

Right Star Rising: A New Politics, 1974–1980

By Laura Kalman

W.W. Norton & Co., New York, NY, 2010. 473 pages, \$27.95.

REVIEWED BY CHRISTOPHER FAILLE

Laura Kalman's *Right Star Rising* is a narrative political history of the period 1974 to 1980, a period that began with the resignation of Richard Nixon and ended with the election of Ronald Reagan. How did we get from one to the other? Kalman works from the premise that a movement in the other direction might reasonably have been expected: Nixon's fall might have set off a leftward shift. Because it plainly did not, this book begins in wonder.

Kalman's answer to that question is found in the concise statement she provides in the epilogue: the left and the center were outmaneuvered. "It would be ... obtuse to deny that during the middle and late 1970s conservatives more effectively used conflicts over race, rights, religion, taxes, the market, the family, national security, the Middle East, détente, and American captivity and decline than [did] moderates or liberals."

In the story she tells on the way to that conclusion, the fascinating figure of Nelson Rockefeller, Gerald Ford's vice president, plays a large part. Indeed, he plays a part large enough to deserve a back-story, which Kalman neglects to bestow.

Nelson Rockefeller

It was in the second week of Gerald Ford's presidency, in August 1974, that Ford nominated Nelson Rockefeller as his vice president. Kalman tells us little about Rockefeller's life before that moment, but she does describe him as a "charismatic politician," and she mentions the concern on the part of members of Ford's staff that Rockefeller would "overshadow the president." Ford had no such concerns, because he was "secure in himself."

Why should anyone have had such

concerns? Here we can help Kalman by providing some context. Theodore White's classic book, *The Making of the President, 1960*, tells us that Nelson Rockefeller pressed the Republican Party that year at its convention to accept platform language supporting the civil rights movement—in particular, the blacks who were conducting sit-down strikes at the lunch counters of pharmacies in Southern cities. Rockefeller prevailed on this point. The platform as approved spoke of "the constitutional right to peaceable assembly to protest discrimination by private business establishments" and praised "the action of the businessmen who have abandoned discriminatory practices in retail establishments."

A cynic could see that as a ploy to exploit the well-known sectional divide of the opposition party. But White is not cynical about this. Indeed, he gets a bit misty-eyed about Rockefeller on this point, writing that he "withdrew from the field of battle with honor, in full control of his own state political system and delegates, and with the knowledge that in the platform there were wordings ... that would permit Richard M. Nixon to campaign on a forward Republican position if he so chose. But it was up to Mr. Nixon."

Four years later, Nelson Rockefeller was the most determined intraparty opponent of the nomination of Barry Goldwater, whom he called an "extremist." It was, accordingly, as much against Rockefeller as against any other person that Goldwater directed his famous words at the Republican Party convention in 1964: "Extremism in the defense of liberty is no vice. ... [M]oderation in the pursuit of justice is no virtue."

So, if Goldwater represented the "right," circa 1964, Rockefeller was not there. On the other hand, no sensible observer will see Rockefeller as a raging leftist. Indeed, his prominence in national politics would have been unthinkable but for the wealth accumulated by his grandfather, John D. Rockefeller, the paradigm of a pernicious, petroleum-engorged, proletarian-oppressing plutocrat. The left ("old"

or "new") could never warm up to anyone on that family tree.

Further, the draconian response by the New York State Police to the riot at Attica Prison in 1971—a response that left 39 people dead and for which Governor Rockefeller was, of course, responsible—created in some quarters an image of Rockefeller as a gendarme recklessly or sadistically twirling his nightstick while strutting rather than walking his beat.

Gerald Ford

The back-story supplied, we now rejoin Kalman. She tells us that the Rockefeller nomination inflamed the right, especially that portion of it that had taken to calling itself the "new right" at this time. The board of directors of the American Conservative Union met on Sept. 22, 1974, and discussed the nomination. Kalman, referring to the minutes of this meeting, says that the participants decided "to discredit Rocky and show the rank and file Republicans that he and Ford are not conservatives." She also quotes the direct-mail maven Richard Viguerie, who referred to Rockefeller as "high-flying [and] wild-spending."

