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Little Known Pages of Supreme Court History
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In a letter to her husband John, Abigail Adams famously asked him to "Remember the Ladies" in framing the new Nation's laws. Taking a cue from Abigail, I will recount this evening two sets of little known pages relating to Supreme Court history. One set draws on the recently published memoir of Malvina Harlan, wife of the first Justice John Marshall Harlan, who served on the Court from 1877 until 1911. The other set features a great lady from Mississippi, Burnita Shelton Matthews, first woman ever to serve on a U.S. Federal District Court. I will start with Judge Matthews and the historic episode in which she played the lead role.

Burnita Shelton was born in 1894 in Copiah County, Mississippi, and raised there along with her four brothers. Her father was Clerk of the County's Chancery Court. Burnita became a court watcher at an early age, regularly accompanying her father to the courthouse where she often sat in on trials. She wanted to pursue a career at the bar, but her father, perhaps believing that a woman could not gain a livelihood in the practice of law, strongly opposed that career choice. Bowing to his preference, Burnita attended the Cincinnati Conservatory of Music, gaining a teaching certificate there.

Music certificate in hand, she returned to Mississippi, still hopeful of becoming a lawyer. But no law school in that State then accepted women. For several years, she taught music and gave piano lessons to support herself.

In 1917, she married a high school beau, Percy Matthews, then a recent graduate of the Chicago-Kent College of Law. Shortly after their marriage, Percy enlisted and served in World War I as a pilot. He then pursued a career in service, as a lawyer in the Army Judge Advocate General Corps. They remained married for 52 years, until Percy's death in 1969, but Burnita did not follow him to Army posts. They lived apart for much of their marriage, and had no children.

After Percy's departure for war, and during the height of the suffrage movement, Burnita moved to Washington, D.C., attracted by the prospect of law school admission there. Ultimately comprehending his daughter's unflagging passion for the law, Burnita's father relented and offered to cover her law school tuition. By then accustomed to independence, Burnita preferred to pay her own way. She attended law classes at night at National University, now George Washington University, while holding down a day job at the Veterans Administration. She earned an LL.B. in 1919, followed by a Master of Patent Law degree the next year.

On weekends, she picketed the White House in the suffragist cause. Later, she recalled:

[Y]ou could go to the front of the White House, and you could carry a banner, but if you spoke, you were arrested for speaking without a permit. . . . So, if the press or anyone else asked me why I was there, I didn't answer.

The banner she carried declared her purpose. And no arrest record impeded her admission to the bar.

When Burnita graduated from law school, no law firm in the District of Columbia would hire her. Even the Veterans Administration, where she had previously worked, declined to consider her for a position in its legal department, simply and solely because she was a woman. Wasting no time on anger, resentment, or self-pity, she devoted her energy to establishing a practice of her own.

Believing the Nineteenth Amendment incomplete, Burnita became counsel to the National Woman's Party, the group responsible for introducing in 1923 the idea and the original text of an equal rights amendment. The Woman's Party also urged legislators to repeal protective labor laws that applied only to women and other laws that restricted women's opportunities. Burnita wrote of that endeavor:

It is, of course, disappointing to women that men of the legal profession are unable to see equality as equity when applied as between men and women. But then it is not surprising when one remembers that this defective vision, this regard of discrimination as 'protection,' is traditional.

Burnita helped to change that tradition.

Now to the historic episode. The D.C. bar knew Burnita Shelton Matthews as a skilled practitioner in the field of eminent domain. In 1927, the federal government condemned the National Woman's Party headquarters near the Capitol. Matthews' representation of the Woman's Party and adjacent parcel owners led to the largest condemnation award the United States had yet paid. The government put the condemned land to defensible use: demolition of the Woman's Party headquarters made way for the current Supreme Court building. The Party used the just compensation it received to purchase the historic "Belmont House" nearby. That House is still owned by the Woman's Party; it is nowadays used for various receptions, many of them celebrating women's achievements.

