

Probable Cause

by Charles L. Harness

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...

Nor shall any person be compelled to be a witness against himself...

-- Constitution of the United States, excerpts, Fourth and Fifth Amendments

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Benjamin Edmonds turned the film advance knob on the self-developing camera in slow rhythmic motions of hand and wrist. When the mechanism locked, he placed the camera on its side next to the bronze casting on the wall table. He flipped off the ceiling light and turned on the faint red darkroom lamp over the developing trays. He sat for a moment, studying the casting and waiting for his eyes to adjust to the near darkness.

The replica was a plain, almost homely thing: a hand clasping a piece of broomstick. Even after a century and a quarter it still radiated the immense strength and suprahuman compassion of its greater model, and it would surely help to waken the distant sleeping shadows. Edmonds laid his own big hand over it softly; the metal seemed oddly warm.

It was time to begin.

He turned off the red light and let the blackness flow over him.

The images began almost immediately. At first they flickered vaguely, seemingly trapped within the plane of his eyelids. Then they gathered clarity and stereoscopic dimension, and moved out, and away. They were real, and he was there, in the crowded theater, looking up at the flag-draped presidential box, occupied by the three smaller figures and the tall bearded man in the rocking chair. And now, from behind, a fifth. The arm surely rising. The deadly glint of metal. The shot. The man leaping out of the box to the stage below. And pandemonium. Fluttering scenes. They were carrying the tall man across the street in the wavering paschal moonlight. And finally, in that far time, Edmonds permitted the strange hours to pass, until the right moment came, and the right image came.

It was the critical instant. This last scene, this static vision in time, must now be captured on the emulsion waiting inside the camera. As always, the mental process of transfer was sharp, burning. And then it was done.

He stood up and turned on the ceiling light again. He was breathing heavily. He felt cold, but his face was dripping with sweat. He pushed the bronze casting aside, rubbed at his eyes with a couple of paper towels, then pulled the film out of the camera. He studied the positive print briefly, but with approval. He rubbed the negative carefully with a hypo-stick and placed it between the carrier plates of the enlarger.

Why, of all the transcendent possibilities, did he think Helen would want this simple thing of hands? Why not the gangling young man, brooding at the grave of Ann Rutledge? Or the poignant farewell from the rear of the train just before it pulled out of Springfield? No, none of these. For Helen Nord, it had to be the hands.

For a bachelor in his fifties, thought Edmonds, I am a fool. And if Helen only knew what I have been doing here, she would certainly agree. I'm worse than Tom Sawyer, walking the picket fence to show off in front of his young lady friend.

He smiled wryly as he turned off the ceiling light once more and reached for the 8x11 bromide paper.

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The secretary in the outer office looked up from her typewriter and smiled. "Good morning, Madam Nord. The Justice is expecting you. Please go right in."

"Thank you." Mrs. Nord returned the smile and walked through into the inner office.

Benjamin Edmonds stood up gravely and motioned her to the chair by the great oak desk.

Helen Strachey Nord of Virginia, once known only as the widow of John Nord and the mother of three sons (all now launched in professional careers) was a handsome woman in her late forties. The tragic death of John Nord in the first Mars landings had brought her initially to the public eye, but her own remarkable abilities had kept her there. After working several years at NASA and taking her law degree at night, she had been appointed to the US-Soviet Arbitration Commission to settle the Lunar Disputes of the seventies. War had been averted. She was the obvious choice for the next appointment of a United States delegate to the UN And finally, when old Justice Fauquier died, President Cromway submitted her name to the Senate as the first female Justice of the United States Supreme Court. The ensuing senatorial debates and hearings made the long forgotten Cardozo and Black appointments seem exercises in benevolence. But for Cromway's assassination, she would never have made it. As a courtesy to the late President, enough votes were collected. Just barely.

How strange, thought Edmonds, that this woman, who has known passion, and who has nourished three fine sons, can yet bring such intricate insights into bankruptcy, space law, admiralty... the whole gamut. He said: "Glad you could drop by, Helen. I have something for you." He opened the attaché case, took the picture out, and handed it to her. "It's only an eight by eleven, but if you like it I can make you a bigger blowup for framing."

The woman walked over to the window and studied the picture.

Edmonds asked: "Do you know what it is?"

"Yes-- that is, I know what it would be, if it were possible. The hand of Charles Leale holding the hand of the dying Lincoln in the dawn hours of April fifteenth, eighteen sixty-five." She looked back at him, pondering. "But it can't be, because I also know that no photographs were taken. Not on that terrible night. But no matter. It is superb." She continued, sorting it out in her own mind. "It was the crowning, exquisite irony of the Civil War. You know the story, of course. Dr. Leale was a young army surgeon. He had come to Ford's Theater that night just to see Lincoln. It was the great ambition of his young life to shake the hand of the President, but he scarcely dared hope for this. And so he was the first doctor in the presidential box after Booth leaped down to the stage. Leale had the President moved across the street, and endured the last hours with him. And, it being his army experience that a dying man will sometimes regain consciousness in the moments just before the end, and wanting Lincoln to know he was among friends, he came around to his right side, and took him by the hand, with the tip of the forefinger on the fading pulse, just as you see here." She looked back at Edmonds thoughtfully. "It is certainly pertinent, considering the case we'll have at conference today."

His eyes searched her face uneasily. "Poor timing, wasn't it? I'm truly sorry. But you'll have to learn not

to let a case get to you, Helen. Not even *Tyson v. New York*. Especially not *Tyson*."

"Ben, do *you* think Frank Tyson shot President Cromway?"

"What *I* think about it personally is irrelevant. I can think about it only as a judge. And being a judge, even on this Court, is a job like any other. We get paid for interpreting laws made by other people. Our personal feelings of right and wrong are supposed to be irrelevant." How could he explain to her that he himself had never learned how to deal with that bitterest judicial duty-- to decide whether a man lives or dies-- and that he was reconciled to the knowledge he would never learn how to deal with it? He had never understood the rationale of capital punishment. After a history of six thousand years, it did not deter murders that led to further capital punishment. Maybe it had reduced the number? There was no way to tell. There was no control experiment. He shrugged. "The only thing that you and I and our seven brothers will have to think about is whether New York violated Tyson's constitutional rights in convicting him. As a Lincolnian, you must appreciate that."

"I know. Poor Dr. Mudd-- his only crime was to set the broken leg of a stranger-- who later turned out to be John Wilkes Booth. For which he was sentenced to life imprisonment."

"And Mrs. Surratt, in whose house the conspirators met."

"Yes. Even when the hangman pulled the black bag over her head, she did not understand."

They both looked around. Edmonds' secretary was standing in the doorway. "Excuse me, sir. The five-minute buzzer."

Edmonds nodded.

Helen Nord took a last puzzled look at the photograph before she put it away in her briefcase. Edmonds followed her out into the corridor.

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Subtler and more far-reaching means of invading privacy have become available to the government. The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions.

-- Justice Brandeis, dissenting in

Olmstead v. United States (1928)

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At his first Friday conference, Edmonds had thought the custom rather silly: each of the nine justices of the United States Supreme Court, the most prestigious body in the world, had to shake hands with the eight others before they could take their seats around the long table. But now, after several years on the high court, he could understand why Chief Justice Fuller had instituted the practice nearly a hundred years ago. It softened the long-standing frictions and differences that might otherwise prevent nine totally divergent minds from meshing together as a court. He thought wryly of analogies from the ring: "Shake hands and come out fighting." Thirty-six handshakes. It was possible now, at eleven o'clock in the morning. When they adjourned at six, it might not be.

And now they took their places around the long black table, Chief Justice Shelley Pendleton at the south end, Senior Associate Justice Oliver Godwin at the north end, and the other associate justices, in order of seniority, around the sides. The great John Marshall gave them his blessing from his portrait over the ornate marble fireplace.

The face of Chief Justice Shelley Pendleton was a paradox-- almost ugly in its craggy, masklike impassivity, yet capable of dissolving into a strangely beautiful humanity, warm, humorous, even humble. It was whispered that he had retired to his office and wept after his first affirmation of a death penalty, and that the widow was still receiving a pension from the manager of his immense personal estate. Before

his appointment, he had been a well-known figure on Wall Street. Edmonds admired the man. He found it incredible that such lucid opinions could flow from such a complicated intellect. It used to bother him, until he finally concluded that the Chief Justice considered *all* possible angles, sifted out the major controlling aspects, weighed them against each other in a multi-dimensional balance, and accepted the answer. The Pendleton technique involved all factors of legal precedent... *stare decisis*... logic... the common law... social needs... and a fine prophetic grasp of the impact of a given decision on future similar cases. Marshall had been a constitutionalist, Holmes a historian, Brandeis a sociologist, Cardozo a liberal, and Warren a humanist-- but Pendleton was none of these; for he was all.