What did Ford do about the tempest raised on his right by this selection? He caved in. At the end of October 1975, he informed the public that Rockefeller would not be his running mate in the upcoming election. He presumably meant to mollify those whom Rockefeller had annoyed. Indeed, he later expressed regret about this decision, calling it "one of the few cowardly things I did in my life."

In fact, it was part of a hastily arranged reshuffling. Ford also pushed Secretary of Defense James Schlesinger out of the cabinet and replaced him with Donald Rumsfeld. Schlesinger had been skeptical of détente with the Soviet Union, and this had put him at odds with Secretary of State Henry Kissinger (a longtime Rockefeller associate). The conservative publication *Human Events* said that the effect of the appointment of the unknown Rumsfeld "has only fueled the concern of those who fear that ... Kissinger

can now pursue his détente policies unchecked.”

So Ford caved in on Rockefeller, chose Bob Dole as his running mate, and found that the cave-in achieved nothing. Ronald Reagan announced his own campaign for the Republican nomination for the presidency soon thereafter, and the people who had been unhappy with Ford with respect to Rockefeller were still unhappy with Ford, now with respect to Rumsfeld and a hundred other matters, and they rallied around the new hope from Hollywood.

Once, the phrase “moderate Republican” meant ... Nelson Rockefeller. Whether one admired his policies as governor of New York or not (and I said something unflattering about one of those policies in my review of *Confidence Game* in the August 2010 issue of *The Federal Lawyer*), Rockefeller did offer a principled position that was neither left nor right in any stereotypical sense. But, after he had been, essentially, dismissed in October 1975, “moderate Republican” came to mean Gerald Ford: a wishy-washy desire to seem moderate, as long as that stance didn’t upset the right too much. “Moderate Republican” has meant roughly that ever since, which is why there are so few samples of the species left.

Much Else

Right Star Rising contains a great deal more, notably a fine discussion of the strains that arguments over “affirmative action” or “quota systems” placed upon the Democratic Party’s coalition and on any possibility of a national move leftward. “Once Jews, African Americans, and workers had viewed each other as fellow outsiders and had worked together for equality and social justice,” Kalman writes. “Their alliance had hit rocky spots before, but disagreements over affirmative action threatened to destroy it” by the time the Supreme Court prepared to hear the *Bakke* case in 1977.

Kalman is straightforward in acknowledging that she is an old-fashioned New Deal liberal herself, and she regrets the broad developments of the middle and late 1970s that she chronicles. Her analysis is not, so far as

I can tell, vitiated by that regret, and I recommend this book for all of those (like myself) who were young and foolish in the period she describes. I graduated from high school around the time that Ford was edging Reagan out for the 1976 nomination and Jimmy Carter was triumphing over a much wider field, and one naturally tends to regard the events of that time in one’s life as pivotal, epochal, and so forth. So my own bias inclines me to endorse this book. Those who share the one will enjoy the other. **TFL**

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At the Edge of the Precipice: Henry Clay and the Compromise that Saved the Union

By Robert V. Remini

Basic Book, New York, NY, 2010. 200 pages, \$24.00.

REVIEWED BY NATHAN BROOKS

It is often said that America is a nation born of compromises, with our Constitution itself the result of high-stakes horse-trading among the states that ratified it, particularly on the issue of slavery. But history has shown that compromise can lead to the appeasement of unjust interests, and, in the ensuing decades, the compromises on slavery in the Constitution led to further compromises on slavery and eventually to the Civil War.

Even before America was born, Colonial leaders established a firm tradition of yielding to the slaveholding interests in order to preserve the Union. Thomas Jefferson’s original draft of the Declaration of Independence, for example, was significantly edited to remove forceful language condemning slavery. This tradition continued through the early 1800s to the days before the Civil War. The result was a “house divided”—a nation that espoused liberty and free-

dom for all, yet allowed human bondage. This was what compromise had wrought for the young nation, and to some leaders in the late 1850s—one in particular—it was clear that the time had come for the question to be *decided*, rather than passed to the next generation yet again. Would the nation be free everywhere, or would slavery exist everywhere? To some, such as Abraham Lincoln, there was no middle ground.

