

**THE WILD BLUE: THE MEN AND BOYS WHO FLEW
THE B-24s OVER GERMANY¹**

REVIEWED BY MAJOR MICHAEL J. MCCORMICK²

The word “plagiarism” derives from Latin roots: “plagiarius,” an abductor, and “plagiare,” to steal. The expropriation of another author’s text, and the presentation of it as one’s own, constitutes plagiarism and is a serious violation of the ethics of scholarship. It undermines the credibility of historical inquiry. In addition to the harm that plagiarism does to the pursuit of truth, it can also be an offense against the literary rights of the original author and the property rights of the copyright owner . . . The real penalty for plagiarism is the abhorrence of the community of scholars.³

I. Introduction

2002 did not start well for Stephen Ambrose. While enjoying the success of his latest best seller, *The Wild Blue*, an article in *The Weekly Standard* raised charges of plagiarism in the work.⁴ The article showed that Ambrose lifted quotations from Thomas Childers’ *Wings of Morning: The Story of the Last American Bomber Shot Down over Germany in World War II*,⁵ without properly footnoting the material (although Ambrose did

1. STEPHEN AMBROSE, *THE WILD BLUE: THE MEN AND BOYS WHO FLEW THE B-24s OVER GERMANY* (2001).

2. United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia.

3. Organization of American Historians, *Statement on Standards of Professional Conduct – Statement on Plagiarism*, at <http://www.oah.org/pubs/nl/> (last visited Mar. 6, 2002).

4. Fred Barnes, *Stephen Ambrose, Copycat; The Latest Work of a Bestselling Historian Isn’t All His*, *WKLY. STANDARD*, Jan. 14, 2002, at 27.

5. THOMAS CHILDERS, *WINGS OF MORNING: THE STORY OF THE LAST AMERICAN BOMBER SHOT DOWN OVER GERMANY IN WORLD WAR II* (1995).

acknowledge the work in the bibliography and several footnotes).⁶ *The Weekly Standard* correctly pointed out:

Sentences in Ambrose's book are identical to sentences in Childers's. Key phrases from *Wings of Morning*, such as "glittering like mica" and "up, up, up," are repeated verbatim in *The Wild Blue*. None of these—the passages, sentences, phrases—is put in quotation marks and ascribed to Childers. The only attribution Childers gets in *The Wild Blue* is a mention in the bibliography and four footnotes. And the footnotes give no indication that an entire passage has been lifted with only a few alterations from *Wings of Morning* or that a Childers' sentence has been copied word-for-word.⁷

Confronted with the evidence, Ambrose quickly admitted to guilt by negligence.⁸ Despite this honorable admission of his mistake, the damage had been done to Ambrose's reputation.⁹ As one fellow historian noted, "This would be, for me as a teacher, unacceptable in a student, much less in a professional historian. It's sad because he is a historian whose work I have often used and admired."¹⁰ The question now is should the student of military leadership and history read *The Wild Blue* in spite of the plagiarism?

Plagiarism is a serious charge. It completely cuts the author's credibility. In the academic world, Ambrose may have suffered a fatal blow to his credibility. Ambrose, however, had been moving away from the academic world for some time. His recent works¹¹ are entertaining and moving, but have not contributed any new theories or profiles to the history of World War II. No one can argue that Ambrose knows how to capture the stories of the average troop in World War II. Because of this, his works have been very successful with the general public. Thus, setting aside the

6. Barnes, *supra* note 4, at 27.

7. *Id.*

8. David D. Kirkpatrick, *Author Admits He Lifted Lines From '95 Book*, N.Y. TIMES, Jan. 6, 2002, at 1-22.

9. Ambrose has taught at the University of New Orleans, Rutgers, Kansas State, Naval War College, and a number of European schools. He has frequently written on military history. He was the official biographer of Dwight D. Eisenhower as well as the author of the best selling work *Undaunted Courage*, a history of the Lewis and Clark expedition.

10. Northwestern University Professor Michael S. Sherry, *quoted in* David D. Kirkpatrick, *As Historian's Fame Grows, So Do Questions on Methods*, N.Y. TIMES, Jan. 11, 2002, at A1.

plagiarism issue, if that is even possible, this review turns to the question of whether *The Wild Blue* is worthy of the reader's time.

II. The Wild Blue

The Wild Blue begins with the following query:

*The Army Air Corps needed thousands of pilots, and tens of thousands of crewmembers, to fly the B-24s. It needed to gather and train them and supply them and service the planes from a country in which only a relatively small number of men knew anything at all about how to fly even a single-engine plane, or fix it. From whence came such men?*¹²

One of the young men that came forth to fly the B-24 was George McGovern, later the senator from South Dakota and unsuccessful candidate for president in 1972. In this, his latest book on World War II,¹³ Ambrose elicits the stories of the young men, such as McGovern, who made up the fighting force who in Ambrose's words "saved the world."¹⁴ The stories involve the background, training, and combat experiences of those who flew the B-24 Liberator Bomber in Europe during World War II. While *The Wild Blue* does not contribute anything new to the literature on World War II or, more specifically, the aerial campaigns, it is an enjoyable and interesting book that captures the story of the young men who grew into warriors and leaders.

The Wild Blue has an interesting genesis. This book arose out of McGovern urging his long-time friend Ambrose to tell the story of the not-so-well-known B-24 Liberator and the role it played in the European Theater of World War II. While this is not a book about George McGovern, his experiences as a B-24 pilot are the book's linchpin. The friendship between Ambrose and McGovern was the bridge between McGovern's

11. *The Wild Blue* is the final volume of a trilogy by Ambrose in which he describes the experiences of the ordinary citizen-soldier that fought in World War II. AMBROSE, *supra* note 1; STEPHEN AMBROSE, *CITIZEN SOLDIERS: THE U.S. ARMY FROM THE NORMANDY BEACHES TO THE BULGE TO THE SURRENDER OF GERMANY, JUNE 7, 1944-MAY 7, 1945* (1997); STEPHEN AMBROSE, *BAND OF BROTHERS: E COMPANY, 506th REGIMENT, 101ST AIRBORNE FROM NORMANDY TO HITLER'S EAGLE'S NEST* (1992).

12. AMBROSE, *supra* note 1, at 262.

13. *See supra* note 11.

14. AMBROSE, *supra* note 1, at 262.

wartime experiences and Ambrose's desire to tell the story of the junior ranks that actually operated and maintained the aircraft.

Ambrose's admiration of McGovern and the men of his generation who fought the war comes through unabashedly in the book. Unfortunately, this may be the book's weak point. Ambrose provides almost no critical analysis of their missions, although he briefly discusses the issue of the accuracy of bombing attacks. He devotes only a few pages to whether the Army Air Corps actually succeeded in the strategic bombing attacks, and whether the attacks actually resulted in needless deaths of civilians or the destruction of a countless number of historic buildings and civilian homes.¹⁵ Ambrose dismisses any criticism of air power as mere inter-service rivalry.¹⁶ His answer to the critics is a simple conclusion: The Allies won the war, and a big part of the war was the bombing campaigns. Thus, the bombing campaign was a success.¹⁷ Any reader expecting lengthy analysis of whether the bombing campaigns were successful will come away disappointed.

The Wild Blue focuses on the B-24's role in the European front, where McGovern and others flew the B-24 for the Fifteenth Air Force. At that point in the war in 1944, the Allies had occupied southern Italy, and there the Army Air Corps stood up the Fifteenth Air Force. Ambrose briefly describes the origin and background of the Fifteenth Air Force, but unfortunately, it is only a superficial examination of this major flying combat organization.

This is disappointing since Ambrose entitles an entire chapter "The Fifteenth Air Force." The reader receives a brief introduction to the advocacy of air power and the main reasons the Army Air Corps created this second major air corps unit in addition to the Eighth Air Force. Beyond only the simplest survey, however, the reader does not take much away from the chapter, either on the leadership of the unit or its overall mission. Therefore, the chapter only detracts from Ambrose's main purpose in describing the men who flew the B-24, without lending any true insight into the Fifteenth Air Force.

