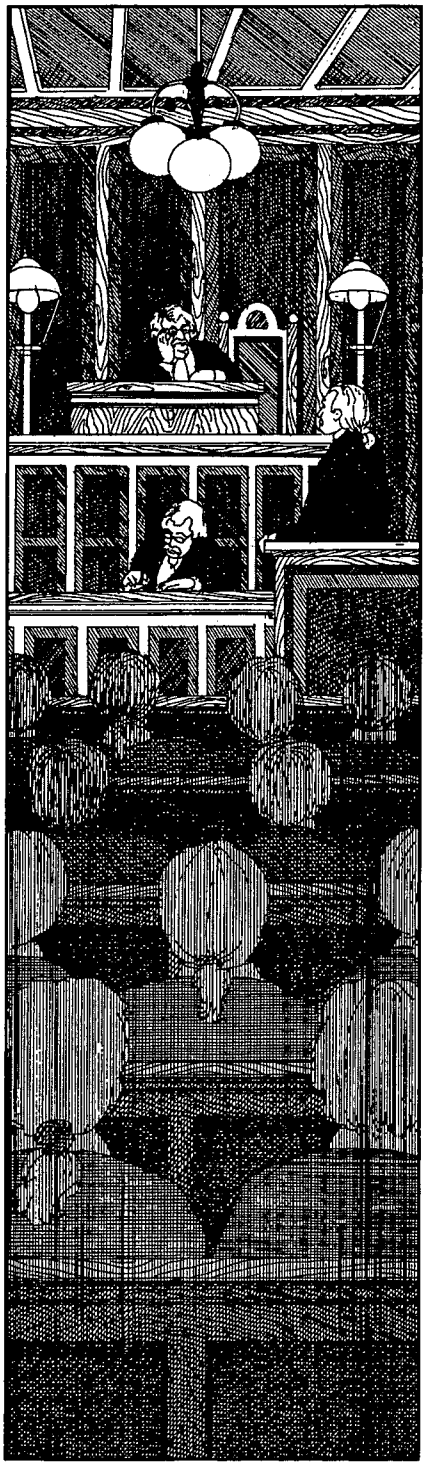
Legal Lore



Two Trials in and About Chattanooga—Lynching and Federal Judicial Power

by Michael E. Tigar

This is the story of two trials, one unfortunately typical and the other so path-breaking that even today we read of it with a sense of wonder. Both trials are chronicled in an exciting book by Mark Curriden and Leroy Phillips, Jr., *Contempt of Court*, published in 1999 by Faber & Faber. What follows is taken from that good book.

On the night of January 23, 1906, someone raped Miss Nevada Taylor in Chattanooga, Tennessee. The next day, *The Chattanooga News* reported that this was "a crime without parallel in criminal annals of Hamilton County" and that a "Negro fiend" had done it. Thus began a case, today almost forgotten, that shaped the law of habeas corpus and federalism.

Two days later, based on information given by an informer, Hamilton County Sheriff Joseph F. Shipp arrested Ed Johnson for the crime. By this time, the local press had already stirred up anger toward Taylor's attacker. Ed Johnson was a carpenter by trade and a drifter by disposition. He protested his innocence when arrested and never wavered in that assertion.

With Johnson in jail, the local paper kept up the attack; its articles and editorials barely concealed calls for a lynching. Some townspeople obliged, and armed gangs made two serious efforts to storm the jail even before Johnson was tried. That should not surprise us: between 1880 and 1940, there were more than 4,000 lynchings in the United States, mostly of African-American men.

For his counsel, Johnson had three local, white lawyers. Taylor testified twice. On her first appearance, she said that she was fairly certain Johnson was her attacker, but some of the details did not match. Johnson's lawyers put on a parade of alibi witnesses, all of whom swore that Johnson was working elsewhere when Taylor was attacked. Some of the jurors asked that Taylor be brought back to the witness stand.

On her second appearance, Taylor was tearful. "I will not swear that he is the man," she said, "but I believe he is the Negro who assaulted me." A juror asked her to say whether "that [is] the guilty Negro." Miss Taylor repeated that she believed so. Taylor, Johnson, and some jurors wept. One juror fainted from the emotion of the moment. Another juror called out, "If I could get at him, I would tear his heart out right now."

In summation, defense counsel methodically tore the state's case apart. The victim saw her attacker only briefly and would not swear that Johnson was the man. Aside from those who testified to inconsequential detail, the state's only other witness was a paid informer. Johnson denied the crime and was supported by independent witnesses.