To others, however—most notably Henry Clay—there was yet room for compromise on this pressing issue in order to avoid conflict. In *At the Edge of the Precipice: Henry Clay and the Compromise that Saved the Union*, Robert Remini, who has written extensively on the pre-Civil War era, ventures into the time period again to examine the Compromise of 1850, in which the Northern and Southern states came to an agreement on the admission to the Union of several new western territories and the status of slavery in them. Unfortunately, this informative but frustratingly dry work will not likely add to its author’s formidable and well-earned reputation.

Remini’s topic is interesting enough. Most Americans are taught at a young age how the “Great Triumvirate” of Henry Clay, Daniel Webster, and John Calhoun kept together a fractious nation through a series of well-crafted and difficult compromises in the first half of the 19th century. By 1850, however, the three giants were fading into the background, while men such as William Seward and Stephen Douglas were ascending.

Against the backdrop of changing congressional leadership as the century’s midpoint approached, the issue of slavery once again threatened to pull the nation apart. Manifest destiny and victory in the Mexican War had brought expansive new territories into the American fold, and the nation’s leaders had to determine in which of these territories the South’s “peculiar institution” would be allowed to take root. Henry Clay had only recently returned to the Senate after a six-year absence that culminated in a failed presidential bid in 1848. As Remini

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recounts, compromise was decidedly not in the air as Clay took office, with the Whigs in the midst of a steady decline and the Southern states preparing to gather in Nashville for a convention of their own.

Clay went to work immediately, and legislative procedure buffs will appreciate the attention that Remini (who recently retired as the historian of the U.S. House of Representatives) gives to Clay's legislative strategy in piecing together a compromise. The crisis in 1850 involved several different territories—including Texas, New Mexico, and California—and many in Congress wanted to address the question of slavery in each of these territories separately. Clay, however, initially believed that these questions were all interconnected and that a true compromise (as well as national stability) could be achieved only if they were addressed together. That way, for example, a party who gave ground on the issue of slavery in Texas could be offered a victory with respect to California in return.

As Remini notes, it was in a debate over Clay's determination to consider the divisive issues together that the term "omnibus" was first used with respect to broad-ranging legislative vehicles. Unfortunately, such interesting observations are few and far between in this book, as Remini does not draw nearly enough on his literary talents in recounting the seemingly endless procession of legislative maneuvering. This is a major failing of the book. In order to succeed in writing about the past, authors must exhibit both historical *and* literary heft, because skilled writing can turn a methodical recitation of the facts into a thrilling lesson from the past. On this point, while reading Remini's book, I could not help but think of how Robert Caro brought legislative wrangling to life in *Master of the Senate*, his book about Lyndon Johnson, and how far from this admittedly difficult target Remini drifts. Remini's writing limps to the finish line as congressional leaders approach the denouement of the 1850 crisis, by which time Clay, Remini's supposed hero, had retreated to Rhode

Island after the defeat of his omnibus strategy.

In Clay's absence during this time of crisis, Stephen Douglas picked up the pieces of the compromise and pushed each through separately. As Remini concludes about his protagonist, "And when the omnibus failed, Clay walked away. ... He left the Senate to go sunbathing in Rhode Island. He abandoned his post—which is understandable given his shattered health and pride—and left it to Stephen Douglas to repair the broken omnibus and achieve the victory that spared the Union possible civil war."

Another major failing of *At the Edge of the Precipice* is its failure to convince the reader of its claim that the Compromise of 1850 temporarily saved the Union by buying the North more time. In his epilogue, Remini explains, "Had secession occurred in 1850, the South unquestionably would have made good its independence." Other commentators too, including the late Senator Robert Byrd and the aforementioned Robert Caro, have made the same point, but none of the three—Remini, Byrd, or Caro—has substantiated it with evidence.

Remini does argue that, in the 1850s, the North possessed neither the industrial might nor the great statesman it would need (and find in the 1860s) to defeat the South. The major problem with this argument is that it ignores one of the primary reasons that the Compromise of 1850 succeeded: At that time, most of the Southern states were still firmly committed to remaining in the Union. As Remini notes, when the Southern states gathered for their convention in Nashville in 1850 (when the success of the compromise was still in doubt), they would not bow to the minority wing that advocated secession. Viewed in this light, it was not the Compromise of 1850 that saved the Union, but rather the commitment to the Union that saved the compromise. Moreover, given that a primary reason for early Southern success in the Civil War was the unique superiority of Southern military leadership, can we "unquestionably" say, as Remini does, that the South would have had

the same leaders and enjoyed this same advantage a decade earlier?