The chapter entitled "The Tuskegee Airmen Fly Cover" equals the scant attention paid to the Fifteenth Air Force. The story of the fabled 99th

15. *Id.* at 247.

16. *Id.* at 246-47.

17. *Id.* at 251.

Fighter Squadron manned by African Americans has rightly received great attention over the last ten years. Their war record was exemplary even without factoring in the barriers they had to overcome. While these fascinating warriors, who overcame so much, deserve an entire chapter in *The Wild Blue*, Ambrose, for unknown reasons, goes on to devote only three pages of the chapter to their story. Instead, the Tuskegee Airmen story intersects with the B-24 story because the Tuskegee Airmen successfully flew cover for B-24 crews such as McGovern's. Naming the chapter after the famed Tuskegee Airmen is misleading: it only promises the reader something that Ambrose does not deliver.

The reader also will not find much analysis devoted to whether the extraordinary destruction caused by the bombing was proportional to any military success. McGovern's crew and others assigned to the Fifteenth Air Force dropped 13,469 tons of bombs at just one target: the oil refineries in Ploesti, Romania.¹⁸ The cost of these bombing runs was high; the Fifteenth Air Force lost 318 bombers in July 1944 alone.¹⁹ Ambrose just touches on the high cost of these missions. The destruction on the ground due to inaccuracy of free-falling bombs was equally devastating. Ambrose briefly mentions this destruction,²⁰ but never engages in a meaningful analysis of whether the bombing's collateral damage was worth it for the target's successful destruction. Like the chapters on the Fifteenth Air Force and the Tuskegee Airmen, if Ambrose raises the topic, he owes the reader more than a cursory discussion.

The lack of analysis on bombing accuracy and extensive collateral damage as well as the curt examinations of the Fifteenth Air Force and the Tuskegee Airmen will disappoint any reader wanting more academic substance. Multiple books and articles have been written on all of these topics.²¹ It is unclear whether Ambrose deliberately gave the topics little

18. *Id.* at 121.

19. *Id.*

20. *Id.* at 247.

21. *See generally* THE AIR FORCES IN WORLD WAR II (Wesley F. Craven & James L. Cate eds., 1958); TUSKEGEE AIRMEN, SELECTED REFERENCES (Dana Simpson ed., 1993) (bibliography on file with the Air University Library at Maxwell Air Force Base, Alabama), available at <http://www.au.af.mil/au/au/bibs/bib97.htm>; EUROPE: COALITION AIR POWER STRATEGY IN WORLD WAR II (Janet Seymour & Evette Pearson eds., 1998) (bibliography on file with the Air University Library at Maxwell Air Force Base, Alabama), available at <http://www.au.af.mil/au/au/bibs/bib97.htm>; LAW OF ARMED CONFLICT: AERIAL BOMBING OF CIVILIANS (Melinda M. Mosely ed., 2000) (bibliography on file with the Air University Library at Maxwell Air Force Base, Alabama), available at <http://www.au.af.mil/au/au/bibs/bib97.htm>.

discussion or if he felt only a brief discussion was necessary to complete the background of the World War II European Theater. A better approach would have been to maintain the book's primary focus on describing the young men who piloted and crewed the B-24s. Wandering summarily into the other topics detracts from the book and promises more than Ambrose delivers.

Despite the shortcomings, Ambrose delivers vivid portraits of the men who flew the B-24. While not a historical treatise, *The Wild Blue* is a captivating account of those who brought the fight to the enemy from the air. "Where They Came From" is the appropriately titled first chapter of *The Wild Blue*. Ambrose logically begins his account of the B-24 crewmembers by describing their backgrounds. As he points out, the crewmembers came from diverse backgrounds. Some came from big cities; others came from remote rural areas. Some were relatively well off despite the Depression, while others were literally dirt poor. Ambrose's focus of the book, George McGovern, was somewhere in the middle. He grew up in a small town in South Dakota, the son of a minister. Ambrose's no-nonsense writing style cuts directly to the essence of these young men.

The Wild Blue makes effective use of interviews with numerous veterans. As these veterans who led the battle on the ground, in the sea, and in the air begin to pass away, the use of primary sources such as these interviews is invaluable to students of history. Perhaps more importantly, there are few authors better than Ambrose who speak to these veterans. As Thomas Childers, the author whom Ambrose plagiarized noted, "He really did a lot to shift the focus away from the high commands . . . Veterans love him."²² What is amazing to the reader of Ambrose's works is that he was not a veteran of World War II.

The stories found in *The Wild Blue* are fascinating. One of the best accounts in the book is of the emergency landing that McGovern made at the island of Vis, located in the Adriatic Sea near the Dalmation coast. The island had a 2200-foot runway, perfect for fighters but nowhere close to the required 5000 feet needed for B-24s. With a damaged engine and low fuel, McGovern nursed the B-24 to Vis. Ambrose perfectly describes the tension as the crew, beginning their approach, sighted "carcasses of half a dozen bombers beyond the field."²³ McGovern made the perfect landing

22. Barnes, *supra* note 4, at 28.

23. AMBROSE, *supra* note 1, at 195.

and the crew lived to see another day. For his actions, the Army Air Corps awarded him the Distinguished Flying Cross.²⁴

This and other harrowing accounts of B-24 crews provide vivid examples of how ordinary men were trained to deal successfully with extraordinary situations. While Ambrose may not have set out specifically to write a book on leadership, the stories of the B-24 crews provide excellent leadership examples. Literally putting their lives on the line every time they went into the air, each member of the crew worked closely together to ensure mission success. Ambrose correctly points out that the leadership of young men like McGovern was instrumental in ensuring that the crews accomplished their mission and survived the dangers they faced. Any reader interested in the art of leadership would benefit from reading *The Wild Blue*.

One tends to forget that McGovern, like many of the B-24 pilots, was only twenty-two years old. Ambrose does a good job of periodically reminding the reader of these warriors' youth. He also does an excellent job of organizing the book from the pilots' early days of flight training, to training on the B-24, and finally into actual combat. The organization helps the reader understand the journey of these young men who undertook an incredibly difficult task and prevailed, becoming warriors and leaders in the process.

III. Conclusion

In an interview with the *New York Times*, Ambrose defended his mistake by saying: "I tell stories. I don't discuss my documents. I discuss the story. It almost gets to the point where [. . .] how much is the reader going to take? I am not writing a Ph.D. dissertation."²⁵ This explanation in no way excuses what Ambrose did; however, readers should not avoid *The Wild Blue* simply because of the underlying plagiarism. Instead, students of World War II history and leadership should strive to read the accounts of veterans who were there, those that came together and truly saved the world. As these veterans pass into history, any book that vividly captures their stories is valuable despite its academic shortcomings. Ambrose's plagiarism, intentional or not, does not diminish the value of their stories.

24. *Id.* at 196.

25. Kirkpatrick, *supra* note 10, at A1.

**THE PRICE OF VIGILANCE:
ATTACKS ON AMERICAN SURVEILLANCE FLIGHTS¹**

REVIEWED BY MAJOR JEFFREY A. RENSCHAW²

If, begrudging the outlay of ranks, emoluments, and a hundred pieces of gold, a commander does not know the enemy's situation, his is the height of inhumanity. Such a person is no man's commander, no ruler's counselor, and no master of victory.

- Sun Tzu³

In *The Price of Vigilance*, authors Larry Tart and Robert Keefe discuss the crucial Cold War mission of U.S. Air Force and Navy airborne intelligence-gathering reconnaissance aircraft: to keep abreast of Soviet military capabilities and intentions and to avert a surprise attack. No less a seminal military philosopher than Sun-Tzu recognized the importance of intelligence, which is no doubt why the authors prefaced their book with the quote above. *The Price of Vigilance* details how American Cold Warriors successfully met this all-important mission, satisfying Sun-Tzu's admonishment to spare no expense in obtaining information.

The authors may also have chosen the Sun-Tzu quote to criticize a commander's ill-advised frugality—begrudging the outlay of “gold,” the military budget—in training, outfitting and providing recognition for his troops. The quote's philosophy can be extended to support one of the authors' main premises of the book. Tart and Keefe argue that these airborne recon crews successfully performed their vital mission, but they did so constrained by poor training and planning and by scant, if any, official recognition of their efforts.