The Chief Justice spoke rapidly and concisely. "The first case on our agenda is *Frank Tyson, petitioner, v. New York*. Petition is for certiorari to the Court of Appeals of New York. All of you know what this one is about, so I need restate the facts but briefly. Tyson was indicted, tried, and convicted of killing our late President Cromway in the entrance of the United Nations Building, with one bullet from a telescopic-sighted rifle, from a window in an empty room in a nearby building. Tyson's palm-print was found on the rifle, and ballistics tests showed that the bullet taken from the President's body was fired from the rifle. An elevator operator named Philip Dopher testified that he saw Tyson leave the room, carrying something, and hurry down the stairs. Tyson, a porter in the building, contends that he was supervising a shipment of files to a warehouse for storage, that he heard a shot in the empty room, went in to investigate, found the rifle, picked it up, then looked out the window, took in the scene instantly, and realized that he was holding the weapon that had just killed a President of the United States. He panicked, thinking only to get rid of the rifle. He ran down the side stairs with it and hid it, unobserved, in a crate of files standing by the freight elevator. Seconds later, the movers took the crate down the elevator to the van waiting on the other side of the building. And there, in that warehouse, it was eventually found."

He paused and looked around at the intent faces.

"Thus far, the case does not present a federal question. I want you to ignore the enormity of the crime and the fact that a President of the United States was murdered. All of us knew him personally, and we all have an abiding respect and affection for his memory; some of us are here by his appointment. These aspects standing alone cannot possibly warrant our review. The sole issue of relevance to us, and indeed, the sole ground urged as basis for reversal, is the alleged violation of the Fourth Amendment to the Constitution by officers of the State of New York, in that their warrant to search the warehouse was not issued 'upon probable cause.' Specifically, petitioner contends that the officers hired a clairvoyant, one Dr. Drago, to read petitioner's mind, without his consent, thereby to visualize the location of the rifle, and that the New York magistrate issued the warrant to search the warehouse on this so-called information, and on nothing else. The primary question therefore seems to be, can clairvoyance adequately substitute for the routine and legally sufficient visual and aural observations as basis for a sworn statement on which a search warrant may validly issue? If we accept this as the heart of the matter, we may have to consider ancillary questions. For example, is there actually such a thing as clairvoyance? If we can satisfy ourselves here and now that there is not, then we would of course have some basis for deciding that the warrant was not issued on probable cause: and Tyson might be freed. On the other hand, if we can decide here and now that clairvoyance does exist, we have no escape from the next question: Was the exercise of this power an unconstitutional invasion of Tyson's right of privacy? If it was not, then he was properly convicted. But if it was an improper invasion, then of course the evidence developed by it-- the rifle, and his fingerprints on the rifle-- would be inadmissible under the Fifth Amendment, and again he would go free."

He shifted restlessly in his chair. "There is more. Mrs. Nord, will you please step to the door and ask the marshal to bring in Exhibit Q?"

For over a century, no clerks, messengers, or secretaries had been permitted in the room during conference. The duty of doorman fell to the juniormost appointee.

Helen Nord stepped to the door, waited until the marshal and his assistant had place the object on the felt pad in the center of the great table, and closed the door after they left.

"As you know," resumed the Chief Justice, "this is *the* safe. And you know what it is said to contain.

During Tyson's trial, the so-called clairvoyant, Dr. Drago, testified that he had placed a suitably cushioned auto-developing camera inside, then locked the safe, and delivered it into the custody of the trial court-- but without the combination. So far as the record goes, Drago is the only one who knows the combination. If we grant certiorari, he will provide the combination. In fact, he is waiting in my outer office at the moment. He refuses to give the combination to anyone but me. But back to the facts. At the trial, New York put Drago on the stand to prove the existence of clairvoyance, and hence that the warrant was validly issued. Drago testified that his clairvoyant power-- he called it 'psi'-- was erratic, that it comes and goes, and could not always be called up at will. But he said he could prove it existed. He then predicted, over petitioner's objection, that New York would convict Tyson, that we would grant certiorari, and that the majority of us would reverse Tyson's conviction, holding that the warrant was not issued upon probable cause. He further predicted that most of us would deny the existence of psi. His proof to the contrary is supposed to be inside Exhibit Q, which we are invited to open after handing down our predicted decision."

"What colossal impertinence!" roared Oliver Godwin. His white handlebar mustache trembled indignantly.

"Mr. Godwin," said Justice Roland Burke coldly, "since the days of John Marshall it has been the custom at these conferences that each of us will be heard in turn without interruption, starting with the Chief Justice and proceeding down the line in order of seniority. I will ask you to await your turn."

The hard blue eyes of the Senior Associate Justice crackled. He said gravely, "Sorry, Roly. Sometimes I forget you're no longer barely passing my course in torts, back at Harvard Law. Ah, what a time you had with proximate cause, and those prolix, tautological so-called briefs. In fact, you still do. You used nearly fifty words just to tell me to shut up."

The ample cheeks of Justice Burke turned pink. "I'd resent that, if you weren't a senile old man, who should have retired long ago." He concluded primly, "You confuse tautology with logic."

Godwin grinned evilly. "Do I? 'Senile' is from *senex*, Latin for 'old man.' I'm an 'old-man old man.'" He laughed. "Well, perhaps I am. But age is a relative thing, Roly. If you leave me out, the average age on this court would be about sixty. And you're well over *that*. If it weren't for me, Roly, *you'd* be an old man."

Pendleton's mouth twitched faintly. "If we can defer the actuarial comparisons for a moment, I think I can finish. I don't want us to grant certiorari and then find we have to decide whether there is or is not such a thing as psi. And I want to ignore Exhibit Q altogether. Its contents-- or at least the eventual contents of the camera-- if any-- are not of record. Drago's insistence to the contrary, we can give it no consideration. Certainly, we cannot open it. Another point: petitioner urges an analogy to wiretapping. What has been done to him, if clairvoyance was in fact used, he calls 'clairtapping.' We have held that evidence obtained by wiretapping or by any other unlawful means is inadmissible, in both federal and state courts. *Mapp v. Ohio*, *Berger v. New York*. The contention is therefore made that 'clairtapping' is a violation of privacy as bad as, if not worse than, wiretapping, and that evidence so obtained must be similarly excluded. I think that there is merit in this contention. In summary, if the rifle was located by clairvoyance, the search may well have been unconstitutional in analogy to wiretapping. If clairvoyance does not exist, then there was no basis on which a valid warrant could have issued at all. Thus there is a possibility that we could decide the case without deciding anything about psi." He paused and looked down the table. "Mr. Godwin, I yield to you."

"Thank you, Shelley. It was about time. Several things bother me. *Can* we decide on the merits without deciding about psi? It's rather like that Kidd will case in Arizona, back in the sixties, where the testator gave all his money to anybody who could prove the existence of the soul. The judge *had* to decide whether human beings have souls. Pity we didn't grant cert on that one. Always wondered whether I'd get a soul out of a 5-4 decision. Sorry, brothers-- and sister. An old man likes to ramble. So I'll just ask a question: why don't we just open that safe right now and see what's on the film? Might save a lot of argument and embarrassment later on."

"You read the testimony," said Pendleton. "At the moment there's supposed to be nothing on the film."

"Then what in tarnation is the good of it?"

'Some kind of magic-- and don't ask me what-- is eventually supposed to appear on it.'

"When?"

"On Decision Day."

The Senior Associate Justice snorted. "You expect us to believe that?"

"No."

"I should think not. Let's get back to reality. As I view this thing, we're on the horns of a real dilemma. If we take the case and reverse Tyson's conviction because there was an unconstitutional invasion of privacy, then we have probably ruled that clairvoyance is a real and functional phenomenon. Science arises in anguish. On the other hand, if we rule that clairvoyance doesn't exist, and that, therefore, there was no invasion of privacy, then the bleeding-heart liberals arise in howling dismay at the official blessing we have now given police use of clairvoyance. Who needs wiretaps anymore? Psi is easier, and the cops will be welcome to use all the psi technique they can dig up: telepathy, clairvoyance, hexing, prekenners..."

"What's a 'prekenner,' Judge?" asked Edmonds, fascinated.

"Somebody who *previously kens* what's going to happen, so as to set up police traps to catch criminals in the act. I just made up the word. But if Roly can use two words when he means one, surely I can use one word when I mean two. That's all I wanted to say. You take it, Roly."