The archives maintained by the Supreme Court Curator's Office contain detailed notes on the condemnation of the Supreme Court site, and it is those notes that prompted this account. Chief Justice Taft, propelling force behind the building project, complained in a June 29, 1927 note to Justice Van Devanter:

The Woman's Party would never consent to a reasonable price. They want to include as an element the historical associations of that ramshackle house of theirs.

The house was erected in 1815, after the burning of the Capitol in the war of 1812. It served as temporary quarters for Congress, and later, as a jail for Confederate prisoners.

In November 17, 1928 correspondence, Taft reported that the pace of the condemnation proceedings was "dreadfully slow and most exasperating." Of the Woman's Party headquarters, he deplored:

It is just a broken down old building that ought to be removed. But the women, insisting on its historical interest, are most unprincipled and are attempting to use every method possible to squeeze up the amount they are to derive from the Government.

Through it all, Burnita remained unperturbed. A low point for the Government was reached at trial. The Department of Justice undertook — through the expert testimony of two architectural engineers — to diminish the value of the house by asserting that it was a post-Civil War building, constructed in 1869, after demolition of

the original, 1815 structure.

The Government's ploy did not work. Burnita's exhaustive preparation and persistent effort carried the day and case. She introduced reams of evidence to show that the 1815 building had never been demolished and still occupied the property. Her evidence included the testimony of a member of the Society of Oldest Inhabitants, a very elderly gentleman located the night before the close of the Woman's Party's case. Most devastating to the Government's position was a photograph of one Mrs. Greenlow, a well-known Confederate spy, taken against a wall of the still existing building when it was used as a Civil War jail. So much for the Justice Department's contention that the building was constructed in 1869. In all, Burnita gained \$400,000 for her clients, a huge sum at the time.

In 1949, after a nationwide lobbying effort and a personal plea from India Edwards, then head of the Women's Division of the Democratic National Committee, President Truman appointed Burnita Shelton Matthews to the Federal District Court for the District of Columbia. Her colleagues on the bench were initially less than welcoming. They assigned to her the most technical and least rewarding matters. One District of Columbia jurist was reported to have commented: "Mrs. Matthews would be a good judge, [but there is] just one thing wrong — she's a woman." The President was of a different mind: "This was one appointment about which I had no misgivings," Truman said, "only genuine satisfaction."

Judge Matthews' secure hand in managing each case identified the great lady from Mississippi more than the fine lace collar and cuffs of her robe, or her petite size and soft, Mississippi-accented voice. She presided over major trials, including the prosecution of Teamsters leader Jimmy Hoffa and a Black Muslims' suit for the right to conduct religious services in prison. At a time when women at the bar faced many closed doors, Judge Matthews signaled her confidence in women lawyers by hiring only women as law clerks.

After nearly twenty years on the District Court, Judge Matthews took senior status in 1968; for a decade more, she sat regularly on court of appeals panels. She died in 1988 at the ripe age of ninety-three. It was my great good fortune, when appointed to the D.C. Circuit in 1980, to meet and converse with this truly great lady.

Her eyesight was failing and she had difficulty hearing, but her spirit remained indomitable.

Travel with me further back in time now as I speak of a project started some years ago. I was collecting information in 1997 for a lecture promised to the Supreme Court Historical Society; the topic was "Lives of Wives of Supreme Court Justices." The Library of Congress called to my attention a memoir lodged among the first Justice Harlan's papers, an unpublished manuscript written by the Justice's wife. Members of the Harlan family and the Justice's biographer were well acquainted with the memoir, but it had attracted no public attention.

The manuscript's author, born Malvina Shanklin, lived from 1839 until 1916, but she dated her memoir, which she titled *Memories of a Long Life*, from 1854, the year she met John Marshall Harlan, until 1911, the year he died. The manuscript contained well told anecdotes and keen insights about the Harlan family, politics in Indiana, Kentucky, and Washington, D.C. in pre- and post-Civil War days, religion, and of course, the Supreme Court.