The authors assert that poor training and planning, as well as faulty equipment, led to the 1958 Soviet shoot-down of an Air Force reconnaissance aircraft. The book's centerpiece is a detailed discussion and analysis

1. LARRY TART & ROBERT KEEFE, *THE PRICE OF VIGILANCE, ATTACKS ON AMERICAN SURVEILLANCE FLIGHTS* (2001).

2. Judge Advocate, United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. TART & KEEFE, *supra* note 1, at vii.

of this particular shoot-down. The authors deplore the fact that the flight's dead crewmembers and their families did not receive official recognition until the late 1990s. The authors themselves were instrumental in seeing that the Air Force finally gave this long-overdue recognition. Did the authors also offer the Sun-Tzu quote, therefore, as a stab at the "inhumane" commander who does not properly train, equip, and then recognize his troops? Probably so.

Two former Air Force members, Larry Tart and Robert Keefe, co-authored *The Price of Vigilance*. Both were trained as Russian linguists and airborne voice intercept operators, and they served aboard Air Force reconnaissance aircraft during the Cold War. Both are personally invested in the subject matter of the book; as discussed herein, this has its pros and cons.

As noted above, the authors focus on the Soviet shoot-down over Soviet Armenia of Air Force C-130 60528 on 2 September 1958, in which all seventeen crewmen died. The Air Force's post-shoot-down failure to provide details of the incident to the lost crewmen's families is well documented. For many years, some family members harbored hopes that their loved ones were still alive and held in captivity in the Soviet Union. The authors write:

Forty years ago, I felt it my duty to pay my condolences to the families of the men who died. Bureaucratic, largely senseless, security considerations prevented me and my friends from taking that simple human step, which seemed so natural, so necessary to me and to the others. This book has finally given me that chance. Moreover, after nearly half a century, I feel that I finally have a reasonable understanding of just what happened and why it happened.⁴

The reader need go no further to find out why Tart and Keefe wrote the book. At its best, *The Price of Vigilance* satisfies the authors' main intent, to identify the critical mission U.S. airborne reconnaissance crews performed during the Cold War, to highlight the inherent dangerousness of those missions, and to give credit where credit is due, specifically to the fallen crewmembers of 60528. In doing this, *The Price of Vigilance* ably

4. *Id.* at xiii.

discusses the crews' vitally important Cold War intelligence-gathering mission.

The authors explain that U.S. Cold War leadership feared a Soviet nuclear attack, necessitating reconnaissance missions probing Soviet air defenses. Faced with the threat of a Soviet nuclear attack, the Strategic Air Command required accurate air order of battle (AOB) data and electronic order of battle (EOB) data to locate strategic targets and develop air operations plans.⁵ These AOB and EOB were "essential elements of information for strategic air combat planners. . . . Signals intelligence was often the only available source for that critical data on the enemy's military forces."⁶ The authors explain that "signals intelligence" or "SIGINT" refers collectively to the interception and exploitation of enemy communications and enemy radars.

The reader might also expect *The Price of Vigilance* to offer suggestions on how to improve the safety of reconnaissance flights, but none is forthcoming. The book does, however, delve into a discussion of the 1 April 2001 incident between a U.S. Navy P-3 reconnaissance aircraft and a Chinese F-8 fighter. In his "Author's Note," Mr. Tart admits that the book, as originally intended, had a "tight focus" on the 1958 shoot-down and the loss of the seventeen crewmen. But the U.S.-China incident convinced him of the need to expand that tight focus and delve further "into a much broader consideration of the dangers of aerial reconnaissance throughout the Cold War."⁷ He states:

There have always been inherent dangers associated with manned airborne reconnaissance missions—yet the missions were and still are necessary. . . . From the beginning of the Cold War, one of the primary results of aerial reconnaissance was to allow the [United States] to hold down military spending because the country has a very accurate idea of potential enemies' ability to carry out hostile actions, and, simultaneously, that knowledge allowed the United States to avoid other potential Pearl Harbors. . . . Airborne reconnaissance, working in tandem with surveillance satellites, is still necessary to forewarn

5. "Air order of battle data" or "AOB" is the number and types of aircraft by unit and deployment base; "electronic order of battle data" or "EOB" is the number and types of radars and other emitters in use and where they are deployed. *See id.* at 143.

6. *Id.*

7. *Id.* at xv.

America of the military capabilities and intents of its adversaries.⁸

The author's point is well taken. The 11 September 2001 *Washington Times* reported an incident occurring the week before over the Pacific Ocean, in which a Russian MiG-31 interceptor pilot "thumped"⁹ and "locked-on" a U.S. Navy P-3 reconnaissance aircraft.¹⁰

This most recent incident, coupled with the 1 April 2001 U.S.-China incident, strongly supports the author's conclusion that "today's surveillance flights are every bit as perilous as the recon missions of our airborne recon pioneers more than fifty years ago."¹¹

The Price of Vigilance goes beyond a discussion of the danger of Cold War reconnaissance missions, and it attempts a detailed discussion of the 1 April 2001 U.S.-China incident. This is a mistake. The authors' stated aim, to specifically pay homage to the crew of 60528, is noble enough and worthy of a book. Further, the book's expanded consideration of Cold War aerial reconnaissance dangers is thorough. Those messages are diluted, however, by the tacked-on discussion of the U.S.-China incident,¹² contained in the first chapter, which is numbered differently from the rest of the book.¹³ No doubt, the authors simply added this introductory chapter as an afterthought.

That is not to say that the introductory chapter does not contain a thorough summary of what happened, including the U.S. and Chinese versions of the incident. But the chapter's content is muddled, including a hodge-

8. *Id.* at xvi.

9. "[A] high speed interception from the rear and above (or below) at near Mach is extremely routine and is called 'thumping.' As the fighter passes the heavier intercept aircraft, the fighter pilot pulls up abruptly, causing shock waves to beat upon the bigger plane." *Id.* at li. See *supra* note 13 (explaining the book's unusual pagination).

10. "One alarming sign of the Russian intercept was a radio message sent by one MiG pilot to his base stating his fire-control radar had 'locked-on' to the U.S. surveillance plane, U.S. intelligence officials said. A radar 'lock' is a pilot's final step before firing a guided missile." Bill Gertz, *Russian Warplanes Harass U.S. Craft over Pacific*, WASH. TIMES, Sept. 11, 2001, at A1.

11. TART & KEEFE, *supra* note 1, at xvi.

12. The first edition of the book is dated June 2001, and indeed, both authors' prefatory notes predate the 1 April 2001 U.S.-China incident.

13. Chapter 1, "Introduction: U.S.-Chinese Air Incidents," is numbered pages xix-lxxxii. The remainder of the book—chapters 2-12, Epilogue, Appendices A-G, and the Index—is numbered pages 1-566.

podge of general historical discussions on the rise of the Chinese communist government in 1949, and U.S.-China Cold War relations. The chapter also contains a lengthy discussion of several other U.S.-Chinese incidents occurring in the 1950s that serve the authors' purpose in showing "the inherent dangers involved in both airborne reconnaissance and search and rescue," and illustrating "the tenacious determination of the Chinese [Peoples Liberation Army] to defend China's territorial waters."¹⁴ There are more dissimilarities than similarities, however, between these Cold War incidents and the most recent U.S.-China incident. Nevertheless, the discussion serves to inform the American public of the heretofore unknown sacrifices made by American reconnaissance aircrews in non-war confrontations during the Cold War, a goal of the authors.

In discussing the inherent danger of recon missions, the authors interestingly note that U.S. Navy F-4 and F-14 pilots often reveled in tales of "how close, how long, and how risky they could get during intercept missions." The authors characterize this as just the "common environment in the escort world."¹⁵ They note that, during the Cold War, more than 200 U.S. military "silent warriors" who were involved in airborne intelligence gathering missions became KIA (killed in action) or MIA (missing in action) statistics, highlighting the dangers that surveillance crews routinely faced.¹⁶ Because even U.S. fighter pilots acknowledge what can be colloquially described as a high stakes, high altitude game of "chicken," this may explain why the authors offer no safety suggestions for airborne recon flights; there are none to offer.

