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THE PRE-COURT CAREER OF
JOHN MARSHALL HARLAN

By

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B. A., Kentucky Wesleyan College, 1960
B. D., Methodist Theological School in Ohio, 1965

A Thesis
Submitted to the Faculty of the
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for the Degree of

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ABSTRACT

The thesis deals with the political career of John Marshall Harlan prior to his appointment in 1877 as an associate justice of the United States Supreme Court. Throughout the majority of those twenty-three active years in Kentucky politics, Harlan was an adamant defender of the slave system, and despite the fact that he had been a strong Unionist during the Civil War, he resisted emancipation of the slaves and opposed every effort to gain civil rights for the blacks once they were freed. When Harlan became a Republican in 1868, he hurriedly reversed himself, and became a consistent advocate of the Reconstruction Amendments and of the Civil Rights Acts. On the Supreme Court, Harlan--an ex-slave owner--was widely hailed as a progressive on a conservative court, often delivering impassioned dissents in civil rights and anti-trust cases.

The author concludes that above all other considerations, Harlan was an ambitious politician. Having seen his father's political success in the Whig Party, Harlan became active in the party just as its popularity in the state rapidly declined. Therefore, whether in opposition to immigrants as a member of the "Know-Nothing" Party or in support of full protection for slaveowners as a member of the anti-Democratic "Opposition" Party, Harlan's stand on these issues, though not totally void of personal conviction, was primarily designed to restore lost political success.

Despite Harlan's penchant for placing politics above principle, one consistent loyalty prohibited him from following most of his friends into the southern Democratic Party that emerged to dominant Kentucky politics after the Civil War: Harlan was unwilling to see the Union cause, for which he had proudly fought the Civil War, belittled by the former

Confederates who led the southern Democrats. Thus, after failing to create a third party option to the southern Democratic and "Radical" Republican Parties, Harlan, the consummate politician, swallowed his opposition toward full citizenship for blacks and the other aspects of Congressional Reconstruction and joined the Republican Party. The significance of this decision can be illustrated by juxtaposing Harlan's new Republican views with declarations that he made a short time before; truly, political ambition had led to the transformation of a southerner.

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CHAPTER I

PRE-CIVIL WAR YEARS

John Marshall Harlan was born to politics. His father, James, was one of Henry Clay's most faithful political lieutenants and served the Whig Party as a United States congressman, secretary of state of Kentucky, state legislator, and state attorney general.¹ The elder Harlan took his son at an early age to hear Clay speak;

¹Robert Spencer Cotterill, "James Harlan," Dictionary of American Biography, VIII (1932), 267; H. Levin, ed., Lawyers and Lawmakers of Kentucky (Chicago: Lewis Publishing Company, 1897), p. 120. The Biographical Encyclopaedia of Kentucky (Cincinnati: J. M. Armstrong, 1878), p. 26. Typewritten copy of a thirty-two page autobiographical letter from John M. Harlan to his son, Richard, July 4, 1911, John M. Harlan Papers, Law School Library, University of Louisville, Louisville, Kentucky. Cited hereafter as Harlan Autobiographical Letter. Harlan remembered that Henry Clay, while serving on Zachary Taylor's cabinet, had arranged for James Harlan to be appointed land commissioner of California; the son noted that his father refused the offer because he did not want to leave Kentucky. Ibid., pp. 2-3. He also recalled that at the National Anti-Democratic convention in 1844, his father demonstrated his loyalty to Clay by continuing to vote for his nomination after the convention had settled on Taylor. Ibid., pp. 7-8.

In addition to his broad political involvements, Harlan's father was also a distinguished lawyer; he authored two professional books--the first, in collaboration with Ben Monroe, was a digest of Court of Appeals decisions (Digest of Cases at Common Law and in Equity Decided by the Court of Appeals of Kentucky from its Organization in 1792 to the Close of the Winter Term of 1852-1853, 2 vols. /Frankfort: A. G. Hodges and Company, 1853/), and the second was a code of legal practice that James Harlan and two other members of the bar prepared for the state legislature (James Harlan, Madison C. Johnson, and John W. Stevenson, Code of Practice in Civil and Criminal Cases for the State of Kentucky /Frankfort: A. G. Hodges, Public Printer, 1854/). The younger Harlan recalled that his father had the largest practice before the Court of Appeals of any lawyer in the state. Harlan Autobiographical Letter, p. 30, Harlan Papers, University of Louisville.

the young boy was keenly impressed by the venerable Whig leader's "magnificent, bugle voice."²

During the boy's formative years, James Harlan schooled his son in a political philosophy rooted in the strong Federalist views of Henry Clay and of John Marshall, young Harlan's namesake. John Harlan later explained that he had learned from "the sage of Ashland" (Clay) that "I owed primary allegiance to my country,"³ and that his father had taught him that Marshall reserved certain supreme powers for the national government that could not be claimed for the states. In addition, Harlan was taught to oppose the view associated with Thomas Jefferson and the Democratic Party that would "place the National government so completely at the mercy of the states that it could not accomplish the objects of its creation."⁴

Following his graduation from Centre College at Danville in 1850, young Harlan enrolled in the Law School at Transylvania University in Lexington. At the time of his graduation from the latter in 1852, he appears to have accepted the strong nationalist doctrines that he had been taught. In a request to the university that a faculty member's speech to the senior class be published, Harlan and three other students praised their teacher for his strong condemnation of "the monstrous doctrine of nullification and secession, which threatens . . . to

²Harlan Autobiographical Letter, p. 2, Harlan Papers, University of Louisville.

³Cincinnati Daily Gazette, May 25, 1871, quoted in Louis Hartz, "John M. Harlan in Kentucky: 1855-1877," Filson Club Quarterly, XIV (January, 1940), 27. Cited hereafter as "Harlan in Kentucky."

⁴Harlan Autobiographical Letter, p. 2, Harlan Papers, University of Louisville.

undermine the fabric of our government."⁵ At seventeen, John Marshall Harlan was a faithful son of Whig nationalism.

Even before he completed his law training, Harlan began to benefit from the political contacts that his father had made as attorney general. In 1851, while working during his summer vacation as a clerk in the finance section of state government, the eighteen-year-old student was designated state adjutant general by Governor John L. Helm. This office paid \$250 a year for serving as the state's liaison with two privately owned military academies--a responsibility that involved an annual inspection tour of the schools--and for supervising the state arsenal which contained a few muskets and military papers from the War of 1812.⁶ In 1854, a year after being admitted to the bar and joining his father's law firm, the young lawyer accepted another position when he was elected the city attorney of Frankfort.⁷

A bright future seemed assured the budding politician, but ominous clouds had been gathering for the political party through which Harlan was finding such early success. In 1851 the Whigs were forced to vacate

⁵George Robertson, Scrap Book on Law and Politics, Men and Times (Lexington: A. W. Elder, 1855), p. 245.

⁶Harlan Autobiographical Memo (undated) quoted in Allan F. Westin, "The First Justice Harlan: A Self-Portrait From His Private Papers," Kentucky Law Journal, XLVI (Spring, 1958), 328. Cited hereafter as "Self-Portrait." Harlan explained that immediately after his appointment as adjutant general, "I was . . . dubbed General by the boys, and that title stuck to me ever afterwards." Harlan Autobiographical Memo quoted in Westin, "Self-Portrait," p. 328.

⁷Lewis F. Johnson, History of Franklin County (Frankfort: Roberts Printing Company, 1912), p. 137

the governor's mansion for the first time in twenty years.⁸ The next year, the Whig's presidential candidate, Winfield Scott, suffered a devastating national defeat--despite the fact that Scott won the approval of a majority of Kentuckians.⁹ The unity of the party collapsed as deep sectional divisions arose over the extension of slavery in the territories. Some northern Whigs joined the crusade of the "Free Soil" or Republican Parties to resist any further expansion of slave territory, while most anti-slavery Whigs remained to dominate the national party, forcing many southern Whigs, under pro-slavery leadership, to defect to the Democrats. The Democratic Party then became the strongest voice for protecting and expanding the rights of slave owners. By 1856 a veteran Whig politician declared: "It is conceded that the Whig party is dead. That question slavery has destroyed the Whig party."¹⁰

Finally, the Whigs who were not absorbed into either the Republican or Democratic Parties joined a new national coalition embracing men with diverse political pasts and, as Harlan later recalled: "Having

⁸ Lewis Collins, History of Kentucky, revised by Richard H. Collins (Louisville: John P. Morton and Company, 1924), I, 62. The Democratic gubernatorial nominee, Lazarus Powell, was the only member of that party's slate elected; the Whigs continued to hold the other state offices, including James Harlan as attorney general. Albert D. Kirwan, John J. Crittenden: The Struggle for the Union (Lexington: University of Kentucky Press, 1962), pp. 273-74. Cited hereafter as Crittenden: Struggle.

⁹ Ruth McQuown and Jasper B. Shannon, Presidential Politics In Kentucky. 1824-1948: A Compilation of Election Statistics and an Analysis of Political Behavior (Lexington: Bureau of Government Research, University of Kentucky, 1950), pp. 23-25. Cited hereafter as Presidential Politics.

¹⁰ "Americanism," Speech of Hon. Lewis D. Campbell, of Ohio, Delegation at the American Mass Meeting, Held in Washington City, February 29, 1856, Pamphlet Collection, Yale University Library, quoted in Allan F. Westin, "Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," Yale Law Journal, LXVI (April, 1957), 640. Cited hereafter as "Constitutional Rights." The insertions are Westin's.

for its object to restrict and destroy the influence of foreigners and Catholic priests in our political affairs."¹¹ The new party hoped to stop the division of the country into pro- and anti-slavery factions by uniting the native majority against the alleged dangers of foreign immigrants.¹² Formally called the American Party, its members were quickly dubbed "Know Nothings" because many of them were active in anti-Catholic and anti-foreign lodges which met in secret.¹³ In 1854, under the approving eye of his father and other leading Whigs of Frankfort, John Harlan became a "Know Nothing," swearing to vote only for "native Americans."¹⁴ Harlan's decision to join the American Party was motivated in part by his strong Presbyterianism, which produced some genuine fear of and hostility toward the growing influence of Roman Catholics in political institutions that had been the traditional preserve of Protestants. His opposition to immigrants appears even more the result of a desperate effort promoted by many of the Harlan's close Whig friends to revitalize their waning political fortunes.

The next year, at age twenty-two, John Harlan organized his first campaign tour away from Frankfort. Traveling alone and living off

¹¹Harlan Autobiographical Memo quoted in Westin, "Self-Portrait," p. 332.

¹²David Donald and James C. Randall, The Civil War and Reconstruction (2d ed. rev.; Boston: D. C. Heath and Company, 1961), pp. 102-04; McQuown and Shannon, Presidential Politics, pp. 24-31; Kirwan, Crittenden: Struggle, pp. 297, 300-01.

¹³Agnes G. McGann, Nativism in Kentucky to 1860 (Washington: Catholic University of America, 1944), p. 48, n. Cited hereafter as Nativism. Kirwan, Crittenden: Struggle, p. 296.

¹⁴Harlan Autobiographical Memo quoted in Westin, "Self-Portrait," p. 332. Harlan observed: "I knew at that time that the Democratic party were in league with Catholic priests--the latter, by their machinations with Democratic leaders, obtaining favors for their church (as in New York City), which were not accorded to Protestant Churches." Harlan Autobiographical Memo quoted in Westin, "Self-Portrait," p. 333.

provisions that he carried in two saddlebags, he spoke in over twenty counties for the American Party's gubernatorial slate that included his father as the incumbent candidate for attorney general. Years later young Harlan retained vivid memories of how frightened he had been at speaking before strange audiences and at debating Democratic candidates who were much older and more experienced than he was.¹⁵ Quickly, however, the robust, six-foot two-inch redhead cultivated the extemporaneous wit and sarcasm, and the quickness of thought that are essential to the campaign orator. Following an appearance in central Kentucky, the Lexington Observer and Reporter noted that the young campaigner "came amongst us unknown to fame, and utterly unheralded, but he left an impression behind him that will not be effaced for a long time."¹⁶ John Marshall Harlan had come of political age.

Although there is no record of exactly what Harlan said on his tour in 1855, his speech at Georgetown was hailed by party leaders there as "the clearest and ablest exposition of American [Party] principles which has been given in that place."¹⁷ Their praise indicates that his speeches were faithful to the stock catalog of indictments which other Kentucky "Know Nothings" levied that year against the immigrants. The speeches, for example, that his father made while stumping the state as the "Know-Nothing" candidate for attorney general are illustrative of those American Party indictments. James Harlan charged that the foreigners bred poverty and crime; that veneration of the Pope by Roman Catholics meant that their allegiance belonged to a foreign power; and that they

¹⁵ Harlan Autobiographical Memo quoted in Westin, "Self-Portrait," pp. 333-35. Harlan's campaign itinerary included towns in central and eastern Kentucky. Louisville Daily Journal, July 18, 1855.

¹⁶ July 25, 1855, quoted in Hartz, "Harlan in Kentucky," p. 19.

¹⁷ Frankfort Commonwealth, July 10, 1855, quoted in Hartz, "Harlan in Kentucky," p. 19.

brought ideas and practices from Europe that undermined traditional American moral and religious values. He argued that these alien influences could be effectively counteracted by tightening the suffrage restrictions on newcomers and by strengthening the Protestant resolve to conduct religious teaching in the schools. Though the American Party's national platform had hoped to avoid divisive sectional debate over the future of slavery in the territories by proposing that each territorial legislature be allowed to decide the future of the institution within its bounds, the elder Harlan, warning that each foreign immigrant to Kentucky brought an innate prejudice against slavery, went beyond the moderate American Party plank to declare that the right to own slaves anywhere in the country should not be prohibitable even by the territories themselves.¹⁸ In 1855, this "Know Nothing" appeal to nativism, mixed with a strong undertone of "Southern rights," was highly successful; James Harlan was elected to a second term as attorney general in an American Party landslide.¹⁹ His son, presumably having stood on the same platform as his father, was exhilarated by the quickening of political fortune which "Know Nothingism" brought the ex-Whigs, and, indeed, he was pleased by the discovery of his gifts as a stump speaker.²⁰

¹⁸Hartz, "Harlan in Kentucky," pp. 18-19; Frankfort Tri-Weekly Yeoman, May 24, 1859; Above, p. 17.

¹⁹There were serious civil disturbances between nativists and immigrants--primarily Roman Catholics--on election day. Most students of the period have blamed the "Know Nothings" for contributing to the atmosphere of hatred and suspicion with their fear-ridden vilification of the newcomers (e. g. Leonard Koester, "Bloody Monday," Louisville Courier-Journal Magazine, August 31, 1955).

²⁰Harlan Autobiographical Memo quoted in Westin, "Constitutional Rights," pp. 333-35.

The following year, young Harlan's reputation as a skillful campaign orator earned him an appointment as an assistant state canvasser for the "Know Nothing" presidential nominee Millard Fillmore.²¹ Campaigning vigorously in over forty counties, he was hailed by a pro-Fillmore newspaper as the "young giant of the American party."²² During the campaign he charted a middle-of-the-road course on the sensitive issues of slavery and immigration by refuting the Democratic charge that the American Party was an abolitionist party, by denying (possibly in reaction to the "Bloody Monday riots" the year before) that he favored general religious proscription, and by insisting that he opposed only those Catholics who owed their allegiance to a foreign cause. His speech, however, rekindled the fiery "Know Nothing" rhetoric of 1855 as Harlan reportedly proclaimed that only "Americans should rule America" and that "in all cases I would vote for the son of the soil in preference to a foreigner."²³

The blend of nativism and a strong, though muted, support of slavery did not work as it had in 1855. Fillmore was badly defeated, failing even to carry the supposed American Party stronghold of Kentucky;²⁴ Harlan's dream that the "Know Nothings" might succeed the

²¹Harlan Autobiographical Memo quoted in Westin, "Constitutional Rights," p. 335.

²²Louisville Daily Journal, July 29, 1856, quoted in Hartz, "Harlan in Kentucky," p. 20.

²³Frankfort Commonwealth, May 21, 1856.

²⁴Walter D. Burnham, Presidential Ballots: 1836-1892 (Baltimore: John's Hopkins Press, 1955), pp. 61-71; McQuown and Shannon, Presidential Politics, pp. 28-31. The Democratic victory in the state was aided by the nomination of a Kentuckian, John C. Breckinridge, as the Democratic candidate for vice-president.

Whigs as a strong, non-sectional party was dashed. In 1856 his only political consolation was that he was elected to a second term as city attorney of Frankfort.²⁵

During the years 1856-1859, as the short-lived appeal of the American Party ebbed away, Harlan's life was filled with a variety of involvements. His primary interest was the busy family law firm.²⁶ Since his father divided his time between the law firm and the attorney general's office, much of the routine business fell to the son.²⁷ In addition to time given the practice in Frankfort, young Harlan spent several months each year handling cases on a circuit of neighboring counties.²⁸ Furthermore, he also had extensive family, political, and civic interests: he was father of a growing family, teacher of a Sunday School class, holder of local political offices, Frankfort

²⁵Johnson, History of Franklin County, p. 137.

²⁶Above, n. 1, p. 1.

²⁷Malvina Shanklin Harlan, "Some Memories of a Long Life," 1854-1911 (184 pages of typewritten manuscript completed in 1915). Cited hereafter as "Memories of a Long Life." Quoted in David G. Farrelly, "Harlan's Formative Period: The Years Before the War," Kentucky Law Journal, XLVI (Spring, 1958), 389-90. Cited hereafter as "Formative Period." There are several extant copies of the firm's correspondence during 1857 that are signed "Jas Harlan by Jno M [John Marshall] Harlan," indicating that, at that time, the son was acting in his father's stead. Harlan Papers, University of Louisville. Though an older brother, William Lowdnes Harlan, was intermittently associated with the firm, there is strong evidence that he was incapable of relieving his brother of much of the responsibility. Above pp. 16, 43. Frankfort Commonwealth, July 31, 1849; Frankfort Tri-Weekly Commonwealth, September 22, 1858; May 21, 1859; Frankfort Semi-Weekly Commonwealth, February 19, 1867. William Lowdnes Harlan died in 1868 at thirty-seven years of age. Alpheaus H. Harlan, History and Genealogy of the Harlan Family (Baltimore: Lord Baltimore Press, 1914), p. 274. Cited hereafter as History of the Harlan Family.

²⁸Farrelly, "Formative Period," pp. 388-89.

correspondent for a Louisville newspaper, lecturer in a community cultural series, and (until 1859) adjutant general of Kentucky.²⁹

In 1858, despite the fact that he again won a local election--this time for judge of Franklin County³⁰--the death-knell for the American Party in Kentucky was sounded when its candidate for the Court of Appeals was overwhelmingly defeated by a Democrat who overtly espoused "Southern slave rights."³¹ A former Whig governor who had been a "Know Nothing" lamented to John J. Crittenden, the Whig-American leader and personal friend of the Harlans, that "something must be done or said . . . to infuse new life, and courage, and confidence in our party, or we are lost."³² A Lexington newspaper, sympathetic to the Whigs, struck a more optimistic note when it predicted: "The Whig party is nominally dead; the American party may also die in the same manner, but it will be a death of body only and not of soul. We think . . . that under some name . . . the time is not distant when the conservative party will again triumph."³³ John Marshall Harlan and his political allies were determined to return to power.

²⁹Alpheaus Harlan, History of the Harlan Family, pp. 658-59; Farrelly, "Formative Period," p. 388. Harlan served as notary public, Frankfort city attorney, and judge of Franklin County. Johnson, History of Franklin County, p. 137; Louisville Daily Journal, February 21, 1859; Frankfort Tri-Weekly Commonwealth, November 22, 1858; Farrelly, "Formative Period," p. 405.

³⁰Farrelly, "Formative Period," p. 393. Significantly, Harlan's two terms as county judge comprise the only judicial experience that he had until his appointment to the United States Supreme Court. Ibid., p. 392. He recalled that during the hard-fought campaign in 1858, he "visited every house and shook hands (as was the fashion) with nearly every man, woman, and child in the county, and spoke nearly every day." Harlan Autobiographical Memo quoted in Farrelly, "Formative Period," p. 393.

³¹Collins, History of Kentucky, I, 80.

³²Letter, Robert P. Letcher to John J. Crittenden, January 26, 1859, quoted in Mary Ann Coleman, ed., Life of John J. Crittenden: With Selections from His Correspondence and Speeches (Philadelphia: J. B. Lippencott and Company, 1873), I, 170. Cited hereafter as Life of Crittenden.

³³Lexington Observer and Reporter, May 12, 1858, quoted in McGann, Nativism, p. 144.

Having been denied an important victory for four years, the Whig-Americans tried to make a come back in 1859 by restraining their crusade against foreign influence and by inviting "all Union loving men" to join them in a coalition against the Democrats, who were blamed "for the slavery agitation which threatens the Union."³⁴ Appropriately calling themselves the "Opposition," the new party held its first state convention in February, 1859, at which they nominated for the August elections a gubernatorial slate that included James Harlan for a third consecutive term as attorney general.³⁵ At Lexington, three months later, a meeting of the "Opposition" within the Eighth Congressional District, after an acrimonious hassle over nominees, designated young John Harlan to wrestle the Democrats for the District's House of Representative seat.³⁶

This, Harlan's first major political race, was a formidable undertaking because his Democratic opponent, William Simms, was a seasoned campaign veteran.³⁷ In an unpublished memoir written over fifty years later, Harlan recalled that the Democrats had placed great importance on the contest because the prestigious "Ashland" district was the home of vice-president John C. Breckinridge, a popular Democratic contender

³⁴Frankfort Tri-Weekly Commonwealth, December 27, 1858. The nascent Republican Party's opposition to slavery made it very unpopular in Kentucky; for instance, its few members made no effort to qualify the party's presidential candidate in 1856 for the ballot. McQuown and Shannon, Presidential Politics, p. 28.

³⁵Louisville Daily Journal, February 23, 24, 1859.

³⁶Paris Western Citizen, May 20, 1859; Frankfort Tri-Weekly Yeoman, May 21, 1859; Louisville Daily Journal, June 1, 1859.

³⁷A veteran of the Mexican War, Simms had served two terms in the state house of representatives in the 1840's as a Whig. After failing to receive the Whig nomination for the state senate or for the United States Congress--honors that Simms felt he deserved--he became a Democrat. Paris Western Citizen, June 10, 1859, Harlan Papers, University of Louisville.

for the presidential nomination of 1860. Although the Democrats had captured the district by over five hundred votes in 1857, the promoters of Breckinridge's presidential candidacy wanted a dramatic demonstration of Democratic strength in their candidate's home district.³⁸

The issues which Harlan raised in his contest with Simms were, for the most part, standard political fare. The "Opposition" candidate lambasted the Democrats for their reckless spending policies during the seven years they had occupied the White House. In public debate he challenged his opponent to show how the increased revenues had been spent, implying that they had been wasted through extravagance and corruption.³⁹ Harlan announced that he favored the Democrats' proposal to annex Cuba, but he insisted that the acquisition should be made "fairly and honorably," without resorting to coercion or fraud. He charged that a bill pending in the Senate to grant President Buchanan a thirty million dollar acquisition fund would be used to acquire Cuba by bribery. On economic matters Harlan invoked the state rights argument to oppose a Democratic scheme to place state corporations under the jurisdiction of the federal courts,⁴⁰ but antithetically, he called on the national government to establish a high tariff to protect Kentucky hemp growers from foreign competition.⁴¹

³⁸Farrelly, "Formative Period," p. 394.

³⁹Paris Western Citizen, June 10, 1859, Harlan Papers, University of Louisville.

⁴⁰Ibid., May 27, 1859.

⁴¹Frankfort Tri-Weekly Commonwealth, July 1, 1859.

Harlan's opposition to immigrants had somewhat moderated from his most zealous days as a "Know Nothing."⁴² Though he still wanted to prevent those who had criminal records or who were poor from entering the country and to limit the distribution of public lands to those holding United States citizenship, he indicated his interest in the immigrant vote when he championed the cause of naturalized Americans who had been forced into the armies of their native lands when they had visited there as tourists.⁴³ Significantly, at a time when there were Roman Catholic voters in Kentucky in increasing numbers, Harlan replaced his earlier fervent anti-Catholicism with an impassioned call for a military crusade against the Mormons in the far west.⁴⁴ Apparently, his strong religious orthodoxy was appalled at the exotic and independent ways of followers of Joseph Smith; besides, the novice politician stood to gain votes by raising this popular "scare issue" in a state where there were no Mormon voters.

In his keynote campaign speech, Harlan made it clear that he viewed Simms' reluctance to support unequivocally Congress' right to protect slavery in all the territories as the most important issue of their contest.⁴⁵ He argued that the Supreme Court's Dred Scott decision permanently secured the constitutional right of a citizen to take slaves into any territory; therefore, he contended that Congress' only power regarding slavery was to pass laws enforcing this fundamental right. By contrast, he alleged that Simms advocated Stephen Douglas' doctrine of

⁴²Above, pp. 4-8.

⁴³Paris Western Citizen, May 27, 1859; Hartz, "Harlan in Kentucky," p. 21; Farrelly, "Formative Period," pp. 399-400.

⁴⁴Frankfort Tri-Weekly Yeoman, July 23, 1859.

⁴⁵Paris Western Citizen, May 27, 1859.