"Thank you, Mr. Godwin," said Burke coldly. He paused a moment, looking at the chandeliers overhead, as though simplifying and tailoring his thoughts for certain of the less disciplined minds around him.

Edmonds awaited the dissertation with interest. Somehow, of course, it would turn on logic.

In Burke's early days as a judge on the New Jersey bench, Frankfurter had been his model. But this had changed over the years. Burke (like Cervantes) had finally recognized that every man was the product of his own work. But where Cervantes had been content to permit the process to operate subconsciously, Burke went to the final logical limit. He found in his own past works his best inspiration. As he shaved in the morning, he listened to tapes of his previous decisions. And he listened to the same tapes in his car as he drove to court, and at night put himself to sleep with them.

He had founded the Burke Chair in Logic at Harvard. His famous text, *Logic in Appellate Decisions* (dedicated to himself) consisted largely of annotated excerpts from his own decisions. He was both ignorant of and indifferent to what others thought of his magnificent narcissism. In fact, he considered himself modest, and sought out situations where his modesty might be displayed, noticed, and commented on. Roland Burke's long love affair with himself had not dimmed with the passing of time: it was a serene thing, unmarred by lovers' quarrels. He had no portraits hanging in his office; only mirrors.

Edmonds sometimes wondered at his own reaction to Burke. Far from feeling contempt or derision, he found he envied the famous jurist's confident, self-centered, doubt-free integration into his codified environment, and his system of logic that so easily resolved all questions into black and white, with no plaguing shades of gray left over.

"Psi," began Burke, "is hogwash-- illogical by its very definition. Yet, as I shall demonstrate, logic requires that we take the case. There are only two possibilities: a) to deny the petition, and b) to grant. If we deny, this sets a precedent that the Supreme Court will refuse to review constitutional questions involving psi. Our refusal would be interpreted by the lower courts as endorsing warrants issuing on clairvoyant information. Such a consequence is clearly unthinkable. This leaves us, therefore, only with the second alternate, b), to grant. Logically, we must grant."

"*Quod erat demonstrandum*," murmured Godwin.

Burke ignored him loftily.

"Thank you, Mr. Burke," said the Chief Justice. "Mr. Moore?"

Nicholas Moore of Louisiana spoke with a soft drawl. "I disagree. This is not the kind of case this court should take. Even if there *is* a federal question-- which I doubt-- we can turn it down. Since the revision of the Judiciary Act in the twenties, we have been free to turn down practically any case we wish-- excepting issues between the states, or the states and the United States government. It's a question of policy. We can handle no more than a hundred to a hundred and fifty cases a year-- less than

ten percent of the appeals that come to us. Our every decision should throw light on some current judicial problem and state principles for the guidance of the lower courts in thousands of similar cases. We did this with the wiretapping cases, the desegregation cases, the school-prayer cases. But how many cases involving this psi thing are currently pending in the lower courts? None at all, that I've heard about."

"Mr. Blandford?"

"I agree with Moore," said the Massachusetts justice thoughtfully. "We took considerable interest in this kind of thing in Salem three hundred years ago. We burned people at the stake for less. We weren't too sure about God, but we certainly believed in the Devil. I hope this isn't evidence of a trend. We're not an ecclesiastical court of the Middle Ages. We can't go back. I don't think we should get involved. No, never again."

"Thank you. Mr. Lovsky?"

Justice Lovsky stared suspiciously at the safe. "The whole thing smells. But I agree with Mr. Burke, *supra*. We ought to take it. If we deny the cert, you'll have every J.P. in the country issuing warrants on psi. *Cf.* Godwin. It's a return to the general warrants of eighteenth-century Britain, *q.v.* We had a little revolution about *that*. Madison, Federalist Papers. The Bill of Rights, Madison, *op. cit.*, would be down the drain. In a few years we'll get a hundred petes for cert on the same point. *Ibid.* The time to stop it is now."

"Mr. Randolph?"

Justice Randolph spoke on all occasions with slow incision, as though dictating, direct to the stone cutter, immortal inscriptions for the entablature of a majestic new federal building. He clipped:

*CONSTITVTIONAL*QVESTION*

And then was gloomy because the first word, under the circumstances, was possibly superfluous. His law clerks always conferred with those of Justice Lovsky, fitting, with consummate artistry, Lovsky's footnotes to Randolph's headnotes. The result read like pages in Corpus Juris Tertium. This procedure required that the justices always agree; they found this a small price to pay for the exquisite result.

"Mr. Edmonds?"

"Isn't it a strange coincidence? Here we are in the opening months of nineteen eighty-four." He tossed a book on the table. "It's Orwell's Nineteen Eighty-Four-- the ultimate regimented state. All citizens under police surveillance twenty-four hours a day. No privacy at any time. The police have even installed closed-circuit TV in homes and apartments. When this book was popular, forty years ago, many people laughed. It was absurd. It couldn't happen in America. Well, it *has* happened. It's here now-- except clairtapping is even worse than spy TV. It penetrates the privacy of our minds. We must deny its use to the police."

"You sound as though you really believe in this stuff," said Godwin.

Edmonds shrugged.

"Thank you, Mr. Edmonds. Madam Nord?"

"My argument for granting certiorari will, I think, seem totally incompetent and irrelevant to most of you. And I expect that my distinguished brother, the Senior Associate Justice, may have a stroke. In a word, I think Tyson is innocent. Also, I think we ought to open the safe."

There was an embarrassed silence.

Then came Oliver Godwin's stage whisper: "Don't knock it, boys. Never forget, we're the only high court in the world with our own Madam."

Helen Nord led the laughter.

The Chief Justice rapped the table with his knuckles. "We will vote. Madam Nord?"

"To grant."

The vote went backwards, in inverse order of seniority. The theory, which seemed utterly fallacious to Edmonds, was that the junior justices would thereby not be influenced by their seniors. In this group, he thought, nobody influences anybody. Nine sovereign independent republics.

"Mr. Edmonds?"

"Grant."

Two more votes were needed.

"Mr. Randolph?"

GRANT

"Mr. Lovsky?"

"To grant."

"That's it. And now we can accept the combination to the safe. Madam Nord, will you please ask the deputy to summon Dr. Drago?"

"Most irregular," grumbled Justice Burke.

"Possibly," admitted Pendleton. "But at least it's by stipulation of counsel. All we permit him to do is hand me the combination in a sealed envelope. We ask him nothing, and we must silence him if he attempts to speak. Ah, here they come."

Edmonds was mildly surprised. Drago was a tall, dignified young man with smooth, pale cheeks. He might have been the desk clerk at the local YMCA, or a bank teller, or a deacon at Edmonds' own church.

Drago's eyes opened a little wider as he exchanged glances with Edmonds. And then his searching stare passed quickly around the table, next resting momentarily on Helen Nord... then Moore... Blandford... Godwin... and finally Pendleton. His mouth opened slightly, as though he were whispering to himself. Edmonds strained to hear. Was it, "Oh no?" He could not be sure.

Pendleton said gently, "We thank you for coming, Dr. Drago. I am Pendleton. I understand you wish to give me the combination to the safe."

Like an automaton, Drago walked to the end of the table, and without a word handed the envelope to the Chief Justice.

Edmonds was leaning forward intently. There was suddenly something very strange about Drago's face. The cheeks were no longer smooth. And the man's hair... seemed *bushier*. And then Edmonds knew: Drago's face and scalp were rough with goose bumps. The thought sent a chill along his own spine. He looked rapidly around the table. No one else had noticed.

But *why*? And *what*, in this, the law's inmost, most austere sanctum, could possibly terrify any man, be he clairvoyant or not? He watched uneasily as Helen Nord led Drago outside and closed the door behind him. It required an effort of will to return to the business at hand.

Pendleton was dictating into the transcriber: "Frank Tyson, petitioner, v. New York. Petition for writ of certiorari to the Court of Appeals of New York, granted, limited to the single question presented by the petition as follows: 1. Whether the search warrant used by the State Officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was not founded upon probable cause."

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Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet.

-- Blackstone, Commentaries

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Edmonds paused at the door to Godwin's office, and, as was his habit, stared across at the portrait of Laura Godwin hanging on the opposite wall.

The room was full of reminders of the old justice's dead wife. Actually, three portraits of Laura hung from the walls. The last, the one that now held Edmonds, was a brilliant, haunting thing, painted by the younger Wyeth just before her last illness. It still showed the elfin eyes that had conquered presidents. On her right wrist she wore Godwin's wedding gift, a bracelet of green laurel leaves, clustered with pink pearls representing the little flowers. In death, as in life, the great court left her unawed, and she looked out upon the justices, individually and collectively, with the tolerant respect due precocious children.