Regarding the 1 April 2001 U.S.-China incident, the authors conclude that Wang Wei, a reputed "show-off" Chinese pilot with a history of dangerous flying, caused the mid-air collision by bumping into the U.S. aircraft. Not surprisingly, the Chinese version holds that the American plane veered at a wide angle toward the Chinese fighter and rammed its tail. *The Price of Vigilance*, however, adds no more to the substantive discussion of the incident than could be found in the American print media. The introductory chapter on the incident does not provide source information for some of the authors' conclusions (in contrast to the remainder of the book), and it fails to adequately explain the significance of the "Dutch P-30 Orion

14. TART & KEEFE, *supra* note 1, at lxxii.

15. *Id.* at li.

16. *Id.* at lv.

Group,” which apparently did an accident reconstruction supporting the American version of the collision.¹⁷

The authors would have done well by either skipping entirely the discussion of this U.S.-China incident, or delaying the book’s publication until it thoroughly discussed the incident’s ramifications. A cynic might say they added the chapter to make their book more attractive to the book-buying public. The hastily written discussion results in some internal inconsistencies, and the authors fail to hammer home obvious, key points. For example, the book states that while China focuses its SIGINT activities primarily within “its neighborhood,” it also “snoops” on the United States.¹⁸ Later in the chapter, however, the authors state that “[t]he extent to which PLA ships and aircraft shadow U.S. operations in the Pacific appears to be minimal.”¹⁹

Earlier in the same chapter, the authors point out the distinct possibility that the Chinese will be able to “reverse-engineer” the Navy P-3 and therefore incorporate its technology into their own, giving the Chinese greater intelligence-gathering capability. They further speculate that since the late 1980s, China has jointly operated SIGINT ground stations, with the U.S. Central Intelligence Agency’s (CIA) Office of SIGINT Operations, which monitor Soviet missile tests and space launches. “[A]ny signals intelligence collection technology provided by the CIA for those sites has in all probability already found its way into other Chinese intelligence collection systems.”²⁰ This seems a rather obvious point. It is unlikely that one arm of the Chinese intelligence community did the “ethical thing” and protected confidential U.S. SIGINT technology from other arms of the Chinese intelligence community. In this instance, the U.S. can hardly expect China to institute a firewall, that is, a “Chinese wall”!

Yet the authors fail to make the point that, even if Chinese intelligence monitoring of the United States has been “minimal” in the past, it seems likely that the technology gained from the reverse-engineering of the Navy P-3, as well as the technology they undoubtedly picked up from joint oper-

17. The book states “A Dutch ‘P-3 Orion Research Group’ completed an analysis of the collision,” but it provides no further explanation as to who or what this “research group” entailed. *See id.* at xlvi.

18. *Id.* at lviii.

19. *Id.* at lxi.

20. *Id.* at lxii.

ations with the CIA, will enable the Chinese to exert a much greater intelligence-gathering capability, which the United States needs to counter.

Despite the introductory chapter's favorable points, the book's discussion of the 1 April 2001 U.S.-Chinese incident distracts the reader from its "centerpiece," the 2 September 1958 U.S.-Soviet incident. Here the book is at its best, providing an extensive, well-documented discussion of this ultimately tragic mission, beginning in Chapter 1.

Flying out of Incirlik Air Base, Turkey, the American crew's primary mission was to monitor Soviet ground communications involving new surface-to-surface missiles. For reasons definitively unknown, the aircraft inadvertently strayed into Soviet territory (Armenia). Four Soviet fighter planes intercepted 60528 the moment it crossed the Soviet border. The authors do an excellent job of piecing together accounts of the incident from both American and Soviet sources, which until the 1990s were largely classified and unavailable. The book chillingly describes the "deadly encounter":

The first pair of MiGs . . . suddenly materialized out of the blinding glare of the afternoon sunlight before the American crew noticed its mistake. The Yerevan flight leader . . . made a quick pass, opening fire on the American plane, and the C-130, instead of obeying that command to land, banked sharply to the right, diving and turning west. Two minutes later, at 1:09, the second pair of MiGs . . . had been vectored into the interception. Making sure that they stayed on the Soviet side of the border—"I can see the fence"—the Soviets then began their kill.²¹

The authors pejoratively describe the Soviet attack as "sadistic," "utterly gratuitous," and as a "one-sided dog fight."²²

After discussing other attacks, Cold War aerial reconnaissance in general, and the development of U.S. airborne communications intelligence reconnaissance in the 1940s and 1950s, Chapters 2 through 5 shift the focus back to the shoot-down of 60528. Why did it inadvertently fly into Soviet territory? While the authors call the Soviet shoot-down "sadistic," readers also learn that Soviet military policy dictated strict defense of state borders. Pilots had orders to force intruders to land at a Soviet airfield;

21. *Id.* at 10.

22. *Id.* at 11.

failing that, they were ordered to shoot down the intruder. “The U.S. reconnaissance pilot had orders to turn away from enemy territory if attacked, and to avoid landing at an enemy airfield at all costs. Two such differing command philosophies were sure to result in tragic clashes.”²³ In fairness to the Soviets, the authors admit numerous intentional U.S. intelligence-gathering overflights of their territory, leading to what Premier Khrushchev described as Soviet paranoia of an all-out American attack. This no doubt led to the Soviets’ aggressive policy when their pilots were able to intercept intruding aircraft, whether flying inadvertently into their territory or not.

The authors’ criticisms do not end with the Soviets, however. They conclude from their extensive research of the shoot-down that several factors contributed to the American plane’s unintentional overflight, including poor training characterized as a “kick the tires and fly” mentality, and faulty navigation and radar equipment. The book discusses in detail the practice of dividing crews on these recon planes. The “front-enders” were the air crew who flew the plane, while the “back-enders” were the recon specialists. These two crews forged an uncomfortable relationship on the ground and in the air. The front-enders did not know the mission of the back-enders. Such unnecessary “security compartmentalization,” according to the authors, contributed to the shoot-down.

The authors heap further strong criticism upon the Air Force for its post-shoot-down handling of the incident. The Air Force had monitored the Soviet MiG pilots’ voice communications during the shoot-down and therefore knew it occurred in Soviet territory. Not wanting the Soviets to learn that it had the capability to monitor their voice communications, the U.S. conducted a sham search for the plane in Turkey. The Air Force wanted to publicly maintain the fiction that the flight had a non-intelligence-gathering mission. Also, the eleven recon specialists killed in the shoot-down were retroactively re-assigned to the flying crew’s squadron, obscuring their identity and denying the other members of their squadron the “opportunity to honor their fallen brothers, or to console the wives. It created a bitterness in the men that has lasted to this day.”²⁴

Author Keefe was one of those squadron members denied the chance to honor and console; hence, his personal animus. He calls this purging of the names “unconscionable.” The authors call the Air Force’s “public lies,

23. *Id.* at 118.

24. *Id.* at 297.

. . . surreptitious transfer of the dead men to another outfit, the total lack of information, the sequestration and then secret removal of the wives from Germany” as a “violation of trust” between the men and their leaders who had “insufficient regard for ‘what is right.’”²⁵

The tone of the book seems to cast the crew of 60528 as unwitting pawns in a cat and mouse espionage game between East and West. The United States and the Soviets each surely knew the other’s capabilities. Why could they not put aside these concerns and provide simple humanity to the families of the fallen crewmembers? The Soviets turned over the remains of six aircrew members who died in the crash, but stated at the time that they did not know what happened to the other eleven crewmembers (the “back-enders.”). For several years there was U.S. speculation as to whether the eleven were alive and in Soviet captivity. It turns out they were not; the entire crew was killed in the plane crash.

Readers may begrudge the authors’ use of the word “pawn,” which unwittingly does a disservice to the memory of their fallen comrades. These seventeen brave crewmembers were not “pawns” caught between two equally evil, or at the very least, indifferent, superpowers. Rather, they were American warriors. Silent warriors. The authors point out, but do not stress, the 306 U.S. intercepts of Soviet planes over U.S. airspace between 1961 and 1991, all occurring without one shoot-down. The authors could have given some credit to the United States for this fact without resorting to jingoism.