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Defense counsel chided the judge for showing bias in questions, comments, and rulings. He turned his fury on the prosecutors and singled out Sheriff Shipp. Counsel observed that an election was on the horizon and that making this case "may not achieve justice. But it does get you re-elected."

The jury convicted Johnson just 17 days after the crime. The judge huddled ex parte with the district attorney and appointed a panel of three lawyers to review the case. Two of the three "reviewers" were nominated by the prosecutor. They confronted Ed Johnson and told him that he had two choices: he could accept a death sentence and be executed in the ordinary course of law, or he could appeal. If he appealed, they told him, the community might become so angered that he would be lynched. As one lawyer put it: "You can accept the verdict of the court and die in an orderly, lawful manner. Or you can die horribly at the hands of the mob." Johnson agreed to tell the judge that he was ready to die but also that he was "an innocent man."

So, Ed Johnson's lawyers waived an appeal, and the trial judge sentenced him to be hanged. Were it not for two African-American lawyers—the only ones in Hamilton County—that would have been the end of it.

Noah Parden had helped prepare the defense and was responsible for finding the African-American alibi witnesses. But he had not entered an appearance. Ed Johnson's father asked Parden to take over the case and appeal it. Styles Hutchins, a younger lawyer, agreed to help. The trial judge told the two of them that filing an appeal was fraught with danger—for everyone involved.

The jury had reached its verdict on a Friday. On Monday morning, Parden and Hutchins presented a motion for a new trial. The trial judge refused to hear the motion, however, telling the lawyers they would have to return the next day, when the prosecutor could be present. The next day, Tuesday, Parden and Hutchins renewed their motion. The trial judge denied it because a motion for a new trial had to be made within three days of the verdict and the time had run. He then ridiculed the "Negro lawyers" for thinking they could do something a "white lawyer" could not. The Tennessee Supreme Court summarily refused a hearing.

Ed Johnson's execution was set for March 13, 1906. On March 3, Sheriff Shipp ordered the gallows crew to begin stretching and testing the rope. Johnson was being held in the Knox County jail to await transportation back to Chattanooga for his execution.

On March 7, Sheriff Shipp went to Knoxville to collect his prisoner. That same day, however, Hutchins and Parden invoked the Habeas Corpus Act of 1867, which gave federal courts the power to review state court criminal convictions. A federal district judge issued a stay of execution, citing the exclusion of African Americans from the trial jury. Hutchins and Parden hoped that the jury issue—on which there was some favorable Supreme Court case law—would carry the day. They also invoked the denial of due process, as to which the Supreme Court's precedents offered no consolation.

On March 10 and 11, Federal District Judge Clark heard evidence and argument. Because there was no Supreme Court case applying the Sixth Amendment to the states, he concluded that he had no jurisdiction over claims that the defense attorneys were intimidated. He reached the same decision as to the claims that the trial had been a sham. And on the juror exclusion point, Judge Clark ruled that the petitioner's attorneys failed to carry their burden of proving systematic racial exclusion.

After delivering this news, Judge Clark said that he did have the power to stay the execution. He did so, until March 23, 1906, to permit Parden and Hutchins to seek review in the United States Supreme Court.

Sheriff Shipp was not pleased with the delay. He arranged to transfer Johnson back to Chattanooga to await further developments. Now, Johnson had been sent to Knoxville in the first place to get him out of harm's way—to prevent a lynch mob in Chattanooga from getting at him. Why move him back? And why, as the evidence later revealed, did Sheriff Shipp reduce the guard contingent at the Chattanooga jail to a skeleton crew?

The local papers excoriated the federal

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stay and called for vengeance. The *Chattanooga Times* of March 16, 1906, assured its readers that Ed Johnson would surely die. It also reported that he was "not provided with a special guard."

Hutchins prepared a petition and went to Washington. Fortune smiled. The Circuit Justice for the Sixth Circuit—including Tennessee—was John Marshall Harlan. Harlan had dissented in the "separate but equal" case of *Plessy v. Ferguson*. He heard Hutchins in chambers and agreed that the full court should hear the case. But Harlan did not act

until he met with his colleagues. After they were moved to grant plenary review, Harlan issued a stay of execution on March 19, 1906.