Godwin sought out anything that spoke her name. On a stand by the window grew a tiny bonsai laurel, a *Kalmia latifolia* transplanted from the Blue Ridge Mountains. Like the ancients, Godwin believed that this living symbol of his wife had the power to ward off lightning and similar disasters.

In the burdened bookshelves behind his desk was an illustrated edition of Petrarch. Godwin had learned Italian just to be able to read of the poet's Laura in the original. Next to Petrarch was a volume of Goethe's poems. Edmonds had once pulled it out, and it had fallen open automatically to the marvelous Mignon: "*Die Myrte still und hoch der Lorbeer steht. The myrtle silent, and high the laurel stands.*"

The clock on the fireplace mantel had been stopped years ago, at the moment of Laura's death. Godwin had never since permitted it to be wound. On his credenza sat a small silver casket engraved in laurel leaves. Edmonds knew its contents: a shining black plastic ink-blot; a box of matches that would not light; a deceptive fiberglass cigar; a cement egg-- all paraphernalia that Laura had used in years past in perpetrating her famous April Fool jokes on her famous husband.

The room seemed warm to Edmonds. A log fire was burning with steady cheerfulness in the handsome fireplace. He knew that Godwin's chief secretary got to the office thirty minutes early to start the fire, after the old man had once complained of being cold.

"Ben! Come in, my boy." Oliver Godwin peered up at Edmonds from behind the stacks of books, files, and documents cluttering his big oak desk. "We'll have a full house at argument today. Have you seen the headlines? Here's the Daily News: High Court Hears Mindreading Case. And the Post: Assassination Case to Supreme Court. And the Star: Supreme Court Questions Tyson Evidence. Well, I think we're ready for 'em. I've dug up a little wiretap chronology. History, dear boy, that's the modern touchstone. Bah! Holmes said it first, nearly a hundred years ago. 'One page of history is worth a volume of logic.'" His hands began fluttering like pink mice through the debris covering his desk. "Strange, very strange. I had it here just yesterday, right next to the nineteen eighty-three Annual Index."

Edmonds had seen this a hundred times. It always fascinated him. He knew that Godwin made valiant efforts to keep all his papers and files on his desk. Godwin never knowingly filed anything. And although his desk was the largest in the Marble Palace, it had become buried years ago, soon after his appointment to the Court. Thereafter, the heaps could grow only vertically. Still, legend stated that the system had actually worked in the early years. Nothing could possibly get lost; it had to be there, somewhere. And knowing that it was there, Godwin did not mind digging until he found it. He developed the skill, intuition, and patience of a trained geologist in excavating for the exact stratum. Stooping, he could peer at the side of a stack of papers and read them, edgewise, as an archeologist would read tree-rings, or varve-layers in an ancient lakeside. At one time, Edmonds had wondered whether Godwin would be driven to rediscover carbon-dating. But then came the day when Godwin had mislaid his famous dissent in the double jeopardy case. Laura Godwin had to drive in with his "house copy," just at robing time. And then and there she had forced his clerks and secretaries to swear an oath in blood, that old man's wrath notwithstanding, that they would start a decent filing system.

And now Godwin pounded the stacks on his desk and shouted through the rising clouds of dust: "Gus!" Although monosyllabic, it was a long, wailing cry, fully orchestrated, a blend of supplication, outrage, entreaty, and indignation.

His senior law clerk, Miss Augusta Eubanks, a lady of indeterminate years, walked in quietly, holding a paper cup in each hand and a file under her arm. "The Tyson file, Mr. Godwin?"

"What else?" he roared. "I'll bet it was lost in that metal junkheap you keep out there to curse and torment my declining years. Well, hand it over!"

"First, your pills, Mr. Godwin. And we will not have a scene in front of Mr. Edmonds."

Edmonds took all of this philosophically. He happened to know that Laura Godwin had called Augusta to her deathbed and had extracted her promise to stay with the judge until he retired. He also knew that the old gentleman had set up a sizable trust in Augusta's name.

The old man meekly tossed down the pills and water. She gave him the file.

"You have to be firm with them," he whispered as she left. "Patient, but firm. *They're* the ones the Senate ought to confirm. They think they run the place. And maybe they do." He flipped the folder open. "Ah, here we are. First wiretapping, California, eighteen sixty-two, after they strung the telegraph across

the Rockies. And California was the first state to make wiretapping a crime. But General Jeb Stuart of the Confederate cavalry couldn't care less. He had his own personal wiretapper in the field. Doesn't say how they did it. Shunt tap, maybe. And then Alexander Graham Bell invented the telephone in eighteen seventy-six, and the real fun began. The New York police had already been actively tapping for several years when the first tapping litigation hit the courts and the newspapers, in eighteen ninety-five. And here's a note on the nineteen twenty-eight Supreme Court case, *Olmstead v. United States*. The feds tapped the phone of four indignant rum runners." He leaned back in happy contemplation. "Prohibition, Ben. Before you were born. Everyone had his personal bootlegger. Speak-easies. The eye at the peephole. The raids. But the bathtub gin-- ugh! That's why they smuggled it in."

"So what happened to the four rum runners?"

"The Supreme Court said their constitutional rights hadn't been violated by the wiretap, and that the evidence obtained by tapping was admissible. Holmes dissented, of course. 'A dirty business... the government played an ignoble part.' And do you know, it took us thirty years, but we gradually came around to Holmes's view. Ten years after *Olmstead*, in *Nardone v. United States*, we conceded that maybe Holmes was partly right, but only for evidence offered in federal courts. We still didn't think the Fourth and Fifth Amendments applied to the state courts. And then finally, in *Mapp v. Ohio*, we extended the doctrine to apply to the states. In those early days, when we finally did get around to finding a few instances of illegal wiretapping, we made it turn on trespass. Some of the early distinctions were fabulous. If you drilled a hole in a wall and pushed a mike through, that was trespass, and it was illegal. But merely hanging a mike on the outside of the wall was still okay. And if you drove a spike mike into the wall, it was legal if it didn't go all the way through, provided it didn't touch a ventilating duct. But of course all these nice distinctions are buried in the footnotes now. Today, any kind of electronic pickup is illegal, and evidence obtained by wiretapping can be excluded in any court in the country, even if the cops wiretapped by a court order. *Berger v. New York*. But do you think our rulings have stopped wiretapping?"

"I'm sure they haven't."

"Indeed not, my boy. In fact, we redoubled it. The police now have to wiretap twice as much to get evidence that they can prove they didn't get by wiretapping. And telephone wiretapping is the simplest trick in the world. Ex-employees of big city phone companies do it best. They call a clerk in the repair section and ask for the terminal box and location of the 'pairs'-- the two electrodes for a specific telephone. There're several pairs in each terminal box, in a nearby underground utility conduit. They run a line from the pairs, attach a hand-set, and they're in business. They might run a dozen lines from a dozen different terminal boxes to an empty room in a nearby building, and have one man monitor all the lines, with automatic tape recorders that start whenever a number is dialed. I think at one time or another every important phone in Washington has been tapped."

"Surely not *our* phones."

"Of course, my boy. We were tapped liberally in nineteen thirty-five and thirty-six, in the *Ashwander v. T.V.A.* case. And maybe at other times that we never found out about."

"Holmes was right. It *is* a dirty business."

Godwin was thoughtful. "Dirty, ignoble... but very possibly necessary. Three-quarters of the racketeers and dope peddlers convicted in New York before the Berger case were caught with wiretapping. Ben, I just don't know. Surely there are instances where it is justified, say to recover a kidnapped child, or to save the life of an innocent man. Maybe we're going to have to figure out a way to let the police keep up with the criminal. Telephone tapping is passé, anyhow. The criminals are afraid to use a telephone. The police use bugs, hidden mikes, parabolic microphone pickups, light beams reflected from a windowpane vibrating from voices in the room."

Edmonds looked toward the window, and beyond to the white dreary innocence of the Library of Congress. "Do you think somebody out there is reading *your* window?"

"Who knows?" said Godwin genially. "The point is, you can't find the heading 'Wiretapping' in the Index to Legal Periodicals anymore. They started grouping everything under 'Eavesdropping' long ago-- a broader term, of course. I imagine the rash of law journal articles that *Tyson* will generate will all show

up under 'Eavesdropping,' not 'Clairvoyance' or 'Psi.' And we'll be back to the old common law misdemeanor. A dirty business? I suppose. But let's fit our reports together. What did your clerk turn up on clairvoyance?"