Because the authors do not acknowledge that the United States tried to do the right thing, their pejorative attacks on U.S. treatment of the families after the shoot-down seem largely unwarranted. “Security guidelines forbade releasing any meaningful details regarding reconnaissance missions, leaving family members feeling abandoned, frustrated, and often bitter toward their government.”²⁶ The authors fail to convince the reader that this sad but true outcome was anything but unavoidable. To the authors’ credit, however, they helped rectify any injustice to the crew and their families by their efforts in establishing the National Vigilance Park

25. *Id.* at 299.

26. *Id.* at 117.

and Aerial Reconnaissance Memorial at Fort Meade, Maryland, which the book details.

Readers will enjoy *The Price of Vigilance* if they are interested in a detailed discussion of the development of the U.S. airborne reconnaissance program. The book will also satisfy readers seeking an exhaustive examination of the unfortunate 60528 crew, the 2 September 1958 shoot-down of their aircraft, and the uncertain aftermath for their families. On these topics, Tart and Keefe's well-researched work provides valuable insight.

RISE TO REBELLION¹REVIEWED BY MAJOR RICHARD V. MEYER²

That we know so much about these characters today is a testament to their accomplishments, their extraordinary achievements, and, yes, their astounding heroism.³

In his latest work, *Rise to Rebellion (Rebellion)*, Jeff Shaara reintroduces us to the most pivotal men in our nation's history. Despite the abundance of existing literature on the American Revolution, Shaara uses a new and relevant approach to re-tell a familiar tale.

Jeff Shaara is a proven writer in the historical novel genre. With the bestsellers *Gods and Generals*, *The Last Full Measure*, and *Gone for Soldiers*, Jeff has shown his ability to mirror the incredibly successful style of his father, Michael Shaara. Both writers bring humanity to historic personages through dialogue and colorful background. Unlike simple historic texts, the reader of a Shaara novel can understand the emotions behind the making of critical decisions, not just their results.

The books of both father and son are not typical novels. Each bases its work on extensive research into the events and characters portrayed. The vast majority of each work contains the same recitation of historical facts found in non-fiction works. Where they differ, however, is in providing the inner thoughts and dialogue of the characters. These ideas do not originate in the imagination of the author, but rather through a more deductive process. Both authors gather documents written about or by each historical figure and then use them to develop the "characters" in the novel. Dialogue comes from what the authors believe the characters most likely would have said or felt in the given situation. Additionally, they add names and personalities to figures that are otherwise only remembered as a statis-

1. JEFF SHAARA, *RISE TO REBELLION* (2001).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. SHAARA, *supra* note 1, at viii.

tic. An excellent example of this is the character of Private Hugh White in *Rise to Rebellion*.

In the opening scene of *Rebellion*, we meet Private White, a British Regular standing sentry duty at the Boston Custom House on 5 March 1770 in the face of colonial protests. Shaara goes beyond the limitations of non-fiction by detailing the soldier's thoughts.⁴ By doing so, the reader can better understand the profound confusion of this young man. The passage also shows how little the profession at arms has changed in the last two centuries. Then, like now, the peacekeeping soldier feels daunted by a mission that is totally alien to his war-fighter training. As Shaara describes the scene, you can feel Private White's fear mount as the locals become more and more unruly. You can experience the unasked question that must have been pounding through the soldier's brain: "Why me?" White is never mentioned after the first chapter, and yet the reader remembers the fear and confusion of the British soldier and incorporates it into the events that follow. Private White is the first of many well-developed characters that Shaara introduces to the reader. With White, Shaara does an excellent job of convincing the reader to always remember the effects on the pawns when we follow the actions of the power brokers throughout the rest of the book.

History buffs will recognize the date above as the night of the famous Boston Massacre, the night British troops fired upon colonial protestors. Shaara, like many historians, identifies this event as the catalyst that started the snowball rolling down the path to all-out rebellion. He shows, as many suspect, this as a staged event, planned and carried out by radicals seeking exactly this type of catalyst. Second, he uses the event to introduce the most prevailing theme of the book, John Adams's love of the law and search for justice.

In the second chapter we meet Adams, a colonial lawyer still relatively dedicated to the British crown. He witnesses the aftermath of the massacre, and having no political agenda, feels only a great sadness at the tragedy. Despite his close personal ties to the radicals (his cousin Sam Adams is a ringleader), Adams makes the difficult and unpopular choice to defend the commander of the British⁵ charged with ordering his soldiers to fire on unarmed civilians without provocation. In a courtroom drama, despite the perjury of several government witnesses supporting the

4. *Id.* at 4.

5. Captain Thomas Preston.

charges, Adams is able to successfully defend his client by finding an honest witness from among the radicals.⁶ This is an example of Shaara's dedication to account historic events accurately. The testimony of the witnesses, including the critical defense witness, Richard Palmes, is almost verbatim from the official court transcripts.⁷ Shaara uses this case to solidly introduce the character of Adams so that the reader can watch as Adams is slowly transformed from pacifist and semi-loyalist to raging revolutionary by his quest for justice.

Shaara may be the first author to effectively show the critical role of the legal system in the fermentation of the colonial rebellion. After Adams's client is acquitted, Shaara moves to June 1772 for the next critical legal event, the burning of the schooner *Gaspee* by Connecticut colonists.

The burning of the *Gaspee* was a minor incident but for the over-reaction of the British government. Ignoring the colonial judicial system, the crown sent English investigators to find the perpetrators and bring them to England for trial. This investigation failed, as Shaara implies any outside investigation would in this situation. Rather than a search for truth and justice, the investigation was perceived as a "colonials versus intruders" confrontation,⁸ and thus colonial witnesses would not come forward. Shaara explains, but does not justify, the acts of the colonists, and even implies that they would probably have received just punishment at the hands of other colonists. When the British reacted to the failed *Gaspee* investigation by pulling control of the colonial judiciary back to the crown, Shaara portrays Adams as filled with righteous indignation. The reader can understand Adams's fury when the American judicial system is punished for the *Gaspee* incident after never being given the opportunity to deal with it.⁹ Shaara artfully reminds us that this is the same judicial system that Adams struggled to protect the integrity of, at great personal expense, in the Masacre trial. It is also through the *Gaspee* incident that Shaara introduces a second theme of his book: the rebellion was a direct result of British arrogance and ignorance.

Through the characters of Lieutenant General Thomas Gage and Massachusetts Governor Thomas Hutchinson, Shaara portrays the British government as a frustrated parent dealing with an unruly teenager. While both

6. SHAARA, *supra* note 1, at 47-54.

7. WHEELER BECKER, *THE AMERICAN PAST* (1990).

8. SHAARA, *supra* note 1, at 88.

9. *Id.*

Gage and Hutchinson have close ties to the colonies, (Hutchinson is American born, and Gage is married to an American), both fail to soften the British heavy-handed dealings with the colonies. Rather than serve as educator, teaching the nobility about the differences and idiosyncrasies of American culture, Hutchinson falls into a battle of wills with the rebels¹⁰ that, like any poor parent insecure in his role, Hutchinson is destined to lose. As a result, Hutchinson loses the necessary respect a leader must have to be effective.

It is through the character of Benjamin Franklin that Shaara develops his theme on British arrogance on the opposite side of the Atlantic. He first takes the reader along on Franklin's trip to Ireland. On this trip, Franklin sees the pervasive "Let them eat cake" mentality of the British nobility towards Irish peasants and house servants. Shaara uses Franklin to show how much the colonies have grown away from their English roots, primarily in the respect for the role of the common man. Next, he portrays a nobility publicly outraged that Franklin would invade the privacy of another's mail, while this same nobility glibly reviews each and every piece of Franklin's personal correspondence. Franklin, who consistently receives mail with the seal broken, acquires the personal correspondence of Governor Hutchison from the estate of a deceased English gentleman. Franklin covertly provides these letters to the patriots in the colonies, who publish them. Franklin's time in England climaxes with his personal humiliation, as a result of this breach of privacy, at the hands of the British lords in front of parliament in a riveting scene. In it, you see a dramatic role reversal, as Franklin becomes parental, and the nobility becomes the unruly and petulant children.¹¹ The dialogue of the British contains the whiny, affronted air one would expect from a toddler, while Franklin calmly sits, patiently listening and maintaining personal decorum despite the attacks.