Back in Chattanooga, it was one week before Sheriff Shipp's re-election was to be decided. On the night of March 19-20, a white mob broke into the lightly guarded jail. Sheriff Shipp, called by a newspaper reporter who told him what was happening, walked to the jail and asked the crowd not to destroy the building. A group of the mob leaders led the sheriff to a bathroom in the jail and advised him to stay there. The sheriff complied.

The mob took Johnson out to the county bridge and called on him to confess. Johnson said, "I am ready to die. But I never done it. I am not guilty. . . . God bless you all. I am innocent." Those were his final words. The mob hanged him from the bridge and fired shots into his twitching body.

That was the end of the first trial—the trial of Ed Johnson.

The Second Trial

Would there be another trial? It seemed unlikely that the lynch mob leaders would be prosecuted. Sheriff Shipp arrested no one. Chattanooga prosecutors convened a grand jury, but no witness would identify anyone connected with the lynching.

The probe was dropped. Sheriff Shipp was re-elected. Newspapers across the South applauded the lynching and regarded it a fit response to the Supreme Court's interference.

In official Washington, D.C., the reaction, fortunately, was different. Justices Harlan and Holmes met with Chief Justice Fuller and gave press interviews. They denounced not only the lynching but Johnson's trial as well—calling it "a shameful attempt at justice." President Theodore Roosevelt condemned the lynching as "contemptuous of the court" and promised action.

The options were limited. The U.S. Attorney in Chattanooga, a Roosevelt appointee, was willing to investigate and prosecute. And he believed that federal civil rights legislation provided both jurisdiction and sanctions against the guilty parties. But he and his superiors knew that a grand jury of white men would not likely indict and that a Tennessee trial jury would never convict. So with the Supreme Court's encouragement, Roosevelt sent two Secret Service agents to Chattanooga to gather evidence and report back to Washington.

On May 28, 1906, the Justice Department—with the agents' report in hand—filed a petition in the United States Supreme Court. The petition asked that Sheriff Shipp, nine deputies, and 15 civilians be ordered to show cause why they should not be held in contempt of the Court's order and authority. The second trial was in motion.

On October 15, 1906, the defendants entered pleas of not guilty. On December 4, the Court heard argument on a limited issue: whether it had jurisdiction over the defendants' conduct. On December 24, 1906, the Court decided without dissent that even if the federal trial court had no jurisdiction, and even if the Supreme Court were ultimately to decide that it had no jurisdiction, the case was properly before it. Justice Holmes wrote the opinion. Only the Supreme Court has the power to decide if it has power—"jurisdiction to determine jurisdiction," as a latter-day formulation puts it. While it is deciding a case that it has determined to hear, its authority is not subject to question. "This was murder by a mob," Holmes wrote, and even if it was a crime against the state, it was also a crime against "the United States and this court." For that reason, "the trial of this case will proceed." 203 U.S. 563 (1906).

In Chattanooga, from February through June 1907, a special master appointed by the Supreme Court took sworn testimony about the lynching. The Supreme Court received the transcripts soon thereafter but was silent on the issues for more than a year. Finally, in the fall of 1908, the Court announced that it found the evidence sufficient to authorize further proceedings against nine defendants, including Sheriff Shipp. The lawyers for those defendants were invited to present oral argument to the full Court in March 1909.

On May 24, 1909, the Court issued its opinion: Shipp and five others guilty, the remaining three not guilty. Shipp's five guilty companions included one deputy and four civilian members of the mob. The vote was 5 to 3, with Justice Moody (who had been Roosevelt's attorney general and was thus recused) not sitting. The opinion is reported at 214 U.S. 386 (1909).

The justices debated the proper sentence for months more. Finally, on November 15, 1909, the Court sentenced Shipp and two others to 90 days imprisonment; the other three were sentenced to 60 days. All sentences were to be served in the District of Columbia. 215 U.S. 588 (1909).

The sentences were indeed light—Holmes and Harlan wanted at least a year. But a point had been made. This was the first time the Supreme Court had tried a contempt of its own authority. The justices expressed views of their power over state criminal convictions that were not to blossom fully for another half-century. And this was the only instance of federal judicial power being brought to bear against the tide of lynchings.

Hutchins and Parden could not resume their practices in Chattanooga. Sheriff Shipp, the trial judge, and the other white figures in the Johnson trial went on to distinguished careers in politics and law. Nonetheless, the story of these two trials is a powerful example of courage and faith. Those who take the first, courageous steps along a path toward justice receive obloquy as often as honor. Only in retrospect do we learn and heed the lessons they try to teach.