I was drawn to Malvina's *Memories* as a chronicle of the times, as seen by a brave woman of the era. I thought others would find the manuscript as appealing as I did. For many months, I tried to interest a university or commercial press in Malvina's *Memories*, to no avail. When I was about to give up on the endeavor to find a publisher, the Supreme Court Historical Society rescued the project.

The Society devoted the entire summer 2001 issue of its Journal to Malvina's *Memories*. Pre-publication in the Society's Journal, the manuscript was carefully annotated and helpfully introduced by historian and University of Cincinnati Law Professor Linda Przybyszewski, author of an engaging biography of the Justice titled *The Republic According to John Marshall Harlan*. The Historical Society acquired, and placed throughout the issue, a number of attractive photographs. On the cover is a portrait of Malvina, age 17, and John, age 23, on their wedding day in 1856.

To call attention to the Society's publication, I asked the *New York Times* Supreme Court reporter, Linda Greenhouse, if the *Times* might do a review of the memoir. She said the *Times* was not likely to write a book review of a periodical issue, but added, perhaps something useful might be done. She would think about it. As

those who read her *Times* reports know, she is a very good thinker.

In August 2001, the *New York Times* ran two feature stories about Malvina's *Memories*. On page 1 of a Sunday edition, the *Times* ran the wedding photograph and described the memoir. A follow-up story the next week included several quotations from the manuscript. Among them were memories relating to the Civil War.

The first quotation concerned Malvina's decision to marry John, a slave-owning Kentuckian. Malvina, who lived her first 17 years in Indiana, wrote:

All my kindred were strongly opposed to Slavery, the "peculiar institution" of the South. Indeed, an uncle on my mother's side, with whom I was a great favourite, was such an out-and-out Abolitionist that I think (before he came to know my husband) he would rather have seen me in my grave than have me marry a Southern man and go to live in the South.

Although Kentucky was a slave state, it remained loyal to the Union. On John Marshall Harlan's decision to join the Union Army five years after their marriage, when two children were part of the family, Malvina recalled:

That night he paced the floor until dawn, his duty to his wife and little ones and his duty to his country wrestling within him in bitter conflict. He came to my bed, and sitting beside me, he said he would leave the matter entirely to me; that he felt his first duty was to me and his children. I asked what he would do if he had neither wife nor children[;] he said at once, with great earnestness, "I would go to the help of my country."

I knew what his spirit was, and that to feel himself a shirker in the hour of his country's need would make him most unhappy. Summoning all the courage I could muster, I said, "You must do as you would do if you had neither wife nor children. I could not stand between you and your duty to the country and be happy."

Decades later, in 1903, War stories were still retold. Malvina wrote of a dinner party that year:

There were perhaps a dozen people at the table. My husband, being in the best of spirits, began to tell the company some of his experiences in the Civil War.

He was describing a hurried march which he and his regiment made through Tennessee and Kentucky in pursuit of the daring Confederate raider, John Morgan. He came to a point in his story where he and the advance guard of the pursuing Union troops had nearly overtaken the rear-guard of Morgan's men, who had just crossed from the opposite shore.

Suddenly, Judge Lurton [a guest at the dinner] laid down his knife and fork, leaned back in his chair, his face aglow with surprise and wonder, and called out to my husband in a voice of great excitement, "Harlan, is it possible I am just finding out *who* it was that tried to shoot me on that never-to-be-forgotten-day?"

In a tone of equal surprise . . . my husband said, "Lurton, do you mean to tell me that *you* were with Morgan on that raid? Now I know *why* I did not catch up with him; and I thank God I didn't hit *you* that day."

The whole company was thrilled by the dramatic sequel to my husband's story, as they realized afresh how completely the wounds of that fratricidal war had been healed; for there were those two men, [one from Kentucky, the other from Tennessee,] fellow citizens of this one and united country, serving together as Judges on the Federal Bench. It was as if there had been no Civil War.