The Ben Franklin character is also evidence that Shaara has held true to his stated ideals. In the introduction, Shaara discussed his goal to show the founding fathers as realistically as possible. He wanted to avoid both the historical deference they had received and the nouveau approach of emphasizing only the sensational and shameful. Shaara shows both Franklin's strengths as a gifted statesmen and scholar, and weaknesses in his personal life. The interplay between Franklin and his loyalist governor son was profound. The reader was left to decide who possessed the greater

10. *Id.* at 104.

11. *Id.* at 238.

fault in their relationship. Shaara did an excellent job of showing the humanity of all his characters without sensationally tarnishing their heroic acts.

The third theme of this novel is the battle of John Adams versus Sam Adams to control the soul of the rebellion. On the one hand is John Adams, the lawyer dedicated to achieving justice, who looks at rebellion as a last resort to achieve that goal. On the other is his cousin, Sam Adams, an opportunist and conspirator, for whom independence is the only goal. At the beginning they are almost at odds with one another, with John Adams stealing much of the thunder from the Massacre by his decision to defend the British officer. After the *Gaspee* incident, John Adams reluctantly allies himself with Sam in order to protect the law he so loves.¹² By the end of the novel, it is John Adams who has become more of the firebrand at the Continental Congress, now virtually espoused to Sam in all issues. However, despite the transition, Shaara is careful to show that John Adams's motivation never changes. His quest remains justice, but he becomes more radical as his belief in the goodness of the British government fades to nothingness.

Rebellion also contains the battlefield drama that readers have come to expect from all the Shaara family works. With characters like George Washington and Joseph Warren, Shaara takes the reader through the battles of Lexington/Concord, Bunker (Breed's) Hill, and Dorchester Heights. Also through Washington, he explores the struggles of a commander forced into an unfamiliar command, with a staff of mostly strangers and with no clear mission. While each battle was clearly presented and obviously pivotal to history, readers may be surprised to find themselves considering the battles as secondary events. One gift from *Rebellion* is that the reader will grow to understand how the revolution was fought more in the streets, meeting houses, and bars of cities like Philadelphia, Boston, Charleston, and New York than on any battlefield.

While most readers have heard of *Common Sense*, and know that Thomas Paine wrote it, few have probably ever read the document or understood the immensity of its impact. Shaara shows how *Common Sense* educated the masses in the philosophy of the revolution and caused them to accept the new paradigm of individual rights. Through the character of Adams, Shaara showed how the act of questioning the divine right of kings, a concept that has become the birthright of every American, was

12. *Id.* at 94.

incomprehensible at that time. John Adams's transition is further shown by his reaction to the pamphlet. By 1775, he praised the words of Paine, while in 1770, he would have thought them heretical.

The final quarter of the book discusses much of the interplay of the continental congresses. The John Adams transformation is complete, and he is the firebrand the rebels rally around when discussing independence. Shaara uses the Continental Congress to illustrate that even when independence had become the clear goal, the means remained far more important than the end. As always, Adams (and most of the subsequent signers) was dedicated to doing moral and ethical right. Even after open hostilities, the majority of the Continental Congress still favored a peaceful re-unification with Britain. The book then closes with the Declaration of Independence. It is the final scene, however, that holds another profound lesson for many readers.

The book's audience may have read about the importance of the Declaration of Independence to Washington and his men, and simply accepted it as fact, without ever truly understanding why. Shaara examines it from a soldier's perspective.¹³ For months these soldiers had been away from home, fighting an enemy that was stronger, better trained, and better armed. And yet, after the Declaration of Independence they gained something the British troops never had the entire war: they now had a defined goal. Giving a soldier a clear mission has always been the first step to achieving victory.

The greatest strength of this novel is clearly its character development. From the tangential characters, like Private White, to the pivotal leaders, like John Adams, the reader is able to see into the minds and hearts of each person. In addition to John Adams, the characters of Benjamin Franklin, Lieutenant General Thomas Gage, Governor Thomas Hutchinson, and General George Washington were especially well developed. Shaara developed characters less with dialogue, as many writers do, and more with commentary on their personal thoughts. This is a result of Shaara's goal to keep all quotations accurate.¹⁴ The character of Samuel Adams is the exception to otherwise excellent character development.

While the novel clearly focuses on John Adams and his role in the revolution, it does so at the expense of Sam Adams. Despite the constant

13. *Id.* at 476.

14. *Id.* at vii.

reappearance of Sam Adams throughout the story, the reader never learns more about his inner thoughts and emotions. The reader is left with an over-simplistic perception that Sam Adams was an amoral activist for whom revolution was a goal in and of itself. Shaara fails to explain Sam Adams's ardent fervor.

Another great strength of *Rebellion* is the historical accuracy shared by all Shaara novels. The amount of research Shaara put into this work will be obvious to any reader motivated by *Rebellion* to learn more about this historical era. Despite restricting most of the plot and dialogue to conform to actual history, Shaara ensures that the flow and message of the novel do not suffer.

Rebellion is an excellent book for judge advocates desiring to learn more about the role of a dedicated attorney, John Adams, in the formation of our nation. In addition, it gives a soldier-lawyer rare insight into the hearts and minds of soldiers on both sides of the conflict. From Private White to Generals Gage and Washington, *Rebellion* shows how critical a clear mission is to all levels of soldiers.

Shaara wrote *Rebellion* to demonstrate that the underlying themes of the revolution are still relevant to the United States today. The author's unstated advice is to remember the ignorance and arrogance that led to Britain's downfall as the premier world power, and to remember how motivating perceived injustice may be. The British learned, to their loss, that they did not hold a sole and proprietary interest in the concept of justice. The lessons of the Revolution serve as sage advice as the United States currently struggles with her own potential *Gaspee*, the World Trade Center and Pentagon terrorist's attacks. Granted, these tragedies are infinitely more serious than the *Gaspee* attack, but like that incident was for the British, America's reaction will be far more important in the annals of history.

Rise to Rebellion opens new windows into the souls and events that led to the age of revolution in the United States. There is a promised sequel to cover the second part of the era, and I certainly look forward to it.

**MARBURY V. MADISON:
THE ORIGINS AND LEGACY OF JUDICIAL REVIEW¹**

REVIEWED BY MAJOR STEPHEN M. SHREWSBURY²

*It is emphatically the province and duty of the
judicial department to say what the law is.*³

But what *is* the law? That question forms the constant undercurrent that runs throughout William Nelson's well-written and fascinating narrative about the facts and legacy of one of America's most important Supreme Court cases. The case, readily recognized by every student of the law or American history, established the beginning of one of our most important legal principles—the axiom that the Supreme Court has the final word on whether actions by the other federal branches and States complied with the requirements of the Constitution.⁴

This book has two apparent and distinct purposes. On the one hand, the fast-paced and interesting historical review moves through the beginning and development of judicial review. To that end, Nelson quickly establishes his thesis that Chief Justice John Marshall,⁵ in creating judicial

1. WILLIAM E. NELSON, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (2000).

2. Judge Advocate, United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury* involved an action by William Marbury and others to seek a writ of mandamus directly from the Supreme Court forcing the new Secretary of State, James Madison, to deliver to them their commissions as justices of the peace. The former President, John Adams, had signed these commissions before leaving office. See NELSON, *supra* note 1, at 57.

4. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury* before stating that "the federal judiciary is supreme in the exposition of the law of the Constitution").