"popular sovereignty," which proposed that the spread of slavery be decided by the vote of each territorial legislature. Harlan rejected this proposal on the grounds that the territorial legislatures, which derived their authority from Congress, had no power to prohibit slavery within their boundaries.⁴⁶

Although Harlan's new party charged the Democrats with splitting the country over the slave issue,⁴⁷ Harlan himself used harsh sectional rhetoric as he indicted Simms and other slave-state Democrats for "having sold the rights of the Southern people to squatter sovereigns of the North" in order to hold the Democratic Party together.⁴⁸ The young politician relentlessly attempted to brand his opponent with temerity toward the issue of full protection for the rights of slave owners, focusing the abstract constitutional issue by pointedly asking Simms: "Could you [if elected to Congress] . . . vote for a law against Negro stealing if a territory failed to enact one?"⁴⁹ Clearly, Harlan favored the preemptive power of the federal government to keep slavery intact. Significantly, the Frankfort Commonwealth hailed him as the candidate for "young America"⁵⁰ and the Cynthiana News described him as "the standard bearer, and defender of Southern rights, and Southern interests."⁵¹ While the change in his

⁴⁶Ibid., May 20, 1859; June 10, 1859, Harlan Papers, University of Louisville.

⁴⁷Above, p. 11.

⁴⁸Frankfort Commonwealth, July 29, 1859, quoted in Hartz, "Harlan in Kentucky," p. 22.

⁴⁹Paris Western Citizen, June 10, 1859, Harlan Papers, University of Louisville. Simms replied that he would "vote to hang the nigger-stealer as high as Haman!" Ibid.

⁵⁰Frankfort Tri-Weekly Commonwealth, May 30, 1859.

⁵¹Cynthiana News, n. d., quoted in Frankfort Tri-Weekly Commonwealth, May 30, 1859.

position on slavery between his days as a "Know Nothing" and 1859 is clearly more a matter of emphasis than content, it is noteworthy that he had moved from an earlier position that avoided a clear stand in favor of slavery by stressing the greater danger of foreign influence to a position that celebrated his adamant support of slavery. In each case, his support of slavery appeared to be more the product of political expediency than principle.

Even before the campaign had begun, Harlan had made clear his opposition to Douglas' "popular sovereignty" doctrine, arguing that the constitution protected the right to take property--in this case, slaves--into the territories. He maintained that Douglas' proposal to allow the territorial legislatures to tamper with this fundamental right was to submit to "majority despotism." He bitterly charged that the plan was based on the theory of

the divine inalienable rights of majorities
The mobocratic idea which levels destruction at all written
contracts by which the weak are protected against the
strong . . . that majorities can make and set aside consti-
tutions at pleasure.⁵²

Harlan found refuge against attempts to proscribe the rights of slaveholders in a conservative constitutional interpretation⁵³ that the citizen's basic rights could not be altered by the changing whims of the majority. He believed that the right of a citizen to move slaves into a territory was a right that was non-negotiable because of the constitutional guarantee of private property ownership.

Colonel Simms' favorite retort was that his opponent's support of congressional intervention to protect the rights of slaveholders in the

⁵²Louisville Daily Journal, February 23, 1859.

⁵³Westin, "Constitutional Rights," p. 643.

territories was premeditated deception--that, in fact, Harlan was in collusion with the abolitionist, "Black" Republicans.⁵⁴ Simms' supporters produced a witness who claimed that in 1853 Harlan had been the attorney for a slave who sued his master for freedom.⁵⁵ They also identified their young opponent as the author of an unsigned letter written in 1856 to a New Albany, Indiana, newspaper endorsing the gubernatorial candidacy of "Black Republican" Oliver P. Morton.⁵⁶ Harlan printed denials of these attempts to depict him as anything but a firm advocate of the rights of southern slaveowners, bringing forth testimony that it had been his brother, William Lowdnes Harlan, who had represented the slave and had written the letter endorsing Morton.⁵⁷ On one occasion, he pledged that he would never support the Republicans on any issue vital to the South.⁵⁸ Harlan's persistent denials of the Democratic claim that he was a tool of the abolitionist Republicans was telling evidence that he feared that their charge might cost him votes.

⁵⁴Paris Western Citizen, May 27, 1859; June 10, 1859, Harlan Papers, University of Louisville; Louisville Democrat, August 12, 1859, quoted in Frankfort Tri-Weekly Commonwealth, August 15, 1859.

⁵⁵Georgetown Journal, n. d., quoted in Frankfort Tri-Weekly Commonwealth, July 29, 1859. Several years before, James Harlan had been accused of abolitionism because he had been the attorney for a slave who had sued his master for freedom. Above, p. 20.

⁵⁶Louisville Democrat, August 12, 1859, quoted in Frankfort Tri-Weekly Commonwealth, August 15, 1859; Paris Western Citizen, July 8, 1859; Lexington Statesman, n. d., quoted in Frankfort Tri-Weekly Yeoman, May 28, 1859.

⁵⁷Paris Western Citizen, July 8, 1859; Frankfort Tri-Weekly Commonwealth, May 30, August 15, 1859. The extent to which Harlan's older brother supported the Republican nominees in 1856 is not known. The possibility of William Lowdnes Harlan's instability is noted above, n. 27, p. 9, p. 43.

⁵⁸Paris Western Citizen, May 27, 1859.

In addition to the accusation that Harlan planned to co-operate with the Republicans, the Democratic press delighted in exposing inconsistencies in his support of slavery. These critics quoted portions of the American Party's national platforms of 1855 and 1856--to which Harlan had subscribed--that stated that the territories were free to accept or deny the slave system and that Congress had no right to pass laws to protect slavery rights in the territories.⁵⁹ These tactics were designed to show that his present "hard line" represented a radical departure from a position that he had taken just three years before. The Lexington Statesman summarized Harlan's political career:

Young as he is he has exhibited a facility to drift in the current popular sentiment, and change his opinion as the hour demanded Once a Whig, then a fanatical and violent American, and now a hybred opportunist, he has accomplished as many sommersaults in his brief career as any man in the country.⁶⁰

The Frankfort Yeoman took up the charge that Harlan was a political opportunist by asking its readers to remember that John J. Crittenden, Kentucky's Whig-American senator and a close political ally of the Harlans, had voted against the pro-slavery Lecompton Constitution and in favor of the ill-fated Wilmot Proviso that had proposed the exclusion of slavery from any territories acquired from Mexico.⁶¹ The Yeoman asked whether the voting record of the Whig-American solon wasn't a better guide to how Harlan actually planned to vote if sent to Washington than were what the newspaper alleged to be his recently hatched pro-slavery proclamations.⁶²

⁵⁹Frankfort Tri-Weekly Yeoman, May 24, 1859; Above, p. 7.

⁶⁰Lexington Statesman, n. d., quoted in Frankfort Tri-Weekly Yeoman, May 28, 1859.

⁶¹Frankfort Tri-Weekly Yeoman, May 21, 24, 1859; Collins, History of Kentucky, I, 79.

⁶²Frankfort Tri-Weekly Yeoman, May 24, 1859.

It is difficult to evaluate the accuracy of the Democratic charge in 1859 that Harlan's adamant call for the full use of federal power to protect and expand the slavery system was, as the editor of the Lexington Statesman had charged, merely an expression of "temporary expediency rather than intelligent and honest conviction."⁶³ It appears, in retrospect, that during the "Know Nothing" days, Harlan and his American Party colleagues had attempted to forge a national party free from sectional schism by generally supporting the rights of slave owners, while trying to bury divisive debate on the specific issue of the future of slavery in the territories under a smoke screen of emotionalism against the dangers of foreign influence.⁶⁴ Any conclusion, then, about how Harlan really viewed slavery should consider that his campaign statements were influenced by the mood of his electorate--and in 1859 he addressed voters who were frightened by the rise of a successful anti-slavery party in the North. The fact that there are few primary sources that reveal Harlan's personal views toward slavery makes it likely that he refused to express himself on the issue except for some possible political advantage. There is, however, documentation that will allow some substantial conclusions about the attitude of Harlan's father toward slavery. In light of the personal and political bonds between the two (e. g. both father and son vehemently supported expanded rights for slaveowners in 1859),⁶⁵ it is possible to speculate about young Harlan's private attitude toward slavery.

⁶³Lexington Statesman, n. d., quoted in Frankfort Tri-Weekly Yeoman, May 28, 1859.

⁶⁴Above, pp. 6-8.

⁶⁵Frankfort Tri-Weekly Yeoman, May 21, 1859.

First, although James Harlan inherited over a dozen house slaves,⁶⁶ he allowed at least two of them to purchase their freedom on an indentured basis.⁶⁷ During his first term as attorney general, moreover, the elder Harlan had urged a friend to release immediately two slaves from the terms of their purchase contract before a new state statute "requiring all subsequently freed blacks to leave the state became effective."⁶⁸ There is no evidence, however, that James Harlan's interest in limited emancipation led him to participate in the movement for gradual abolition and colonization of the blacks that flourished in the state just before the constitutional revision convention was held in 1849--even though his political mentor, Henry Clay, had chaired the state-wide emancipation rally.⁶⁹ Despite the fact that he was not an activist in the abolition and colonization movement, it is safe to say that during the years of John Harlan's maturation his father was not a doctrinaire advocate of an inflexible slave system.

In addition, John Harlan remembered that his father had been appalled by the inhumane treatment that blacks received at the hands of slave dealers who traded on a large scale. He remembered from childhood that the only time he had ever heard his father swear was when the two of them

⁶⁶ Malvina Harlan, "Memories of a Long Life," quoted in Westin, "Self-Portrait," p. 33; Westin, "Constitutional Rights," p. 642. In 1852, James Harlan owned seventeen slaves with a total valuation for tax purposes of \$6,000. Frankfort, Kentucky, Tax Records (1852), Kentucky Historical Society, Frankfort, Kentucky.

⁶⁷ Malvina Harlan, "Memories of a Long Life" cited in Farrelly, "Formative Period," pp. 368-69.

⁶⁸ Letter, James Harlan, Attorney General of Kentucky, to Colonel Orlando Brown, Washington City, May 19, 1850, Orlando Brown Papers, Kentucky Historical Society, Frankfort, Kentucky.

⁶⁹ Frankfort Commonwealth, May 1, 24, 1849.

met an armed slave driver at the head of a chained slave gang being taken to the trading block.⁷⁰ On another occasion, when slavery advocates criticized him for acting as defense attorney for two free blacks who had been kidnapped and resold into slavery, James Harlan wrote: "Nothing which may emanate from Negro traders or others will ever prevent me from instituting a suit for Freedom if I believe the laws authorize it."⁷¹

Despite his apparent sympathy for limited emancipation and, according to his son's later description, his "abhorrence of the traffic in human beings,"⁷² James Harlan, it should be remembered, was a slaveholder who strongly opposed rapid, general freeing of slaves.⁷³ Although he wanted, in the style of the benevolent squire, to retain full control over the destiny of his slaves, it is clear that, in the early 1850's, he was not a zealous defender of the slave system. Even allowing for some hardening of position in reaction to the anti-slavery agitation in the North, it appears that the unqualified demand for federal protection of slavery that the Harlans made in 1859 as "Opposition" candidates was inconsistent with the elder Harlan's long-standing desire to reduce slavery's

⁷⁰ Interview with John Marshall Harlan, reprinted from the Washington Post, in Lexington Leader, March 25, 1906, Harlan Papers, University of Louisville. Cited hereafter as Harlan Interview. Malvina Harlan, "Memories of a Long Life" quoted in Westin, "Self-Portrait," pp. 331-32.

⁷¹ Letter, James Harlan to D. Howard Smith, August 5, 1851, quoted in Westin, "Constitutional Rights," p. 643. While this author has found no evidence that John Harlan also petitioned the court to free blacks illegally enslaved, Westin has established that the young attorney was not adverse to taking free blacks as his clients. Westin, "Constitutional Rights," p. 643, citing John Marshall Harlan's Law Ledger.

⁷² Harlan Interview reprinted in Lexington Leader, March 25, 1906, Harlan Papers, University of Louisville.

⁷³ Letter, Harlan to Smith, August 5, 1851, quoted in Westin, "Constitutional Rights," p. 643. James Harlan wrote: "He who applies (abolitionist) to me lies in his throat I have the same opinion of an abolitionist that I have of a disunionist Each deserves the gallows."

influence rather than expand it. Indeed, there is some truth in their opponents' charge that the Harlan position was a product of political opportunism and not moral conviction.

The "Opposition's" rabid defense of slavery did not, however, bring victory; the Democrats elected their gubernatorial slate, captured six of the state's ten congressional seats, and gained overwhelming control in the state legislature. Although young Harlan proved to be a game candidate against a formidable adversary, he lost the election by 67 votes out of 13,797 cast.⁷⁴ Harlan explained years later that he was sure that in terms of legitimate voters he had defeated Simms by five hundred votes, but had decided not to contest the results because of the time-consuming court procedure required to challenge an election. This would have taken from his legal profession that he could not afford since he "came out of the canvass . . . with a debt . . . of about \$9,000 and without any money to pay it off."⁷⁵ He reasoned that his defeat was actually a blessing because it allowed him to apply his full energy to paying off the campaign debt. He also later rationalized his defeat with the thought that "one session of Congress at Washington, at my then age, would have given me such a taste for political life as would not have been consistent with professional success."⁷⁶ Finally, Harlan remembered in an unusually candid assessment that

⁷⁴Collins, History of Kentucky, I, 81; Kirwan, Crittenden: Struggle, p. 341. Harlan Interview reprinted in Lexington Leader, March 25, 1906, Harlan Papers, University of Louisville; Harlan Autobiographical Memo cited in Farrelly, "Formative Period," pp. 401-02; Louisville Daily Courier, August 11, 1859.

⁷⁵Harlan Autobiographical Memo quoted in Farrelly, "Formative Period," pp. 401-03. Harlan's friends charged that the Democrats won the election by importing fraudulent voters of Irish descent into the district. Harlan Autobiographical Memo cited in Farrelly, "Formative Period," pp. 401-03.

⁷⁶Harlan's Autobiographical Memo quoted in Westin, Constitutional Rights, p. 644 n.

the Opposition party . . . had . . . no national political alliance. If I had been given a seat in Congress it would have been by the votes of the Republican or Free Soil party, and that fact alone would have sufficed to destroy our party in Kentucky and would have ruined me politically--so bitter was the feeling in Kentucky, at that time, against the Republican or Abolition party.⁷⁷

Harlan had failed in his first bid for major office. Nevertheless, in his calculated use of the immigrant and slave issues, the aspiring young politician had clearly demonstrated his willingness to subordinate principle to political expediency.

In early 1860, as the nation plummeted toward dissolution, Kentucky's "Opposition" Party searched, as the American Party had unsuccessfully tried several years before, to find a common denominator that would cool the enflamed passions of both North and South over the slave issue. The "Opposition," still composed mostly of former Whigs, joined a loose-knit coalition called the Constitutional Union Party,⁷⁸ which sought to blunt the divisive slavery issue by emphasizing national unity above all other considerations.⁷⁹ As part of that effort, John Harlan

⁷⁷ Harlan's Autobiographical Memo quoted in Farrelly, "Formative Period," pp. 402-03. Since there was no organized Republican Party in Kentucky at this time, the author assumes that Harlan meant that he planned to caucus with the House Republicans on organizational matters. It will be recalled that during the campaign, he responded to the charge that he would caucus with the "abolitionist Republicans," (above, p.15) with an admission that he would vote with them on matters that did not affect the peculiar interests of the South. Above, p.16.

⁷⁸ Harlan explained: "I belonged to a local political party known as the 'Opposition party.' Its members were all old Whigs by training and association." Harlan's Autobiographical Memo quoted in Farrelly, "Formative Period," pp. 402-03.

⁷⁹ John J. Crittenden, a leader of the coalition, apparently wrote Abraham Lincoln asking him to become the new party's presidential candidate in 1860, but Lincoln refused on the grounds that the "Opposition" were evading the main issues by their appeal to "the Union, the constitution, and the law." Letter, Lincoln to Crittenden, December 22, 1859, quoted in Phillip Van Doren Stern, ed., The Life and Writings of Abraham Lincoln (New York: Random House, 1940), p. 567.

signed an "Address of the Union State Central Committee" that pledged unwavering support to the "Union" and "unalterable hostility to Northern Republicanism and Southern Secession."⁸⁰ When the new party held its state conclave, Harlan was instrumental in writing a resolution that acknowledged that the South had been treated unfairly, but also asserted that sectional grievances should be redressed "inside the Union and not out of it."⁸¹ Before the convention adjourned, he was chosen as an elector in the upcoming presidential race.⁸² Loyalty to the Union clearly overshadowing regional considerations, Harlan rejected secession as a solution to the bitter sectional conflict.

In the fall of 1860, Harlan and other former Whigs campaigned ardently to heal the divided nation with their rhetoric of unity, and although Bell lost the national campaign, he carried Kentucky by a substantial margin.⁸³ Harlan had correctly assessed the political mood in Kentucky if not in the nation. In December, 1860, when he met to cast his vote as a Bell elector, he joined seven of his Constitutional Union colleagues in calling for an emergency meeting of the party's state convention because of "the alarming condition of public affairs."⁸⁴

Indeed, there was a mood of uncertainty and fear in the land. Speculation was rampant over what action the federal government would

⁸⁰Newspaper Clipping Bruner Scrapbook, John B. Bruner Papers, Filson Club, Louisville, Kentucky.

⁸¹Ibid.

⁸²Ibid.

⁸³Kentuckians gave their native son, Abraham Lincoln, fewer than one percent of the state's votes.

⁸⁴Louisville Weekly Journal, December 28, 1860.

take in response to the departure of the southern states from the Union. It was also unclear what the seceded states planned to do about the lingering presence of federal military facilities within their territory. Fifty years later, Harlan remembered that "the country literally trembled at the possibility of war between the Union and the disunionists."⁸⁵

The Constitutional Unionists scheduled their emergency session to meet in Louisville on January 8, 1861--simultaneously with a convention of Democrats also opposed to secession. A committee selected by the two conventions prepared a joint resolution, and Harlan, as secretary to the Constitutional Unionists, read it to his group. The resolution acknowledged that the slave states had suffered some injustices at the hands of the free states, but insisted that the injustices were insufficient grounds for secession, especially since the Democrats still controlled Congress where any anti-slavery measures initiated by the victorious Republicans could be blocked. Finally, the resolution urged both sides to adopt the compromise formula proposed by Senator John J. Crittenden as a peaceable resolution of the sectional conflict.⁸⁶

The Constitutional Union convention approved the joint resolution and Harlan and a colleague were selected to inform the Democratic convention of its passage.⁸⁷ Finally, in the closing hours of the Constitutional Union convention, Harlan sponsored a successful motion that squelched the attempt

⁸⁵Autobiographical Letter, p. 9, Harlan Papers, University of Louisville.

⁸⁶Louisville Journal, January 10, 1861; Wilson P. Shortridge, "Kentucky Neutrality in 1861," Mississippi Valley Historical Review, IX (1922-1923), 287.

⁸⁷Louisville Journal, January 10, 1861. In less than a month, the two factions of Kentucky Unionists would formally merge into a single party. Louisville Daily Courier, February 9, 1861.

of some Unionists to gain support for a policy of federal coercion of the slave states.⁸⁸ Three months before Sumter, John Harlan believed that the rights of slave owners were endangered by northern opposition to the slave system; he adamantly opposed secession as the proper response of the aggrieved; and he rejected with equal vigor the use of military force to restore the integrity of the Union. His hopes for solving the sectional crisis appeared to have rested solely on negotiation and compromise.

It was during this anxious time that Harlan decided to move from Frankfort and the family law firm to Louisville and a law partnership with an old Whig family friend, William F. Bullock. He wrote many years later that he had resigned his office as judge of Franklin County and moved to Louisville "in order to escape connection with politics and to avoid another race for Congress, but especially for the reason that Louisville presented a larger field for a lawyer."⁸⁹ Although the young politician had little doubt that he could vindicate his political defeat of 1859, he

⁸⁸ Louisville Daily Journal, January 10, 1861.

⁸⁹ Harlan Interview reprinted in Lexington Leader, March 25, 1906, Harlan Papers, University of Louisville. Harlan's resignation was not formally submitted until May 4, 1861. Harlan's Resignation and Order Book N, Franklin County Records (1854-1862), cited in Farrelly, "Formative Period," p. 393. In a biographical account that he approved, it was explained that the only way Harlan could avoid the clamor to nominate him for the seat that he narrowly lost in 1859 was to move from the district. Unsigned biographical sketch of Harlan, sixteen page typescript copy with note by Harlan's son, Richard, stating that his father had read and approved the contents of the sketch. Harlan Papers, University of Louisville. Hereafter cited as Harlan Biographical Sketch. The sketch is a draft copy written by Blackburn Esterline, a Washington lawyer, in response to a request by a Louisville historian, E. Polk Johnson, to provide him with a biographical article for publication. Harlan Papers, University of Louisville. Johnson published the sketch in his History of Kentucky and Kentuckians (Chicago: Lewis Publishing Company, 1912), I, 535-44.

declined the opportunity because, with in increasing family, he could not afford another campaign and because he was still in debt from the earlier campaign.⁹⁰ In addition, Frankfort was a difficult town for the young lawyer because many experienced lawyers with good reputations had settled in the state capital, thereby forcing the younger men to spend as much as half the year traveling a circuit in neighboring counties. By contrast, Louisville, a growing city, offered wider opportunities with less travel.⁹¹ From this combination of personal and political motives, John Harlan set out for Louisville and he did so in a time of crisis.

The demands of moving to Louisville did not prevent Harlan from doing all he could to avoid an armed confrontation between the seceding states and the federal government. On March 11, 1861, he wrote a letter to Joseph Holt, a Kentuckian who had just finished serving as secretary of war and postmaster general in the Buchanan cabinet, in which Harlan set down at length his views on the impending crisis. He was convinced that the clamor for secession in the upper slave states could be stopped by the immediate removal of federal troops from Forts Sumter and Pickins, South Carolina. He predicted that the withdrawal of federal troops would be seen as "an act of magnanimity" toward a "mad and uncontrollable South," which would ease the widespread fear throughout the slave states which were still in the Union that Lincoln and his "abolition administration" were bent on fomenting a conflict with the South in order to "coerce" changes in the southern way of life.

Harlan was convinced that once fighting started, the northern tier of slave states (Kentucky, Maryland, Virginia, North Carolina, Tennessee,

⁹⁰ Harlan Biographical Sketch, Harlan Papers, University of Louisville.

⁹¹ Farrelly, "Formative Period," p. 388; Above p. 9.

and Missouri) would be swept into secession out of sympathy for the southern cause. His dominant concern, therefore, was to effect the removal of the federal troops who, as symbols of northern coercion, were likely to provoke the South into war. He predicted that withdrawal of the troops from the forts would produce the following results:

First in the border slave states the Union cause would be placed upon an immovable foundation; Second, a formidable party would immediately spring up in the seceding states in favor of a return to the National Union--without some such thing as coercion with which to keep the Southern people in constant alarm, the cause of secession would sicken and die and in six months its authors would be hurled from power.

Harlan was certain also that following the removal of the federal troops inflamed sectional passions would ameliorate to the point that the issues dividing the North and South could be resolved by a national mediation convention.

Recognizing that his proposal to relinquish the forts asked the federal government to yield prerogatives secured by the national constitution, he insisted that "by a withdrawal, the government need not abandon its right to the forts, but it would be regarded as a peaceful practical measure . . . to avoid cruel war and reunite our people." Harlan was more than willing to sacrifice constitutional principle in order to avoid war.

Finally, Harlan revealed just how far he was willing to go in his search for peace. He told Holt:

It must be conceded that if whenever it becomes a settled fact that the people of the seceding states are unalterably opposed to the Federal government they should be allowed to go in peace. To subdue by arms under an attempt to enforce the laws would be madness in the extreme.

He asked:

What would more likely produce an undying hostility to the Federal government than a cruel war and what would more certainly produce a cruel war than an attempt to reinforce Major Anderson or to collect revenue?⁹²

⁹²Letter, Harlan to Joseph Holt, March 11, 1861, Holt Manuscripts, Library of Congress.

A month before the Civil War began, John Harlan, the strong nationalist, preferred to see the Union divided than see the South forced to stay in the Union by a bloody war.

With the firing upon Sumter, however, Harlan's views underwent a dramatic reversal. Years later, he explained what had led him to abandon his opposition to coercion and to favor the use of soldiers to force the South to adhere to the Union:

At last, the actual crisis came, when the flag of the United States was fired upon, and the authority of the Union defied Then the people in the non-slave holding states and the Union men in the border states felt that any more effort to keep the peace and prevent bloodshed was useless.⁹³

Harlan did not mention his willingness, a month before Sumter, to let the South "go in peace." In retrospect, his earlier willingness to acquiesce to secession in order to leave the door open for ultimate reconciliation appears to have been the result of his revulsion at the prospect of Civil War⁹⁴ rather than a considered political judgment. Thus, when compromise proved impossible and war came, he was determined that the Union should not be divided--a decision that involved his willingness to preserve its integrity by force. In stark contrast to his preference for secession over war expressed in the letter to Holt, three months later, Harlan was eloquently arguing that the Union was organically indivisible.⁹⁵

⁹³ Harlan Autobiographical Letter, p. 9, Harlan Papers, University of Louisville.

⁹⁴ Hartz, "Harlan in Kentucky," pp. 23-24, suggests that Harlan's fear of war in March, 1861, even transcended his concern for national cohesion.

⁹⁵ Above, pp. 32-34. In his memoirs, John reconstructed his stance following the firing on Sumter: "I announced that the government was under a solemn duty to save the Union, even by force if necessary." Harlan Autobiographical Letter, p. 10, Harlan Papers, University of Louisville.

