his deputies, and other members of the mob under the same Enforcement Act which had been restricted by the Supreme Court in *Cruikshank*.[126] By the end of the spring, the largest point of disagreement within the Department of Justice leadership and those

121. THE NASHVILLE BANNER, Mar. 1906.
122. THE NEW YORK TIMES, Mar. 21, 1906.
123. THE WASHINGTON POST, Mar. 23, 1906.
124. *Id.*
125. Letter from William Moody, Attorney General, to James R. Penland, United States Attorney (Mar. 31, 1906) (on file at the National Archives Department of Justice Collection).
126. United States v. Cruikshank, 92 U.S. 542 (1876).

detailed to this particular investigation was whether to call up a special grand jury in Knoxville to indict the case during Shipp's re-election campaign or to wait until the next regular grand jury sat in October.[127] While the Department of Justice officials in Knoxville discussed those options, Attorney General Moody attended a private meeting with Chief Justice Fuller and Justice Harlan to figure out the federal government's best path forward.[128] All agreed that Moody should bypass the federal grand jury and file an information and complaint alleging contempt of the Supreme Court before that body, who for the first time ever would sit as trial court in a criminal matter.[129]

B. The Trial of Joseph Shipp

The complaint against Shipp and his co-defendants came on May 28, 1906.[130] In it, the Department of Justice alleged a conspiracy between Shipp, his deputies, and members of the mob not employed by the state to violate Johnson's civil rights and to directly ignore an order from the Supreme Court not to execute Johnson pending appeal.[131] The recitation of facts painted a damning picture of the scene in Chattanooga that March day when Johnson's lynch mob found their target, using a detailed investigative report from a pair of Secret Service agents sent to Chattanooga to investigate the offense.[132] The Supreme Court accepted the information and complaint, issuing show-cause orders to the twenty-seven total defendants named in the complaint, demanding that the defendants answer for their alleged contempt and show why the Court ought not to sanction them accordingly.[133] Harlan's

127. Letter from James R. Penland, United States Attorney, to William Moody, Attorney General (May 1, 1906) (on file at the National Archives Department of Justice Collection); Memorandum from M. D. Purdy, Department of Justice Official, to William Moody, Attorney General, (Apr. 30, 1906) (on file at the National Archives Department of Justice Collection).

128. Curriden, *supra* note 13, at 252.

129. *Id.*

130. Compl., *United States v. Shipp, et al*, May 28, 1906.

131. *Id.*

132. Report of E. P. McAdams and Henry G. Dickey, Secret Service Agents, to William Moody, Attorney General (Apr. 20, 1906) (on file at the National Archives Department of Justice Collection). During this period, the Federal Bureau of Investigation had yet to be formed and given the relative brevity of the federal criminal code at the time, the Department of Justice had few dedicated investigators in their employment. Additionally, the Secret Service remained still in the control of the Department of Treasury, acting as counterfeit currency investigators instead of Presidential bodyguards. McAdams and Dickey were loaned to the Department of Justice to conduct this investigation.

133. Show Cause Order, *United States v. Shipp, et al*, May 28, 1906.

meeting with the Chief Justice,[134] Department of Justice officials,[135] and fellow Justices in various informal settings,[136] had successfully convinced the Court to proceed with a never-before-seen legal maneuver.

There was another problem facing Harlan and the Court: immediate legal challenges from the defendants which suggested the Court had no jurisdiction to hear this contempt complaint since the Court had no jurisdiction to hear Johnson's habeas petition in the first place.[137] The argument began by rejecting Johnson's underlying premise that his conviction was unlawful.[138] To the defendants, since the trial court administered a fair trial for Johnson and the jury duly convicted him, Johnson had no legal right to petition for habeas corpus relief. Absent that right, the federal courts had no business interfering in the rights of the state courts to try and execute defendants.[139] If the federal courts lacked jurisdiction over Johnson's habeas petition, then any defiance of an order of the court, even of the Supreme Court, in such a proceeding was also outside the jurisdiction of the Court to punish.[140]

The Department of Justice[141] and the Supreme Court disagreed.[142] After two days of argument, the Court unanimously rejected the defendants' contention that it lacked jurisdiction to hold Shipp and his co-defendants responsible for their conspiracy to murder Johnson and violate the Court's order.[143] While recognizing that "orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt,"[144] the Court then reminded the defendants

134. Letter from Melville Fuller, Chief Justice, to Oliver Wendell Holmes, Associate Justice (Mar. 20, 1906) (on file at the Harvard University Library Collection of Oliver Wendell Holmes Papers) (copy of a letter sent to all Justices setting a meeting at Chief Justice Fuller's house the day after the lynching).