5. 1755-1835; Chief Justice of the United States, 1801-1835. Marshall was born in Fauquier County, Virginia, as the oldest of fifteen children. Marshall married sixteen-year-old Mary Ambler in 1783, following his service with George Washington in the Revolutionary War and admission to the Virginia Bar in 1780. He served in Virginia politics before going to France at the behest of President Adams in 1797. He was elected to the House of Representatives in 1799 before being nominated as Secretary of War and then immediately as Secretary of State, in 1800. Six months later, President Adams nominated Marshall as Chief Justice of the Supreme Court, and he was confirmed unanimously in January 1801. See The John Marshall Foundation, *Biography of John Marshall*, at www.vba.org/jmfinfo.htm (last visited July 10, 2002).

review, carefully drew a distinction in *Marbury* between legal and political decision making.⁶ He attempts to explain the case's influence then and now by first drawing the reader into the eighteenth century American world in which John Marshall lived. He then examines the details of *Marbury* and the subsequent spread of the new power of judicial review. According to Nelson, it was a power that evolved from drawing a line "between the legal and political—between those matters on which all Americans agreed and which were fixed and immutable and those matters which were subject to fluctuation and change through democratic politics," to the power of today's courts to make policy choices.⁷

But underlying this entire historical discussion is the book's second purpose—Nelson's use of *Marbury* as a foundation of support for judicial activism. Glimpses of this underlying theme appear throughout the book, but do not become clear until the last chapter. Eventually, the reader learns that, in Nelson's view, the power of today's courts to make policy choices is well deserved because "[o]nly judges are sufficiently insulated from majority prejudices to be trusted."⁸ To support his reasoning, Nelson posits that in early American society, judges and juries said what the law was by following the "consensus" views of society. Consequently, today's judges should use the same standard of lawmaking as they make policy choices based on societal consensus.

Of course, the source of that consensus is very different today, but that is not the issue. What is important is the idea that judges say what the law is based on societal consensus—a standard used then, and one that should be used today. After all, as Nelson explains, John Marshall himself relied on consensus in deciding part of the *Marbury* opinion when he found "that Marbury had a right to his commission because, by a consensus of American lawyers, a commission for office was a property right and because, by the consensus of the American people, property was a fundamental, legal right that trumped the political will of the popular majority."⁹ Whether the reader ultimately agrees with the author's use of *Marbury* to sustain his enthusiastic support of judicial activism by courts today, he succeeds in helping the reader understand some of the reasons why courts slowly

6. See NELSON, *supra* note 1, at 8.

7. *Id.*

8. *Id.* at 124.

9. *Id.* at 119. Marshall opined that Marbury's commission, as evidence of his appointment, was his property and, therefore, the appointment vested him with legal rights that the law protected under the Constitution. See *id.* at 55-62.

evolved from strictly limited judicial review to today's unabashed making of political policy choices.

Nonetheless, long before the book reveals Nelson's viewpoints on the proper role of the judiciary today, it moves in whirlwind fashion as a fascinating historical review, in which the reader is first carried back into pre-American colonial history. To help give the book its flowing style, Nelson uses a bibliographic essay instead of endnotes, which may be difficult for the reader seeking more in-depth discussion of source material. Yet, with a view to establishing American life in the colonies as an important foundation to the coming doctrine of judicial review, Nelson deftly draws the reader's attention to various aspects of colonial life that provided the floor upon which the founding fathers built our constitutional republic.

It was within this world that John Marshall grew and lived. The historical portion of the book is by far the most interesting as Nelson adeptly paints a backdrop for the development of judicial review. He discusses the ties between the social and legal development of eighteenth and nineteenth century America based on societal consensus, and he explores John Marshall's life before the *Marbury* decision.

From where did consensus in early American society arise? According to Nelson, the social structure of the mid-eighteenth century British North America was rooted in localities. The courts and government were not thought of as institutions for policy change—no one really thought things could change. Life went on as usual, and “[n]o one in government needed to make choices about the direction that law, government, and the society ought to take.”¹⁰ Thus, in American society during that period, law was determined by juries, which had the power to ignore the instructions of judges and make whatever decisions they wished. “[T]he law-finding power of juries suggest[ed] ineluctably that jurors came to court with shared preconceptions about the substance of the law.”¹¹ Thus, if juries “mirrored the . . . landholding . . . population,” then “perhaps a body of shared ideas about law permeated a large segment of the population.”¹² In

10. *Id.* at 15.

11. *Id.* at 21.

12. *Id.* at 22.

sum, the “consensus style of government was known to most mid-eighteenth-century white, male Americans on a routine, day-to-day basis.”¹³

Having provided a basis for consensus-style lawmaking in American colonial history, Nelson states that consensus-style government became “unhinged” at the end of the French and Indian War as the revolutionary struggle split communities as they identified with the Tories or patriots.¹⁴ In the early 1790s, the line between believers in popular sovereignty and believers in supreme fixed principles was plainly drawn, pitting the will of the people against fixed principles of law.¹⁵ The Republicans feared that the “Federalists would subvert republican liberties and rule autocratically.”¹⁶ The Federalists feared that the “conferral of power upon Republicans would subvert morality and lead to violence and anarchy.”¹⁷

With that background, Nelson begins the most fascinating chapters of the book, detailing the life of John Marshall and his *Marbury* decision. It is through understanding John Marshall’s development into a man of consensus that the reader begins to understand what motivated the man who would change the course of American judicial history. Marshall came from a shared common ancestry with Thomas Jefferson and other Virginia families. Having served in the Continental Army under George Washington for four years, including at Valley Forge, he became a committed nationalist and a consensus builder.¹⁸ As a spokesman for the Federalist forces during the Constitutional Convention, he was in charge of designing the judiciary article.

Known as a party moderate, Marshall won a seat in Congress as one of the few Federalists from the South, partly because he opposed the Alien and Sedition Act.¹⁹ Marshall was extremely loyal to President Adams, and though he greatly distrusted Jefferson, he remained neutral during the Jefferson-Burr election contest.²⁰ Marshall became Chief Justice less than one month before that election, with the Jeffersonian Republicans supporting Marshall because of his moderate stand and rebellion against party dis-

13. *Id.* at 27.

14. *Id.* at 28-30.

15. *Id.* at 37.

16. *Id.* at 39.

17. *Id.*

18. *Id.* at 42-43.

19. The Federalists had supported the Act, which made newspaper criticism of the Adams administration a criminal offense. *See id.* at 46.

20. *Id.* at 49-50.

cipline. Thus, Marshall came to mutual respect with Jefferson, and despite the bitter fight over the change of power from the Federalists to the Republicans, was “no fanatic.”²¹

With Marshall’s world fresh in the reader’s mind, Nelson explains the tightrope Marshall walked in his brilliant *Marbury* opinion. It was a decision neither the Federalists nor Republicans could criticize, but which, at the same time, established judicial review by the Supreme Court as a fundamental principle. Marshall exercised and solidified the Court’s new power just a few days later in *Stuart v. Laird*²² by striking down an Act of Congress for the first time.

Here the book moves as a fast-paced historical review. The lame duck Congress during the end of President Adams’s term of office passed the Judiciary Act of 1801, greatly expanding the size and power of federal courts. This Act upset the compromises that had been reached in designing the Sixth and Seventh Amendments.²³ The anti-Federalists designed these amendments to the Bill of Rights because they were aware of the fact- and law-finding powers of juries,²⁴ and they feared such powers would be transferred to federal judges. This would “weaken the power of the states to nullify federal policy.”²⁵ Thus, the new Congress quickly passed the Judiciary Act of 1802, repealing the 1801 Act. Soon after, new Chief Justice Marshall was faced with two cases that, if decided incorrectly, would create a Supreme Court that the newly elected Jefferson feared.²⁶

Nelson convincingly asserts his thesis that John Marshall carefully drew a distinction between legal and political decision making—a distinction that runs throughout the *Marbury* opinion.²⁷ Marshall, the consensus

21. *Id.* at 53.

22. 5 U.S. (1 Cranch) 299 (1803).

23. NELSON, *supra* note 1, at 57. Among other important protections, the Sixth Amendment guarantees a right to a jury trial in criminal cases and the right to have the jury drawn from the district where the crime occurred. The Seventh Amendment guarantees a right to a jury trial in civil cases involving amounts greater than \$20, and it guarantees that no fact tried by a jury could be “re-examined in any Court of the United States, [other] than according to the rules of common law.” U.S. CONST. amends. VI, VII.