Following the attack on Fort Sumter, the determination of Kentucky's Unionists to resist secession by force demanded prompt action in two crucial areas: first, according to Harlan's recollection, the Unionists had to prevent Governor Beriah Magoffin, who leaned toward the Confederacy, from leading the state into secession; and second, since many of the state militia sympathized with secession, a way had to be devised to supply the opponents of secession with arms and to cultivate popular support for their cause.⁹⁶

The first step in the Unionist plan was to block a proposal in the state legislature to call a convention which was to decide what action Kentucky should take in the face of Civil War.⁹⁷ Harlan feared that such a convention might serve Confederate sympathizers by passing an ordinance of secession, or by committing the state to a neutrality policy so constricting that Unionists would be unable to give effective support to the federal government.⁹⁸ In this Unionist effort to block the calling of a convention, Harlan wrote of his role as follows:

In obedience to a summons from my father, I went from Louisville to Frankfort and remained there some weeks. With him and others I labored constantly for weeks with members of the Kentucky legislature for the purpose of defeating the scheme for calling a "Sovereignty" convention.⁹⁹

⁹⁶Harlan Narrative in Thomas Speed, The Union Cause in Kentucky: 1860-1865, foreward and lengthy narratives by John Marshall Harlan (New York: G. P. Putnam and Son, 1907), pp. 116-121. Cited hereafter as Union Cause. Kirwan, Crittenden: Struggle, pp. 430, 435.

⁹⁷The legislative session at which Harlan was most active as a Union lobbyist (May, 1861) was actually the third meeting of the legislature in five months. Although there had been attempts to call a sovereignty convention in the two previous sessions, the May session was most crucial because war had broken out and the necessity for deciding Kentucky's role in the conflict was imperative.

⁹⁸Harlan Narrative in Speed, Union Cause, pp. 116-117.

⁹⁹Harlan Narrative in Speed, Union Cause, p. 117.

Harlan's wife, Malvina, in an unpublished memoir, confirmed the intensity of her husband's efforts during that period: "My husband and a few others of the younger men actually slept in the State House during several all-night sessions when that dangerous resolution was being discussed."¹⁰⁰ After almost three weeks (May 6-24), the legislature rejected the proposal for the convention and Harlan returned to Louisville to continue the work of strengthening the Union cause.¹⁰¹ The immediate danger of losing Kentucky to the Confederacy had passed.

The Unionists, however, had to develop the military and political strength needed to keep Kentucky loyal to the federal government. Immediately after the firing on Fort Sumter, the Union State Central Committee in an "Address to the People of the Commonwealth" called for Kentucky to remain neutral between the two combatants, siding "not with the government and not with the seceding states, but with the Union against them both."¹⁰² Another ambiguous proposal for arming the state solely for defensive purposes was included in the address. Recalling years later how many people had criticized the Unionist plan of armed neutrality as a feeble demonstration of loyalty to the federal government, Harlan explained:

The Union men of Kentucky were content to rest for a time under that charge, knowing that they were unarmed while the rebel sympathizers were armed, and to enter the conflict before they were 'full ready' was to invite disaster

¹⁰⁰Malvina Harlan, "Memories of a Long Life" quoted in David G. Farrelly, "John Marshall Harlan and the Union Cause in Kentucky, 1861," Filson Club History Quarterly, XXXVII (January, 1963), 10. Cited hereafter as "Harlan and Union Cause."

¹⁰¹Harlan Narrative in Speed, Union Cause, p. 117.

¹⁰²Collins, History of Kentucky, I, 87.

to the Union cause in the state. We determined to defer decisive action until the Union men of the state obtained arms.¹⁰³

John Harlan was active in both overt and clandestine efforts to remedy the military imbalance that existed between the Union and the Confederate sympathizers. Overtly, during the period of armed neutrality, he was chosen captain of a company of Union Home Guards that was organized to counterbalance the pro-Confederate State Guard.¹⁰⁴ The young lawyer played a major role in distributing muskets and bayonets to Unionists in central Kentucky. The weapons were shipped by riverboat from Cincinnati to the Louisville wharf, from which Harlan and his friends secretly transferred them to the railroad depot for shipment to Lexington.¹⁰⁵

James Harlan, who had been appointed United States district attorney for Kentucky by President Lincoln in May, 1861,¹⁰⁶ and who served on the "private committee" set up by the President to distribute the weapons, kept his son informed of the movement of the guns.¹⁰⁷

¹⁰³Harlan Narrative in Speed, Union Cause, pp. 118-19.

¹⁰⁴Harlan Autobiographical Letter, p. 11, Harlan Papers, University of Louisville; Robert M. Kelley, The Union Regiments in Kentucky (Louisville: C. J. Printing Company, 1897), p. 367; Donald W. Zacharias, "John J. Crittenden Crusades for the Union and Neutrality in Kentucky," Filson Club History Quarterly, XXXVIII (July, 1964), 198; Harlan Biographical Sketch, p. 6, Harlan Papers, University of Louisville. Harlan remembered that the militia groups had been organized "mainly for our self-protection" adding that "we intended to let the violent men of the Confederacy know that we were not to be imposed upon or intimidated." Harlan Autobiographical Letter, p. 11, Harlan Papers, University of Louisville.

¹⁰⁵Harlan Narrative in Speed, Union Cause, p. 120.

¹⁰⁶Louisville Daily Journal, May 6, 1861. James Harlan's appointment was heralded as proof that President Lincoln filled offices with men other than abolitionists.

¹⁰⁷Harlan Narrative in Speed, Union Cause, p. 118; Harlan Autobiographical Memo quoted in Westin, "Constitutional Rights," p. 645. Letter, Union committee in Kentucky to Abraham Lincoln, May 28, 1861, quoted in John Hay and John G. Nicolay, eds., Abraham Lincoln: A History (New York: Century Company, 1904), IV, 237; Farrelly, "Harlan and Union Cause," p. 9

While the Unionists used Kentucky's neutrality policy to buildup their forces, young Harlan distributed more than weapons. He worked feverishly to capture the minds of Kentuckians for the Union cause. In collaboration with the assistant editor of the Louisville Journal, he inserted unsigned editorials supporting Unionist policies.¹⁰⁸ Beginning in May, 1861, moreover, and continuing throughout the summer, Harlan took his appeal for the Union cause to the street corner. He was a member of a committee of Louisville Unionists that, in his words, raised money "to educate the people as to the value of the Union, and as to the horrors and dangers of a civil war, should Kentucky ally itself with the rebel forces."¹⁰⁹ The money was used to hire bands to attract crowds to be addressed by Unionists. Remembering the summer of 1861, Harlan wrote: "The courts were virtually closed and there was little business in my profession It is safe to say that . . . I made at least fifty 'soap-box' speeches for the Union cause."¹¹⁰ In his speeches, he

¹⁰⁸ Harlan remembered that this measure had been necessary to counteract a tendency of the newspaper's editor, George Prentice, "to greatly discourage the Union men" by writing "that the true policy of the General Government was to let the wayward sisters go . . . that it was unwise to attempt the use of force in preventing a secession of any state which in any proper way indicated a desire to withdraw from the Union." Farrelly, "Union Cause in Kentucky," pp. 11-14. Westin, "Constitutional Rights," p. 645.

¹⁰⁹ Harlan Autobiographical Letter, pp. 10-11, Harlan Papers, University of Louisville.

¹¹⁰ Ibid., p. 11; Harlan Narrative in Speed Union Cause, p. 117; Harlan Autobiographical Memo quoted in Westin, "Constitutional Rights," p. 645. Harlan worked closely on his speaking efforts with James Speed, a Unionist candidate for the state senate destined to become Lincoln's attorney general. Harlan Biographical Sketch, p. 6, Harlan Papers, University of Louisville; Louisville Daily Journal, July 30, 1861. That summer, Harlan carried his defense of the Union cause to Lexington and other towns outside Louisville. Louisville Daily Journal, July 4, 30, 31, August 1, 1861.

vigorously opposed recognition of the independence of the Confederate states for fear that any legitimacy ascribed to the rebellion might become a pretext for Kentucky to join the Confederacy.¹¹¹

Harlan saw legal recognition of the Confederate government by Kentucky as part of a larger scheme hatched by the pro-Confederate leadership of the state to take Kentucky out of the Union eventually. Following a series of Union victories in statewide congressional elections held in June, 1861, Harlan described the suspected plan in a letter to his friend John J. Crittenden:

The Secessionists here seem still to be defiant and talk desperately. Their plan now evidently is to effect a cessation of hostilities, to be followed by an acknowledgment of the independence of the Confederate states, believing [sic] that when that occurs and all hope is lost of the restoration of the Union, Kentucky will drift into the Southern Confederacy. They seem to have abandoned all hope of forcing our state in that direction and are aiming so to shape events as to produce the result which they desire. In other words they believe that when the United States government consents to a dismemberment of the Union, Kentucky is bound to go South.¹¹²

At the time Harlan wrote of the secession scheme, he and several other Unionist attorneys had already argued before the Jefferson County Circuit Court a test case that had broad implications for the legal status of the Confederate government. Harlan and his colleagues defended the Louisville and Nashville Railroad in a suit challenging the railroad's compliance with the federal government's embargo on freight shipments to the Confederate states. The judge's decision sustained the contention made by the Unionist attorneys that the federal government was justified

¹¹¹Hartz, "Harlan in Kentucky," pp. 24-25.

¹¹²Letter, Harlan to John J. Crittenden, June 25, 1861, Crittenden Manuscripts, Library of Congress.

in its restraint of trade because it aided the effort to suppress an insurrection.¹¹³ In effect, Harlan and his friends succeeded in getting a judgment that denied legal recognition to the self-proclaimed government in the South.

During the busy month of June, Harlan spent several days back in his home congressional district stumping for his old friend John J. Crittenden. The popular Crittenden, who had just completed a distinguished term in the United States Senate, was persuaded to run against the incumbent, William Simms, whom Harlan had opposed in 1859. Years later, Harlan cited the sweeping victories by Crittenden and other Union congressional candidates as evidence that the campaign to formally commit Kentucky to the Union cause was succeeding.¹¹⁴ At the end of the summer, following elections that further strengthened the Unionist cause, Kentucky's legislature moved formally to abandon the state's neutrality and to side actively with the Union against the Confederacy.

In the six years that young Harlan had been active in politics--first as a "Know Nothing" and then as a member of the "Opposition" Party--he had struggled unsuccessfully to build a secure political base like that founded two decades earlier in the state by his Whig political mentors. In 1861, the promise of renewed political success under the broadly Union label would be delayed by Harlan's decision to serve as an officer in the Union Army.

¹¹³ Brady and Davis v. Louisville and Nashville Railroad, Case 50705, Jefferson Circuit Court Records (1861) Jefferson County Court House, Louisville, Kentucky; Louisville Daily Journal, July 3, 12, 1861.

¹¹⁴ Louisville Daily Journal, June 20, 1861; Kirwan, Crittenden: Struggle, pp. 438-39. Above, p. 29; Harlan Autobiographical Letter, p. 11, Harlan Papers, University of Louisville.

CHAPTER II

SERVICE IN THE UNION ARMY

On September 17, 1861, Harlan's company of "Crittenden Zouave" Home Guards was ordered by General William T. Sherman to Muldraugh Hill, thirty miles south of Louisville, for temporary duty against an anticipated assault by Confederate troops that never materialized. On September 27, the day that the Home Guards returned to Louisville, Harlan announced his intention to raise a regiment of infantry in the Union Volunteers.¹ In his memoirs, he wrote that he had decided that he must "join the Volunteer Union forces and become something more than a speaker for the Union cause in public halls or on the stump."²

The public announcement of Harlan's decision to fight was an emotional appeal to patriotism and self-interest. He described his cause by saying:

Their invaded state appeals to them, their foully wronged and deeply imperiled state appeals to them. The cause of human liberty and republican institutions everywhere appeals to them Every consideration of enlightened self-interest calls us to the field. If our enemies triumph, all our trades, all our professions, all our avocations of whatever character, all our professions of whatever description, become valueless.. To save ourselves and our families from ruin . . . and . . . our state and our country from shame,

¹Robert M. Kelley, The Union Regiments in Kentucky (Louisville: C. J. Printing Company, 1897), p. 367. Cited hereafter as Union Regiments. Louisville Weekly Journal, October 8, 1861; Louisville Daily Journal, September 27, 1861.

²Typewritten copy of a thirty-two page autobiographical letter from John M. Harlan to his son, Richard, July 4, 1911, pp. 11-12, John M. Harlan Papers, Law School Library, University of Louisville, Louisville Kentucky. Cited hereafter as Harlan Autobiographical Letter.

we must rally now. Come then, let us gird up the whole strength of our bodies and souls for the conflict, and may the God of battles guide home every blow we strike. For one, I am unwilling to see the people of my native state overrun and conquered by men claiming to be citizens of a foreign government.³

The language of compromise had been drowned by the battle cry.

Harlan formed his regiment at Camp Crittenden in Marion County and made recruiting sojourns into neighboring counties. On several occasions large public rallies were held, at which popular Union personalities spoke, in order to encourage enlistments. The citizens of the region supported Harlan's efforts by giving a "dinner on the grounds" for his recruits and by contributing blankets for the men when the regimental supply was exhausted. Designated the "Tenth Kentucky Volunteers" and numbering about a thousand men, his regiment was mustered into federal service on November 21 and assigned to the command of General George H. Thomas. On muster day, the twenty-eight year old Harlan was commissioned colonel in the service of the United States.⁴

A month passed before Harlan received orders to move southeastward from Camp Crittenden to engage the invading enemy. The young colonel left for the front aware that his decision to see the Union preserved at all cost jeopardized the future of slavery by putting it at the mercy of the Republican government. He could only hope that the Lincoln

³Ibid., pp. 13-14; Louisville Daily Journal, September 27, 1861; "Harlan's Republicanism," Louisville Commercial, November 1, 1877.

⁴Reminiscence by Governor Augustus E. Willson on the day of Harlan's death, Louisville Herald, October 15, 1911, Clipping File, Louisville Free Public Library. Cited hereafter as Willson Reminiscence. Harlan Narrative in Thomas Speed, The Union Cause in Kentucky: 1860-1865, foreward and lengthy narratives by John Marshall Harlan (New York: G. P. Putnam and Son, 1907), p. 195. Cited hereafter as Union Cause. Louisville Weekly Journal, October 10, 17, 1861. Louisville Daily Journal, October 12, 25, 1861; Kelley, Union Regiments, p. 367.

administration would abide by the resolution sponsored by his friend, United States Representative John J. Crittenden, and passed by both houses of Congress that promised that slavery or any other aspect of the southern way of life would not be altered. Instead, the resolution made the restoration of the Union the sole aim of the war. Little could he know how fragile his hope was and how far the social revolution that accompanied the war would shatter his cherished views.⁵

Following Harlan's first exposure to battle at Mill Springs, Kentucky, he seemed excited by the Union victory and exhilarated by the command of troops. In the official field report of his regiment's participation in the battle--which was almost over when his regiment arrived--Harlan bitterly denounced the Confederate leaders as "those wicked and unnatural men who are seeking without cause to destroy the Union of our fathers."⁶ Like a wide-eyed schoolboy who brings home mementoes of a day's venture in the woods, Harlan sent to his friends victory trophies that he gathered on the battlefield. To the editor of the Unionist newspaper in Frankfort, he sent a camp stool that had reportedly belonged to Confederate General George B. Crittenden; and to another friend he sent a luxurious Rocky Mountain wolf-skin robe that a Confederate officer had abandoned in hasty retreat.⁷

Harlan's involvement in the war also had its sobering side. He vividly remembered the "harrowing sight" of the battlefield at Mill Springs

⁵Foreward by Harlan in Speed, Union Cause, p. vi; Congressional Globe, 37th Cong., 1st Sess., 222-23, 265. Louis Hartz, "John M. Harlan in Kentucky: 1855-1877," Filson Club Quarterly, XIV (January, 1940), 24.

⁶"Report of the Capture of Mill Springs, January 27, 1862." War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies (Washington: Government Printing Office, 1880-1901), Series I, VII, 89-90. Cited hereafter as War of Rebellion.

⁷Louisville Evening Bulletin, February 5, 1862.

littered with dead; especially did the sight of the slain Confederate General Felix K. Zollicoffer, laid neatly on a slab, remain etched on his mind. A year after Mill Springs, with his indignation deepened by fatigue, he reported to the editor of the Louisville Journal the cold-blooded murder of a Union prisoner by a Confederate officer.⁸ War heroics were muted by the stark reality of battle deaths and escalated hatred.

In Harlan's recollection of the war years, there is an intimation that the exigencies of war forced him to resort to the threat of civilian atrocities in order to protect his men. He recalled that when his regiment neared Shelbyville, Tennessee, they encountered the body of a Negro Union soldier hanging from a tree. Fearing that the Confederate guerillas operating in the area might harm his troops, several of whom were ill and unable to protect themselves, Harlan ordered the townspeople assembled, took several of them hostage, and warned the rest of the citizens that their friends would be killed if the guerillas molested his troops. In retrospect, he viewed the incident with benign good humor, insisting that he didn't intend on carrying out his threat.⁹ It is likely, however, that the intervening years softened the memory of the desperate circumstances that had compelled Harlan to issue the warning.

During thirteen months of command, a rapid succession of triumphs transformed the young colonel into a minor military hero. First, early in 1863, the Frankfort Commonwealth proudly published a letter of commendation that Harlan had received for his role in an engagement near Hartsville,

⁸Harlan Narrative in Speed, Union Cause, pp. 197-98; Louisville Daily Journal, January 3, 1863.

⁹Harlan Autobiographical Letter, pp. 21-23, Harlan Papers, University of Louisville; Harlan Autobiographical Memo (undated) quoted in Allan F. Westin, "The First Justice Harlan: A Self-Portrait From His Private Papers," Kentucky Law Journal, XLVI (Spring, 1958), 338-39. Cited hereafter as "Self-Portrait."

Tennessee. Soon thereafter, he was lionized by both military and civic leaders for outflanking Morgan's raiders on their second sweep into Kentucky. Harlan's quick action against Morgan at Rolling Fork was credited for preventing the destruction of the railroad between Louisville and Elizabethtown and for squelching a planned attack on Louisville.¹⁰ The Louisville Journal commented that Harlan "was entitled to the lasting gratitude of the whole country."¹¹

There was a blemish, however, on his good military record. In testimony given before a board investigating charges of incompetency against the Union commander of the Army of the Ohio, General Don Carlos Buell, one of Harlan's executive officers testified that Colonel Harlan had circulated a petition among his fellow officers requesting the general's removal from command. The witness explained that Harlan had wanted to create trouble for Buell because the general had publicly criticized the performance of a portion of Harlan's regiment. Many years later Harlan remembered that he played a much less active role in circulating the petition than the testimony at the time indicated.¹²

While Harlan defended the Union cause in battle, his political allies at home were in despair because the Lincoln administration was turning the war into an abolitionist crusade. Although several slave-holding Unionists from Kentucky had access to leading federal officials

¹⁰Frankfort Commonwealth, January 7, 1863; Louisville Daily Journal, January 5, 1863; Harlan's Narrative in Speed, Union Cause, p. 230. In the official field report of his participation in the encounter, Harlan heaped unrestrained praise on himself and his men. War of Rebellion, Series I, XX, 137, 141.

¹¹Louisville Journal, January 5, 1863, quoted in Frankfort Commonwealth, January 7, 1863.

¹²War of Rebellion, Series I, XVI, 2, 321; Harlan Autobiographical Letter, pp. 26-29, Harlan Papers, University of Louisville.

(James Harlan, for instance, continued to hold a patronage appointment as United States district attorney for Kentucky, and another one of his son's, James Jr., held a clerkship in the United States district court) they were unable to limit the purpose of the war to the Crittenden Resolution of 1861.¹³ The sensibilities of these men were swept aside in the summer of 1862 when President Lincoln freed all the slaves in Confederate-held territory.

Kentucky's Unionists had already lost several preliminary battles in their struggle to keep the federal government from tampering with slavery. Harlan's aging friend in the United States House of Representatives, John J. Crittenden, who had sponsored the resolution defining the war aims, had already uncompromisingly opposed both the Confiscation Acts and Lincoln's plan for compensated emancipation in the border states. Another Kentucky congressman, George H. Yeaman, desperately sought to nullify Lincoln's Emancipation Proclamation with a resolution censuring the executive order as detrimental to peace. Yeaman's resolution failed to pass just weeks before January 1, 1863--the date that the proclamation went into effect.¹⁴ From that time forward, the triumph of the Union cause for which John Harlan had fought so vigorously would clearly result in the extinction of slavery.

John Marshall Harlan resigned from the Union Army less than sixty days after Lincoln's emancipation decree became effective. His resignation followed by two weeks the death of James Harlan on February 14, 1863,

¹³J. Stoddard Johnston, ed., Memorial History of Louisville from Its Settlement to the Year 1896 (Chicago: American Biographical Publishing Company, 1896), II, 32; Above, pp. 36-37.

¹⁴Allen E. Ragan, "John J. Crittenden, 1787-1863," Filson Club History Quarterly, XVIII (January, 1944), 25; Albert D. Kirwan, John J. Crittenden: The Struggle for the Union (Lexington: University of Kentucky Press, 1962), p. 461; Congressional Globe, 37th Cong., 3rd Sess., 76.

after a brief illness. Despite the young colonel's insistence that his resignation was compelled by his father's death, the proximity of the resignation to the implementation of Lincoln's proclamation, compounded with the general disillusionment with the purposes and conduct of the war that prevailed among many Kentucky Unionists, has led many observers to speculate that Harlan left the Union Army in an angry protest over emancipation. E. Merton Coulter, for instance, the author of the definitive general work on the Civil War period in Kentucky, has concluded that Harlan surrendered his military career in order to oppose the federal policies on slavery and military government. Indeed, among the Union troops with whom Harlan served, there were numerous desertions caused by low pay, troop weariness, and a general mood of disillusionment with the prosecution of the war. In addition, some soldiers who left the Union Army about the time that Harlan did openly attribute their departure to their contempt for federal policies.¹⁵

In 1877, during the Senate hearings on his nomination to the Supreme Court, Harlan wrote a lengthy letter to Senator James B. Beck from Kentucky, answering the charge by opponents of his nomination that he had resigned his commission as a protest against Lincoln's Emancipation Proclamation. On that occasion, Harlan restated his declared motive and called his critic's allegation "utterly false." He explained to Senator Beck that at the time he had left Union service, he had prepared an answer to such criticism: "Being from a Slave State, and fearing that

¹⁵ Robert E. Cushman, "John Marshall Harlan," Dictionary of American Biography, ed. by Allen Johnson and Dumas Malone, VIII (1932), 267; Frankfort Commonwealth, February 21, 1863; Speed, Union Cause, p. 282; E. Merton Coulter, The Civil War and Readjustment in Kentucky (Chapel Hill: University of North Carolina Press, 1926), pp. 157-75. 434; Cincinnati Daily Enquirer, February 21, 1863; Lewis Collins, History of Kentucky, revised by Richard H. Collins (Louisville: John P. Morton and Company, 1924), I, 118.

my motives might be misunderstood, I determined, that, in my letter of resignation, I would state my reasons."¹⁶ In that letter of resignation which Harlan took pains to see published in newspapers across the state, he assured his superiors that it had been his "fixed purpose to remain in the Federal Army until it had effectually suppressed the existing armed rebellion, and restored the authority of the National Government over every part of the nation." But, the letter of resignation continued: "The recent sudden death of my father has devolved upon me duties of a private nature which I cannot with propriety neglect, . . . those duties relate to the unsettled business of my father which demands my immediate attention." Then, as if he were preparing for critics in the future who would charge that he wavered in his devotion to the Union, the young officer's resignation declared:

It is from no want of confidence either in the justice or the ultimate triumph of the Union cause. That cause will always have the warmest sympathies of my heart, for there are no conditions upon which I will consent to a dissolution of the Union. Nor are there any concessions, consistent with a Republican form of government, which I am not prepared to make in order to maintain and perpetuate that Union.¹⁷

However much Harlan opposed freedom for the slaves, there is nothing in his resignation to indicate that even the Republican policy of arming Blacks had soured his devotion to the cause of restoring the Union; apparently he

¹⁶ Letter, Harlan to James B. Beck, October 31, 1877, quoted in Ellwood W. Lewis, "Document: The Appointment of Mr. Justice Harlan," Indiana Law Journal, XXIX (Fall, 1953), 67. Cited hereafter as "Document."

¹⁷ Louisville Daily Journal, March 11, 1863; Frankfort Commonwealth, March 13, 1863; Kelley, Union Regiments, p. 371; Official Copy of Order Authorizing Harlan's Resignation from the Army, Special Field Order 62, Signed by Major General Rosecrans, Department of Cumberland, Murphreesboro, Tennessee, March 6, 1863, Harlan Papers, University of Louisville. Italics mine.

had placed the integrity of the Union above the domestic institution that he had defended so resolutely in 1859.¹⁸

Furthermore, Harlan explained to Senator Beck that James Harlan's finances were unsettled as a result of the large sums that he had put up as surety for the release of some old friends who had been charged by federal officers with disloyalty to the Union.¹⁹ In another attempt to justify his resignation, young Harlan wrote:

At the time he died my father had the largest practice of any lawyer in Kentucky and the support of my Mother and the family depended on the right handling of the business left by him My three oldest brothers were dead, and my 20 only remaining brother had become incompetent for business. I was connected with my father in business and alone knew of what was necessary to be done in order to preserve from loss or waste what he had fairly earned by hard work in his profession.²¹ So in every sense, I was compelled to return to civil life.

When George Prentice, editor of the Louisville Journal, published Harlan's resignation, he noted that the young colonel had recently been

¹⁸ Above, pp. 13-15. Harlan's determined loyalty to the Union should not be construed to mean that he had acquiesced to emancipation. He wrote to his son, Richard: "The Kentucky Unionists, as a general rule, did not approve of all the methods suggested by the Union men of the Northern states for the prosecution of the war, particularly those relating to the institution of slavery." Harlan Autobiographical Letter, p. 11, Harlan Papers, University of Louisville.