135. *To Arrest Lynchers*, THE WASHINGTON POST, Mar. 22, 1906.

136. Canellos, *supra* note 10, at 421–24.

137. Mot. to Set Down for Hr'g on Prelim. Questions of Law, Without Prejudice, etc., *United States v. Shipp, et al*, Nov. 12, 1906.

138. *Id.*

139. *Id.*; Br. of J. F. Shipp, Sheriff, and his Deputies, on Prelim. Questions, *United States v. Shipp, et al*, Dec. 3, 1906.

140. *Id.*

141. Br. of the United States on Prelim. Questions of Law, *United States v. Shipp, et al*, Nov. 26, 1906.

142. United States v. Shipp I, 203 U.S. 563 (1906) (Shipp I).

143. *Id.* at 575.

144. *Id.* at 573.

what dealing with the Supreme Court, the highest judicial body in the nation, meant: "[T]his court, and this court alone, could decide [if the federal court's lack of jurisdiction] was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it."[145] By taking the question of jurisdiction, and Johnson's life, into their own hands back in March, the defendants had robbed the Court of the chance to definitively say whether it had jurisdiction over the habeas petition and appeal. For that, the defendants had to answer.

Having disposed of the preliminary hurdle to the Court's contempt proceeding, the parties then turned to matters of practicality: how would the Court hear evidence, and where?[146] Would the defendants have a chance to make closing arguments to the Court, and if so, how?[147] These matters had never before been worked out, as never before had the Court heard a criminal trial in the first instance. Yet through trial and error, the Court and parties eventually worked out an arrangement. The Court would appoint its deputy Clerk, James D. Maher, as Commissioner, who would travel to Chattanooga and take evidence like a trial court.[148] After that, the parties would travel back to Washington to argue their view of the evidence to the Court, who would then rule on the complaint as to each defendant.

Throughout much of 1907, the Commissioner sat in Chattanooga hearing testimony, the record of which is preserved in the National Archives' Supreme Court collection. The 20 volumes of testimony, taking up more than 2,200 type-written pages of which more than 1,200 were selected for publication by the Commissioner in his final report to the Court,[149] include the testimony of dozens of witnesses, focusing on the role Shipp played in the conspiracy to lynch Johnson and implicating

145. *Id.*
146. Mot. for the Summoning of Witnesses and to Take Test. Herein, *United States v. Shipp, et al*, Jan. 14, 1907.
147. Mot. that Reports of Comm'r be Filed, *United States v. Shipp, et al*, Oct. 14, 1907.
148. Order Appointing James D. Maher as Comm'r, *United States v. Shipp, et al*, Feb. 4, 1907.
149. Final Report of Comm'r James D. Maher, *United States v. Shipp, et al*, Oct. 14, 1907.

five others to the satisfaction of the Court.[150] Several of the original twenty-seven defendants had their charges dropped by the Department of Justice after the testimony concluded, as the evidence placing them in the mob proved shakier than expected.[151] Of the nine defendants whose charges remained after the government's motion to dismiss, the Court itself only voted to convict six, acquitting the others in its five-to-three decision convicting Shipp and others.[152]

C. Harlan's Last Word on State Action

With the *Shipp* II opinion, unlike that of *Shipp* I, Harlan was somewhat less successful in uniting the entire Court behind the opinion. Shipp and his co-defendants' convictions rested on a narrow majority. William Moody was now on the Court and recused himself, and three justices dissented.[153] But the work Chief Justice Fuller and Justice Harlan did behind the scenes turned out to be enough.[154] A majority of the Court held that the evidence which the Department of Justice presented to the Commissioner in Chattanooga had proved that a conspiracy existed between state officials and private citizens to murder Johnson and deprive him of his chance at an appeal to the Supreme Court.[155]

Had that deprivation been tried as a violation of the Enforcement Clause of the Fourteenth Amendment,[156] the decision would almost certainly have come out differently. The *Cruikshank* opinion and the publicly expressed views of at least two Justices about the constitutionality of that same statute

150. United States v. Shipp, 214 U.S. 386 (1909) (Shipp II).

151. Mot. of the Attorney General to Dismiss as to Certain Defs, *United States v. Shipp, et al*, Oct. 13, 1908.

152. Shipp II, 214 U.S. at 425. By the time the Court heard Shipp I, II, and III, former Attorney General Moody had been promoted to Justice Moody. He sat out of consideration of any of the Shipp matters, given his role in bringing the contempt scheme to the Court in the first place.