Judge Lurton, at the time of the dinner party, served on the Court of Appeals for the Sixth Circuit; he was appointed to the Supreme Court seven years later, in 1909, and served his first two years on the Court together with Justice Harlan.

Indicating the power of the press, the *Times* coverage of Malvina's *Memories* garnered the attention of several publishers. Random House made the offer most attractive to Justice Harlan's heirs and the Supreme Court Historical Society. The Modern Library edition was in bookshops last spring, in good time for Mother's Day. Malvina's memoir was well received. One reviewer commented that reading it "[was] like engaging with a fine conversationalist," and encountering a "gifted storyteller." To give you a better sense of the work, I will relate some further passages from the history Malvina Harlan recorded.

In the Supreme Court's early nineteenth century days, when the great Chief Justice John Marshall led the Court — the jurist whose name Harlan's parents gave their son — the Justices lived together in one boarding house or another when the Court was in session, leaving their wives at home. By the time of John Harlan's appointment in 1877, boarding house days were long over, and a Supreme Court appointment meant a move to Washington, D.C., for all in the Justice's immediate family. It also meant an unpaid job for the Justice's wife.

Malvina Harlan wrote of the "at home" Monday receptions Supreme Court wives were expected to hold. The callers came in numbers. Malvina reported she might receive as many as 200 to 300 visitors at an "at home" Monday. These events were more fancy than plain. Tables would be spread with refreshing salads and rich cakes. Musicians were engaged so the young people might dance a waltz or two while the older folk looked on. "At home" Mondays held by Court wives continued into Charles Evans Hughes Chief Justiceship in the 1930s.

In 1856, when 17-year-old Malvina Harlan left her parents' home in Indiana to begin married life in Kentucky, her mother counseled:

You love this man well enough to marry him. Remember, now, that his home is YOUR home; his people, YOUR people; his interests, YOUR interests — you must have no other.

Malvina valued that advice, but did not follow it in all respects. She continued to pursue her interest in music and eventually sojourned abroad on her own when her husband returned to the United States to attend the Court's term. Of her decision to visit Italy with a few friends during that time, she wrote: "This exhibition of independence was so new and surprising to my daughters that they called my Italian trip "Mother's Revolt."

In the main, however, her ambition was her husband's success. She sought to be helpmate to, not independent from, John Marshall Harlan. She took pride in his nickname for her, "Old Woman." She thought it showed "he looked upon [her] as having the judgment and experience that only years can bring."

When John became a Supreme Court Justice, Malvina developed a friendship with First Lady Lucy Hayes, nicknamed “Lemonade Lucy” for her avid temperance. This friendship yielded the Harlans more than occasional invitations to the White House.

At White House evenings, Supreme Court wives did not always stand solidly, or at least silently, behind their men. Malvina Harlan tells of a dinner at which Chief Justice Waite endured some teasing by his wife, Mrs. Waite, and the First Lady for having “squelched” Belva Lockwood’s 1870s application to be admitted to practice before the Supreme Court. Lockwood was persistent. She eventually gained admission to the Court’s Bar in 1879 – the first woman ever to do so – but only after an Act of Congress required the Court to relent. (Lockwood’s case is a striking illustration that the Legislature is sometimes more sensitive to individual rights, and the winds of change, than the Court is.)

Malvina reported an episode, my favorite, showing that Supreme Court wives attended to more than the social side of a Justice’s life. Justice Harlan was a collector of objects connected with American history. He had retrieved for his collection, from the Supreme Court Marshal’s Office, the inkstand Chief Justice Taney used when he penned the 1857 *Dred Scott* decision, which held that no person descended from a slave could ever become a citizen of the United States, and that the majestic due process clause safeguarded one person’s right to hold another in bondage. It was a decision with which Harlan, as a Justice, strongly disagreed, an opinion overturned by the Civil War and the Fourteenth Amendment.