¹⁹ Letter, Harlan to James B. Beck, October 31, 1877, quoted in Lewis, "Document," p. 67.

²⁰ Apparently Harlan's mention of his only brother's "incompetence for business" referred to his older brother, William Lowdnes Harlan. Above, pp. 9, 16. He failed to mention, however, that his younger brother, James Harlan, Jr., in fact, did join him in the management of the law firm. Frankfort Commonwealth, March 16, 1863; Alpheaus H. Harlan, History and Genealogy of the Harlan Family (Baltimore: Lord Baltimore Press, 1914), p. 274.

²¹ Harlan Autobiographical Letter, p. 30, Harlan Papers, University of Louisville. E. Polk Johnson, History of Kentucky and Kentuckians (Chicago: Lewis Publishing Company, 1912), I, 538, has explained that most of James Harlan's assets were tied up in uncollected bills and unfinished law cases that required attention from someone familiar with the family law practice before his estate could be settled. John Harlan had given his approval to the accuracy of this account. Above, n. 89, p. 25.

nominated by President Lincoln for promotion to the rank of brigadier general. Prentice lamented the personal circumstances that forced John to leave the army at the "very moment when a brilliant military career was opening before him."²² Similarly, the officers in Harlan's brigade substantiated their colleague's claim that he was not disenchanted with the Union cause by distributing a resolution of regret to key Union newspapers in Kentucky. Harlan's fellow officers praised him for his "abiding confidence in, and, . . . his unwavering devotion to the cause of the Union."²³ Despite the fact that Harlan abandoned the Union military effort in midstream--early 1863--a formidable array of witnesses corroborated his claim that his resignation was not a sign that his devotion to the Union cause had waned. Indeed, the preponderance of evidence supports Harlan's claim that it was the family emergency that required him to quit the Union Army. While Harlan undoubtedly disapproved of Lincoln's policies regarding slavery, his determination to see the Union preserved did not.

²²Louisville Daily Journal, March 11, 1863; Willson Reminiscence, Louisville Herald, October 15, 1911, Louisville Free Public Library.

²³Frankfort Commonwealth, March 13, 1863. Louisville Daily Democrat, March 13, 1863.

CHAPTER III

A MEMBER OF LINCOLN'S LOYAL OPPOSITION

Within less than a month after his father's death, John Harlan had resumed his law career in the family firm in Frankfort and was prominently mentioned as the Union Party's choice for state attorney general. On March 18, 1863, five days after he was chosen as a delegate from his congressional district to the party's state nominating convention, he was chosen to run for the office.¹ The Union Party, known also as the Union State or Union Democratic Party, on whose slate Harlan was chosen to run for attorney general, was the largest of the three factions into which the diverse coalition that had led the state into the Union camp in 1861 had splintered. The other factions stood on either side of the position taken by the Union Party. On one hand, there was a small, but vocal, group of "radical" Kentuckians who unflinchingly supported Lincoln's emancipation decree and his government's policy of military control in the state. In 1863, these "unconditional" Unionists did not nominate a slate of candidates for state office, and were identifiable only as an amorphous pro-Lincoln minority in the Union Democratic Party.²

¹Louisville Daily Democrat, March 13, 18, 20, 1863; Typewritten copy of a thirty-two page autobiographical letter from John M. Harlan to his son, Richard, July 4, 1911, p. 32, John M. Harlan Papers, Law School Library, University of Louisville, Louisville, Kentucky.

²Frankfort Commonwealth, July 3, 1863, quoting Louisville Journal, n. d.; Albert D. Kirwan, John J. Crittenden: The Struggle For the Union (Lexington: University of Kentucky Press, 1962), p. 468. Cited hereafter as Crittenden: Struggle.

On the other hand, there was a growing group of prominent Unionists who still wanted the rebellion quelled but were increasingly embittered by Lincoln's conduct of the war. This faction, often called the "Peace Democrats," argued that the state ought to withhold revenue and recruits from the national government in order to force the Republican regime to leave the social and political institutions of the slave states alone. They reasoned that the South's resistance would only stiffen and that the war would continue for years unless the administration stopped conducting what, in their minds, was a vindictive revolution in the way of life of that region. Charging that the Union Democrats were merely puppets of the Republicans, the "Peace Democrats" nominated the highly respected Charles A. Wickliffe to head a rival gubernatorial slate.³

Harlan's Unionists tried to hold to a middle course between unqualified support and bitter denunciation of Lincoln's war policies by emphasizing the need for an all-out war effort. The Union Democrats charged Lincoln with having abused his executive authority with his emancipation edict while, on the other hand, they called their "no men and no money" rivals the "Secessionist" Party. Harlan's Union Democrats claimed to stand on the same platform as the northern Democratic Party--i. e., totally committed to the full prosecution of the war, while harshly criticizing Republican domestic policies. It appears that the Union

³Frankfort Commonwealth, April 8, 1863; Louisville Daily Democrat, March 21, 1863. Undoubtedly, many "stay-at-home" Confederates flocked to the support of Wickliffe as a way to vent hostility toward the Union. The party's leadership, however, had begun the war firmly committed to the suppression of the rebellion. For example, William F. Bullock, the ex-Whig with whom Harlan had opened a law office in 1861, was a leading "Peace Democrat." E. Merton Coulter, The Civil War and Readjustment in Kentucky (Chapel Hill: University of North Carolina Press, 1926), p. 174. Cited hereafter as Civil War.

Democrats were determined to be members of "the loyal opposition."⁴

In his speech accepting the Union Democratic nomination for state attorney general, John Harlan made a strong appeal for moderate Unionism. He urged "discarding of the idea of peace on any terms less than the submission of the rebels to the laws that they had outraged and coming under the authority of the government."⁵ Throughout the campaign that summer, however, Harlan tried to give substance to the difference between being an ally of the Republicans in a common effort to win the war and being one of their puppets. He criticized Lincoln's suspension of the writ of habeas corpus in the state, but reserved his harshest expletives for the Emancipation Proclamation, which he declared was "unconstitutional and null and void."⁶ Perhaps a Union soldier, who wrote a letter to the editor of the Frankfort Commonwealth applauding Harlan's nomination, best epitomized Harlan's stance in 1863. Complaining that "Kentucky is not in a very pleasant fix Hated by rebels and radicals alike," he proceeded to depict Harlan as the true Unionist who believed that "we need to fight it out and then try to do something about the 'war measure.'"⁷

During the summer, Harlan went beyond formal campaign speeches to demonstrate his determination to see the rebellion subdued. In May, for instance, he chaired his party's district convention, at which a resolution was adopted praising the vigor with which the Union commander in the state,

⁴Frankfort Commonwealth, April 1, May 13; Louisville Daily Journal, March 23, 1863.

⁵Louisville Daily Journal, March 20, 1863.

⁶Louis Hartz, "John M. Harlan in Kentucky: 1855-1877," Filson Club Quarterly, XIV (January, 1940), 28.

⁷Frankfort Commonwealth, April 3, 1863.

General Ambrose E. Burnside, had been pressing the Confederate foe.⁸ In addition, on at least two occasions, Harlan delivered speeches on strongly pro-Unionist themes: he was designated "Orator of the Day" at Frankfort's Fourth of July celebration; and, in August, delivered an address honoring Richard T. Jacob, who had resigned his military commission in the Union cavalry to seek election as lieutenant governor of the state.⁹

Harlan and the entire Union Democratic slate were elected by an overwhelming margin in balloting marked by interference of federal troops at the polls.¹⁰ At the gubernatorial inauguration of Thomas E. Bramlette, the attorney general elect welcomed the new administration on behalf of the city of Frankfort. In a flowery oration he declared that the war was being fought by the Unionists in "the interests of Christian civilization and free republican government." Describing the hierarchy of values to which loyal Kentuckians adhered, Harlan asserted that "they . . . regarded the preservation of the unity of this country as far and above all ties of blood or interest."¹¹ He wanted to continue the struggle for the restoration of the Union, despite the fact that many of his cherished principles had been violated by the leaders of the Union war effort.

One of the most interesting things about Harlan's return to Frankfort from military service was the speed with which the Unionist politicians

⁸Ibid., May 13, 1863. At the "Ashland" district nominating convention of the party, Harlan also served on two important committees. Ibid., June 24, 1863.

⁹Ibid., June 17, August 21, 1863.

¹⁰Ibid., September 4, 1863; Thomas D. Clark, A History of Kentucky (Lexington: John Bradford Press, 1954), p. 341. Harlan decisively defeated his "Peace Democrat" opponent by a ratio of over five votes to one. Frankfort Commonwealth, September 4, 1863.

¹¹Frankfort Commonwealth, September 2, 1863.

received him into their ranks and placed him in positions of responsibility. Although Harlan had proved himself an effective campaigner in his own right, his selection as state attorney general was undoubtedly due in part to the stature that his father had lent the office during almost a decade of service. In 1863 James Harlan's political mantle passed to his son and his son wore it with self-assurance.

In addition to his hurried involvement in politics, young Harlan had many other irons in the fire. Just a week after his return, he and his brother, James Harlan, Jr., were appointed co-administrators of their father's estate, a task that required a great deal of time in order to settle the elder Harlan's complex financial affairs.¹² Furthermore, the brothers announced plans to publish Harlan's Selected Cases, an anthology of important decisions rendered by the Court of Appeals since the adoption of the new state constitution in 1850.¹³ All this--compounded with a busy law practice--left little time for John Harlan to reflect on his decision to leave the Union Army.

In June, 1864, Harlan's abiding commitment to the Union took an unexpected twist when he returned briefly to military service as one of the commanders of a volunteer militia force hastily formed to protect Frankfort from one of John Hunt Morgan's recurrent raids on the city. On June 10, Harlan's out-numbered militiamen repulsed an attack by an advance band of Morgan's raiders. In the immediate aftermath of the attack,

¹²Ibid., March 13, 20, 1863.

¹³Ibid., April 27, 1863. The volume was scheduled for distribution in the summer of 1863, but this author has been unable to substantiate publication. It will be recalled that a decade earlier their father had published a similar compendium of decisions by the high court. Above, n. 1, p. 1.

Harlan was feverishly engaged in supervising the building of fortifications against a return strike, in addressing the troops, and in organizing an all-night vigil to guard the key bridges into the city against sabotage. On June 28, after the danger had passed, he moderated a meeting of Frankfort Unionists which had been convened to create a permanent militia to defend the city against future rebel assaults. As a result of the meeting, he took an active part in collecting voluntary contributions for the defense of the city.¹⁴

While Harlan was engaged in the defense of the state capital against Confederate raids, he continued to resist, in the political sphere, what he considered to be President Lincoln's unlawful exercise of executive authority. It will be recalled that during his campaign for state attorney general in 1863, Harlan had strongly supported the war effort but had assailed the Republican administration for its emancipation policy, its arbitrary use of the military to suppress dissent and to confiscate the property of those suspected of disloyalty, and its interference in the political processes in the area where the rebellion had been suppressed. In 1863 Harlan could only register his verbal protest against these policies because of his fear that a vote for the Democrats meant aiding the Confederate cause.¹⁵

In 1864, however, he had another option for expressing his protest: a move had begun among the "conservative" Unionists to find an alternate

¹⁴Louisville Daily Journal, June 13, 1864; "Report of Inspector General Daniel W. Lindsey, Kentucky State Guard, June 18, 1864, to John H. Boyle, Adjutant General of Kentucky," War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies (3 series, 77 vols. /Washington, D. C.: Government Printing Office, 1880-1901/), Ser. I, XXXIX, Pt. I, 48-52; Lewis F. Johnson, History of Franklin County (Frankfort: Roberts Printing Company, 1912), p. 153; Frankfort Commonwealth, June 29, 1864.

¹⁵Above, p. 47.

to Lincoln's candidacy for re-election. The earliest sign of an organized search for a Unionist alternative to Lincoln had taken place in Cincinnati in early December, 1863, at a meeting of the National Committee of the Conservative Union Party--a loose confederation of state organizations with most of its support centered in the border states. Although Harlan had not attended the meeting, many of his closest political friends had, including Governor Thomas E. Bramlette, Leslie Combs, and John B. Bruner. The committee had unanimously adopted a resolution naming General George B. McClellan as the "only standard bearer around whom conservative people, without regard for former predilections, can rally in the approaching contest." In addition, the committee had reaffirmed the position that had been taken by Kentucky's moderate Unionists that the restoration of the Union was the only purpose for which the war was being fought. Before adjourning, the committee had also recommended a list of three possible candidates for vice-president, one of whom was Kentucky's Governor Thomas E. Bramlette.¹⁶

By May, 1864, as attention began to focus on the national nominating conventions of the two major parties (Republican and Democratic), Harlan met in Louisville as a member of the Union Party's central committee to select delegates to one of the national conventions. Since Kentucky's Unionists did not hold formal relationship with either of the nation's major parties, there was a brief debate as to which convention the delegates should attend. After the failure of an attempt by a minority faction of "unconditionalists" to designate the delegates for the

¹⁶"Report of the Meeting of the Conservative Union National Committee at Cincinnati, Thursday, December 3, 1863," John B. Bruner Papers, Filson Club, Louisville, Kentucky.

Republican convention, the "conservatives" prevailed and the committee agreed that their delegates should attend the national convention of the northern Democratic Party, scheduled to meet in Chicago in August. In addition, General McClellan was again recommended as the choice of Kentucky's Unionists for president, with Governor Bramlette proposed as his running mate.¹⁷ Significantly, John Harlan had agreed to support a Democrat.

During his earlier political career, spanning a decade and marked by several party affiliations and important shifts on major issues, Harlan's "adaptations" had at least been consistent in one respect and that was in their opposition to the Democratic Party. It is true that since the formation of a Unionist coalition in 1861, Harlan had worked closely with many pro-Democratic Unionists and, in fact, their war-time coalition was often referred to as the "Union Democrat" Party. Despite the party name, he appeared to continue to view himself as a former Whig and to consider the coalition not as the Democratic Party but as the local party of "Unionists," devoid of any national affiliation. Therefore, Harlan's decision in 1864 to support the presidential nominee of the national Democratic Party against Abraham Lincoln and the "radical" Republican Congress should be viewed as a significant symbol of his having abandoned the anti-Democratic orientation that he had been taught as a youth. In 1861, Harlan had been forced into a coalition with anti-secession Democrats in order to save the Union; three years later, he avidly

¹⁷Frankfort Commonwealth, April 20, 1864; John S. Goff, "Justice John Marshall Harlan of Kentucky," Register of the Kentucky Historical Society, LV (April, 1957), 113.

supported Democratic candidates in the hope that the Republican leadership of the Union could be prevented from conducting a revolution in the southern way of life.¹⁸

In the late summer of 1864, Harlan embarked on an extensive campaign tour in behalf of the Democratic slate. His speeches attacked the Lincoln administration for betraying the simple mandate that the country had given it to suppress the rebellion of the Confederate states. At New Albany, Indiana, speaking for the Democratic nominee for governor of that state, Harlan charged that "Lincoln had changed and perverted the purpose of the war . . . by illegally turning it into a crusade . . . clearly for the freedom of the Negro race."¹⁹ Late in the campaign, Harlan reiterated the theme in a debate with a Lincoln supporter. He told his audience a joke about "the Frenchman and the Little Black Cow" and then applied it to the Republican Party which, he said, was enamoured with "ze little black nigger."²⁰

¹⁸ A decade later, Harlan was reported to have boasted in a campaign speech that "upon every occasion except one 1864 in his career since he had arrived at the years of manhood he had voted with the organization which stood opposed to the Democratic party." Louisville Daily Commercial, May 31, 1871, quoted in Harlan to James B. Beck, October 31, 1877, quoted in Ellwood W. Lewis, "Document: The Appointment of Mr. Justice Harlan," Indiana Law Journal, XXIX (Fall, 1953); 67. Cited hereafter as "Document." By contrast, during his campaign for the Democrat McClellan in 1864, he acknowledged his Whig, anti-Democratic antecedents, and then announced that he had "buried the hatchet," and could now gladly support a Democratic candidate. Louisville Daily Journal, September 24, 1864. Also, it is noteworthy that Harlan ran for attorney general in 1863 on a platform that claimed that Kentucky's Union Party was affiliated with the national Democratic Party. Above, p. 46.

¹⁹ David G. Farrelly, "A Sketch of John Marshall Harlan's Pre-Court Career," New Albany Ledger (Indiana), October 4, 1964; Vanderbilt Law Review, X (1956-1957), 218.

²⁰ Louisville Daily Journal, November 1, 1864.

Harlan also argued that as long as the Lincoln administration made the abolition of slavery a war goal, peace was impossible. He insisted that there was a strong conciliatory element in the rebellious states that would have petitioned for an end to the war long before, had the moderate southerner not been forced to continue the fight in order to save the slave system. Harlan protested that Lincoln's reconstruction measures even hampered the restoration of loyal governments in liberated areas because suffrage had been made to hinge on whether a person would take an oath affirming the abolition of slavery.²¹

On another occasion, before an audience of five to six thousand Unionists gathered at Camp Dick Robinson for a "dinner on the grounds" in support of McClellan's candidacy, Harlan recalled an earlier incident in order to describe what he himself considered to be the proper use of Union power to bring peace. He recalled that while serving as a Union commander near Huntsville, Alabama, he had told a southern audience that his troops had come only to drive the "Rebels" from their midst and not "to rob and plunder innocent citizens." By contrast, he noted that at the same time, a fellow Union commander at nearby Athens, Alabama, had inflicted a heavy toll on the life and property of the civilian population. Harlan then read from a copy of the Emancipation Proclamation, caustically commenting that the document was clear evidence that "Lincoln cared no more for the Constitution that [he does] for [his] old shoe."²² In the New Albany speech, Harlan declared that

²¹ New Albany Ledger, October 4, 1864.

²² Louisville Daily Journal, September 24, 1864.

the triumph of abolition would be the triumph of a spirit which in order to effect its purpose would not hesitate to trample with impunity upon the Constitution and the Laws. There is no safety in this land of ours except in rigid adherence to law . . . no safety for life, liberty, and property.²³

Central to his argument that Union soldiers should come to the South as liberators and not conquerors is the legal definition of the states in rebellion for which he had argued in June, 1861. At that time, Harlan and his Unionist colleagues had contended that the southern states had not legally seceded from the Union and therefore remained under both the limitations and protections of the federal Constitution. Thus, when the Union troops pushed southward in 1864, he argued that once the rebellious state governments were dismantled, the citizens of those states returned to the same legal status that they had enjoyed before the war.²⁴ By this line of reasoning, Harlan concluded that the Lincoln government had grossly overextended its authority when it forced a reconstructed state to renounce slavery or accept military occupation.

One of the reasons that Harlan had such contempt for the Lincoln administration was his painful realization that the interference of the federal military in political matters extended even to Kentucky--a so-called "loyal" state. He had several grievances against the misuse of federal authority in the Commonwealth. For one thing, he must have grown weary using his influence in Washington to mediate between federal officials and Kentuckians who had had their property confiscated by

²³New Albany Ledger, October 4, 1864.

²⁴Above, p. 33. Interestingly, Harlan kept a copy of a speech made by a Kentucky congressman in February, 1864, that gave a similar legal definition of the insurrectionary states. "Speech by A. Harding, United States Representative from Ky., before House on February 27, 1864," Harlan Papers, University of Louisville.

military tribunal on the charge of disloyalty.²⁵ Harlan was convinced that in many cases, "disloyalty" to a Union military official meant disagreement with the policies of the Lincoln administration. He resented also Lincoln's disregard for normal legal processes when, during the 1864 presidential campaign, he imposed martial law and suspended the writ of habeas corpus in Kentucky, insisting that the rising Confederate guerilla activity justified his action. Harlan, along with many other anti-Lincoln people feared that the Union soldiers would be used to intimidate McClellan voters in the November election.²⁶

²⁵Harlan's dilemma is illustrated by the case of Preston R. Pattie, whose property had been confiscated by federal officials when he fled the state to avoid prosecution for disloyalty. Harlan and several other Union men had submitted petitions to a political friend who was an auditor in the United States Treasury Department. The petitions vouched for Pattie's loyalty and asked that his property be remitted since the accused had come back to the state to stand trial on the charge. Indicating that Pattie's case was one of many, Harlan wrote: "I have troubled you very frequently in regard to matters of this kind." The overzealous arm of the military had reached out to several of Harlan's friends whom he believed to be innocent of the charges placed against them. Letter, Harlan to Green Adams, Washington City, September 21, 1863, Harlan Family Papers, Kentucky Historical Society, Frankfort, Kentucky. "Green Adams," Biographical Directory of the American Congress, 1774-1927 (Washington: United States Government Printing Office, 1928), p. 459. Kirwan, Crittenden: Struggle, pp. 455-56, cites a similar situation in which Harlan petitioned federal officials for the release of a Frankfort neighbor who had been imprisoned for disloyalty. Harlan was purported to have prepared character affidavits in January, 1862. Since this was soon after his regiment had engaged the enemy, the author suspects that Kirwan erroneously cited John Harlan instead of his father, who would have been in a better position to write for a neighbor's release. James Harlan had been in the practice of coming to the aid of his friends whom he felt were unjustly charged with disloyalty. Above, p. 43.

²⁶Frankfort Commonwealth, November 7, 1864. As the campaign progressed, the Democrats became increasingly alarmed that the Republican administration would use federal troops to "guarantee" victory for Lincoln. The national Democratic Party circulated a campaign leaflet charging that Kentucky, along with several other border states, was "ruled by the bayonet rather than the ballot box." Bruner Papers, Filson Club, Louisville, Kentucky. Similarly, Kentucky's governor wrote a friend at the national Democratic convention in August, 1864, asking that he not be considered as a vice-presidential nominee because of his fear that Lincoln would retaliate with a full military takeover of the state. Frankfort Commonwealth, September 2 and October 12, 1864.

In addition to his strong denunciation of federal usurpation, Harlan dramatically displayed his discontent with the Lincoln administration when he frequently appeared on the same platform with the state's most notorious symbol of disenchantment, Colonel Frank Wolford. Wolford had been a popular Union officer who had been relieved of his command earlier in the year for flagrantly violating an order to enroll Kentucky Negroes in the Union Army. Instead of obeying the order, the strongly pro-slavery Wolford had returned slaves who had sought refuge in his camp. Kentuckians who resented Negro enrollment transformed Wolford's discharge from the intended mark of infamy into a badge of honor. Referred to as the "Gallant Soldiers of the Union," the Harlan and Wolford team received enthusiastic crowds everywhere it went.²⁷

John Harlan's decision to stand with the Democrats in 1864 was publicly debated in the press. The Frankfort Commonwealth, a pro-Lincoln newspaper and a long friend and supporter of the Harlans in their bids for public office, castigated John for his "traitorous" stand. In a lengthy editorial, the newspaper charged Harlan and many other McClellan supporters with "duplicity" for having begun the war as "professed Union men," only to become "conservatives," and finally in their opposition to Lincoln, to become "Ultra Democrats of the strictest set."²⁸ The Commonwealth remembered that the very men with whom Harlan was now aligning had been his Democratic opponents the year before in his race for attorney general. From that campaign, Harlan was quoted as having called his new friends "the Secessionist party" and "traitors"; it was remembered, furthermore, that he had charged them with being willing to

²⁷ New Albany Ledger, October 4, 5, 1864; Louisville Daily Journal, September 24, 1864; Coulter, Civil War, pp. 199-200.

²⁸ Frankfort Commonwealth, October 12, 1864.

settle for "peace at any price." Harlan's critics noted the irony in the fact that the party that had condemned Harlan's victory in 1863 as the work of federal bayonets was, a year later, having Harlan join them to make the same charge against the Union Party.

The Frankfort newspaper charged also that Harlan demonstrated blatant ingratitude by campaigning for the Democratic candidate for governor of Indiana, Joseph E. McDonald, against the Republican incumbent Oliver P. Morton. The Commonwealth recalled that Governor Morton had come to Kentucky's aid each time she had been threatened by invasion. Specifically, the paper noted that Morton had sent troops to Frankfort three times "when the property and interests of Col. John M. Harlan . . . were threatened by Morgan's marauders," while at the same time, MacDonald had been aiding the Confederate cause. The Commonwealth asked:

Is it not inconsistent and ungrateful for any citizen of Kentucky professing Unionism . . . much more so for an incumbent of a state office . . . to take an active part to defeat Gov. Morton? The Union men of Kentucky wash their hands of this crime of ingratitude.²⁹

John Harlan received more than rebuke in 1864; there were also strong voices to defend his support of the Democrats. George Prentice's Louisville Daily Journal, recalling Harlan's impeccable credentials "as an old-Whig and the son of an old-line Whig," explained that "he acts with the Democratic Party in this struggle from simple devotion to his country." The Daily Journal tried to relieve any doubt that the voters might have of Harlan's loyalty to the Union cause. The newspaper held up his meritorious service in the Union Army and his resignation only upon the unfortunate death of his father as ample evidence that he was a qualified spokesman in any section of the country for true Unionism.³⁰ In a published debate

²⁹ Ibid., September 30, 1864.

³⁰ Louisville Daily Journal, September 24, 1864.

with the Frankfort Commonwealth, the Journal's editor justified Harlan's support of McClellan as a choice between the lesser of two evils. Prentice wrote:

As to the odium endeavored to be cast upon Col. Harlan for canvassing the great political issues of the day with such men as Wickliffe, Powell, and others of that ilk, we have only to say . . . that whilst we neither seek nor desire affiliation with men of their stamp of politics . . . necessity requires that he do it in order to defeat . . . the machinations of the Nigger Republican party.³¹

It is clear that the threat that Republican emancipationist schemes posed for the South's social system had forced a fearful Harlan into an alliance with persons who, under more normal conditions, would have been his political enemies.