Remini ends *At the Edge of the Precipice* with a galling remark. He surveys the carnage that was the Civil War and laments, "If only Henry Clay had been alive," suggesting that further compromise would have been beneficial. But must we forget that the Civil War, for all its horror, ended slavery in this country? Are we really to say that further compromise with the Southern states would have been more favorable than ending the forced bondage of four million human beings? This seems akin to reviewing the horrors of World War II and exclaiming, "If only Chamberlain had still been prime minister." Compromise has its place, but so does backbone. **TFL**

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The Fiery Trial: Abraham Lincoln and American Slavery

By Eric Foner

W.W. Norton and Co., New York, NY, 2010. 426 pages, \$29.95.

REVIEWED BY HENRY COHEN

Until late in the Civil War, Abraham Lincoln favored only the gradual emancipation of the slaves. He also favored the voluntary colonization of African-Americans in Central America or elsewhere, as well as compensating slave owners whose slaves were freed. As Eric Foner observes in *The Fiery Trial*, "No one proposed to compensate slaves for their years of unrequited toil." In April 1862, when Lincoln signed the bill that abolished slavery in the District of Columbia, "he noted with pleasure," Foner writes, "that the law respected the principle of monetary compensation for slaveholders." In his annual message to Congress on Dec. 1, 1862—one month before he issued the Emancipation Proclamation—Lincoln asked for constitutional amendments authorizing Congress to appropriate

funds for colonization, to authorize payment to states that provided for emancipation by the year 1900, and to compensate loyal owners of slaves who gained freedom as a result of the war. Even after the Emancipation Proclamation, Foner writes, Lincoln “would continue to speak on occasion of gradual abolition, compensation to slave owners, and apprenticeship as a halfway house on the road to freedom.” It was only as the Civil War neared its end, as thousands of slaves freed themselves and served with distinction in the Union army, and as the 13th Amendment worked its way through Congress, that Lincoln abandoned these positions.

Foner does not criticize Lincoln for not being an abolitionist sooner. Nor does he praise him for adopting the more conservative strategy that eventually freed the slaves. Foner just gives us the facts and lets us make the judgments. His intent, he writes, “is to return Lincoln to his historical setting, tracing the evolution of his ideas in the context of the broad antislavery impulse and the unprecedented crisis the United States confronted during his adult life.” Foner, an acclaimed historian, succeeds admirably.

As part of the historical setting, Foner describes the racism that most white Americans—Lincoln included—shared. Lincoln believed that blacks were entitled to the natural rights spelled out in the Declaration of Independence—“Life, Liberty, and the Pursuit of Happiness”—but not necessarily to legal rights. They were entitled to retain the products of their labor, but not necessarily to vote. In 1858, in his first debate with Stephen A. Douglas, Lincoln said, “I agree with Judge Douglas [that the black man] is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man.”

Another aspect of the historical setting was Lincoln’s respect for the Constitution. He believed that it protected slavery where it existed, but that Congress had the power to block its

expansion into the territories. In 1854, in his speech in Peoria, Ill., Lincoln said that he was “arguing against the extension of a bad thing, which where it already exists, we must of necessity, manage as we best can.” In 1861, in his first inaugural address, he tried to reassure the South that “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”

Lincoln particularly respected the Constitution’s separation of powers. During the Civil War, Lincoln overturned the emancipation order of Gen. John C. Frémont, who had declared martial law in Missouri and purported to free the slaves in that state. Lincoln said that a general could seize property, including slaves, used for military purposes, but that it was up to Congress to “fix their permanent future condition. ... Can it be pretended that it is any longer the government of the U.S.—any government of Constitution and laws—wherein a General, or a President, may make permanent rules of property by proclamation?” To give a general or the President that power would be to create a “dictatorship,” Lincoln said. Can one even imagine a President in the 21st century being concerned about the dangers of expanding the powers of the executive?