"Very little. Only two cases, in fact-- both criminal." Edmonds opened his file. "Here's *Delon v. Massachusetts*, nineteen fourteen. A so-called clairvoyant was arrested for practicing medicine without a license. It seems she went into a trance, and the spirits gave her the diagnosis and what medicine to prescribe. She had a license to practice clairvoyance, but not to practice medicine. Went to jail."

"Seems reasonable. What's the other case?"

"*New York v. MacDonald*, eighteen ninety-six. MacDonald was absolutely identified as a would-be burglar in an apartment on Second Avenue in Manhattan. But he produced several hundred alibi witnesses who swore that at that very moment, he was on the stage of a Brooklyn theater, under hypnosis by the famous Professor Wein. The professor explained to the court that MacDonald's astral projection had simply got loose temporarily and had unwittingly materialized miles away in Manhattan. The judge let MacDonald off with a warning not to get hypnotized, ever again. But there's the bell. Time to robe."

They walked around to the robing corridor together.

* * *

The last demand upon him-- to make some forecast of the consequences of his action-- is perhaps the heaviest. To piece the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop.

-- Justice Felix Frankfurter

* * *

Lawyers on a Supreme Court case for the first (and generally the only) time describe the experience in hushed tones. They compare the long walk up the marble steps and through the towering white columns as a thing of horror, like mounting the guillotine, and the wait in the great boxlike courtroom until their case is called, a refinement of hell. And to wear tails, rented the day before from a Washington haberdashery, uncomfortable and occasionally not a perfect fit, when before they have never even worn a tux, with a certain knowledge that every mouth in the packed room is curled in scorn at their naivete and gaucherie, is an experience not voluntarily repeated.

It is thus for the petitioner's lawyer, even though he knows that over half the cases heard by the high court result in reversals in his favor. And it is even worse for the attorney for the state. He is full of gloomy forebodings. Back home, with all the power of his state behind him, he got a conviction. Here, he has to start all over again. And now immense forces are arrayed against him. The tables are turned. He is now the defendant.

Guy Winters, Assistant Attorney General for the State of New York, ran his finger halfway around his collar, then folded his hands self-consciously on the table in front of him. His eye wandered over the long bench of Honduras mahogany, extending almost the width of the courtroom, and then one by one to the nine faces behind it, and finally back to his opponent, Walter Sickles, representing Frank Tyson. Sickles was already at the lectern and was about to begin.

Edmonds was not surprised to find the courtroom packed. Some of these people, he guessed, had stood in line all night to get in. A triple quota of reporters was present. The oldtimers of the press could frequently forecast how the vote would go just by listening to the questions asked by the justices. He wished he could do as well.

From the lectern that stood squarely in front of Chief Justice Pendleton, Sickles began his presentation, slowly, in a low voice, without notes. He was glad of the microphone on the lectern, but hoped it would not pick up the knocking of his knees. As in a dream, he heard his own voice echoing back from the

maroon drapes behind the great bench. "My client stands convicted of murder, on evidence improperly admitted, in that it was obtained in violation of his constitutional rights."

"You refer to the rifle, with Tyson's palm-print?" demanded Justice Godwin.

Sickles groaned inwardly. Not ten seconds at the lectern, and the questions had begun. "Yes, Your Honor."

"You admit the ballistics tests?"

"Yes, Your Honor."

"And that this evidence was obtained by search warrant giving the warehouse address and where the rifle would be found in it?"

"Yes, Your Honor, but-- "

"But what, Mr. Sickles? Proceed." Godwin's mustache twitched grimly as he leaned back.

"The warrant was not issued upon probable cause."

"The information was not sworn to?"

"Oh, it was sworn to. But the officer who gave the sworn information admits he obtained it from on Dr. Drago, who admitted that he obtained it by his own personal clairvoyance."

"You don't believe there's such a thing?" demanded Justice Burke.

Oliver Godwin said calmly, "Don't answer that, sonny." He turned a bland face to his outraged colleague. "Relax, Mr. Burke. What counsel thinks personally is irrelevant."

Sickles sighed. If he were back in Brooklyn, he would be comfortably leaning back in his old wooden swivel chair, dictating during coffee break. He said, "I'd like to answer that this way, Your Honor. If there is such a thing, then it's the same as wiretapping. Maybe worse. And any evidence obtained by its use cannot justify a warrant. The circumstances of the issuance can be examined in court. This court has so ruled. And if the warrant issues wrongfully, the evidence obtained with the warrant is inadmissible, the same as if it had been obtained by wiretapping. Clairtapping... wiretapping... the legal consequences should be the same."

"There's no other evidence of Tyson's guilt?" asked Helen Nord.

"Not much, Your Honor. Just that of Dopher, the elevator operator. He testified he saw Tyson leaving the empty office, carrying an object in front of him. That alone is not enough to convict Tyson. His life or death depends on the admissibility of the rifle."

"Dr. Drago testified that clairvoyance is a fact?" asked Pendleton.

"He did, but he didn't offer proof beyond the bare statement, which was merely his own opinion."

"How about the camera in the safe, and Drago's predictions?" asked Edmonds.

"The contents of the safe are not actually in evidence, Your Honor. And as for his predictions... their value depends on the decision of this court. They have no present probative value."

"He predicted we'd grant the certiorari?" pressed Edmonds.

"He did, but-- "

"And that we'd hold the warrant invalid, and reverse?"

"That is my expectation and hope, Your Honor."

"So that, if he turns out to be right, doesn't that prove clairvoyance, and would it not therefore follow that the warrant was in fact valid?"

"That involves a hopeless paradox, Your Honor. Anyhow, every case that is decided here is won by somebody, without benefit of clairvoyance."

Edmonds smiled. He had been thinking the same thing himself, but he wanted Sickles to make the point in open court.

"He! he!" Godwin slapped the bench with his open palm. "Well said, young man."

Sickles bowed to the aged justice-- and wondered how many votes he had just lost.

"Mr. Sickles," said Helen Nord, "do you know what is in the safe-- on the camera film, I mean?"

"No, Your Honor. I'm interested, of course. It may be nothing at all. But whatever it is, it can have no relevance in these proceedings."

"Suppose, Mr. Sickles," said the Chief Justice, "that it shows the face of the assassin?"

Sickles looked up at the great man in astonishment, then shrugged. "And who *is* the assassin, Your

Honor? How would face and deed be connected? But I respectfully submit that the camera and its contents, whether present or prospective, are moot. Exhibit Q is not in evidence."

"Yes, that's true."

"Can electromagnetic radiation penetrate that safe?" asked Helen Nord.

"Quite impossible, Your Honor. The walls are one-inch steel and form a perfect Faraday box."

"So that, if psi does exist, and is a form of electromagnetic radiation, it would not be possible to penetrate the steel shell and affect the photographic emulsion in any way?"

"That's right, Your Honor."

"Then," asked Pendleton, "if we open the safe, and find the film activated, wouldn't this prove that psi is not a violation of Section six-oh-five of the Federal Communications Act, and hence that you have no benefit under *Nardone v. United States*?"

"That would seem to follow, Your Honor," said Sickles unhappily. He realized that he was being given the "treatment." The court frequently, at argument, forced both sides to admit they were in the wrong; then neither could complain if he lost. But he was not ready to admit defeat. "If the court please, I'd like to elaborate a little further on the constitutional question. I respectfully remind this court that under the British common law, before this country had a constitution, it was lawful to extract testimony on the rack. Farfetched, Your Honors? Similar things have happened here, and not too long ago. Your Honors will recall the case of *Rochin v. California*, in which the police used a stomach pump to recover the 'evidence,' two capsules of narcotics, from Rochin's stomach. After lengthy appeals, it was finally held that Rochin's constitutional rights had been violated, and the exhibits were ruled inadmissible. Now, if a man's stomach is sacred, how much more so his mind!"

"But surely Tyson does not contend that his body is inviolate from the police for all purposes?" demanded Justice Blandford. "Surely they can still fingerprint him, measure him, take his picture, record his voiceprint, and test his blood and breath for alcohol, and do it all without his consent?"

"Well, yes, Your Honor."

"Then how does clairvoyance differ?"

"It's the degree of privacy. The attributes that Your Honor has just mentioned, fingerprinting and so on, well, these are pretty well exposed to the public anyhow. But a man's thoughts are not. If Americans lose their right to have private thoughts, freedom is gone."

Edmonds found himself nodding in agreement.

"But you contend there is no such thing as clairvoyance," said Justice Burke. "How, then, this concern for privacy of thought?"