153. *Id.*

154. Justice Harlan kept virtually no record of the *Shipp* case among his papers, which are available for inspection from the Library of Congress. Chief Justice Fuller's papers, also with the Library of Congress, are also scant of detail relating to *Shipp*. Justice Holmes, however, did retain some notes and letters between the Justices on the matter, which corroborate contemporaneous news accounts of the Justices' informal, in-house meetings to strategize about the case. *See* Fuller letter, *supra* note 134; *To Arrest Lynchers*, *supra* note 135. Justice Harlan's role in pushing the case towards its ultimate destination is one which Justice Thurgood Marshall recognized in an interview with Curriden, summarized and quoted in the preface to his text. *See* Curriden, *supra* note 13, at xvii.

155. *Id.*

156. U.S. CONST. amend. XIV., § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

would likely have injected the state action doctrine into the matter and killed prosecution before it could have ever started.[157] With the only other option being to rely upon the state courts to try Shipp and the other mob members for murder or a conspiracy to commit murder, the outlook would be even bleaker. Indeed, a grand jury in Chattanooga did investigate the mob violence against Johnson, concluding that no one had seen anyone do anything illegal, and thus declined to indict anyone.[158] While absurd, that result was hardly surprising, considering how many state officials, from deputies to the Sheriff and even Judge McReynolds himself, were arguably involved in Johnson's lynching. The state courts could not have been trusted to bring Johnson's killers to justice given their positions of power in the city.

By encouraging the Department of Justice to bring the *Shipp* case directly to the Supreme Court so as to test the Court's inherent powers of contempt and the statutory provisions in federal law which authorized courts to punish contempt, Justice Harlan avoided implicating state action in the vindication of the civil rights of a Black American altogether. The result of the Court's opinion in *Shipp* II, whereby three state officials and three private citizens were each convicted of contempt, constitutes the only time in this era of Supreme Court history where private citizens received punishment authorized by the Court for depriving a Black citizen of their civil rights. This could only be possible by skirting what Harlan saw as the overly restrictive readings of the Fourteenth Amendment at the heart of the state action doctrine. Only by employing the previously-unheard-of approach of Supreme Court contempt proceedings could Harlan vindicate Johnson's legal right to appeal.

Perhaps one reason why this episode from the Supreme Court and Justice Harlan's history has largely fallen into obscurity is that Justice Harlan did not author any of the opinions in the *Shipp* cases.

157. United States v. Cruikshank, 92 U.S. 542 (1876); Curriden, *supra* note 13, at 251–52.
158. Curriden, *supra* note 13, at 232–33.

It was Justice Holmes who spoke for the unanimous Court to authorize the trial at its inception in *Shipp* I,[159] and it was Chief Justice Fuller who wrote the divided opinion of conviction in *Shipp* II.[160] Why Justice Harlan stepped into the background here remains unclear. It may well have been a strategic move to avoid implicating personal emotions in the Court's opinion, since the "Committee" who lynched Johnson had called out Justice Harlan by name in its note on Johnson's body. We know that perceptions of bias did occupy at least some of the Court's concern: Holmes would emphasize that issue in his opinion in *Shipp* I. As Holmes put it in addressing the contempt issue, "[t]he court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."[161] It strains credulity to think that the justices who decided *Shipp* had no personal interest in the matter or that there was "nothing" in the case that affected the judges in their own persons. But the Court's choice of emphasis suggests that Harlan's approach, behind the scenes, had succeeded.

In this way, then, Justice Harlan's final words on the state action doctrine are not really his own. Instead, they are the collected beliefs of the Justices who joined the majorities throughout the *Shipp* case, undoubtedly aided in their decision-making by Justice Harlan's fervent belief that Johnson had been denied justice in the state courts and that the open hostility of the mob towards the Supreme Court deserved penalty. Harlan had stepped into a new role, that of Great Coalition-Builder, one which deserves more attention in the historical record and more recognition in the history of civil rights in the "nadir" era.