In evaluating Lincoln’s being less an advocate of African-American rights than we might wish, we must also consider that he was a politician. When Lincoln made racist remarks in his debates with Douglas, he was running for Senate and appealing for the support of white racist voters. As such, he was taking a risk in opposing slavery at all. Note too the apparent hedging in Lincoln’s remark quoted above that the black man “is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment.” His phrase, “not equal in color,” if it has any meaning, is merely a repetition of the assertion that the black man is not the equal of the white. “Not equal in moral or intellectual endowment” is qualified by “perhaps.” The mere possibility that blacks might be equal to whites mor-

ally or intellectually must have been so unthinkable to Lincoln’s white listeners in 1858 that they probably did not perceive that Lincoln had implied it.

As President, Lincoln believed that he could not win the Civil War without the support of the border states—Delaware, Kentucky, Maryland, and Missouri—which were slave states. If it appeared that the North was fighting the Civil War to abolish slavery rather than to save the Union, then, Lincoln feared, the border states would join the Confederacy and the war would be lost. And, of course, if Lincoln could not win the war, then he could not free the slaves. In stating that his goal was solely to save the Union, Lincoln was a savvy politician who was more realistic than the abolitionists. Commenting on his overturning Frémont’s emancipation order, Lincoln wrote, “I think to lose Kentucky is nearly the same as to lose the whole game. Kentucky gone, we can not hold Missouri, nor, as I think, Maryland.” Foner writes that “Lincoln is said to have quipped, ‘I hope to have God on my side, but I must have Kentucky.’”

Yet, even if Lincoln was not an abolitionist until the end of the Civil War, he had always opposed slavery. In April 1864, in a letter to Albert G. Hodges, Lincoln wrote:

I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel. And yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. ... [T]his oath ... forbade me to practically indulge my primary abstract judgment and feeling on slavery.

Lincoln, however, did not blame only the South for slavery. In that same letter to Hodges, Lincoln suggested that God had willed “that we of the North as well as you of the South,

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shall pay fairly for our complicity in that wrong.” Eleven months later, in his second inaugural address, Lincoln said that “American Slavery”—not Southern slavery—“is one of those offences” that God “now wills to remove” and “gives to both North and South, this terrible war, as the woe due to those by whom the offence came.” Foner suggests that Lincoln’s belief that the North was complicit in slavery “may help to explain why he clung so long to the idea of compensated emancipation.” In his Peoria speech in 1854, Lincoln had said, “I think I have no prejudice against the Southern people. They are just what we would be in their situation. If slavery did not now exist amongst them, they would not introduce it. If it did now exist amongst us, we should not instantly give it up.” True as that may be, one might reply that the South had slavery and deserved to be condemned for it, as well as for fighting a war to preserve slavery. But, although Lincoln spoke of slavery as a “monstrous injustice,” he had no interest in condemning any individuals for practicing it.

The Fiery Trial (the phrase is Lincoln’s description of the Civil War) proceeds largely chronologically—from Lincoln’s encounters with slavery in 1828 and 1831, when he helped transport farm goods by flatboat down the Ohio and Mississippi rivers for sale in New Orleans; to the three cases involving slaves that he handled as a lawyer (in one of them he represented a slaveholder who sought to regain possession of runaway slaves); to his term in the House of Representatives (in 1849, Lincoln drafted a bill to provide for gradual compensated emancipation in the District of Columbia); to his actions as President, including issuing the Emancipation Proclamation and devising a plan for Reconstruction, under which a new state government could be established when 10 percent of the voters in any state took an oath of loyalty to the Union.

Foner concludes by praising Lincoln’s growth as President. At first, unlike Senator Charles Sumner—

and other Radicals, Lincoln did

not see Reconstruction as an opportunity for a sweeping political and social revolution beyond emancipation. He had long made clear his opposition to the confiscation and redistribution of land. He believed, as most Republicans did in April 1865, that voting requirements should be determined by the states. ... But time and again during the war, Lincoln, after initial opposition, had come to embrace positions first advanced by abolitionists and Radical Republicans.

One such position was support for the 13th Amendment. Lincoln had initially preferred to pursue abolition on a state-by-state basis as part of his plan for Reconstruction. After the Senate approved the 13th Amendment in April 1864, however, Lincoln, in his letter accepting the nomination for a second term as President, called for its passage. In addition, in his final speech, three days before he was shot at Ford’s Theatre, Lincoln called for the “elective franchise” to be conferred on African-American men who are “very intelligent, and on those who serve our cause as soldiers.” Still not the radical, yet, as Foner writes, “not all men placed in a similar situation possessed the capacity for growth, the essence of Lincoln’s greatness.” TFL

Henry Cohen is the book review editor of The Federal Lawyer. He published reviews of other books on Lincoln’s attitude toward slavery in the July 2006, June 2007, and August 2008 issues of The Federal Lawyer.