Chivalrous gentleman that he was, Harlan promised to deliver the Taney inkstand to a woman he met at a reception, who claimed a family relationship to Chief Justice Taney. Malvina thought the promise unwise, so she hid the inkstand away among her own special things, and Justice Harlan was obliged to report to the purported Taney relative that the item had been mislaid.

In the months immediately following the incident, the Supreme Court heard argument in the so-called *Civil Rights Cases*, which yielded an 1883 judgment striking down the Civil Rights Act of 1875, an Act Congress had passed to advance equal treatment without regard to race in various public accommodations. Justice Harlan, alone, resolved to dissent, as he did 13 years later in *Plessy v. Ferguson*, the 1896

decision that launched the “separate but equal” doctrine. He labored over his dissenting opinion for months, but “his thoughts refused to flow easily.” He seemed, Malvina wrote in her memoir, trapped “in a quagmire of logic, precedent, and law.”

Malvina, as I earlier mentioned, grew up in a free state family strongly opposed to slavery. She very much wanted her husband to finish writing that dissent. On a Sunday morning when the Justice was attending church services, Malvina retrieved the Taney inkstand from its hiding place, gave the object “a good cleaning and polishing, and filled it with ink. Then, taking all the other ink-wells from [her husband’s] study table, [she] put the historic . . . inkstand directly before his pad of paper.” When Justice Harlan came home, Malvina told him he would find “a bit of inspiration on [his] study table.” Malvina’s memoir next relates:

The memory of the historic part [t]hat Taney’s inkstand had played in the Dred Scott decision, in temporarily tightening the shackles of slavery . . . in the ante-bellum days, seemed, that morning, to act like magic in clarifying my husband’s thoughts in regard to the law that had been intended . . . to protect the recently emancipated slaves in the enjoyment of equal "civil rights". His pen fairly flew on that day and . . . he soon finished his dissent.

Next time my thoughts on an opinion “refuse to flow easily,” I may visit the Marshal’s Office in search of a pen in need of absolution, perhaps the one Justice Bradley used to write his now infamous concurring opinion in Myra Bradwell’s case, *Bradwell v. Illinois*, an 1873 decision upholding a State’s right to exclude women from the practice of law. Justice Bradley wrote in that opinion:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . .

In his view, women’s “domain” did not extend beyond “the domestic sphere.” He rooted his opinion in a law higher than the Constitution:

. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Fast forward with me now to our own times. Justice Sandra Day O’Connor is

serving her 22nd year on the Supreme Court and I am well into my 10th year as her colleague. A custom that started in 1972, whenever there is a change in the Court's composition, a group photograph with spouses is taken, and prompted by *Good Housekeeping* magazine in 1957, a photograph is taken periodically of spouses only. The subjects of these photographs have changed beyond anything Justice Bradley or even Justice Harlan would have contemplated: Two women are among the Justices, two men add diversity to the spouses.

The life of a Supreme Court spouse also has changed greatly since Malvina Shanklin Harlan's days. Spouses do not receive "at home" callers on Monday, or any day; they pursue careers or interests of their own. Spouses have seats in a special section of the courtroom, and they lunch together three times a year, rotating cooking responsibility. One member favored as a co-caterer is my husband, superchef Martin D. Ginsburg. The lunches are held in a ground-floor space once designated the Ladies Dining Room, but in the 1997 term, at Justice O'Connor's suggestion, fittingly renamed the Natalie Cornell Rehnquist Dining Room.

Our Chief Justice commented in a 1996 address at American University: "Change is the law of life, and the judiciary will have to change to meet the challenges we will face in the future." Change yields new traditions. A most positive one, I think, is the new tradition we are creating by the way the Justices and their partners — at work and in life — relate to, care about, and respect each other. I like to think Malvina Harlan, although she did not count herself what she called a "New Woman," would say, "That's fine."