In his campaign appearances, Harlan explained why he could support McClellan despite the Harlan family's traditional antipathy for Democrats. He declared that he had "buried the hatchet" against Democrats because General McClellan offered the only hope for preserving the Union, the Constitution, and the civil laws everywhere in the country.³² A decade later, reminiscing on his departure from precedent, Harlan explained: "I did not vote for McClellan because I was a Democrat, or because he was a Democrat, but because I then believed that his mode of prosecuting the war was most likely to bring it to a speedy conclusion, with the Union

³¹Both Charles A. Wickliffe and Lazarus W. Powell had been organizers of the "Peace Democrats" in 1863; Wickliffe had been the party's gubernatorial candidate and Powell was a Kentucky senator who began the war a staunch Unionist, only to become one of the most outspoken critics of federal war measures. Louisville Journal, n. d., quoted in Frankfort Commonwealth, October 12, 1864.

³²Louisville Journal, n. d., quoted in Frankfort Commonwealth, October 12, 1864.

preserved intact."³³ He then insisted that his vote for McClellan had not meant that he had advocated the "peace plank" in the Democratic platform, a plank that called for the immediate cessation of the war in the belief that a settlement restoring the Union to its ante-bellum status could be negotiated. Instead, Harlan asserted that he had voted for McClellan on the basis

of his letter of acceptance, in which he repudiated the platform upon which he stood, and declared for the preservation of the Union, in favor of furnishing the men and money to whatever extent might be necessary to maintain the unity of the country.³⁴

Clearly, John Harlan favored the vigorous suppression of the rebellion despite his manifold protests against the political leadership and social goals of the war effort.

In the presidential election that fall, Lincoln was returned for a second term by an overwhelming national margin; Harlan had the bittersweet consolation that of the three states that McClellan carried, Kentucky gave him the highest percentage (57%). Harlan had supported a candidate whom he hoped would not tamper further with slavery or be vindictive in his peace terms, while, at the same time, refusing to compromise with the enemy. Having failed to elect the candidate of his choice, Harlan remained faithful to the Republican-led war knowing full well that a Union victory would mean that the southern way of life would be drastically altered.

³³Letter, Harlan to James B. Beck, October 31, 1877, quoted in Lewis, "Document," p. 61.

³⁴Letter, Harlan to James B. Beck, October 31, 1877, quoted in Lewis, "Document," p. 61; Cincinnati Commercial, July 20, 1866; Thomas Speed, The Union Cause in Kentucky: 1860-1865, foreward and lengthy narratives by John Marshall Harlan (New York: G. P. Putnam and Sons, 1907), p. 334.

CHAPTER IV

SEARCH FOR A POST-WAR COALITION

Confident of comfortable majorities in Congress as a result of the Fall, 1864 elections, President Lincoln moved to have slavery abolished by constitutional amendment. Kentucky's attention was fixed on its legislature when it met to consider the abolition Amendment. John Marshall Harlan lobbied desperately in the legislative halls against ratification, making his last stand in favor of a continuation of chattel bondage, a cause he had championed since powerful political forces in the North had hardened against it.¹ The reasons that Harlan continued to resist what was essentially an accomplished fact are very complex. It will be recalled that his father as far back as the late 1840's had favored emancipation on an individual basis. His support for isolated manumissions should not obscure the fact that the Harlans held several slaves and would have sustained a substantial financial loss if a general emancipation scheme had been effected at that time.² In 1864, however, fear of monetary loss would not appear to be a factor in his opposition, since John Harlan owned only one slave.³ He did, however, have an economic interest in the

¹Above, pp. 12-15.

²Above, n. 66, p. 19.

³Harlan's wife, Malvina, in a sentimental memoir written years later, remembered that her husband's purchase of his only slave (probably in 1863) was as much an act of charity as an economic venture--Aunt Charlotte, a house servant, begged to be purchased in order to avoid being separated from her husband who lived there in Frankfort. Malvina Shanklin Harlan, "Some Memories of a Long Life," 1854-1911 (184 pages of typewritten manuscript completed in 1915). Cited hereafter as "Memories of a Long Life." Quoted in Allan F. Westin, "Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," Yale Law Journal, LXVI (April, 1957), 652. Cited hereafter as "Constitutional Rights." "Interview with John Marshall Harlan," Washington Evening Star, December 22, 1906, Harlan Papers, University of Louisville.

preservation of the slave system that went much deeper than his ownership of a single slave. Malvina Harlan recalled that her husband went substantially in debt to his father's estate so that his widowed mother could retain all the Harlan family slaves.⁴ Thus, slavery's demise meant that John Harlan undertook a debt for slaves who would be freed long before he finished paying for them--sometime after the passage of the Thirteenth Amendment.⁵

Economic self-interest, however, was not the explanation Harlan gave for his opposition to the Thirteenth Amendment's ratification. He argued instead that the Amendment was a gross violation of the constitutional right of the states to manage their internal affairs. He wrote the clearest statement of that position in reply to a fellow Conservative Unionist, Colonel John W. Combs of Versailles, who had asked John to run for United States Congress from the "Ashland" district.⁶ Harlan began his letter by declining the invitation to be the Conservative candidate

⁴ Malvina Harlan explained that under Kentucky inheritance laws, her mother-in-law received only one third of James' estate--in this case, her house servants would be reduced from the customary dozen or so to only four. Interestingly, Malvina Harlan insisted that her husband's willingness to purchase the remainder of the slaves from James Harlan's estate was due in large part to his personal attachment to the slaves. She nostalgically recalled that her husband had

been brought up with those servants in the peculiarly close relations that existed between Master and Slaves in the case of the best type of Slave-holders in the South and had a real affection for his Father's servants. He could not bear to think of them falling into other hands through the barter and sale of human beings that was still in vogue.

Malvina Harlan, "Memories of a Long Life" quoted in Westin, "Constitutional Rights," p. 652.

⁵ Malvina Harlan, "Memories of a Long Life" quoted in Westin, "Constitutional Rights," p. 652.

⁶ Combs apparently held some official capacity among Conservative Unionists since he had written Harlan "on behalf of Woodford County." Letter, Harlan to Colonel John W. Combs, June 1, 1865, quoted in Lexington Observer and Reporter, June 10, 1865.

for Congress "because of considerations of a private nature, relating to my professional and other duties,"⁷ and, then, turning to his political views, he confirmed Combs' assumption that he (Harlan) was opposed to ratification of the Constitutional Amendment. Launching an attack on the Amendment, he sarcastically remarked that it would "confer on a bare majority of Congress the power to enforce that change in the domestic institutions of those slave states by 'appropriate' legislation." The Amendment, he charged, ignored the basis of the American federal-state system by allowing some of the states to interfere in a matter which belonged to the slave-holding states alone to decide. He reasoned:

If three-fourths of the states, and two-thirds of each branch of Congress, can, by an amendment of the National Constitution, abolish slavery in Kentucky, the same power can establish slavery in Ohio against the will of the people of that state.

Harlan maintained, just as he had done in his defense of slavery in 1859,⁸ that any alteration of the fundamental right of each state to determine its slave policy was to submit to "majoritarian" rule--the simplistic notion that whatever most people wanted was automatically "right." Invoking the supreme shibboleth of constitutional debate, he asserted: "Such a radical change [abolition initiated on the federal level] in the fundamental law of the land was never, in my judgment, contemplated by

⁷Shortly before he was to be nominated, Harlan apparently reversed an earlier decision to run for the seat. In the letter to Combs, he acknowledged that he had "heretofore indicated to others the use of my name in connection with that position." Letter, Harlan to Combs, June 1, 1865, quoted in Lexington Observer and Reporter, June 10, 1865. Even several days after another candidate was chosen, Harlan was still touted as the Conservative Unionist nominee. The Lexington newspaper erroneously referred to him as the "Conservative candidate for the Frankfort District." Ibid., June 14, 1865. Frankfort Commonwealth, June 16, 1865.

⁸Above, pp. 13-15.

the men who framed out National Constitution." Harlan simply believed that the right to own slaves, unless denied by the state, belonged to the citizen as much as the privilege to worship as he chose; therefore, no constitutional amendment, no matter how popular, could legally deny a person this fundamental property right. He wrote: "My opposition is not based on views or wishes which I have in regard to the future of slavery in Kentucky, or in regard to that institution in its moral, social, or political aspect, . . . but on principle" the failure of which "may destroy our kind of government." Regarding the Amendment in this light, Harlan concluded, "I could not sustain it, if there were not a dozen slaves in Kentucky."

After having declared the Amendment unconstitutional, Harlan criticized those Conservative friends (notably, Governor Thomas E. Bramlette) who argued that the state ought to ratify the Amendment in the hope that Kentuckians' chances of getting compensation for their slaves would be improved by acquiescence to the inevitable.⁹ To Combs, he wrote: "It is quite frequently urged that the amendment will be adopted without regard to the action of Kentucky, and our people should surrender their convictions in obedience to the 'logic of events'." In answer to this

⁹ Bramlette had written: "Remove slavery and my word for it you will sooner get a commission to pay for your slaves. Recognize the fact at once, and there being no longer excuse for military law, it will at once be removed. Letter, Bramlette to J. S. Brisbin, quoted in Lexington Observer and Reporter, July 1, 1865. Willing to acquiesce in abolition, Bramlette acknowledged that slavery was "an incubus upon our energies, a burden to our advancement, and a negative to our prosperity." Lexington Observer and Reporter, April 29, 1865, quoted in E. Merton Coulter, The Civil War and Readjustment in Kentucky (Chapel Hill: University of North Carolina Press, 1926), p. 279. Cited hereafter as Civil War. The governor's position must not be understood to mean that his vendetta with the Republican administration, which he had so openly displayed in 1864, was ended. It appears that he was genuinely trying to grapple with the realities of power which confronted the nation at the end of the war. Coulter, Civil War, pp. 261 and 282.

counsel to surrender principle, Harlan pledged his adherence "to right and nothing else." He pleaded: "Let it [Thirteenth Amendment] not be passed by those who feel it is an 'alarming innovation' in Constitutional government." By resisting, he insisted: "We'll feel . . . that we did all in our power to stay the tide of fanaticism which threatens to sweep away the land-marks erected by our fathers."

Although Harlan insisted that his opposition to the Thirteenth Amendment was rooted solely in the need to protest the violation of a fundamental legal principle (namely, that control of slave ownership was an inviolable right granted the states), fear that abolition would create racial strife pervades his letter to Combs. Lamenting that Kentucky had suffered great hardship during the war, he warned that

she will suffer much more . . . if . . . her large slave population is suddenly freed in our midst, and the power taken from the state . . . to effect the removal of the blacks to other localities, or protect her white citizens from the ruinous effects of such a violent change in our social system. With the hands of the state tied, and the control of the black population transferred to the appointees of a Freedman's Bureau, the white men of Kentucky will regret that they . . . ever assented . . . to the surrender of our undoubted right to regulate our own local concerns.

Harlan declared that in the "armed bands of Negro soldiers" that were terrifying Kentuckians he saw intimations of a chaotic future. Exploiting the fear that the freed blacks would threaten white political and social supremacy, he charged that the instigators of the Thirteenth Amendment would not be content simply to eradicate slavery but "at the 'appropriate' time, will attempt to confer political rights upon the Negroes of the country." Within less than two years his prediction would be fulfilled.

Harlan's resistance to the Thirteenth Amendment was not devoid of political reality. He appears to have recognized that the Republican-led

Union victory over the Confederacy had destroyed slavery in America; his stubborn opposition to Kentucky's ratification of the inevitable, therefore, appears to have been both a final frustrated gesture of protest against the perversion of the war goals for which he had fought and an attempt to emancipate the slaves on terms more acceptable to a slaveholding Kentuckian. At one point in his letter to Combs, he implied that he accepted the inevitability of abolition in Kentucky and was opposed only to immediate abolition initiated by the federal government. He wrote:

If left alone, . . . the people of Kentucky, will, in due time, and in accordance with their own laws, dispose of all questions relating to slavery in their midsts, consistent with the interests of whites and blacks, and soon enough for the comfort, security, and happiness of both races.¹⁰

Harlan concluded the letter with his views on two related issues that Combs had evidently raised. First, he denounced the federal government for continuing the martial law that it had imposed on the state in the summer of 1864. Secondly, he condemned General John M. Palmer, the commander of federal troops in the state, for enlisting Negroes into the army in order to free them. Bitterly he observed that this activity was creating "large bodies of negro men, women, and children in this state,

¹⁰ Several weeks later, Harlan suggested a plan under which Kentuckians would gradually free their slaves over a seven year period. Several pro-Amendment newspapers delighted in publishing stories of men and women slaves who, on hearing of Harlan's proposed delay for their emancipation, ran to the nearest federal military post to receive immediate release from their bondage by joining the army or by hastily choosing a husband from a unit of black troops. The Frankfort Commonwealth, June 16, 1865, sarcastically quipped that if Harlan continued to frighten slaves into freedom with his speeches, he would have to make good his earlier disclaimer to oppose the Thirteenth Amendment if there were "not five slaves left." Also, Lexington Semi-Weekly Observer and Reporter, June 14, 1865; Above, p. . Harlan's emancipation scheme was not unique among conservative Unionists. In January, 1865, Governor Bramlette had urged the state legislature to approve a plan providing for compensated emancipation over a ten-year period. Louisville Daily Journal, January 7, 1865.

[living] at the expense of the Nation and [receiving] a watchful care which had never been exhibited for the wives and families of white soldiers of Kentucky."¹¹

Although Harlan declined Combs' offer to run as the Conservative Unionist candidate for Congress in the summer of 1865, his brother, James Harlan, ran as an anti-Amendment candidate for the state legislature; during the campaign, John Harlan spoke across the district in his brother's behalf.¹² The Kentucky correspondent to the Cincinnati Daily Gazette accurately defined the central political question that year: "The issue is a simple one . . . shall we adopt the Constitutional amendment abolishing slavery?"¹³ The polarization among the people of the state on this issue meant that Harlan suppressed his political distrust of the "stay-at-home" Confederate sympathizers and returning Rebel soldiers, and joined them against the "Radical" Amendment.¹⁴ The Frankfort Commonwealth bitterly noted:

The Harlan's want rebel votes, and hence their scurrilous abuse of their government. No persons in this country were more denunciatory of rebels . . . than they were until they believed they could win rebel votes to aid their own advancement for office.¹⁵

¹¹Letter, Harlan to Colonel John W. Combs, June 1, 1865, quoted in Lexington Observer and Reporter, June 10, 1865.

¹²Louisville Courier-Journal, September 21, 1872.

¹³Cincinnati Daily Gazette, April 27, 1865. Cincinnati Commercial, July 20, 1866.

¹⁴The Louisville Daily Journal, May 26, 1865, described the scene that spring: "Politicians are actively engaged in this state in reorganizing political parties" Also, Ibid., May 30, 1865. Letter, Garrett Davis to John B. Bruner, September 16, 1865; T. R. Taylor to Bruner, June 28, 1865; W. Anthony to Bruner, April 25, 1865, Bruner Papers, Filson Club.

¹⁵Frankfort Commonwealth, July 28, 1865, quoted in Louisville Courier-Journal, September 21, 1872.

Indeed, at a time when the wartime Unionist coalition was dissolving, the Harlans appeared to have been willing to include southern sympathizers in a coalition that the Conservative Unionists could dominate and that would assure them continued rule of state politics.¹⁶

Throughout the summer John Harlan returned to the themes he had outlined in his letter to Combs. For a speech at the Court House in Lexington, he arrived armed with volumes of the Congressional Globe and piles of newspaper clippings that he used in his indictment of the "Radical" party's "coercive" Amendment. He insisted, as he had to Combs, that the Amendment violated the fundamental constitutional principle that granted the power to each state to regulate its own internal affairs without interference from the outside. On another occasion he exhorted the state to become master of its own household by rejecting the "flagrant invasion of self-government."¹⁷ Reiterating his determination to oppose the Amendment on principle "if there were not a dozen slaves in the state of Kentucky," Harlan warned his audience, however, not to entertain false hope that slavery could be saved: "I am candid, from the signs at present, I do not think there is much chance of preserving it. I think it has got its death blow; from which it can never recover."¹⁸

The anti-Amendment coalition produced widespread victories in statewide elections that summer, although most of them were won by narrow

¹⁶Merton C. Coulter, Civil War, p. 301, concurs in the belief that the Conservative Unionists helped remove political disabilities from the ex-Confederates in the hope that "Rebel" votes would assure them irrevocable control in state politics.

¹⁷Cincinnati Gazette, July 7, 1865, quoted in Coulter, Civil War, p. 279.

¹⁸Cincinnati Daily Gazette, August 2, 1865.

margins, and there were angry charges on both sides of vote fraud and interference. The anti-Amendment force charged that federal troops had influenced the election by preventing Amendment opponents from voting, while the supporters of ratification complained that the scales were tipped against them by the illegal votes of proscribed ex-Confederates. The coalition which, Harlan later admitted, included "most of the Rebel sympathizers" in the state, succeeded in electing five of the state's nine congressmen, the state treasurer, and majorities to both houses of the legislature; Harlan's brother was among those opponents of ratification sent to the state house of representatives.¹⁹ John Harlan, the ardent Unionist, had registered his protest against the Thirteenth Amendment in collaboration with men who, but a short time before, had been his mortal enemies; soon, he would discover what uncomfortable political bed-fellows they could make and how expensive his protest could become.

A year later, in a speech at Glasgow, Harlan told of the brief honeymoon that had existed between the Conservative Unionists and the "Southern Democrats":

When the legislature convened December, 1865, the "Anti-Amendment" men co-operated upon nearly all of the political issues before that body.²⁰ They co-operated in the repeal of the "Expatriation Law" by which the returned Confederates were restored to all the privileges of citizenship in this state.

But to his chagrin, Harlan explained, the "Southern Democrats," having used the votes of the Conservative Unionists to repeal the political

¹⁹Coulter, Civil War, pp. 282-83; Cincinnati Commercial, July 20, 1866; Lewis F. Johnson, History of Franklin County (Frankfort: Roberts Printing Company, 1912), p. 163.

²⁰The coalition, for instance, handily garnered the votes to reject ratification of the Thirteenth Amendment.

limitations that had been placed on former Confederates, were emboldened by their swollen ranks to challenge the Conservative Unionist for control of the "anti-Radical" forces in the state. Harlan's description of the subtle maneuvering in the legislature that terminated the coalition, created a southern-oriented Democratic Party in the state, and forced Harlan and his Conservative Union Democratic colleagues to seek a new political alliance,²¹ revealed his feeling of frustration at his faction's failure to dominate the "southern sympathizers." To his Glasgow audience, he declared:

They [legislators elected on the anti-Amendment slate] met in caucus together, . . . [to consider calling a convention to nominate a candidate for the forthcoming Court of Appeals race] It was determined by a vote of fifty-six to nineteen that no such Convention should be called. The reason which induced the caucus to come to that conclusion was that a party race at this time in Kentucky, under [the] peculiar circumstances surrounding us all, would keep alive the bitterness and animosities engendered by the war, and do much to disturb the peace and harmony of the state. But as soon as this decision was announced, the Conservative Union men were told by a sympathizer with the rebellion that they would call a convention.

Harlan warned his audience at Glasgow that the sponsors of the convention--his "Southern Democratic" allies less than a year before--were the same Confederate sympathizers who in 1864 had advocated forcing the federal government to recognize the rebellion as a "fait accompli" by withholding men and money from the Union cause. Harlan bitterly described the composition and spirit of the Democratic convention that had been held the previous May at Louisville: "With very few exceptions it was a convention of rebel sympathizers, and a body in which services in the Union Army were held at a very low discount." He asked: "What Union man ought to have

²¹ Allan F. Westin, "The First Justice Harlan: A Self-Portrait From His Private Papers," Kentucky Law Journal, XLVI (Spring, 1958), 322; Coulter, Civil War, p. 295; Letter, Orlando Brown, Sr. to Orlando Brown, Jr., February 8, 1866, Orlando Brown Papers, Filson Club, Louisville, Kentucky.

been found in that convention?" Harlan and many other Unionists who had joined hands in 1865 with men of "disloyal" sentiments to protest federal excesses were unable to deal longer with men who, as Harlan had insisted at Glasgow, had chosen "candidates . . . who were either in the rebel army, or were most distinguished for the aid and comfort they gave that army."²² Apparently, Harlan and many other Union Democrats who had opposed the Amendment, became convinced that they would be unable to dominate their "pro-Southern" allies, and were unwilling to see the position they had taken on the Amendment hardened into a party alignment.

Under these circumstances, John and his Conservative colleagues made friends again with those Union Democrats with whom they had differed over ratification of the Thirteenth Amendment. A note of desperation was evident in the call issued by the Conservative Democratic members of the legislature to reconsider their earlier decision not to hold a nominating convention:

Since our adjournment, circumstances have occurred which . . . render it indispensable to the maintenance of the supremacy of the party, that a convention be now called. Three distinct conventions are now called to meet at Louisville;²³ These conventions will inevitably sow wide seeds of dissension, and will tend to disintegrate our own party²⁴ and to terminate its rule, unless they are counteracted.

After the decision to hold the convention was made, the Conservative leadership published a list of principles on which all Union Democrats could stand; significantly, they approved the "just and constitutional sentiments" espoused by President Andrew Johnson's veto of the Freedmen's

²² Cincinnati Commercial, July 20, 1866. Letter, D. C. Gannaway to Bruner, March 3, 1866, Bruner Papers, Filson Club, Louisville, Kentucky.

²³ The three conventions were the "Unconditional Radical Unionists," the "Southern Democrats," and a meeting of Union veterans, ostensibly for a reunion, but actually for political purposes.

²⁴ Campaign Document, Bruner Papers, Filson Club, Louisville, Kentucky.

Bureau Bill and pledged their support to him against "the malignant opposition of an unprincipled majority in Congress."²⁵ While the declaration served to reconcile all Conservative Unionists who had differed over ratification of the Thirteenth Amendment, the document made it clear that those "Radical" Unionists in Kentucky who supported Congressional Reconstruction and military occupation as the means to secure political power would not be welcome at the convention. Following the announcement of the Union Democratic convention, Harlan joined conservatives of all stripes in encouraging the wave of popular support for Andrew Johnson that followed the President's veto of the Freedmen's Bureau Bill. Harlan and several other prominent Conservatives sponsored a public rally in Frankfort "for the purpose of expressing gratitude to President Johnson for the bold and patriotic stand he has taken against the Radicals in Congress."²⁶ It is likely that Harlan supported the widely-circulated but abortive proposal made by many Conservatives to create a national party with the embattled president at its head.²⁷

As the party conventions approached, the complex politics in the state were as follows: first, one group, including numerous Union men, was set to "reorganize" a Democratic Party that was progressively pre-occupied with remorse over the South's "lost cause" and that was dominated by men who had sympathized with the South during the war and, in some cases,

²⁵Ibid.

²⁶Lexington Observer and Reporter, February 24, 1866. Coulter, Civil War, pp. 297-98.

²⁷ Alf Allen of Breckinridge County, a political friend of Harlan's, wrote to George Prentice, editor of the Louisville Journal, urging the formation of a new party with Andrew Johnson at its head and consisting of those who have "found no political party worthy of his support since the Whig party died, with its glorious old leader [John J. Crittenden] . . . , five years back." Louisville Daily Courier, February 23, 1866.

had served in the Confederate Army. Second, a small group of "Radical Unionists" who had supported Lincoln, the Thirteenth Amendment, and Congressional Reconstruction with military rule. Third, and between these extremes, stood Harlan's faction of Conservative Democrats or Conservative Unionists--the moribund heart of the wartime Unionist coalition composed of Union men who had resisted emancipation and what they considered a vindictive Reconstruction imposed on the South. Belligerent toward the "Radical" Republicans, this faction might well have been able to forge a permanent alliance with the new "Southern Democrats" if it had been able to stomach the takeover of that party by former Confederates who had a penchant for debasing the righteousness of the Union cause.

The size and enthusiasm of the throngs at the "Southern Democratic" state convention on May 1, 1866, were sufficient evidence to Unionists of all stripes that their only hope for political survival lay in submerging their differences over Reconstruction and the Amendment, and uniting against the rising "Southern Democratic" threat.²⁸ In late June, following a month of negotiation, the Conservative and "Radical" Unionists reluctantly agreed to unite their efforts behind the candidacy of General Edward H. Hobson for the vacancy on the state Court of Appeals. Hobson was a former Union officer who had gained fame for his capture of the Confederate raider, John Hunt Morgan. The coalition was achieved when the Conservatives agreed to drop their candidate, Richard R. Bolling, who had come under fire for alleged sympathy with the Confederates during the war, and when both factions agreed to avoid discussion of the volatile national issues

²⁸ Louisville Daily Courier, July 13, 1866. The Cincinnati Weekly Gazette, March 21, 1866, warned any Conservative Unionists who were reluctant about teaming up with the "Radicals" that "there are two parties in Kentucky. You must go to one or the other. If you choose to attempt to form a middle party, well and good. In some places the rebels will beat you; in others the Radicals."

which divided them--the Conservatives pledging not to criticize Congressional Reconstruction if the "Radicals" would not attack the moderate program for the South that had been proposed by President Andrew Johnson. The two factions in the coalition did agree to denounce publicly the extension of the franchise to blacks, a Reconstruction measure that was before Congress.²⁹

Harlan threw himself avidly into the support of the compromise candidate. Immediately after the announcement of the coalition, he spoke at an enthusiastic Hobson rally in Frankfort. Before Harlan began his speech, he sponsored a resolution formally endorsing Hobson as the coalition's nominee and praising him for his unwavering Unionism. Then, in the keynote speech for Hobson's campaign, Harlan caustically charged that their "Confederate Democratic" foes were sorry that the rebellion had been suppressed. With the memory of heavy Union wartime sacrifices still fresh in his mind, he bitterly complained: "Though beaten in the field of battle, they [Southern Democrats] propose to renew at the ballot box the contest for supremacy of the principles which had much to do with bringing about the war."