Fugitive Justice: Runaways, Rescuers, and Slavery on Trial

By Steven Lubet

The Belknap Press of Harvard University Press, Cambridge, MA, 2010. 356 pages, \$29.95.

REVIEWED BY HENRY S. COHN

Steven Lubet, a professor at Northwestern University School of Law and author of the acclaimed *Murder*

in Tombstone: The Forgotten Trial of Wyatt Earp, among other books, now turns his attention to the Constitution’s Fugitive Slave Clause and the federal fugitive slave acts that implemented it. His *Fugitive Justice* focuses on three controversial trials that arose from the enforcement of the Fugitive Slave Act of 1850.

Fugitive Justice does not meet the high standard of originality that Lubet set in *Murder in Tombstone*. In relating the story of Earp’s trial for murder at the O.K. Corral, Lubet relied primarily on contemporary documents, including an extant trial transcript. In *Fugitive Justice*, by contrast, his sources are more often secondary ones on the history of the fugitive slave acts and on the three trials at the heart of the book. Lubet informs the reader, for example, that Albert J. Von Frank’s, *The Trials of Anthony Burns* provided “[m]any of the facts” for his chapters on Burns. That being said, *Fugitive Justice*, like the Earp account, is a dramatic telling, bringing out the rift that the fugitive slave acts created between the North and the South. Lubet clearly identifies a major tension that was one factor in the coming of the Civil War.

Lubet starts with the Constitution’s Fugitive Slave Clause (Art. IV, sec. 2, cl. 3), which provides that a “Person held to Service or Labour in one State, ... escaping into another, ... shall be delivered up” to his or her owner, regardless of the law of the state to which the slave fled. The use of the phrase, “Person held to Service or Labour,” exemplifies that, until enactment of the 13th Amendment, the Constitution did not refer explicitly to slaves or slavery.

Congress enacted the Fugitive Slave Act of 1793 to implement the Fugitive Slave Clause. The act provided that slave owners were authorized to seize runaway slaves in the state to which they fled and to bring them before a federal, state, or local judge or magistrate. The judicial officer was to give the owner a certificate allowing removal of the slave to his or her original state. Northern states, however, upset the process by enacting statutes such as “personal liberty laws,” which, in Lubet’s words, “required some mea-

sure of legal process as a condition of lawful removal.” Other such statutes, including Massachusetts’ Latimer Law, prohibited state officials from participating in the detention of fugitive slaves and forbade the use of state facilities for their confinement.

In *Prigg v. Pennsylvania*, 41 U.S. 539 (1841), however, Justice Joseph Story held the Fugitive Slave Clause to be self-executing and to bar states from enacting statutes that limit or delay the right of an owner to the immediate possession of his or her slave. Later, the Fugitive Slave Act of 1850, which was part of the Compromise of 1850, built on *Prigg*. The 1850 act authorized U.S. court commissioners to preside over all aspects of fugitive slave proceedings. The only issue before a commissioner was whether the owner had proved the identity of the slave who had been captured in another state. The 1850 act also imposed stiff penalties on anyone who interfered with an owner’s retrieval of his or her slave. Many in the North were repelled by this harsh act.

Having set forth this background, Lubet devotes the remainder of the book to three court cases that became cause célèbres in the 1850s. Lubet follows the chronology of each trial, focusing on the tactics employed by each side.

The first case was the federal prosecution of Castner Hanway, a white miller, for treason. The case arose from the so-called Christiana Riot of 1851, in which a party of slave catchers was routed as it attempted to capture four fugitive slaves in Christiana, Penn., a town near the border with Maryland, which was a slave state. A slave owner from Maryland who was present to recover his slaves was killed during the incident. Although the trial took place in Philadelphia, the U.S. attorney from Maryland insisted that he be on the prosecution team, afraid that the U.S. attorney from Pennsylvania was insufficiently committed to a victory. The chief attorney for the defense was the “fiery abolitionist” and congressman, Thaddeus Stevens.