Sickles grinned crookedly. "Until this court rules that psi is nonexistent, I have to argue in the alternate: psi doesn't exist; but if it does, it was used in violation of Tyson's constitutional rights."

"Yes," agreed Burke. "Quite logical."

Sickles looked down at his wristwatch. He was done. There was no room in him to wonder whether he had saved a man's life. He felt only relief. He looked up at the Chief Justice. "I have nothing more, Your Honors."

"Thank you, Mr. Sickles. May we hear now from New York?"

Guy Winters took a deep breath and walked to the lectern, where he pulled off his watch and laid down a sheaf of notes. His eyes swept the faces at the bench without seeing them. He was tense, nervous. But he had rehearsed for hours, and knew exactly what he wanted to say-- if they would let him.

"May it please the court, one issue alone is involved in this case-- the question on which certiorari was granted, namely, whether the warrant was invalidly issued as based on clairvoyant information." He took another deep breath and wished he could do something about the perspiration soaking his armpits. "It is the position of New York that clairvoyance does exist, and that, although the state police did not explain that the information was obtained this way, the magistrate, had he known, would necessarily have issued the warrant; and if this be so, the warrant was valid under the Fourth Amendment, the rifle was admissible under the Fifth, and Tyson's conviction must stand.

"The record below, through the testimony of Dr. Drago, is replete with a documentation of American

psi, even to the very beginnings of history on this continent. With the court's indulgence, I'd like to digress for just a moment to present this historical background.

"As far as North America is concerned, historical psi began with the Aztec chief, Quetzalcoatl. When he was forced to abdicate the Aztec throne in ten nineteen, he predicted that in exactly five hundred years he would return in full war panoply and reclaim his dominions. That was why-- in fifteen nineteen-- the Aztec emperor Moctezuma was too paralyzed to act, when Hernando Cortes arrived at the gates of the Aztec capital.

"And psi is an integral part of the history of the United States. Many famous Americans were involved at one time or another with psi. In fact, we might reasonably infer that their psi abilities contributed to their fame. Their names include some of the best known writers, artists, politicians, poets, and religious leaders. One could turn to the Index of American Biography almost at random. Edgar Allen Poe said he did not know the meaning of Ulalume, the poem that describes a man wandering down a misty cypress-lined path, in the month of October, to the crypt where his wife lay buried. We can well understand his mental block. October, of course, was the month, a few years later, in which Poe followed *his* wife to the grave.

"And Sam Clemens-- Mark Twain-- dreamed he saw his brother Henry dead of a steamboat accident, lying in a metal casket, and that on his breast was a spray of white flowers centered with a single red rose. When he found him in Memphis, his brother was dying of injuries received in the explosion of the boilers of a river boat, the Philadelphia. On the fourth day, his brother died, and was placed in a metal casket. As Sam looked on, grieving, a lady walked up and placed flowers on the boy's chest. It was a spray of white blooms, and in the center was a single red rose. I might add that this final detailed touch, completing the dream, or vision, or hallucination, if you like, is quite common."

Pendleton broke in. "My question is perhaps not completely relevant, but I am curious. Is there any reason to believe that there is a psi on this court?"

Edmonds started, but continued to look at the assistant attorney general.

"I don't know for sure, Your Honor," said Winters. "But I think it likely, simply as a matter of statistical probability, that there are at least three psi's on this honorable court. And probably more." He stood there calmly as several of the justices leaned forward suddenly. There was a buzzing rustle in the crowded room behind him.

The Chief Justice rapped the gavel sharply. "Would you explain that, please?"

"Certainly, Your Honor. It's pretty difficult, of course, to take a census of psi's, although it's something the Bureau of the Census really ought to include in nineteen ninety. But fairly large samples have been made in the past. The English Society for Psychical Research canvassed seventeen thousand people in eighteen eighty, and ten percent reported that they had had psi experiences. The Boston Society for Psychical Research made a similar survey in nineteen twenty-five, and that time twenty percent reported that they had had psi experiences. In nineteen sixty-six, one hundred and fifteen students of Aberdeen University were similarly sampled. Thirty percent acknowledged a personal psi experience. The psi percentage of the population is certainly growing, but the rate is hard to determine. We may nevertheless estimate that at least thirty percent of this court is gifted in some phase of psi. And thirty percent of nine is about three. And, having regard to growth rate, and-- forgive me, Your Honors-- the fact that psi correlates roughly with intelligence, culture, and mental activity, one might reasonably expect to find four, possibly even five, psi's on the court."

"Incredible!" breathed the Chief Justice.

"Permit me to disagree, Your Honor. Many of us have some degree of psi, but are not consciously aware of it. Consider the studies of William E. Cox on train wrecks some years ago. He proved that the number of passengers on a train involved in a wreck was generally substantially less than the number for the same train the day before, or two, three, or four weeks before. He concluded that the missing passengers somehow had a 'hunch' about the impending wreck, and simply didn't make the trip. If they were Pullman passengers, they simply canceled the reservation."

Justice Blandford leaned forward. "That's curious indeed, Mr. Winters. It so happens I canceled a plane reservation to Miami tonight. Does that mean I'm clairvoyant?"

"I trust not, Your Honor. I mean, considering the circumstances, and the other lives involved. I merely make the point that psi is a generalized American experience, so common in fact that science must take notice, even though its possessors do not."

"I would go further than the Chief Justice," said Justice Burke. "This is not only incredible; it is absurd. Be that as it may, I think we are digressing."

"Yes, Your Honor. I was about to mention psi politicians. Lincoln is the prime example. He experienced autoscopy in eighteen sixty, shortly before he left Springfield, Illinois, for Washington."

"Autoscopy?" said Helen Nord.

"It simply means seeing oneself. Lying on the horsehair sofa in his home in Springfield, he saw two images, one firm, one vague, in the mirror across the room, which was not positioned to reflect any image of him. He correctly understood that the strong image meant that he would serve out his first term, and that the weaker image meant he would die in his second term. And in the first days of April, eighteen sixty-five, he had his famous dream of his own mourner-lined catafalque lying in the East Room of the White House. 'The President has been killed by an assassin,' they told him in the dream. And he knew, at least subconsciously, when it would be. Every night previous, when he dismissed his guard, he had said 'Good-night, Crook.' But on *that* night, Good Friday, April fourteenth, as he left for Ford's Theatre, he said, 'Goodbye, Crook.'

"And Chauncey Depew was another psi politician. We all know how Coleridge 'saw' the lines of Kubla Kahn as he came out of an opium dream, and was busily writing them down when interrupted by a 'person from Porlock.' But how many of us know that Depew's speech nominating Colonel Theodore Roosevelt for governor of New York was similarly pre-recorded? He had a vision of the nominating convention, and of himself making the speech, while sitting on the front porch of his home on the Hudson. The vision faded, but the speech remained vivid in his mind, and he quickly wrote it down. And so Theodore Roosevelt was launched into national politics-- by psi."

From time to time during this interplay Edmonds had glanced down the bench where Oliver Godwin was busy taking notes. Godwin, he knew, had the remarkable faculty of abstracting and summing up a case during argument. He would turn his notebook over to Augusta Eubanks, who would flesh out the skeleton outline, cite the proper controlling decisions, and revise some of the old gentleman's language. (Augusta would write, "This is indeed a novel proposition, and one for which counsel urges no precedent in our judicial history," instead of Godwin's simpler "Sheep-dip.")

In a moment, Godwin would close his notebook and very likely doze off. Edmonds sighed.

"Let's get back to the camera," said Pendleton. "How can a camera inside a safe take a picture?"

"The technique is well established," said Winters. "Peter Hurkos in Holland and Ted Serios in this country were able to cause images to appear on film in a Polaroid camera. Fukurai and his associates in Japan did substantially the same thing, but caused Japanese ideograms to appear on the emulsion. Although the initial chemical mechanism within the emulsion is obscure, the subsequent steps of developing the latent silver image, fixing with hypo, and using the resultant negative to make positive prints or enlargements are the same as in conventional photography. One can only speculate as to how the sheer force of will, operating at a distance, could make certain molecules of silver bromide sensitive to the photographic developer, while leaving others unaffected."

Edmonds' temples were beginning to throb. He was glad when Burke interrupted.

"Tell me, counselor, why don't these clairvoyants play the ponies, or break the bank at Monte Carlo, or get rich in the stock market?"

"Apparently many do, Your Honor. But of course they would not publicize it."

Pendleton frowned. "My background in Wall Street is no secret. Are you suggesting that I am a psi?"

"I suggest nothing, Your Honor. But perhaps you will agree, on the other hand, that your success is not inconsistent with the possibility."