In the same speech, Harlan voiced a warning that he would frequently repeat during the campaign: that the reorganized Democratic party represented such narrow sectional interests that its triumph would mean the exclusion of Kentucky from an active role in national politics, and the isolation of the state's Unionists in a sea of pro-southern sympathy. He argued that McClellan's defeat by Lincoln in the election of 1864, during the campaign in which the peace wing of the Democratic Party had proposed to enter into negotiation with the Rebels and had thereby implicated McClellan as a pro-Confederate, was clear evidence that no national party could afford to identify with a postwar state party based

²⁹Louisville Daily Journal, June 15, July 20, 1866; Coulter, Civil War, pp. 305-6.

on articulating southern grievances.³⁰ Harlan concluded his speech for Hobson with a plea for unity among the state's Unionists, urging them not to allow their disagreements over Congressional Reconstruction in the South to obscure their common cause in Kentucky. Similarly, he tried to heal the bitterness created among Union men by the controversies of the preceding two years, saying: "We had our respective views about the Presidential election of 1864 and the 'Constitutional Amendment' of 1865. I have no regrets to express for any vote I have given upon those questions." He continued, however, focusing on the immediate crisis: "These are past issues. Let us stand or fall together on whether the men and principles of the rebellion shall control the future destiny of the State."³¹ Harlan hoped that fear of rule by southern sympathizers would bind the fragile Unionist coalition together.

Soon after Harlan launched the Hobson campaign at Frankfort, the Unionist state central committee named him an assistant state canvasser for Hobson, a position that placed him on a speakers' bureau provided for Hobson rallies across the state. By mid-July, at a rally in Glasgow, a profound change was discernible in Harlan's appeal when compared to his keynote address just three weeks earlier. The vigor and optimism with which he had begun the campaign were replaced by fear that the Unionist coalition was breaking apart. Since many Conservatives were defecting to the Democrats, Harlan spent much of the Glasgow speech trying to

³⁰Above, pp. 52-57 . Later in the campaign, Harlan would return to the same conclusion extrapolated from the political lessons learned in 1860: "The political events of 1860 should teach us to beware of entangling alliances with Southern sentiment parties. Countenance no political party which is not eminently national and which will not do equal and exact justice to every part of the country." Cincinnati Commercial, July 20, 1866.

³¹Louisville Daily Journal, July 2, 1866.

counteract the opposition's claim that Hobson was a "Radical."³² He argued, for instance, that Hobson was not a "Radical" just because he supported ratification of the Thirteenth Amendment the previous year. He insisted that his candidate had been among the many Kentuckians who, though they had opposed the Amendment in principle, had voted for it in the hope that Kentucky might thereby be treated more justly by the federal government.³³ To the Conservatives who criticized Hobson's support of the Thirteenth Amendment, and yet looked to President Andrew Johnson as their national leader, Harlan asked: "Who, in all the United States, did more than Johnson to secure the adoption of that Amendment? Will any anti-Amendment Union man say that he will never vote for Johnson?"

To further allay Conservative fears that their coalition's nominee was a "Radical," Harlan emphasized Hobson's life-long devotion to the Democratic Party and his support, of President Andrew Johnson's moderate Reconstruction policy. In an appeal to the Union veterans in his Glasgow audience, Harlan heralded Hobson as a courageous and devoted former officer in the United States Army. Quickly turning on the opposition, he identified with great rancor the real fault that the "Southern Democrats" found with Hobson: "The sin which he committed . . . is that of being a Union man and a soldier in the army of the United States. These Confederate Democrats can never forgive that." Pressing his effort to squelch Conservative defections from Hobson, Harlan amplified his charge that the "Southern Democrats" carried a political vendetta for anyone who had been

³²Frankfort Commonwealth, July 6, 1866; Louisville Daily Journal, July 3, 1866; Coulter, Civil War, p. 307.

³³It will be recalled that many leading Conservative politicians in the state urged ratification of the Amendment, even though they were opposed to abolition. Above, pp. 64-65.

involved in suppressing the rebellion. He warned his Glasgow audience that, unless the Unionists stopped criticizing one another and united behind Hobson, the day would soon come when "Kentucky will become an uncomfortable place for anyone except a rebel soldier, a rebel sympathizer, . . . or an apologetic Union man." Acknowledging that the Democrats were conducting a strong campaign to persuade Unionists to support Duvall (Hobson's opponent), Harlan bitterly reminded any Union veteran who was tempted to join the "Southern Democratic" Party that he would be required by that party to apologize for having sympathized with the Union cause. Furthermore, he cautioned the Conservatives of Glasgow who favored a moderate restoration policy in the South along the lines proposed by President Andrew Johnson not to vote for Duvall as a protest against "Radical" Reconstruction. Harlan was convinced that a victory for the candidate of the Confederate sympathizers would back-fire and strengthen the hand of the "Radicals" by providing the president's opponents in Congress with "proof" that the South remained loyal to the Confederacy and, thus, needed further "reconstruction" before the political prohibitions that had been placed on ex-Confederates could be lifted.³⁴

One of Harlan's central concerns in 1866 was to avoid the regional impasse that had preceded the start of the rebellion five years before. He reminded his Glasgow audience that the "Southern Democrats" had contributed to the hardening of irreconcilable positions in 1861 when they tried to convince the majority of Kentuckians that there was no "middle ground" for them to occupy--that they had to be either abolitionists or Confederates. Harlan warned that the same tactic was being employed

³⁴Cincinnati Commercial, July 20, 1866.

in 1866 by the successors to the Confederate sympathizing Democrats of 1861.

They [Southern Democrats]⁷ now tell the people that every citizen must either be a 'Radical' or a 'Democrat', that unless Kentucky follows the lead of the First of May convention, she might be regarded as cooperating with the extremists of the north. This is the game of 1861. The Disunionists call everyone a 'radical' who will not support the Duvall party.³⁵

Haunted by the memory of ante-bellum politics, Harlan stood for the creation of a broad-based, centrist Unionism capable of quieting the raucous hostilities created by sectional polarization and narrow ideology. In this way, the Conservative leader sought the comfortable middle ground between the excesses of Union "Radicals" in Congress and the sectional myopia of the "Rebel Democracy."

It was this desire to avoid political extremes that apparently caused Harlan to break his silence and to express his unhappiness with the thorough program of Reconstruction supported by the "Radical Republicans." Driven in the earliest days of the campaign to defend Hobson from the devastating allegation that he was a "Radical," Harlan soon began to criticize Congressional Reconstruction and, concomitantly, to praise President Johnson in violation of the tenuous amity between the "Radical" and Conservative Unionists.³⁶ In one speech, he attacked the Republican-sponsored program of vote reform in the strongest terms. He charged that

a large party in the North [in this case, his formal political allies]⁷ are devising by amendments to the Constitution and laws of Congress, to disenfranchise almost the entire white population of the insurrectionary states and to enfranchise the Negroes. The defeat of all such schemes is doubtless regarded by the white people of the slave-holding states of the highest

³⁵Cincinnati Commercial, July 20, 1866.

³⁶Above, p. 73.

importance. The permanent triumph of those who in the North who are following the lead of Sumner and Stevens in their series of Constitutional amendments would work a complete revolution in our republican system of government and most probably the overthrow of constitutional liberty.³⁷

Although the Unionist coalition had agreed at its founding to oppose the extension of the franchise to blacks, Harlan's spirited attacks on the general Reconstruction scheme initiated by the Republican leaders of congress were, nevertheless, overt violations of the Conservative Unionist's pledge not to criticize the Republican administration.³⁸

While Harlan was turning on his "Radical Unionist" allies, the Democrats barraged him with charges of political inconsistency. The Duvall newspapers indicted Harlan for having opposed the "Radicals" in 1865 in the fight to prevent ratification of the Thirteenth Amendment, only to join them, a year later, in support of Hobson. The Louisville Daily Courier was not surprised at Harlan's switch: "The halting, doubting, dubious course of Harlan during the whole of his political career, has been such that no one is surprised now at any position he may take." The Daily Courier saw more than irresolution, however, in Harlan's political ambivalence: "His eloquent scathing of the radicals last summer failed to bring with it the 'recompense of reward' . . . the United States Senate was not reached. Now he chases the radicals."³⁹ In

³⁷Louisville Courier-Journal, July 5, 1875. A critic of Harlan's nomination to the Supreme Court reported that in 1866 Harlan was still very bitter over the abolition of slavery. In this somewhat questionable account, Harlan was to have said purportedly, "that he had no more conscience or scruples in buying and selling a negro than he had in buying and selling a horse, and that the liberation of slaves of our general government was a direct violation of the Constitution of the U. S." Letter, Speed S. Fry to William Brown (?), n. d., quoted in Ellwood W. Lewis, "Document: The Appointment of Mr. Justice Harlan," Indiana Law Journal, XXIX (Fall, 1953), 70. Cited hereafter as "Document."

³⁸Above, p. 73.

³⁹Louisville Daily Courier, July 17, 1866. The author has been unable to find evidence of Harlan's candidacy for the Senate at that time.

a similar vein, the Lexington Kentucky Gazette commented: "Our very recent friend, General Harlan made his appearance . . . on Saturday night, in what dramatic critics would call a new role, in the last act of the political comedy of blunders and errors."⁴⁰ One highly imaginative Duvall editor resurrected the deceased spirits of such political notables as Washington, Clay, and Harlan's father, James, to exhort him to abandon his flirtation with the "Radical" usurpers and return to his true conservative home.⁴¹

In its effort to embarrass Harlan with proof of his political inconsistency, one "Southern Democratic" newspaper reported a campaign incident of singular interest. Following a speech at Elizabethtown in mid-July, 1866, in which Harlan charged that the "Rebel Democrats" served the economic interests of a decadent southern aristocracy who wanted to perpetuate the vast gap between the rich and poor of the region. The Louisville Daily Courier reported that a member of the crowd who had been provoked by Harlan's incessant criticism of the Confederacy blurted out: "Did you not promise . . . when you were making up your regiment, that if the war should be directed against slavery that you would break your sword and make war upon the abolitionists?" According to the newspaper's account of the incident, Harlan was "excessively confused" by his antagonist and "failed to give any direct answer."⁴² The staunchly pro-Democratic Frankfort Tri-Weekly Yeoman echoed the heckler's allegation that in 1861, Harlan had promised to become a Confederate before he would accept

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Lexington Kentucky Gazette, July 4, 1866.

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Louisville Daily Courier, July 18, 1866.

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Ibid.

abolition. The newspaper proudly noted that the Confederates had at least stood behind their beliefs while Harlan failed to carry out his promise.⁴³ The author has been unable to locate any evidence to corroborate this charge and, based on the sources he has found, suspects that Harlan did not make the alleged promise, although as we have seen, he did, throughout the war, consistently protest the federal government's emancipation moves.⁴⁴ The incident is witness to the vulnerability of Harlan's position to the charges of inconsistency and demeaning acquiescence to the dictates of the "Radical Republican" war party.

The outcome of the Court of Appeals election proved the inability of the Conservative and "Radical" Unionists to construct an effective coalition and the political viability in Kentucky of a pro-southern Democratic Party. Duvall defeated Hobson by an overwhelming plurality of almost 38,000 votes.⁴⁵ Immediately after their humiliating defeat, the "Radical" Unionists, not unexpectedly, turned on their Conservative allies with the charge of bad faith. Indeed, Harlan was cited by the Republican Cincinnati Gazette as among those Conservatives who, soon after the campaign had begun, had concentrated their attacks on the very people with whom they were aligned.⁴⁶ Harlan was guilty as charged; the marriage

⁴³Frankfort Tri-Weekly Yeoman, July 21, 1866.

⁴⁴Unfortunately, the contents of Harlan's recruitment speeches have not been found. In a similar charge placed against his Unionist friend, James Speed, "proof" that Speed failed to live up to the promise he made to join the South if the federal government fought a war of conquest was cited in the "Address to the People" of the Union Central Committee in 1861. Since Harlan was instrumental in forming that document, it is possible that his opponents based their charge on the promise implied there. Louisville Daily Courier, July 18, 1866. Above, p. 30. The author of an excellent article on Harlan's Kentucky political career believes that Harlan actually made the promise attributed to him. Louis Hartz, "John M. Harlan in Kentucky: 1855-1877," Filson Club Quarterly, XIV (January, 1940), 25.

⁴⁵Lewis Collins, History of Kentucky, revised by Richard H. Collins (Louisville: John P. Morton and Company, 1924), I, 173.

⁴⁶Cincinnati Gazette, December 1, 1866. Coulter, Civil War, p. 309.

of political necessity had not been strong enough to prevent him from sounding off against what he believed to be the extremist Reconstruction program sponsored by the "Radical" Republicans.

Harlan's hope of finding a durable political base in a party with national affiliations was buried in the bitter ruins of the "Union" alliance. He might have followed many of his friends into the Democratic Party--he stood solidly with that party against Congressional Reconstruction--except for the Kentucky Democratic Party's narrow sectionalism and blatant disregard for the achievement of the Unionists in suppressing the rebellion. On the other hand, he could not then join the national Republican Party because of his belief that their congressional leaders' Reconstruction plans ignored the constitutional rights of the former slave states. As 1867 approached, John Harlan belonged to the moribund remnant of the once broad-based Union or Union Democratic Party that had dominated the state's politics throughout the Civil War.

Meanwhile, as a private attorney and as the state's attorney general, Harlan was involved in matters pertaining to slavery. Evidence indicates that he continued to resist the immediate emancipation required by the Thirteenth Amendment. His resistance to the new situation can be found in several legal opinions that he prepared as attorney general for the Court of Appeals. In those opinions, he upheld the validity of the antebellum state laws regulating slavery over more recent legislation initiated by the federal government in support of a new legal status for the black man. In the much-publicized Commonwealth v. Palmer, Harlan argued that the federal commander in Kentucky had violated a state statute against aiding slaves to escape when he had ordered the operators of public conveyances to permit slaves with military passes to leave Louisville for freedom in the

North.⁴⁷ In another case, involving an appeal to the state Court of Appeals from a lower court that had admitted the use of the testimony of a black man against a white defendant in compliance with the Federal Civil Rights Act of 1866, Harlan as attorney general refused to act as the state's advocate in defending the lower court's stand. Instead, he delivered a "Suggestion to the Commonwealth" in which he strongly objected to Negro testimony on the legal grounds that a state had the constitutional right to establish the rules of testimony in the courts.⁴⁸ Since Kentucky had not then moved to grant full civil rights to blacks, Harlan believed the requirements of the Civil Rights Act of 1866 to have been unconstitutional. Indeed, it is almost as if he believed emancipation to have been a temporary aberration that was preventing a return to the ante-bellum slave days and that his conservative legal arguments might in some way hasten a return to that better time.

In 1866-1867, Harlan also became deeply engrossed in the legal squabble over ownership of church property that followed the split of the Presbyterian Church in Kentucky, and, interestingly, for entirely different reasons than he gave in opposing black testimony, he again argued for preserving an ante-bellum legal status. In 1864, a substantial group of dissident Kentucky Presbyterians led by Reverend Stuart Robinson of Louisville had issued a formal protest against a resolution supporting the Union cause that had been passed by a majority of the delegates to the national

⁴⁷Westin, "Constitutional Rights," p. 650, citing Commonwealth Vs. Palmer, 65 Ky. (2 Bush) 570 (1866).

⁴⁸Harlan had written in his brief prepared for the Court of Appeals: "Not feeling at liberty, according to my views of that question considered as a legal proposition, to uphold the judgment of the court below, the case is respectfully submitted to the court without argument on behalf of the commonwealth." Westin, "Constitutional Rights," p. 650, citing Bowlin vs. Commonwealth of Kentucky, 15 Ky. (2 Bush) 5 (1867).

Presbyterian convention. The dissenter's Confederate orientation earned them immediate censure and finally exclusion from the denomination. Their ejection precipitated a long and bitter court fight between the Unionist and Confederate factions over control of the church's real estate. Harlan was a leader of the Unionist faction that insisted that the denomination's assets in the state belonged exclusively to the faction as the legal successor to the ante-bellum Presbyterian Church.

Soon after Hobson's defeat Harlan also served as legal counsel for Centre College and in that capacity testified against a bill that was pending in the Democratically-controlled state legislature that proposed to grant ownership of his alma mater to the southern Presbyterian faction.⁴⁹ Harlan insisted that such legal controversies should not be decided by a majority vote of representatives of the people--an argument akin to the fear of "mobocracy" raised earlier against opponents of his protectionist views on slavery.⁵⁰ Arguing instead for a more detached legal judgment equitably administered by the courts, he averred:

When the Legislature makes up its mind to legislate upon religious questions, with the view to protect certain persons against the "Radicals," let impartiality be shown, by legislating to protect those of your constituents whose religious privileges, in some churches have been impaired because they did not believe in the justice of the rebellion.⁵¹

⁴⁹Coulter, Civil War, pp. 395-398; Louisville Daily Journal, June-July, 1866. At about the same time as the Centre College controversy, Harlan and his brother, James Harlan Jr., served as legal counsel for the Unionist Presbyterian faction at Shelbyville in what was seen as the test case for all the disputed property in the state. Letter, Harlan and Harlan, Attorneys, to Reverend Robert J. Breckinridge, October 23, 1866, Breckinridge Manuscripts, Library of Congress.

⁵⁰Above, pp. 15-16.

⁵¹Frankfort Semi-Weekly Commonwealth, February 22, 26, 1867.

After a prolonged fight, the bill was defeated and the Unionist faction retained control of the college.⁵² Significantly, throughout the defense of church property for the faction, Harlan was allied with Republican or "unconditional" Unionists; the religious controversy forced him to join hands with some of the very men with whom he had bitterly disagreed during the Court of Appeals campaign just months before.

In January, 1867, public attention was again focused on Kentucky's warring political parties when the state legislature elected a United States senator. Since the southern Democrats had triumphed in their first independent campaign venture and the "Radical" and Conservative Unionists had proven to be so incompatible, each of the three groups began the balloting with its preferred candidate. After almost two weeks of balloting, no candidate received the necessary two-thirds majority for election. Consequently a search was begun for a candidate on whom two of the groups could agree. Because the Unionist factions remained hopelessly estranged, a working agreement between the southern Democrats and Conservative Unionists (or Conservative Democrats) was arranged. John Harlan was among the candidates proposed to break the deadlock, and the twentieth ballot. J. J. Landrum, a Conservative leader in the legislature, nominated Harlan as the candidate around whom the Democratic factions might gather. He received, however, only eight votes--far from the number necessary to win.⁵³ Apparently, the state attorney general's

⁵²Coulter, Civil War, p. 398.

⁵³Coulter, Civil War, p. 317; Cincinnati Commercial, January 19, 1867; William Elsey Connelly and E. Merton Coulter, History of Kentucky ed. Charles Kerr (Chicago: American Historical Society, 1922), II, 914; Hambleton Tapp, "Three Decades of Kentucky Politics, 1870-1890" (unpublished Ph. D. dissertation, Department of History, University of Kentucky, 1950), p. 28. Frankfort Semi-Weekly Commonwealth, February 1, March 8, 1867; Cincinnati Gazette, December 1, 1866.

lingering reputation as an unrepentant Unionist made him unpopular among legislators who were increasingly sympathetic toward a "humiliated" south. Harlan's name having been withdrawn, the deadlock was resolved on the next ballot when the Conservative and southern Democrats got behind the incumbent senator, Garrett Davis, an early "firebrand" Unionist whose ardor had been dampened toward the end of the war by emancipation and Congressional Reconstruction. After the bargain had been struck, Davis won handily over the "Radical" candidate, Benjamin Bristow. Following this demonstration of co-operation between the two Democratic wings, the prospects of merger between the Confederate and Conservative Democrats appeared very bright.⁵⁴

Co-operation between both factions of Democrats turned out to be a short-lived marriage of convenience. Soon after Davis was elected, rumors began to circulate among the Conservatives that the southern Democrats planned to nominate only men who had strongly identified with the Confederate cause for the full slate of state offices to be filled that summer.⁵⁵ When the "Rebel" Democrats met on George Washington's birthday, the Conservatives' worst fears were realized. Despite the fact that the

⁵⁴ Collins, History of Kentucky, I, 167; The American Annual Cyclopedia and Register of Important Events, Vol. VII, (1867) (New York: D. Appleton and Company, 1871), 421. Hereafter cited as Annual Cyclopedia. Coulter, Civil War, pp. 217-18.

⁵⁵ Burwell C. Ritter, the Conservative congressman from the Second District, complained to a friend of Harlan's that a southern Democratic group in his district had called for a convention to nominate for his place. He said: "our Southern friends are now making every effort to carry everything before them in our state." Letters, Burwell C. Ritter, Washington City, to John B. Bruner, January 6, 14, 1867, Bruner Papers, Filson Club, Louisville, Kentucky. The Danville Advocate noting that the revitalized southern Democrats were ready to occupy the governor's mansion, predicted: "The Democrats intend to have things their own way and intend to proscribe them [The Conservatives] and cut them off from office." N. d., reported in Lexington Observer and Reporter, February 9, 1867, quoted in Coulter, Civil War, p. 320.

convention adopted a platform that professed loyalty to the Union,⁵⁶ the southern sympathizers filled all but one position on the slate with Confederate veterans or men who had been "stay-at-home Rebels."⁵⁷ Their blatant exclusion of men of Union sentiment from leadership in the Democratic Party once more confronted Harlan and his fellow Conservative Unionists with the necessity of making a choice: they could accept secondary roles in the southern-dominated Democratic Party or could again attempt to forge a coalition with the "Radicals." Finding neither of these options acceptable, the Conservatives daringly set out to create their own political party.

Less than two weeks after the "Rebel" Democrats made their nominations, the Union Democratic leaders met at Frankfort for consultation. Harlan took an active part in that meeting, and following the decision to launch the new party, he was chosen to serve on its executive committee.⁵⁸ In an impromptu address to the Conservative conclave, he needled his cohorts who found fault only with the "Rebel" sympathies of the candidates nominated at the Democratic convention. The southern Democrats apparently made a

⁵⁶ Annual Cyclopedia (1867) VII, 422.

⁵⁷ Coulter, Civil War, p. 319; Letter, Richard S. Durrett, et. al., to John B. Bruner, March 18, 1867, Bruner Papers, Filson Club, Louisville, Kentucky. The Democratic nominee for governor was John L. Helm of Elizabethtown, who in 1851 had been the Whig chief executive who had appointed Harlan state adjutant general. Above, p. 3. The Conservatives appeared to have been most unhappy about the failure to give popular "War Democrat" Frank L. Wolford a place on the Democratic ballot. In an effort to avoid the pro-Confederate label and win recognition by the northern Democratic Party, Kentucky's southern faction added one or two Unionists to their slate. "An Open Letter to the National Democracy of the Northern States by Richard T. Jacob." Louisville Daily Democrat, May 8, 1867; Maysville Eagle, July 7, 1867.

⁵⁸ Louisville Daily Democrat, March 7, 1867. Harlan served as secretary to the "Union Democratic" organizational convention. Frankfort Semi-Weekly Commonwealth, March 12, 1867; Lexington Observer and Reporter, March 9, 1867.

conscious effort to lure Conservatives into their party by adopting an innocuous non-doctrinaire platform⁵⁹ Harlan declared that he would not vote for the Democrats if they had nominated all Union men because their nominating convention's keynote speaker had boasted that his party was the proud successor to the "Rebel" convention that had been suppressed by federal authorities in 1863. "That party," Harlan bitterly asserted, "was against the country when the country was in danger."⁶⁰

Immediately after the genesis of the third party, Harlan energetically undertook the task of party organization, a responsibility delegated to him by the executive committee. In newspaper announcements across the state, he asked Conservative Democratic leaders to send him the names of five "efficient" party members to serve as committeemen in each county.⁶¹ The Louisville Daily Democrat repeatedly published Harlan's request for help with the admonition that the new party's only chance for success was "through organization against both rebels and radicals."⁶² In addition, he assessed the party organization in each county to pay for the cost of distributing state-wide publicity. He explained that he especially needed the money to distribute an "Address of the Union Democracy to the People of Kentucky," which had been drafted at the party's organizational meeting

⁵⁹ A group of Conservatives in Hopkinsville, wrote a party organizer, "that while objecting to the exclusion of Union men from the slate, they could get along with the principles espoused by the Democratic convention." Letter, Richard S. Durrett, et. al., to John B. Bruner, March 18, 1867, Bruner Papers, Filson Club, Louisville, Kentucky. The Union Democratic "Address to the People of Kentucky" warned Conservatives that "the Democratic platform of resolutions are mere platitudes intended to mean nothing." Louisville Daily Democrat, March 9, 1867.

⁶⁰ Lexington Observer and Reporter, March 9, 1867.

⁶¹ Letter, Harlan to Bruner, March 11, 1867, Bruner Papers, Filson Club, Louisville, Kentucky.