24. *See supra* text accompanying notes 11-13.

25. NELSON, *supra* note 1, at 55.

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Stuart*, 5 U.S. (1 Cranch) at 299. Decided differently, Marshall could have allowed Congress to give the Supreme Court powers in the Judiciary Act of 1801 that the Constitution did not allow, that is, original jurisdiction to issue writs of mandamus, as well as the authority to strike down the Judiciary Act. Such a result could have led to a constitutional crisis between Marshall and Jefferson.

builder, compromised in both *Marbury* and *Laird*; courts would protect legal rights, but refrain from adjudicating political questions. In these companion cases, therefore, Marshall tried to balance popular will with legal principle, and he tried to distinguish “between the domain of the law and the domain of politics.”²⁸

Nelson is convinced that judicial review took shape because Marshall believed that the principles underlying constitutional government were non-political. In *Marbury*, “the Court evoked the Revolutionary generation’s assumption that the people, acting as a unitary body . . . had incorporated basic generally agreed-upon principles of right into their Constitution. The Court thereby reverted to something like the governance by consensus techniques of its eighteenth century predecessors.”²⁹ Accordingly, while the *Marbury* decision prevented the courts from engaging in judicial activism, it laid the foundation for future courts to begin the judicial review process. It was a process relatively uncontroversial then, and very different than the social policy making that courts engage in today.³⁰

While the book’s discussion of the details of *Marbury* is absorbing, its post-*Marbury* historical discussion is too cursory and conclusory. Nelson’s underlying focus on his core theme—that courts act based on consensus—eventually relies on *Marbury* as an important basis for his justification of judicial activism today. But getting there is problematic because Nelson begins to discuss post-*Marbury* cases involving judicial invalidation of legislation as cases mainly involving “takings.” The reader flounders while trying to understand how these takings cases relate to Nelson’s theme. Although the relationship becomes clear later in the book, it gives this section, while historically interesting, a somewhat aimless and dull quality. Once Nelson explains the relevance of the takings cases, the reader wants to return to the previous section with a more intense focus. Accordingly, a few guiding paragraphs, followed by a fuller discussion, may have been helpful.

According to Nelson, judicial review involving judicial invalidation of legislation was rare in the period between *Marbury* and the infamous *Dred Scott*³¹ case. Courts rarely invalidated significant legislation, except

27. See NELSON, *supra* note 1, at 8.

28. *Id.* at 59.

29. *Id.* at 64.

30. See *id.* at 75-76.

in property takings cases. Judicial review was mainly targeted at “the possibility that faithless legislators might betray the trust placed in them by the people,”³² especially with regard to their inherent constitutional right to property. *Dred Scott*, which partially set the stage for the Civil War, focused on the property rights aspects of the case’s facts to invalidate the Missouri Compromise.³³ Thus, in the Court, claims of property rights in slaves and economic liberty were pitted against the fundamental liberty notions of human beings. The claim of property rights won the day.³⁴ Later, this relentless focus on property and economic liberty saw new state “legislative efforts to improve working conditions of laborers founded on the rocks of economic liberty.”³⁵

Nonetheless, courts began to see judicial review not as a device for protecting the people against their government, but for protecting minorities against majorities. While rich property owners were the original “minorities” protected through judicial review, judicial protection eventually became “a means for sectional and political minorities or individuals lacking control of the legislative process to obtain reconsideration of the legislature’s decisions and overturn the legislature’s political judgments.”³⁶

In this section, the book’s second purpose and Nelson’s theme fully emerge. The tone of the writing quickly evolves from a historical narration of Nelson’s conclusions about *Marbury*’s influence to a forceful advocacy for judicial activism as the only trustworthy means to protect minorities from majoritarian legislators. In Nelson’s view, the courts’ focus on legal rights, especially in property, changed in the late 1930s because of fear of totalitarian governments and an underlying loss of faith in popular government and institutions of democracy. The focus shifted to support of economically weak groups so they could stand against stronger opponents.³⁷ Nelson tries to strengthen his position in this section of the book by using

31. *Scott v. Sanford*, 60 U.S. (1 How.) 393 (1856) (commonly called *Dred Scott* after the name of the Petitioner).

32. NELSON, *supra* note 1, at 83.

33. *Id.* at 88.

34. *See Scott*, 60 U.S. at 454 (holding that Dred Scott was not a “citizen” of Missouri in the sense used by the Constitution).

35. NELSON, *supra* note 1, at 90.

36. *Id.* at 93.

37. *Id.* at 99.

a “string of quotations” writing style to make his point, without placing the quotations in any context—a style that was intellectually annoying.³⁸

According to Nelson,

Our task is to comprehend the significance for judges and judicial review of this change in the understanding of the essential task of just government Democratically elected legislators and elected executive officials, who are responsible to popular majorities, cannot be trusted to protect minorities from those majorities. Judges with life tenure can be.³⁹

These statements astonish the reader, considering the vast amount of legislation that has been passed protecting various minority groups over the past several decades.⁴⁰

Nelson argues that *Marbury*'s distinction between law and politics still pulls courts to find “legalistic” grounds for its decisions. But, in his view, “the essential task of government [today] is not to establish the will of the majority but to protect the integrity and civil liberties of minorities. Legislative majorities are too self-interested to be trusted with that task.”⁴¹ Accordingly, judges must use their ad hoc judgments and intuition about good social policy in the absence of clear rules.⁴²

Without justifying these statements, Nelson moves on to discuss the worldwide spread of judicial review. If Nelson had continued to focus on the historical development aspects of the book, this history would be interesting. Yet, he immerses the reader in his emerging arguments. Consequently, this new historical discussion seems superfluous and breaks the flow of the book.

Fortunately, Nelson returns to his theme in the book's concluding chapter. He cogently details original intent and various other arguments related to judicial activism. Ultimately, he provides better arguments for judicial restraint than judicial activism. Nonetheless, he concludes that Marshall in *Marbury* provided authority to the Supreme Court to “identify

38. *See, e.g., id.* at 97 (using eight short quotations in a single paragraph).

39. *Id.* at 101-02 (emphasis added).

40. *See, e.g.,* The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. This act was part of a series of legislative reforms protecting minority groups.

41. NELSON, *supra* note 1, at 103.

42. *Id.*

and enforce, even against majoritarian legislation, values widely shared by the people as a whole.”⁴³ But one is left wondering, what would prevent the majority legislators from enforcing values that the people as a whole share?

In the end, Nelson uses *Marbury* to support his idea of consensus-based judicial decision making. He argues that *Marbury* used consensus in the first part of the opinion, and that is what judges are doing today in articulating the societal consensus against discrimination. For Nelson, such consensus is a second form of “law” relied upon by courts. This consensus, the publicly proclaimed values of which the community agrees, was articulated by juries in the past, but is defined by “societal leaders and the media today.”⁴⁴ Unfortunately, Nelson puts forth this astounding claim of media-created law as a conclusion without nearly enough supporting discussion.

While acknowledging that *Marbury* drew a definitive legal and political line, Nelson concludes that the case supports his views because part of its reasoning was based on societal consensus regarding property rights during the time the Constitution was created. He forcefully opines that only judges can be trusted to implement and protect the majority consensus, which accepts that discrimination is evil and unjust. Whether one agrees or not, this provocative argument ends an excellent book for both the lawyer and non-lawyer alike. The reader is left with a solid understanding of the development of judicial review and an even firmer understanding that—while *Marbury* may stand as the rock upon which rests the judicial power to decide “what the law is”—the ultimate question of “what is the law” remains a matter of considerable dispute.

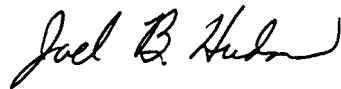
43. *Id.* at 119.

44. *Id.* at 122.

By Order of the Secretary of the Army:

ERIC K. SHINSEKI
*General, United States
Army Chief of Staff*

Official:

A handwritten signature in black ink that reads "Joel B. Hudson". The signature is written in a cursive style with a large, stylized initial "J".

JOEL B. HUDSON
*Administrative Assistant to the
Secretary of the Army*
0223517

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