Controversially, Stevens accepted the applicability of the Fugitive Slave Act of 1850 to the case and did not argue that a “higher law” superseded

it. Rather, he defended his client on the ground that the riot scene was so chaotic that identification of Hanway as a participant was impossible. Stevens was also able to convince the trial judge—Robert C. Grier, a Supreme Court justice riding circuit—that the charge of treason against the United States was overreaching. Treason is defined by the Constitution (Art. III, sec. 3, cl. 1) as “levying War” against the United States or “adhering to” or giving “Aid and Comfort” to its enemies. Lubet explains, however, that, in the early 19th century, although “simply violating a statute in any one instance was an ordinary crime, ... attempting to nullify the law—by rendering it ineffective in all cases—amounted to levying war. ... To gain a treason conviction, the prosecutors had to prove that Hanway intended to render the fugitive law a nullity, not merely that he had provoked resistance to the recapture of certain slaves.”

Justice Grier instructed the jury that it could not convict Hanway for treason if the insurrection was “for a private object, and connected with no public purpose,” and, that in the case of Hanway, there was “want of any proof of previous conspiracy to make a *general and public resistance to any law* of the United States.” The jury took only 15 minutes to acquit Hanway, and, Lubet notes, “[t]he government would never again bring a treason case to trial for resistance to the Fugitive Slave Act, confining itself to more modest prosecutions for lesser offenses.” The governor of Maryland and other Southerners viewed the verdict as an “incalculable calamity.”

The second case that Lubet discusses dates from 1854 and involved Anthony Burns, a slave from Virginia who ran away to Boston. His owner traveled from Virginia to Boston to have Burns arrested. Under the Fugitive Slave Act of 1850, Burns was brought before Edward Greely Loring, a U.S. commissioner, for trial on the sole issue of his identity. Prior to Burns’ appearance in court, a group of Boston citizens tried to free him, and a federal marshal was killed in the melee. At trial, Burns was represented by Richard Henry Dana, author of *Two Years Before the Mast*. Loring ruled in

favor of the slave owner, and Burns was returned to Virginia. Both Walt Whitman and John Greenleaf Whittier wrote poems capturing the gloomy mood of the Boston populace, but the Pierce administration praised Burns’ removal from Massachusetts.

In 1855, Burns was sold to Leonard Grimes, an African-American clergyman, who freed him. Burns returned to Boston, where an anonymous woman gave him a scholarship to attend Oberlin College in Ohio. The city of Oberlin, an abolitionist stronghold featured in the third trial that Lubet discusses.

In late 1858, Kentucky slave hunters had captured a fugitive slave named John Price in Oberlin, but students and faculty from Oberlin College had forcibly rescued Price, who was safely taken to Canada. Thirty-seven Oberlin rescuers were indicted for violations of the Fugitive Slave Act, and the first two defendants—Simeon Bushnell, a white bookstore clerk, and Charles Langston, a black schoolteacher and principal as well as a journalist—were brought to trial in Cleveland the following spring. Both defendants were convicted. Bushnell declined the judge’s invitation to address the court before being sentenced, and he was sentenced to 60 days’ imprisonment and a fine of \$600 plus costs—an impoverishing amount for a bookstore clerk. Langston accepted the judge’s invitation to speak and delivered a powerful speech, calling for future disobedience of the Fugitive Slave Act in the name of God-given rights. The judge replied that the law must be vindicated but said, remarkably, that Langston’s speech had “excite[d] the cordial sympathies of our better natures” and sentenced him to only 20 days’ imprisonment and a fine of \$100, plus costs. It was in this trial that the defense of a “higher law” superseding the Fugitive Slave Act was raised, after use of such a defense was rejected by the accused’s attorneys in the two earlier trials that Lubet discusses. The “higher law” defense was uniformly rejected by judges. According to Lubet, the mere fact that it was raised in the Cleveland trial illustrated that the

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defense attorneys were becoming more desperate and that the country was about to split along sectional lines.

Lubet concludes by pointing out that enforcement of the Fugitive Slave Act of 1850 did not end immediately after the election of Abraham Lincoln and the commencement of the Civil War. Four slave states—the border states of Delaware, Kentucky, Maryland, and Missouri—had not seceded, and Lincoln believed that military victory would be impossible if they did. Accordingly, Lincoln continued to enforce the Fugitive Slave Act in these states. By the summer of 1863, however, Lubet writes, “with the Emancipation Proclamation in force, the Fugitive Slave Act had ‘lost its usefulness’ to the Union and it fell more or less into desuetude.” In June 1864, Lincoln signed a bill to repeal it.