"Hmph."

"If all these psi's have this power," demanded Burke, "why didn't they warn President Cromway in the first place?"

"Several claim they did. The data are still coming in. It's quite similar to the warnings attempted for

Kennedy's benefit in nineteen sixty-two, by Jeane Dixon, John Pendragon, Helen Greenwood, and even Billy Graham. Jeane Dixon even named the day and the hour-- and from fifteen hundred miles away."

"Even if all you say is true," said Edmonds bluntly, "you have offered nothing to prove that the particular clairvoyance in issue was used lawfully."

"I believe I can satisfy Your Honor on that point. If the court please, I would like at this time to place psi in its proper perspective in police technique. For it is a police technique, quite modern, but as useful in its way as the Bertillon measurement system, the Henry fingerprint system, the Keeler polygraph, radar for speeding, alcohol detection in the breath and bloodstream, spectroscopic analysis of dust, ballistics, blood analysis, differentiation by blood groups, voiceprinting, and many others. Many police departments in Europe, and in Holland especially, use clairvoyants routinely. Professor W.H.C. Tenhaeff at one time maintained a whole team of 'paragnosts' for assistance to the Dutch police. And they are used in this country much more often than is generally realized. For example, Gerard Croiset, the Dutch clairvoyant, told the FBI in nineteen sixty-four where the bodies of three civil-rights workers would be found in Mississippi. And the equally famous Dutch clairvoyant, Peter Hurkos, assisted materially in the Boston Strangler case."

"But Hurkos failed on the Jackson case, in Virginia?" demanded Edmonds.

"The results were inconclusive, Your Honor. But these are not the only examples. Some years ago, a policeman in Grosse Pointe Woods, Michigan, was found to have the knack of locating the criminals before the crime had even been reported to the police."

"What *is* clairvoyance, Mr. Winters?" asked Pendleton.

The assistant attorney general shook his head. "I don't know, Your Honor. Even clairvoyants themselves don't know. I mean, they know when it happens to them, but they don't know *how* it happens. Clairvoyance, of course, is just one well-defined variety of psi experience. There are several others."

"Would you explain that?"

"Certainly. Clairvoyance is a unilateral extrasensory phenomenon. Only one person is involved-- the percipient. He perceives a visual or aural experience taking place at a different time or place. Telepathy requires at least two people, a sender and a receiver. Telekinesis is the mental ability to control the motion of matter. Gamblers have it frequently with dice. Radiesthesia is a special kind of psi."

"Radi-*what*?" demanded Justice Moore.

"Radiesthesia, Your Honor. The lay word is dowsing-- for the location of water with a forked hazel wand."

"Nonsense, Mr. Winters. Dowsing is dowsing. Nothing supernatural about it. Back in Louisiana my father was the village dowser. I've dabbled in it a little myself."

"I'm no expert, Your Honor. But I understand that at least five Nobel prize winners consider radi--dowsing, that is, a valid form of psi."

Edmonds stole a glance down at Godwin. The old man's head was propped in his cupped hand and his eyes were closed. Pendleton had better hurry up.

The Chief Justice interrupted. "We seem to have taken you somewhat over your allotted time with our questions, Mr. Winters. In fairness to opposing counsel, and since our two-thirty adjournment is nearly at hand, I will ask that you draw to a close."

"This concludes the case for New York, Your Honor."

"Thank you. We stand adjourned." He stood up.

The clerk began his intonation. "All rise..."

* * *

That judges of important causes should hold office for life is not a good thing, for the mind grows old as well as the body.

-- Aristotle

* * *

In the robing hall Helen Nord took Godwin by the arm. "I'm having some friends over tonight. We want you to come. Ben can pick you up."

"Thank you, my dear. But I don't know. I'd just be in the way. It's disgraceful to be old. You know what they say. Tired old man. Helen, I know I should retire, and I'm going to. But I don't want Roly Burke to think he's forcing anything. Actually, my resignation is already written. I will send it to the President the day we decide *Tyson*."

"No!"

"Yes. Oh, I'm not truly senile. Not yet. With a little help from Gus I can still crank out a passable decision. But I'm tired, Helen. Tired." His mustache drooped. "That's the only reason. I've told Ben, and now you. Later, I'll tell Pendleton. Until then, this is all in confidence."

"Of course."

"And no fuss and feathers at the end. No stupid sentimental retirement banquet. No idiotic gold watch, no initialed attaché case, no desk set. Maybe just a photograph of something familiar with a farewell card that all of you can sign. I would treasure it."

"However you want it."

He stood a moment, thinking. "Your party. I miss Laura's parties. All the old friends are gone. Ah, the times we used to have in Georgetown. Till four, five in the morning. I wish Laura could have known you. She would have liked you." His face clouded.

"You can turn in any time. You know where the guest room is."

He brightened. "In that case, I think I'll come." He put his arm around her shoulders and tried for his best leer. "Just down the hall from your bedroom."

"And what's a mere eighty-five years between friends?"

"That's *my* line, you forward wench!"

* * *

These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative proof.

-- Justice Felix Frankfurter

* * *

Helen Nord lived on a two-hundred-acre farm near Port Royal, Virginia, an hour's drive to the Court by superhighway. Washington had been born nearby. Grant and Lee had struggled here, and Private Corbett had shot John Wilkes Booth in a burning barn a few miles away. She had inherited the land from her Strachey ancestors, and John Nord had designed the big house himself. Her sons had been born and raised here, and now they were grown and gone. She was grateful now for other interests, other ties. A steady stream of her brother justices and their wives attended her dinners and weekend parties. Of course, she rarely had them all out together. The air was strained when Burke and Godwin were merely in the same room. Tonight was the "Godwin" group, namely those whom the old gentleman could insult without offense.

The ladies of the court had accepted her instantly as the lawful successor of Laura Godwin, and felt their own somewhat anonymous status enhanced by direct representation of their sex on the high bench. Millie Pendleton explained it to her. "Laura used to say Washington was full of famous men and the women they married when they were young. But at least we now have a friend in court."

Just now Helen was leading a group down the garden path behind the house.

Godwin left the path and walked over to the great oak tree. Its dead leaves from the previous year were still frozen to its branches. The others waited. He called back, "You're sure you don't mind?"

"I don't mind. But don't hurt yourself."

"Hah!" He kicked the tree trunk savagely, then danced for a moment. A forlorn dead leaf floated down and hung in his mustache. He flicked it off indignantly. As he rejoined the group, he explained matter-of-factly, "I was born in Manhattan, in a hospital next to the old Third Avenue El, in the days when they still used those wonderful steam locomotives. Laura loved the country, but I hate it, with its pure air and the crickets raising Cain at night. So Helen lets me kick a tree when I come out here." (They had all seen this many times before.) "Now let's get on to this well."

Helen Nord laughed. "It's right over there, Judge." She led them to a pit some five feet in diameter, edged with a couple of layers of loose cinder blocks, then called back to Moore. "Nick, there's your well." She pointed to a length of pipe extending up from the pit. "We put the casing in today. The driller hit water at fifty feet-- forty gallons a minute. He brought the county agent and the state geologist out. They just looked at it and shook their heads. The geologist had already proved from his maps it was impossible."

"But why all the excitement about a water-well?" demanded Godwin. "The way you're carrying on, anybody would think you had struck oil."

"When you're on a farm, twenty miles from a city main, water can be more important than oil. But the point I'm making is, Nick Moore showed me where to drill. That was after I had brought in three dry holes, one of them at a hundred twenty feet. Isn't that right, Nick?"

Moore grinned. "Right."

"What are you getting at?" asked Mrs. Pendleton.

"He did it by dowsing."

"No! Water-witching? But I thought that was an old wives' tale."

"It's real. Many people can do it. Actually, it's a recognized form of psi. At argument today we learned it has a fancy scientific name: radiesthesia."

"Fantastic!" breathed Millie Pendleton.

"We'd better be getting back."

"Bill," said Mrs. Blandford, "why do you keep looking up at the sky?"

"No reason at all, dear," said Blandford lamely. "Just thinking about the flight to Miami I canceled."

"I'm glad you did. You can go next week. This is much nicer."

"The farm is directly under the flight line from National Airport to Miami," said Helen Nord quietly. "We always see it out here. It seems to be late this evening."

* * *

After dinner she led them back into the parlor. Ben Edmonds followed with a tray of cigars and liqueurs.