⁶² Louisville Daily Democrat, March 21, 1867.

and which set forth the rationale for the new party's creation. In addition to working resolutely on party organization, Harlan spoke on numerous occasions, each time encouraging a large crowd to be on hand for the party's nominating convention scheduled in Louisville on April 11. He assured those who asked him about the convention's purpose that it would be opposed to both secession and radicalism.⁶³

When the Conservative Union Democrats convened at Louisville on April 11, 1867, the first order of business was the selection of candidates for the major state offices. It is not surprising that the third party chose only men who had been loyal to the Union war effort. John Harlan was unanimously designated to run for another term as attorney general, an office that had become a familiar preserve of the Harlan family over the previous two decades.⁶⁴

The platform of the third party opened with praise for the contribution of the Union soldier in suppressing the rebellion. Following a strong statement affirming the "moral, legal, and Constitutional right and power" of the federal government to suppress rebellion--a principle which the "Confederate Democrats" refused to acknowledge--the Conservatives proudly claimed "that the brave men, who . . . fought for the Union . . . deserves [sic] the gratitude of the nation and should be honored for it."⁶⁵ Significantly, the platform upon which Harlan would stand was most severe in its denunciation of "Radical" Republican policies. It charged that the Republican-dominated Congress was treating the former rebellious states

⁶³ Letter, Harlan to John B. Bruner, March 11, 1867, Bruner Papers, Filson Club, Louisville, Kentucky. Frankfort Semi-Weekly Commonwealth, March 22, 1867.

⁶⁴ Coulter, Civil War, p. 307; Louisville Daily Democrat, April 12, 1867.

⁶⁵ Louisville Daily Democrat, April 12, 1867.

as subjugated territories by arbitrarily erecting barriers to deny their duly elected representatives their seats in Congress and, through the proposed Fourteenth Amendment, by depriving those states of their sovereign right to establish voting requirements. Finally, the Conservative platform advocated revision of the federal tax structure by making the monied-classes pay taxes in proportion to their wealth and by reducing tariffs.⁶⁶

The "Address of the Union Democracy to the People of Kentucky" which Harlan had raised funds to distribute was perhaps the fullest written statement of the purposes of the third party. It explained that there were many Kentuckians

who love the Union, who never once faltered in the darkest hour of conflict, and who, while many things were done by the Government which they could not approve, still maintained a steadfast hope for the triumph of Federal arms.

But, it argued, loyal Unionists in 1867 could choose neither the Democratic Party that "by its nominations . . . [has] given . . . proof . . . of their hostility to the Union" nor the "Radical" Party which is in "full accord with the Republican party of the North." The "Address" reviewed the Reconstruction legislation that been enacted by the Republican-dominated Congress, including the proposed "act to provide for more effectual government of the insurrectionary states" which was passed over President Johnson's veto,⁶⁷ and the document concluded that the South "had suffered enough" even before the "unconstitutional, unwise, and repressive" Reconstruction Act had been yoked upon her by the North. Generosity from the victorious Union, the document argued, was what was needed. The

⁶⁶Ibid.

⁶⁷The reference is to the first Reconstruction Act which was passed by Congress on March 2, 1867.

"Address" made it clear that the new party was unequivocally opposed to equal citizenship for blacks, bitterly protesting the proposal to grant Negroes the right to vote: "It needs no argument to convince Kentuckians, who are well acquainted with the Black race, that much evil would result from the establishment of such law." The Union Democratic Party, with which John Harlan had so strongly identified, was committed to resist every threat to white supremacy in the South.

The "Address" argued, on the other hand, that the attitude displayed by the "Confederate Democrats" ignored the distribution of political power in the post-war era. The southern Democrats' narrow pro-Confederate stance, the third party's document insisted, isolated their party from the national Democrats because, having upheld the Union during the war, that national party could never claim common cause with a group that made nostalgia for the "lost cause" its polestar. The document cogently asserted that Kentucky was the only state capable of voicing some of the southern grievances. It reasoned that the protests should be voiced by more moderate spokesmen with affiliation with a national party, since the bulk of political power remained in the hands of the North. Claiming to be the only Democratic Party in the state that was affiliated with the northern Democrats, Kentucky's third party commended itself as the only means by which relief could come for the South.⁶⁸ Indeed, recalling how the uncompromising party in the South had strengthened the hand of the

⁶⁸The new party went to great pains to secure the endorsement of the national Democratic Party. Maysville Eagle, July 17, 1867; Louisville Daily Democrat, April 14, 1867. At a Union Democratic rally in Frankfort, Harlan was one of the featured speakers and the claim was made that the party was rooted firmly in the platform adopted by the "Northern Union Democracy." Frankfort Semi-Weekly Commonwealth, March 8, 1867. In light of this claim, it is interesting to recall that Harlan insisted, years later, that he had supported the Democratic party only once in his life and that was in 1864. Above, p. 52.

Radical northern abolitionists in 1861, the Conservatives warned that further sympathy for the "lost cause" by Kentucky Democrats would strengthen the northern Republican Party by allowing it to champion the cause of "putting the Rebels in their place."

Finally, the Conservative Union Democratic statement of principles, acknowledging its recommendations to be moderate, raised an age-old organizational problem that the party faced: Moderation seldom excites people. The authors of the manifesto warned, however, that indifference to their moderate cause would only assure the extremists the power to shape the course of events, while the vast majority would be left to suffer the consequences of the minority's bad passions.⁶⁹ While confronting adversaries from both ends of the political spectrum in his campaign for re-election as attorney general, John Harlan tried to shake many "middle of the roaders" from their lethargy.

In special congressional elections in May, 1867, the new party was put to the test. Harlan campaigned in behalf of the Union Democratic nominees in several parts of the state only to see them resoundingly defeated.⁷⁰ With numbed spirits, the new party turned its energies toward the gubernatorial election scheduled in August.

While the sources for Harlan's campaign for state attorney general in 1867 are limited, it is possible to isolate the broad outlines of his appeal. First, he clearly made a sentimental play for the votes of Union veterans. Announcements of his campaign appearances promised that the Harlan rally would be a "reunion of that Democracy whose every Bugle

⁶⁹Louisville Daily Democrat, March 9, 1867.

⁷⁰Ibid., May 2, 1867.

call was a signal of victory." Another campaign blurb nostalgically assured that "Old Battle Days will be remembered."⁷¹

A second component of Harlan's campaign strategy was his persistent effort to prevent Conservatives from defecting to the Democrats. At Irvine, in eastern Kentucky, for example, he met the gubernatorial nominees of the other two parties in public debate. In his opening statement, he warned the Conservative Union men of a persistent scheme to lure them into an alliance with Confederate Democrats. The men setting the trap, he cautioned, were the same men who, except for the patriotism of the Union men, would have led the state into the Confederacy. Harlan also echoed the warning made in the Conservative "Address" against the incendiary dangers of political extremism of all kinds.

Finally, his campaign appeal struck a new perilous note when he spoke of the dangers that Union men faced from violent reprisals by "Rebel irreconcilables" in a state mad with Confederate sympathy. Harlan was reported to have said that

It was his deliberate judgment, based upon the events of the past twelve months, that no Union man of any kind could, even at this day, live in peace in Kentucky, but for fear of the National Government which those persons have who are aiming to place the State under the exclusive control of the men and principles of the rebellion.⁷²

Significantly, in 1867 John Harlan depicted the federal government as a protector of Kentucky's Unionists against reprisals from ex-Confederates.

The elections in August, 1867, constituted an annihilating defeat for Harlan and the new party. The southern Democrats, having recruited into their ranks a large number of Union men, captured undisputed control

⁷¹Ibid., July 3, 1867.

⁷²Louisville Daily Democrat, July 24, 1867. Coulter, Civil War, pp. 27-28, 358-59, recounts incidents of social ostracism and violence which befell Union men in the state.

of state politics with its slate of southern-sympathizing candidates. The vast majority of Kentuckians of both Union and Confederate background took their stand behind the party committed to articulating the complaints of a humiliated Confederacy against the Reconstruction program imposed on them by the "Black Republicans."⁷³ In a state where Unionism in any form evoked the specter of Republican military repression, moderation was not the order of the day.

Harlan's defeat for re-election as attorney general freed him to return to the practice of law in Louisville, a practice that he had left in 1861 after only eight months of existence. It will be recalled that since his return from the Civil War to settle his father's estate, he had lived in Frankfort practicing law with his two brothers and serving as attorney general. The motives for his decision to return to Louisville can only be surmised. It is possible that he believed Louisville to be safer from "Rebel" harassment, but it appears more likely that he sought the political anonymity that only a more cosmopolitan city could provide--a much needed asset for a lawyer who, as a persistent and vocal Unionist, had been increasingly out of step with the dominant mood in the state. In addition, the professional factors that influenced his original decision in 1861 were undoubtedly compounded by the personal ostracism that Harlan would feel from the triumphant Democratic clique that flocked to Frankfort. Whatever his reasons, by the middle of November, 1867, John Harlan was back in Louisville at the law, this time having formed a partnership with John E. Newman, a staunch Conservative Unionist from Bardstown.⁷⁴

⁷³The Democrats outpolled the combined Conservative and "Radical" Unionist vote by a two to one margin. Collins, History of Kentucky, I, 181.

⁷⁴Above, pp. 25-26. The Biographical Encyclopaedia of Kentucky (Cincinnati: J. M. Armstrong, 1878), pp. 122-25; Reminiscence by Governor Augustus E. Willson on the day of Harlan's death, Louisville Herald, October 15, 1911, Clipping File, Louisville Free Public Library.

It was not until early January, 1868, that the death of the third party was formally pronounced. In the months following the disastrous defeat of the Conservative Union Democrats, overtures were made by several of its party leaders to find a formula by which all of the state's Democrats could unite.⁷⁵ They proposed to the southern Democratic wing that the third party men be included in the delegates to the Democratic state convention in February, 1868, and that Union men not be excluded as nominees. Failing to achieve these objectives, the Conservative negotiators settled for the vague assurance that "all other good Democrats" would be welcome to attend the convention.⁷⁶ There followed a meeting in Louisville on January 8 of the third party's executive committee to ratify the negotiators' recommendation to disband. Although Harlan was included in a list of those expected to attend that dissolution meeting, there is no record that he was present.⁷⁷ The Democratic Georgetown Weekly Times, noting the dismantling of the third party, promised the Union men of that party that they would not be relegated to a secondary role in Democratic affairs. The Times welcomed the merger as fulfillment of its hope that "the friends of a white man's government should fight under one flag."⁷⁸ A decade after the collapse of the Conservative Union Democratic party, Harlan laconically summarized its brief existence: "In 1867, I was identified with what was known at that time as the "third party . . . but, in 1867, the third party ceased to exist."⁷⁹

⁷⁵Louisville Daily Democrat, November, December, 1867; Coulter, Civil War, pp. 411-12.

⁷⁶Louisville Daily Democrat, January 2, 1868. Frankfort Semi-Weekly Commonwealth, January 10, 1868.

⁷⁷Frankfort Semi-Weekly Commonwealth, January, 1868; Louisville Daily Democrat, January 2, 1868.

⁷⁸Georgetown Weekly Times, January 15, 1868.

⁷⁹Letter, Harlan to James B. Beck, October 31, 1877, quoted in Lewis, "Document," p. 61.

CHAPTER V

HARLAN BECOMES A REPUBLICAN

Following the demise of the third party, Harlan made a decision that would dramatically shape the remainder of his life; he joined the "Radical" Republican Party, refusing to follow most of his fellow Conservative Unionists into the Democratic Party.¹ The year of his decision, 1868, was a significant political year in the state because, in addition to the presidential race, a special election was scheduled to choose a successor to Governor Helm, who died shortly after his inauguration. A month after the Republicans and Democrats held their state nominating conventions, Harlan's decision was made known to the public. The Frankfort Commonwealth, one of the few Republican newspapers in the state, proudly reported that, a short time before, "Harlan was asked how he intended to vote, and he promptly replied that he should vote for Baker and Grant."² Early in the political season, the "Radicals" began to display their convert's name prominently on lists of ex-Union officers and of former members of the third party who had declared for the Republican ticket. By fall, 1868, Harlan himself was vigorously stumping in Kentucky and southern Indiana for Grant.³

¹E. Merton Coulter, The Civil War and Readjustment in Kentucky (Chapel Hill: University of North Carolina Press, 1926), p. 412.

²Frankfort Weekly Commonwealth, March 20, 1868. R. Tarvin Baker was the Republican gubernatorial nominee in 1868 and Ulysses S. Grant was the successful Union officer who was to be chosen as the Republican candidate for president.

³Ibid., July 24, October 2, 23, 1868.

Despite the fact that Kentucky's Republicans were vastly outnumbered-- Harlan described them as a "hopeless minority"--he threw his fullest energy to their support.⁴ His meteoric rise to the leadership of the state party is shown by the fact that he was its undisputed gubernatorial choice a mere three years after he had joined.⁵ Although he was defeated in a hard-fought contest by 36,000 votes, Harlan received 60,000 more votes than the previous Republican gubernatorial candidate. Indeed, the vitality and optimism which he contributed has been credited for giving the Republican Party in Kentucky its first organized existence.⁶

Harlan's reputation in his newly adopted party quickly spread beyond the Commonwealth. Republicans across the nation demanded his services as a campaign orator. He was especially popular in the North, where party leaders hailed him as the epitome of the enlightened southerner who refused to see his region controlled exclusively by a Democratic Party possessed by hostility for the North and self-pity for the South's "lost cause."⁷ He also became a powerful figure in the highest echelons of the national

⁴Louisville Courier Journal, July 6, 1875. Less than a decade after joining, Harlan wrote of his contribution to the Republican Party: "I have perhaps made for that party as many sacrifices of time and labor as any Republican in the South." Letter, Harlan to James B. Beck, October 31, 1877, quoted in Ellwood W. Lewis, "Document: The Appointment of Mr. Justice Harlan," Indiana Law Journal, XXIX (Fall, 1953), 66. Cited hereafter as "Document."

⁵In 1871, Harlan was nominated by the Republicans for United States senator, but he was handily defeated on the first ballot--112 to 20. Lewis Collins, History of Kentucky, revised by Richard H. Collins (Louisville: John P. Morton and Company, 1924), I, 221.

⁶David G. Farrelly, "A Sketch of John Marshall Harlan's Pre-Court Career," Vanderbilt Law Review, X (1956-1957), 222. Cited hereafter as "Harlan's Pre-Court Career."

⁷Louisville Daily Commercial, September 8, 1872; Letter, Harlan to James B. Beck, October 31, 1877, quoted in Lewis, "Document," pp. 62-64.

Republican Party⁸ and in 1872, was even mentioned as a running mate with President Grant in his bid for a second term.⁹ In 1875, Harlan made another competitive, but unsuccessful, race for governor.¹⁰

A year later, he gained Rutherford B. Hayes' political gratitude when he assured his nomination as the Republican nominee for president. Having gone to the party's national convention as floor manager for the candidacy of Benjamin F. Bristow, one of his law partners and Kentucky's favorite son, Harlan led his state delegation to switch to Hayes at a crucial point in the balloting. In 1877 (just nine years after becoming a Republican) after a brief tenure on the controversial electoral commission created to untangle Louisiana's disputed gubernatorial election, Harlan was nominated to the Supreme Court by a grateful Hayes.¹¹ Despite little success on the state level, national Republican politics proved good to Harlan.

When Harlan became a Republican, there were immediate changes in his political and social views. While there is scant evidence of his early utterances as a Republican, he began immediately to support unequivocally

⁸The Harlan Papers at the University of Louisville contain numerous references to his involvement in the affairs of the national Republican Party. For example, William C. Berman and William E. Read, "Papers of the First Justice Harlan at the University of Louisville," American Journal of Legal History, XI (1967), 62, have dated a note from Justice David Davis to Harlan as having been written in 1874. The note's contents suggest that the two had consulted on political matters concerning the Grant administration.

⁹Frankfort Commonwealth, August 11, 1871.

¹⁰Harlan reduced the Democratic plurality of 1871 by 972 votes; still, he was defeated by 35,000 votes. American Annual Cyclopedia and Register of Important Events (New York: D. Appleton and Son, 1876), XV (1875), 417.

¹¹John P. Frank, "The Appointment of Supreme Court Justices: Prestige, Principles, and Politics," Wisconsin Law Review, (1941), 204-10. Cited hereafter as "Appointment of Justices."

the Thirteenth and Fourteenth Amendments and all other aspects of Congressional Reconstruction.¹² In 1877, for instance, when his nomination to the Supreme Court was before the Senate,¹³ Harlan wrote a defense of his integrity as a Republican to United States Senator James B. Beck of Kentucky, who, despite being a Democrat, was a leader in securing Harlan's confirmation to the Court. In that letter to Beck, he recalled that he had supported the War Amendments in 1868: "I canvassed Kentucky and portions of Indiana for Grant and Colfax, defending the action of the Republican Party in passing the Thirteenth and Fourteenth amendments."¹⁴ Similarly, at an election eve rally for Hayes in 1876, Harlan remembered that at his first campaign appearance as a Republican, he had defended the Reconstruction Acts against the Democrats' charge that the Acts reduced the South to a "subject and conquered people."¹⁵

In succeeding campaigns the record of Harlan's unwavering support of Republican Reconstruction is more complete. In 1871, after the ratification

¹²In 1868, there were few Republican newspapers in the state, while the numerous Democratic papers seldom mentioned Harlan's early "Radical" position. During the Senate debate on his confirmation, the state's only Republican daily, the Louisville Commercial (founded in 1869), published excerpts from Harlan's speeches to prove his loyalty to the Republican Party. At that time the editor complained of the paucity of documentation for Harlan's political pronouncements in 1868, but insisted that he had wholeheartedly supported Grant and the Republican platform as far back as that year. "Harlan's Republicanism," Louisville Commercial, November 1, 1877.

¹³Harlan's nomination was vociferously opposed by Republican critics who charged that his "Republicanism" had been both brief and insincere. Frank, "Appointment of Justices," p. 207. The controversy over the nomination raged for six weeks. David G. Farrelly, "John Marshall Harlan's One Day Diary, August 21, 1877: An Interpretation of the Harlan-Bristow Controversy," Filson Club History Quarterly, XXIV (April, 1950), 168.

¹⁴Letter, Harlan to James B. Beck, October 31, 1877, quoted in Lewis, "Document," p. 62.

¹⁵Louisville Commercial, November 5, 1876.

of the Fifteenth Amendment that gave the blacks the right to vote, he declared that the three Reconstruction Amendments were "not only right in themselves, but as the proper sequence of the war and the only means of putting at rest the many disturbing questions that had arisen out of it."¹⁶

On another occasion, at a rally for Indiana's Governor Oliver P. Morton in 1876,¹⁷ Harlan gave a view of the Thirteenth Amendment that was in stark contrast to the one he had held when he had stubbornly fought its ratification in 1865. Ignoring the fact that at that earlier time he had declared that "he would oppose the Amendment if there were not a dozen slaves left,"¹⁸ he explained without trace of embarrassment that at the war's end the Thirteenth Amendment had been drafted because

the first grave question to which the attention of Congress was the condition of the colored people of the south, who had been made free by the war and the proclamation of President Lincoln. It was agreed by loyal men everywhere that they never be remanded to slavery in any form whatever. Any effort to restore the institution of slavery after . . . the war would have . . . met with universal resistance on the part of the loyal people of the country, and would have disgraced the country before the civilized world.¹⁹

Similarly, in a speech in 1875, he praised passage of the Fourteenth

¹⁶ Ibid., May 26, 1871.

¹⁷ During his congressional campaign in 1859, Harlan had vehemently denied a charge that he had written a letter several years before endorsing Morton's gubernatorial campaign (above, p. 16) and in 1864, he had campaigned in Indiana in behalf of Morton's Democratic opponent (above, p. 64.). Interestingly, after becoming a Republican, Harlan and Morton became excellent friends, corresponding regularly on matters of personal and party interest. Harlan Papers, University of Louisville; Lillian Dudley Foulke, Life of Oliver P. Morton (Indianapolis: Bowen-Merrill Company, 1899), II, 515.

¹⁸ Above, pp. 64 and 67.

¹⁹ Typewritten copy of a campaign speech delivered by John Marshall Harlan at Salem, Indiana, on September 18, 1876, Harlan Papers, University of Louisville. Cited hereafter as Harlan Speech.

Amendment, explaining that the freedom of the former slaves was "insecure . . . until a wise Congress" passed the Amendment, "conferring the rights of citizenship on the blacks."²⁰ Throughout his pre-Republican career, John Marshall Harlan had defended the slave system against every attacker and, once slavery had been abolished, had adamantly opposed any proposal to extend legal rights to blacks; surely, Harlan the Republican politician, must have had a short memory.

The abrupt change in Harlan's public attitude toward blacks, after having become a Republican, is further illustrated by his pronouncements on the Civil Rights Bill of 1866, which, according to him, was designed "to protect the colored people in those states where they were denied the right to testify in courts of justice because of their color."²¹ On one occasion he cleverly argued that opponents of the bill favored the absurd legal situation in which a white man could walk into a black church, shoot the preacher in front of the congregation, and then be allowed to go free unless some white man could testify to having seen the assailant commit the crime.²²

During his first gubernatorial campaign in 1871, Harlan drew on the highest moral authority to denounce Kentucky's failure to comply with the

²⁰ Louisville Courier-Journal, July 5, 1875. In his speeches, the transformed Harlan acknowledged that some excesses had accompanied Republican efforts to reconstruct the South, but he insisted that the program had been justified nevertheless because the "Rebel" states had been in such a condition of physical, political, and social disarray that the firm arm of the federal government had been required to restore order in those states. In 1875 for instance, he excoriated the Democrats of the South for their persistent interference with positive Reconstruction. Insisting that their resistance allowed petty adventurers to capitalize on the resulting confusion, he bitterly complained that "whatever was done by Congress toward the restoration of government in the rebel states, the Democratic leaders denounced as despotism, to which no free people should submit." Louisville Commercial, November 5, 1875. Louisville Courier-Journal, July 5, 1875.

²¹ Harlan Speech, September 18, 1876, Harlan Papers, University of Louisville.

²² Louisville Commercial, June 29, 1875.

section of the Civil Rights Bill of 1866 that admitted black testimony to the courts. He said:

of all the civilized world, Kentucky stands alone in its denial to one class of her citizens of admission to the courts of justice. Humanity, civilization, and Christianity cries out against this monstrous injustice.²³

Two months later, on one of the few occasions that Harlan warned of the danger of racial strife if injustice against the black man were not corrected, he pleaded that further denial to the Negro of the right to testify in the courts was "directly promotive of outrage."²⁴ On the same occasion, he praised the passage of the Civil Rights Bill of 1871 that placed in the federal courts the cases of all persons denied their legal rights in the states. Harlan declared that

thousands of gallant men in the state of Kentucky owe their lives to that bill, and to the fact that it opened the doors of the Federal courts for the protection of their lives, their liberty, and their property.²⁵

Harlan, the man who had bitterly branded Congressional Reconstruction as blatant federal usurpation later sought refuge from Confederate reprisals in that legislation.²⁶

In 1875, a fourth Civil Rights Act, this one assuring blacks equal access to public accommodations, was passed by Congress shortly before

²³Ibid., May 24, 1871.

²⁴Ibid., July 29, 1871.

²⁵Ibid., July, 1871, quoted in Lewis, "Document," p. 62. In 1873, as a result of the passage of that bill, Harlan was appointed by the United States Attorney General to assist in the prosecution of a back-log of violators of the Enforcement Acts which had been designed to implement the civil rights legislation that had been enacted. Telegram, George H. Williams, United States Attorney General, to Harlan, February 11, 1873, Harlan Papers, University of Louisville.

²⁶Above, pp. 90-93.

Harlan made his second bid for the governorship. Throughout the campaign, his opponents charged that the new law granted privileges to the blacks that were denied to whites. He answered that the legislation sought only to secure the same services for blacks at restaurants, hotels, and theaters that were already being enjoyed by whites. Interestingly, Harlan equivocated in his support of "Radical" Reconstruction for the first time since he had joined the Republicans: he reminded his audience that a Republican circuit judge had recently declared the public accommodations law unconstitutional. Obviously relieved at being able to free himself of this politically embarrassing issue, Harlan confidently assured his white audience that subsequent to the judge's decision, the fourth Civil Rights Act had "ceased to have a practical importance in this state."²⁷

Harlan's courthouse audiences, however, ignored his attempt to escape responsibility for the public accommodations legislation and continued to charge him with showing favoritism to blacks. On one occasion a heckler rose to question Harlan about a rumor that he had eaten dinner beside the famous black abolitionist Frederick Douglass while the pair were on a Republican campaign tour in Maine. Harlan admitted that the rumor was true, praised Douglass as one of the most articulate men he had ever heard and then, turning courageously on the heckler, retorted:

I not only do not apologize for what I did, but frankly say that I would rather eat dinner any day by the side of Douglass than to eat with the fellow across the way who sought to entrap me by a question which has nothing to do with the contest!²⁸

²⁷Louisville Courier-Journal, July 5, 6, 8, 1875.

²⁸ Harlan Autobiographical Memo (undated) quoted in Allan F. Westin, "Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," Yale Law Journal, LXVI (April, 1957), 664-665. Cited hereafter as "Constitutional Rights."

Though Harlan withheld full endorsement from the fourth Civil Rights Act, his commitment after joining the Republican Party to full citizenship for blacks was a continual target for his opponents.

In response to those attacks, Harlan became skilled at rationalizing his new position. In a speech delivered during his second campaign for governor in 1875, he admitted to his Democratic critics that during his pre-Republican days, he had feared the social and legal consequences of emancipation: "Fifteen years ago if anyone had said the Negroes would be free, they would predict a reign of violence, rapine, and blood."²⁹ Insisting that his fear had been proved to be unfounded by the black man's responsible conduct since emancipation, Harlan went on to define the concept on which he based his advocacy of full civil rights for Negroes. He said: "The great doctrine of equality before the law, without regard to race or color should be heartily recognized throughout the land."³⁰ Harlan denied, however, the Democratic charge that his support of the concept of equality before the law meant that he favored social equality between blacks and whites. To his gubernatorial opponent in 1871, he retorted:

What do you mean by this cry of Negro equality? Do you suppose any law of the state can regulate social intercourse of the citizen? The Negro . . . is your equal before the law . . . but he is not equal socially. We do not declare as the Democratic orators well know, in favor of social equality. Social equality can never exist between the two races in Kentucky.³¹

Harlan--the man who had so passionately resisted freedom and civil rights for blacks--now appealed to the deepest sources of common humanity

²⁹Louisville Commercial, June 27, 1875.