Lubet states that, in *Fugitive Justice*, his intent was to tell a good story. Even though he rereads some ground, he has certainly accomplished that goal with his descriptions of three tense courtroom trials and of the heroes that fought for justice for fugitive slaves and their rescuers. **TFL**

Henry S. Cohn is a judge of the Connecticut Superior Court. He reviewed the books mentioned in this review about Anthony Burns and Wyatt Earp for The Federal Lawyer, in the Aug. 1998 and Mar./Apr. 2005 issues, respectively.

Testifying Before Congress: A Practical Guide to Preparing and Delivering Testimony Before Congress and Congressional Hearings for Agencies, Associations, Corporations, Military, NGOs, and State and Local Officials

By William N. LaForge

TheCapitol.Net, Alexandria, VA, 2010. 414 pages, \$77.00.

REVIEWED BY BRUCE MOYER

Every year, Congress holds about 2,000 hearings on an endless range of topics. At those hearings—in specially

designated Senate and House meeting rooms scattered across Capitol Hill—government officials, business executives, nonprofit leaders, and academic experts sit before panels of lawmakers to achieve a common purpose: to convince Congress to do something or to refrain from doing something.

The congressional hearing, perhaps more than any other congressional official practice, possesses coherence and value. It is in part classroom, designed to elicit information and insight into a subject, and it is part theater, at times providing political fireworks as well as substantive background that helps direct congressional policymaking. Congressional hearings put to the test why a bill should be passed, or probe why a government agency or a corporation did what it did, or demand to know why a government program deserves to receive taxpayer dollars. The issues and politics of each of these situations are often substantively and politically complex.

Testifying Before Congress is a highly accessible guide to demystifying and mastering the art of the congressional hearing. It is an authoritative reference work for use by witnesses preparing to enter the lion’s den on Capitol Hill as well as for those counseling and preparing a witness to testify before a congressional committee or subcommittee. Its author, Bill LaForge, is a highly respected Washington lobbyist and teacher of public policy, with more than three decades of experience as a government official, Senate appropriations committee staff director, and Washington lawyer and lobbyist. He was also national president of the Federal Bar Association in 2006–2007.

Congressional hearings are the closest that Congress comes to trial litigation, with opening statements, oral testimony, and verbal sparring with witnesses. Preparation for this effort is key, just as it is for trial, and LaForge insightfully dissects and organizes a series of tasks to enable one to meet the challenge. His aim is to assist a witness to deliver a concise, understandable written message, underscored through oral testimony.

Testifying Before Congress is helpful

to understanding the steps involved in crafting the written statement, delivering oral testimony, and answering questions asked by a committee. Each of these activities entails a different set of preparatory tasks, which LaForge does a good job of detailing. He also helpfully includes examples of key hearing documents, including hearing statements, as well as follow-up questions. The bullet-point summaries at the end of each chapter are a valuable map for the time-conscious reader.

Humor also pops up in the book, through what LaForge playfully calls HITS—humor in testimony. Some examples are real, others are fanciful. The best is the transcript the 1906 appearance of Samuel L. Clemens—better known as Mark Twain—before a congressional joint committee to testify in support of a copyright bill. Clemens demonstrated the art of weaving vignettes into the message underlying his oral testimony.

One wishes the book had included coverage of confirmation hearings and how to prepare executive branch and judicial nominees for their appearances before the Senate committee that will vote yea or nay to their appointment. Such hearings can sometimes be high-profile encounters with members of Congress, creating sensitive demands in working with lawmakers, staff, and the media. Although few readers are likely to find themselves preparing for nomination hearings, a review of the distinctive features of these hearings and how to prepare for them would have been helpful.

LaForge observes that, when done well, a congressional hearing is a rational process, capable of serving the interests of effective government. Lawmakers and advocates alike should take time to study and learn from this valuable book. **TFL**

Bruce Moyer, principal of The Moyer Group, serves as counsel for government relations to the Federal Bar Association. He provided editorial encouragement to the author in the early stages of the book.