D. The Epilogue of United States v. Shipp

Following the opinion convicting Shipp and his five fellow co-defendants, the Court only once again entertained the *Shipp* case: hearing arguments and issuing a brief per curiam opinion on

159. Shipp I, 203 U.S. 563 (1906).
160. Shipp II, 214 U.S. 386 (1909).
161. Shipp I, 203 U.S. at 574.

sentences.[162] Shipp, one heavily-involved deputy, and the citizen leader of the lynch mob each received a 90-day sentence at the federal prison in Washington, D.C.[163] The remaining three defendants, including two citizens and Deputy Gibson, the elderly night jailer who failed to intervene in the attack on the jailhouse, received 60-day sentences.[164] When Shipp left the D.C. prison after close to 75 days, having been given credit for his good behavior in jail,[165] he boarded a train back to Chattanooga as a private citizen once more. Shipp had lost his bid for another re-election in 1908, amidst the Supreme Court's trial against him.[166] Yet he was no ordinary citizen to the members of the white community in Chattanooga. When Shipp stepped off the train in his hometown, a crowd of 10,000 onlookers broke out into song: "Dixie" and "Home, Sweet Home" filled the platform as the community offered what could only be called a hero's welcome to the former Sheriff.[167] The Sheriff spent the rest of his days strolling around town in his Confederate uniform, teaching the Lost Cause mythology to anyone who would listen until his death in 1925.[168]

In the year after the Court's action against Shipp, the annual number of lynchings in the United States fell from 97 to 82.[169] That declining trend continued over the next decade, while the number of attempted lynchings stopped by law enforcement significantly rose after Shipp's conviction.[170] Though it is impossible to say that this change in the nation's experiences with lynching were driven by Shipp's trial and punishment, the changes in lynching behavior and police involvement to prevent lynchings cannot be overlooked as one possible outcome of *Shipp*.

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162. United States v. Shipp, 215 U.S. 580 (1909) (Shipp III).

163. *Id.* at 581–82.

164. *Id.* These sentences, however, were not the product of easy or clear instruction from a written statute. Instead, they came about through no small debate among the Justices. Oliver Wendell Holmes, for example, considered that the severity of conduct, the "grave offense" of Shipp and his co-conspirators, warranted a sentence of one year's imprisonment. *See* Letter from Oliver Wendell Holmes, Associate Justice, to Melville Fuller, Chief Justice (May 13, 1909) (on file at the Harvard University Library Collection of Oliver Wendell Holmes Papers)

165. Curriden, *supra* note 13, at 338.

166. *Id.* at 318.

167. *Id.* at 338.

168. *Id.* at 339.

169. *Id.*

170. *Id.*; Canellos, *supra* note 10, at 423.

Justice Harlan remained on the court until his death in October of 1911, about a year and a half after Sheriff Shipp left the D.C. prison on that Tennessee train. Though Harlan had planned to serve the Court until the age of 95, he made it only to age 78, just shy of 34 years on the High Court. The Justice had precious few opportunities to exercise his dissenting pen after *Shipp*, and none involved Fourteenth Amendment civil rights for Black Americans. The *Shipp* proceedings were Harlan's last chance to bring the Court along with him into a more active role in protecting the rights of Black Americans. While a successful episode in Harlan's mission to support federal court action against those who sought to violate the civil rights of Black Americans, the historical singularity of *Shipp* derives from the fact that the Court never again held anyone in criminal contempt, let alone for such contempt as followed from preventing Black Americans from exercising their right to appeal.

CONCLUSION

In the century since Justice Harlan's passing, scholarly investigation of his career and his judicial philosophy has centered, rightly or wrongly, on his dissents. Harlan was arguably the greatest dissenter in Supreme Court history, and certainly among the earliest to develop his voice for fairness and racial equality through the medium of the minority opinion. Yet he was more than that. Through the lens of *United States v. Shipp*, a different kind of Justice Harlan comes into view, one willing to work behind the scenes without the fiery rhetoric that defined his dissents. By channeling the Court's inherent rage at the open defiance of their own orders into an ingenious, expansive, and singular use of federal power against individuals, both state actors and private citizens, whose activity irreversibly harmed the civil rights of a Black American, Justice Harlan ended his career in the jurisprudence of race relations with a victory, not a defeat.[171]

171. The victory of *Shipp* is one which historian Orville Vernon Burton calls a "first small step towards racial justice." I fully adopt this opinion, even if the *Shipp* opinion is more an aberration in the Court's race relations jurisprudence than a marked shift towards pro-Black rights opinions. *See* ORVILLE VERNON BURTON, JUSTICE DEFERRED: RACE AND THE SUPREME COURT 115 (2021).

Through *Shipp*, the record of Justice Harlan's career takes on new light. As the Great Coalition-Builder, Harlan took his deeply rooted belief in the legal equality of all Americans, regardless of race, from the backburner to the front page. By changing tactics in this singular and under-examined historical moment, Harlan eked out a victory he had previously never achieved. While this paper concludes here, much of the fascinating history of *United States v. Shipp* remains untold and unexamined, and future research into the case and its legal significance is warranted. Research to come should continue to reconsider Justice Harlan in a new light and challenge the limits of his conventional historic role.