³⁰Ibid., June 29, 1871. Louisville Courier-Journal, June 29, 1875.

³¹Louisville Commercial, July 29, 1871.

in support of equality before the law. He reasoned: "The Negroes love their wives and children as well as we do ours. They asked only the same rights as other men . . . to live, and support, and protect their families."³² He also compounded a peculiar blend of religious and common-sense notions of race relations to justify his demand for legal equality. He declared:

They Negroes have been created as we have been in the image of our own Maker, and every dictate of humanity, to say nothing of self interest, imperatively demands that political organizations shall cease to keep alive the prejudices and passions which grew out of the abolition of slavery.

Identifying the Democratic Party as that political organization which was needlessly arousing racial and sectional animosities by its recalcitrance, Harlan declared: "A citizen who proposes to deny them Negroes such rights is no friend of the law, is an enemy to our free institutions, and no friend of peace."³³ Harlan undoubtedly believed in the superiority of the white race and the need for his race to dominate the nation's political institutions, yet he tempered his posture with an awareness that his feelings of white superiority were derived from a pride in one's group that was common to all races. In 1875, he was reported to have said: "We all have prejudices, the white man liked his race better than the Black race. The black man loved their own better than the white."³⁴ It was on this belief in the fundamental dissimilarity of interests between the two races that Harlan based his consistent opposition to integrated schools.

³² Louisville Commercial, June 29, 1875.

³³ Louisville Courier-Journal, July 5, 1875.

³⁴ Louisville Commercial, July 29, 1871.

He insisted, however, that racial pride and separatism need not be a source of strife between blacks and whites. On another occasion in 1875, he optimistically predicted that under a system that applied the law equally to all its citizens "the white and black race can move along in this free land of ours, each cherishing, if you please, the prejudices of race, without at all interfering with the just rights of the other."³⁶ In 1877, when Harlan's nomination to the Court was being debated, James Speed of Louisville, a member of the United States House of Representatives and one of Harlan's close Republican friends, cogently described the metamorphosis in racial attitudes that Harlan underwent after joining the Republican Party:

It is due to General Harlan to say that eight or ten years ago, he [Harlan] sloughed off his old pro-slavery skin and has since been an earnest and open and able advocate for what he had thought wrong or inexpedient.³⁷

Indeed, for whatever reasons, Harlan had come a long way since his opposition to "Niggerism" in 1865.

One of the highest prices that Harlan paid for becoming a Republican and "sloughing off his old views" was that he laid himself wide open to the charge of inconsistency. His opponents remembered well his earlier defense of slavery and his opposition to Reconstruction, and had ready access to newspaper files from which damaging quotations could be drawn from old speeches. As an active Republican speaker, he grew accustomed to meeting opponents armed and ready with newspaper clippings proving that he was a political "chameleon" or "weathercock," who adapted his principles to suit the situation. In most cases, Harlan could do nothing but openly acknowledge

³⁶Louisville Courier-Journal, July 5, 1875.

³⁷Letter, James Speed to George F. Edmunds, quoted in Frank, "Appointment of Justices," pp. 208-09.

the accuracy of the contradictory position attributed to him and then attempt to repent of the earlier stand without appearing weak and indecisive.³⁸ To an audience that clearly recalled his pre-Republican campaigns, for example, he admitted that he had changed his mind on slavery, and then explained:

Now fellow citizens, probably some of you will say that I have been inconsistent on the subject of slavery. I grant it. I am here today before this audience that once knew my sentiments on that subject, to say that I regret that I ever advocated the sentiments which I expressed before you in 1859, and there is no man on this continent, . . . that rejoices more than I do at the extinction of slavery.³⁹

At a rally in Elizabethtown in 1875, Harlan mixed honesty with folksy good sense to answer his opponent's charge that he had been a politician without conviction when he changed from a strong pro-slavery advocate into a champion of full citizenship for blacks. He said:

Who in the sound of my voice today can truthfully say that he now holds opinions concerning that race which he held fifteen years ago? I was reared under the shadow of the institution of slavery; there was a time in my life when I was like all the rest of you, a supporter of that institution; but I say today, without any reservations, . . . that . . . no more perfect despotism ever existed ⁴⁰over the human mind than the institution of African slavery.

Willing to admit that he had changed his mind, Harlan refused, on the other hand, to be branded with inordinately erratic sentiments because he knew quite well that most Kentuckians--even his Democratic opponents

³⁸Louisville Courier-Journal, July 28, 1871; Cincinnati Gazette, June 3, 1871, quoted in Hartz, "Harlan in Kentucky," p. 34.

³⁹Louisville Commercial, May 26, 1871. Above, pp.

⁴⁰Louisville Courier-Journal, July 6, 1875.

who branded him with inconsistency--had modified their attitudes toward slavery during the revolutionary times through which the nation had passed.⁴¹

Harlan gave the most cogent rationalization of his political inconsistency when he expressed his regret to a largely German audience in Louisville for having been an anti-immigrant "Know-Nothing." He said: "I have lived long enough to say tonight, that I committed a great error in becoming a member of the American party in 1855, . . . they say I am inconsistent. My friends, I would rather be right than consistent."⁴² Although on that occasion his acknowledgement of repentance and conversion appears to have received a sympathetic hearing, his opponents generally made political capital of his inconsistency. Henry Watterson epitomized the Democratic view of Harlan's political shifting when he sarcastically editorialized in the Louisville Courier-Journal: "No one can laugh off inconsistency better than he, for his youth, the passions of the time, for which he was not responsible, are always at hand to excuse forever positions that to his present view are incorrect."⁴³

The accuracy of the Democratic charge of inconsistency is undeniable. While it is true that many Kentuckians altered their political positions during the period of extreme social change that accompanied the Civil War, John Marshall Harlan's political transformation was unique both because of the degree to which his earlier views were altered and the publicity that his new views were given in his role as a highly articulate spokesman

⁴¹As early as 1870, for example, a significant number of Progressive Democrats in the state--Henry Watterson being their most articulate spokesman--urged the party to abandon its futile efforts to repeal the Reconstruction Amendments. Hambleton Tapp, "Three Decades of Kentucky Politics, 1870-1890" (Unpublished Ph. D. dissertation, Department of History, University of Kentucky, 1950), pp. 47-51.

⁴²Louisville Commercial, May 21, 1871.

⁴³Louisville Courier-Journal, July 7, 1875.

for Kentucky Republicans. Overnight, he disavowed recently-held conservative principles and began making speeches as a "Radical." In addition, he seldom bothered to explain or justify his earlier views; instead, he usually first declared that his earlier stand had been unequivocally wrong and then undergirded his new Republican position with strong religious and ethical sanctions. Thus, in Harlan's absolute political rhetoric, legal equality for blacks became not just a matter of political expediency, but a question of "right." It is the public and absolute character of his utterances, combined with the abrupt and extreme change in his fundamental interpretative stance, that makes a comparison of his old and new views so filled with startling contrasts.

CHAPTER VI

CONCLUSION

John Marshall Harlan's willingness in 1868 to abandon his opposition to full citizenship for black men and to become, instead, an articulate spokesman for Republican Reconstruction was above all the culmination of a series of maneuvers spanning fifteen years that were intended to advance his political career. He was an intensely ambitious man who thrived on the recognition and responsibility that public office brought; throughout his pre-Republican years, he had become adept at changing his party on substantive issues in order to promote the return of the ex-Whigs to power. As a member of the American Party early in his career, for example, Harlan and his "Know-Nothing" colleagues briefly gained power with an appeal to the dangers posed by foreigners, but these politicians dropped that issue as quickly as they had adopted it when they became convinced that Kentuckians' traditional fear of foreigners had been eclipsed by fear of the northern attacks on slavery. In 1859, he tried to outdo his Democratic opponent with impassioned calls for the expansion of the rights of slave owners. While the strong sentiments that Harlan expressed against immigrants, or in favor of an expansion of the slave system were not devoid of some conviction, they appear to have been primarily motivated by his desire to win votes.

As the nation moved toward Civil War, he discovered the key to consistent political fortune by standing with the majority of Kentuckians in favor of preserving the national government without altering the social

and political structure of the southern states. Although his position did not prevail nationally during the war years, Kentuckians confirmed Harlan's centrist position by electing him--after eighteen months of distinguished service in the Union Army--state attorney general in 1863, and by voting overwhelmingly for his presidential preference in 1864, the Democrat John B. McClellan. Even after the coalition of Kentucky's Unionists became severely fragmented, Harlan continued to display skill at accurately reading the political pulse of the state when in 1865 he opposed ratification of the Thirteenth Amendment. He entered the postwar years a bitter opponent of Republican efforts to reconstruct the defeated South and apparently was prepared to co-operate even with ex-Confederates so long as his Conservative Unionist faction could dominate the coalition.

Harlan's best efforts to secure his political future were spoiled, however, by the rapid rise of an independent pro-southern Democratic faction that quickly captured the imagination of Kentuckians by combining an attack on Republican Reconstruction with a rejection of the leadership of Harlan and any other Unionist who claimed credit for the Union victory. After Harlan tried unsuccessfully to cooperate with the new, highly successful pro-southern Democrats, he turned first to a coalition with the "Radicals," and then to the creation of an independent conservative party in search of a formula that would produce political victory. When these measures failed, Harlan, who by that time had become adept at adjusting both his party affiliation and his stand on issues in order to win elections, joined the Republican Party in a desperate attempt to salvage a once-successful political career.

Evidence that Harlan's ultimate political maneuver was based on the hope that membership in the Republican Party--despite that party's powerlessness in Kentucky--could serve his political ambition is provided by

a letter that he wrote only two years after he had become a "Radical," to his law partner. In that letter, Harlan urged his partner, Benjamin F. Bristow (who had already achieved a national reputation in the party), to accept an appointment to the United States Supreme Court if one were offered. Indirectly revealing something of his own ambition, Harlan wrote:

I know of no more desirable position than that [judgeship]
 . . . especially if the salary should be increased to
 \$10,000 It lifts a man high above the
 atmosphere in which most public men move, and enables
 him to become in every sense an independent man, with
 an opportunity to make a record that will be
 remembered long after he is gone.

In the same letter, Harlan also acknowledged that he, himself, had ambitions for political office if the pay were adequate enough to allow him to leave his law practice.¹ Aware that his persistent Unionism excluded him from any immediate prospect of winning an election in Kentucky, it is probable that he hoped that a strong national Republican Party could reward loyalty with federal patronage jobs until that distant time when the state party would be accepted by larger numbers of voters.² Despite the Republican Party's minority status in the state and his lack of personal wealth, Harlan did indeed find his adopted party a place where he could fulfill his highest political ambition.

¹Letter, Harlan to Benjamin F. Bristow, November 16, 1870, quoted in Allan F. Westin, "The First Justice Harlan: A Self-Portrait from his Private Papers," Kentucky Law Journal, XLVI (Spring, 1958), 340. Cited hereafter as "Self-Portrait."

²It will be recalled that in 1872, Harlan had held a temporary patronage appointment from the United States attorney general's office. Above, p. 102. The Louisville Courier-Journal, May 13, 1875, satirically described the delegates to the Republican state convention that year as all holders of federal patronage jobs. The newspaper listed internal revenue agents, postmasters, judges, attorneys, marshalls, and whiskey gaugers as the job categories represented.

While a student of Harlan's pre-Republican career reveals a political figure strongly motivated by personal ambition--even, if necessary, at the sacrifice of principle--it is not surprising that he attempted to justify his career of political shifting upon some consistent, high principle: a singular desire to oppose the Democratic Party. Being careful to admit, and indeed being unable to deny, that he supported the Democrat McClellan in 1864,³ Harlan proudly stated that in every other election contest involving affiliation with several political parties and coalitions he had voted with the side that had opposed the Democrats.⁴ As we have seen, he rooted his antipathy toward the Democratic Party in the teachings of his father, who "saw very little which was good in the Democratic party,"⁵ and of "old Whig" patriarchs like Henry Clay and John J. Crittenden.⁶

Harlan understood his incompatibility with Democrats to be rooted in a fundamental difference of opinion over the relationship between the national and state governments. In statements of his political philosophy justifying his decision to become a Republican, he explained that from the earliest days of his political career he had recognized the United States Constitution and laws as the supreme law of the land and had opposed the penchant of Democrats for elevating the authority of the state over that of the nation. He wrote in his political memoir: "I was an intense

³Interestingly, the fact that Harlan had opposed Lincoln in 1864 was one of the main reasons his nomination to the Supreme Court was resisted by some Republican Senators. John S. Goff, "Justice John Marshall Harlan of Kentucky," Register of the Kentucky Historical Society, LV (April, 1957), 118; Above,

⁴Above, p.46. 53, n.12; Louisville Courier-Journal, July 6, 1875.

⁵"Interview with John Marshall Harlan," Washington Evening Star, December 22, 1906, Harlan Papers, University of Louisville.

⁶Louisville Courier-Journal, July 5, 1875; E. Merton Coulter, The Civil War and Readjustment in Kentucky (Chapel Hill: University of North Carolina Press, 1926), pp. 4-5. Cited hereafter as Civil War.

Nationalist," whereas, the "great majority of the Democrats in Kentucky believed that their first allegiance was to the state."⁷ It was this Democratic precept, he argued, that paved the way for secession.⁸ Harlan said that in 1868, when the collapse of the third party reduced his party options to two, he chose the Republicans mainly because of his affinity for their nationalist political philosophy and the ability of their party to serve as a vehicle for his undiminished opposition to the Democratic Party.⁹

His analysis, however, of the dominant motivation of his pre-Republican political career is misleading. He exaggerated the consistency with which he claimed to hold his nationalist political views. While Harlan obviously found secession repugnant and was generally suspicious of any party without a national constituency, he could, if the situation required it, use the states rights argument--a Democratic favorite--to win political support.¹⁰ In addition, his boast that he had voted against the Democrats in every election except one should be seen as a gross fabrication designed to prove his doctrinal purity to Republicans who questioned his faithfulness to their cause. The truth is that Harlan was much more willing to work with Democrats than he was willing to remember. In addition

⁷Harlan Autobiographical Memo (undated) quoted in Allan F. Westin, "Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," Yale Law Journal, LXVI (April, 1957), 656. Cited hereafter as "Constitutional Rights."

⁸"Interview with John Marshall Harlan, Washington Evening Star, December 22, 1906, Harlan Papers, University of Louisville.

⁹The Louisville Daily Democrat, October 1, 1868, caustically explained why Harlan became a Republican instead of following most of his Conservative friends into the Democratic Party. Harlan, it concluded, was a life-long hater of the Democratic Party, . . . General Harlan must needs find a party whereby to ventilate his spleen against Democracy."

¹⁰Above, pp. 64-66.

to his support of McClellan in 1864, Harlan worked in an effective coalition with "Union" or "War Democrats" throughout the war, and for that matter, he united in 1865 with southern Democrats to oppose emancipation. In 1867, the third party--of which he was a principal organizer--claimed to be Kentucky's "true" Democratic party by virtue of its claim to official recognition by the national Democratic organization. While he later emphasized that the new party was "Union" and "national," it appears that Harlan conveniently overlooked the fact that most of the people in the party also understood it to be "Democratic."¹¹ Harlan's antipathy to Democrats was, therefore, hardly as clear-cut and consistent as he later insisted.

Though Harlan's simplistic explanation of his purposes during his pre-"Radical" days is untenable, it must not be assumed that he was motivated solely by political opportunism. During the turbulent war years, Harlan was a strong nationalist who did not waver in his commitment to the Union: in 1861, he found secession unacceptable; he served proudly in the federal Army; and following his resignation from the service, he continued to sustain the effort to defeat the Confederacy. Thus, soon after Appomattox, Harlan began to fear that the dramatic rise of an unrepentant southern Democratic Party in Kentucky would encourage acts of violence by Confederate sympathizers against those who refused to view the Union victory as an event to regret or service in the Union Army as a badge of shame. Proud of

¹¹Louisville Courier-Journal, July 6, 1875; Above, p. 87, n. 57.

his military service, Harlan was chafed, oppressed, and politically frustrated by the pro-Confederate mood in Kentucky.¹²

Several months before he joined the Republican Party, Harlan was clearly fearful of reprisals against Union men by Confederate "irreconcilables."¹³ He looked to the federal government as the only defense for the Unionists in the state. Significantly, his first speeches as a Republican attacked that portion of the Democratic platform of 1868 that urged resistance to Congressional Reconstruction. Such a proposal, in his opinion fostered a mood of disrespect for established law and government.¹⁴ It appears, therefore, that Harlan was forced to abandon any hope of acceptance by the dominant party in the state because of his persistent Unionism--a position maintained despite his bitter opposition to the political and social changes forced upon the defeated South by the "Radical" Republicans.

¹²Two years after becoming a Republican, Harlan wrote his friend and law partner, Bristow: "I have sometimes thought that if I could, I would leave this rebel state." Letter, Harlan to Benjamin F. Bristow, November 16, 1870, quoted in Westin "Self-Portrait," p. 370. To a campaign audience in Louisville in 1876, he elaborated on his discomfiture with southern Democratic rule: "they denounce all as traitors to the South, who, living upon Southern soil, dare advocate . . . the Republican party. They are still engaged . . . in making it hot for every man who does not bow his knee to the Southern Democracy." Louisville Commercial, November 5, 1876.

¹³David G. Farrelly, "A Sketch of John Marshall Harlan's Pre-Court Career," Vanderbilt Law Review, X (1956-1957), 223. Coulter, Civil War, pp. 327-29, 359-63, 392-93, 414-15, describes both the "Rebel" mood of the state in the years following the war and the incidents of lawlessness against Union men.

¹⁴Louisville Daily Democrat, October 6, 1868; Typewritten copy of a campaign speech delivered by John Marshall Harlan at Salem, Indiana, on September 18, 1876, Harlan Papers, University of Louisville. Cited hereafter as Harlan Speech. Louisville Courier-Journal, July 5, 1875; Louisville Commercial, May 24, July 28, 29, 1871; June 24, 1875. Harlan later commented: "What wonder, therefore, that there arose through the South murderous groups of Klu Klux, who spared neither race, age, nor sex in the persecution of their diabolical schemes against the liberties of citizens." Louisville Commercial, November 5, 1876.

It is Harlan's effective exclusion from Kentucky's triumphant southern Democratic Party that has prompted the view that he became a Republican almost by default--a choice that he drifted to rather than made freely. This interpretation suggests that Harlan was schooled in a tradition that required every man to have a political party, therefore, following his ostracism from the Democrats and the failure of his efforts to form a viable third party, he had no other choice but to become a Republican. The same view has also suggested that Harlan's involvement in the religious controversy that rent his Presbyterian denomination made his decision to become a "Radical" somewhat easier.¹⁵

Another factor making easier Harlan's decision to join the Republican Party was the fact that he moved to Louisville in 1867--a move which was motivated in part by his fear of being ostracized from Frankfort's legal and political coterie by the ruling southern Democratic clique. Even in the state's largest city, which had strong commercial and political contacts with the North, Harlan hesitated to risk the stigma which being a Republican could bring. But while Louisville was by no means a Republican city, membership in that party could provide a Union man more personal and professional contacts than perhaps anywhere else in the

¹⁵Allan F. Westin, "Constitutional Rights," pp. 654-55, has noted that much of the leadership of both Presbyterian factions consisted of men who were also active in the state's southern Democratic or Republican Parties. It will be recalled that as early as 1866, Harlan, as legal counsel for the Unionist faction, had worked closely with one of Kentucky's most adamant "Radicals," Robert J. Breckinridge. When Harlan moved to Louisville in 1867, his unabated activity in the denominational controversy fostered friendships with several of the city's leading Republicans. Westin has observed that "the result of these religious conflicts was to add the stain of heresy . . . to the Southern Democratic cause and to make allegiance with the Southern leaders impossible," p. 655, Harlan Papers, University of Louisville; Above, pp. 83-85.

state.¹⁶ Therefore in Louisville the temptation to become a Republican was more enticing for the politically frustrated but ambitious Harlan than it would have been had he lived elsewhere in Kentucky.

Another factor that has been given to explain Harlan's conversion to Republicanism is that the state's "Radicals" had recently taken a moderate turn by designating Ulysses S. Grant as their choice for the presidential nomination of 1868.¹⁷ This interpretation maintains that Harlan found the Republican Party a more acceptable political option because Grant had demonstrated a spirit of reconciliation at the end of the Civil War and had, subsequently, remained the non-political war hero rather than becoming associated with vindictive Reconstruction.¹⁸ The suggestion that Harlan joined the party as it moved into a moderate phase should be counter-balanced, by the fact that neither the state nor the national Republican platforms in 1868 displayed any evidence that the party had mellowed in its support of "Radical" Reconstruction. To the contrary, the state platform of that year clearly stated the party's determination not to compromise its support of Reconstruction in order to appease the "weak-hearted."¹⁹ In addition, Kentucky Republicans began to

¹⁶The Republican daily, Louisville Commercial, December 29, 1869, began publication with the conviction that Louisville needed a voice of the political party that "has secured control of the national councils." In addition, its readers were reminded of the necessity of establishing business contacts with the burgeoning commercial markets in the North. Westin, "Constitutional Rights," p. 653.

¹⁷Westin, "Self-Portrait," p. 322; Coulter, Civil War, p. 413.

¹⁸Indeed after joining the Republicans, Harlan depicted Grant as the magnanimous victor who kept Robert E. Lee from being hung by the vindictive Democrat, Andrew Johnson. Harlan Speech, September 18, 1876, Harlan Papers, University of Louisville.

¹⁹American Annual Cyclopedia and Register of Important Events, (New York: D. Appleton and Company, 1871), VIII (1868), 406. Coulter, Civil War, p. 413. Similarly, there is no indication in the resolutions adopted at the Republican national convention that the party had grown more moderate. David Donald and James G. Randall, The Civil War and Reconstruction, 2nd ed. revised (Boston: D. C. Heath and Company, 1961), p. 638.

support without apology the Fourteenth Amendment soon after Harlan joined the party. The evidence, therefore, does not indicate that Republicans--either in Kentucky or nationally--had become more moderate in their policies; it is probable, however, that Grant's leadership did impart a less extreme image to the party. This image could have served as an inducement for Harlan to make the move to Republicanism.²⁰

In view of the dynamic personal and political factors involved, it seems clear that John Marshall Harlan's decision to join the "Radical" Republican Party and to defend that party's program of Reconstruction for the South was not the result of a single motive or consideration. While Harlan's entrance into the Republican Party was made easier by such peripheral factors as his decision to move to Louisville, Grant's candidacy for the party's presidential nomination, and his acquaintance with "Radicals" in the court fight over Presbyterian property, the decision was primarily a desperate attempt by a politician to revive a career that had been destroyed by the domination of Kentucky politics by a Confederate-sympathizing Democratic Party. It is ironic, therefore, that the conditions that prevented Harlan from following the majority of the state's Conservative Unionists into the Democratic Party and forced him to join the Republicans were not the result of his political opportunism, but of his refusal to renounce his Unionist principles.

Throughout his pre-Republican career, two strong commitments--the slave system and the national government--competed for Harlan's loyalty.

²⁰There is some evidence that Grant attempted to broaden the support of the party to embrace the Conservative Unionists. In 1869, Bristow, a "radical" Unionist from the earliest days, considered leaving the Republican Party because Grant had overlooked qualified Republicans for patronage positions in favor of men who had been Union Democrats. Letter, Benjamin F. Bristow to Mrs. E. E. Bristow, August 10, 1869, photostatic copy, Benjamin F. Bristow Papers, Gill Collection, University of Kentucky, Lexington, Kentucky.

With his support of slavery firmly anchored in a defense of private property rights, mixed with a seldom-spoken fear of racial upheaval if the slaves were freed, Harlan had few qualms about the essential righteousness of the "southern way of life." Solely on the basis of his attitude toward slavery, he would have been likely recruit for the Confederate Army. On the other hand, however, he had been reared in a strong nationalist political tradition, and when the Civil War broke out, Harlan stood for the preservation of the Union without abandoning his loyalty to the slave system--a position, it will be recalled, that was very popular among Kentucky voters. Thus, Harlan began the war immersed in the tension of his two fundamental political commitments--loyalty to the slave system and righteousness of the Union war effort. Thus, his loyalty to the Unionist principle led to his exclusion from the mainstream of Kentucky political life. Principle had denied the politician par excellence a claim to shape Kentucky's postwar politics; thus, responsibility belonged increasingly to the southern Democratic Party that was dominated by ex-Confederates. After a series of unsuccessful attempts to find a viable political center (including an effort at the formation of a third party), it was apparent to Harlan that his only hope of a political future lay in one of the political extremes--"Radical" Republican or southern Democrat. Having witnessed the degradation of the Union cause by the proud, Confederate "irreconcilables," becoming increasingly convinced that the social revolution in the status of the blacks as codified in Reconstruction law and legislation was irreversible, and probably convinced also that his Unionism had destroyed any possibility of a career within the Democratic Party, Harlan chose--and had no political option but to choose to join--the "Radicals." It is this pre-eminent political decision, made necessary by his determined loyalty to the Union as a matter of principle, that goes farthest in explaining the radical transformation of a Southerner.

Once this unabashed Union man, who had been effectively ostracized from the sectional Democratic Party, made his decision, he became a champion of the very causes he had earlier opposed. Not surprisingly, soon after his decision, he would defend "Radical" Reconstruction with a strong conservative defense of the immutable nature of law. John Marshall Harlan had come full-circle. His Unionism and his ambition were the only two constants in a pre-court career otherwise marked by numerous changes in party and positions.

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