When they were all seated, their hostess began, almost hesitantly: "I want to tell you a story, and then I am going to ask a question of each of you. This has a bearing on the Tyson case. To start, I think there is something about me all of you should know. Mr. Winters, at argument today, hinted very strongly that there were probably three or four psi's on the court. I don't know for sure, but I think I may be one of them. I do know that I have had at least one psi experience. I've even wondered whether I should disqualify myself on the Tyson case. At any rate, I'd like to tell you about it. It took place when my husband died in the first manned Mars flight. It was two-ten on a warm August morning when he lasered back to Orbit Central that the retro rockets wouldn't fire. They analyzed the trouble almost instantly. There was a relay malfunction. They lasered back and told him how to fix it. And he did fix it. And then the retros did fire. But it had taken three minutes for his message to travel thirty-five million miles to Earth, and another three minutes back to Mars. Six minutes was too long. He was barely eight hundred miles above the planet when the retros worked, and he was traveling over four thousand miles an hour. He hit ground at one thousand miles an hour. The ship-- everything in it-- simply vaporized. The point I wish to make is, when he pressed the retro button at two-ten, and nothing happened, I *knew*. And I knew at two-ten. Orbit Central didn't know until they actually received his call, at two-thirteen. I was with him all the way down. He talked to me." She looked over at Edmonds, almost curiously. "We held hands. And

then I died with him. Except, of course, here I am. Some of the other astronaut wives have had similar experiences. Mine didn't surprise the medical people at NASA. In fact, they not only didn't tell me I was crazy-- they put me to work in the Parapsychology Section. They were trying to develop psi as an alternate to laser communication, to avoid the time lag of six minutes for a round-trip message, or even to substitute completely in case of laser failure. Actually, there's nothing new about the principle. The Dutch psi Croiset had already demonstrated that engine defects can be diagnosed across the Atlantic Ocean by clairvoyance. Distance is no difficulty."

She paused and looked around at her guests. Mrs. Pendleton had drawn her chair closer and was sitting on the edge of the cushion. Moore's pipe had long since gone out. Ben Edmonds watched her with impassive eyes,

"It must have been a terrible experience," said Pendleton gravely. "But I'm glad you told us about it. It is indeed pertinent to the Tyson issue, especially on the question of psi transmission. But forgive me, Helen, I don't believe you were finished."

"I just wanted all of you to understand. For me, as an individual, psi exists. I agree with Mr. Winters that psi is a common human experience, that most people have had a psi experience of some type, and that the members of the Court eminently qualify. On the other hand, a certain stigma seems to attach to psi, and the higher out standing in our society, the more reluctant we are to admit our psi experiences or ability. So we will try this one by secret ballot. Ben, would you pass around pencils and paper? I would like each of you to write 'yes' if you have ever had a psi experience, or 'no' if you have not. Ben will collect the votes in this vase."

Godwin grumbled. "Woman, I'm old, but I'm not crazy. It's a silly game, and I won't play."

"No matter. Seven votes should tell us something." She picked the pieces of paper out of the vase. "Five yeses, two noes. You all know how I voted. So, not counting the judge, four of you have had a psi experience, and two have not. Messrs. Pendleton and Blandford are negative, I would assume. The majority vote seems to indicate that psi is a rather recurrent thread in the fabric of our daily lives. It's not something weird or strange, unless me make it so."

"Very dramatic, Helen," said Moore. "But if you believe in psi so strongly, doesn't it follow the search and seizure in *Tyson* was constitutional, and that he was lawfully convicted?"

"Of course not! I've already explained that. My intuition, my own psi, if you will, tells me Tyson is innocent. So I'm going to vote for reversal."

"You tell 'em, Helen," said Mrs. Pendleton firmly.

Their hostess leaned over and touched Edmonds on the sleeve. She pointed to Godwin, who was slumped in the deep maternal upholstery of the chair. His eyes were closed, and his outsize mustache ends vibrated with slow rhythm. Edmonds got up softly, picked up the justice with hypnotic gentleness, as though the old man were a child, and with his burden held loosely against his chest, walked quietly toward the stairs.

The guests watched this in fascination. Mrs. Pendleton tried to catch the eye of Helen Nord, but Helen simply put her finger to her lips. Finally the muffled measured sound of steps died away above them.

Moore shook his head in wonder. "If anyone else tried that, the old gentleman would go through the ceiling."

"What a man," murmured Pendleton. "What are you waiting for, Helen?"

"He's never asked me," said Helen Nord shortly. "Millie, will you help me with the coffee?"

* * *

The maid had already turned back the bed. Edmonds put a hand under Godwin's head and laid the old man down on the waiting sheets. Then he eased off the shoes, loosened the belt, and pulled up the coverlet. He then realized that Godwin was awake and watching him.

"Sit down, Ben. When are you going to pop the question to little Nell?"

"I don't know. Maybe never. She can't forget-- him. And I have a personal problem. Anyhow, maybe we are both too old."

"Of course she still thinks of him. She ought to. But life goes on. Memories should be a garden, not a prison. Talk to the three boys. Get them on your side. Be firm with her. Oh, you are both so stupid. My last twenty years with Laura were the best of all. April Fool's Day coming up soon. She loved it. Laura... Laura..." He seemed to drift off.

Whenever Godwin spoke of his dead wife in this intimate, carefree way, Edmonds felt, on some deep subsensory level, an emptiness akin to despair in the old man. His chest tightened. Does Helen still feel this way about John Nord? What is this sweet hell called love? Can no end come?

He pulled the blanket up about the old man's shoulders and tiptoed toward the door.

"Where's my teddy bear?" mumbled Godwin.

"Go to the devil," growled Edmonds.

* * *

Even as he left the hallway and re-entered the living room, he knew something was wrong.

Everyone was facing away from him, toward the open door of the study across the room. In that doorway stood Helen Nord's maid, holding the phone, one hand over the mouthpiece.

"What is it, Mary?" said Mrs. Nord quietly.

"It's your messenger, mum, calling from National Airport. He said to tell you Flight Sixty-seven to Miami crashed on takeoff. He could just now get to a telephone."

"Thank you, Mary. Tell him he can go home now." Helen Nord turned somberly to Blandford, who was standing, staring rigidly at her.

Mrs. Blandford gasped and sat down. "*That plane!*"

"Yes. I think Bill had a hunch he shouldn't take it."

"But that... that means," stammered Blandford, "I... I'm a..."

Helen Nord simply nodded. "Yes, Bill, you are. Join the club."

* * *

Judges are apt to be naif, simple-minded men, and they need something of Mephistopheles.

-- Justice Oliver Wendell Holmes

* * *

It was late Thursday night, and Shelley Pendleton was alone in his office, and pacing.

Already he knew how the *Tyson* vote would go at conference tomorrow. Five to reverse, four to affirm. He'd be with the majority. Another five-four; and on a case like this! The newspapers, the editorial writers-- the whole country would say that even the Supreme Court didn't know whether Tyson was innocent or guilty. And it was actually going to be worse than that. Burke, for instance, would vote to reverse, because psi was illogical. Godwin didn't believe in it, either, but would affirm. And Helen Nord, because she believed in her own psi (but not in Drago's!) would vote to reverse.

Women. *Sui generis*. On occasion incomprehensible. Yet indispensable. He could hardly complain: by ancient rumor, Laura Godwin had won his appointment by cheating in a poker game with the President's judiciary advisors.

There would be no sanity in the *Tyson* decision. And the public outcry would far dwarf the reaction to the Warren Report of the sixties. For the honor of the Court, he could not let it happen. And just how was he going to prevent it?

He resumed pacing and thinking. Had Tyson really pulled the trigger? Helen Nord seemed so certain he was innocent. Women and their intuition. But suppose she's right? (And I'll have to grant the validity of her psi experience with John Nord.) Can this Court intervene, *sua sponte*, to prove it? Certainly not. But can *I*? I have hunches, too. I've always had hunches. Made my money that way. Does this make me a psi? Maybe. I don't know. God! What a crew. Nord. Moore and his dowsing. Blandford and that plane

to Miami... And what about Edmonds and those impossible photos? Is it actually conceivable that a human intellect can reach into the past and put what he sees on a camera film? Serios did it, and that Japanese fellow. It all begins to make sense. Edmonds is probably the worst of them. And if there will be no image on the film until Decision Day, how does it get there? What are the rules? Can one psi have a hunch about another psi? There's only one way to find out. And to find out, I will have to do a thing which, if done by one of my brother justices, would merit my strongest censure.

He stopped his slow striding and glared at the phone. He knew now that he would have no peace until he acted. In sudden resolution he seized the phone and dialed a number.

"Evans? Pendleton. I have a very delicate matter I want you to handle, very confidential. You've heard of Philip Dopher? Yes, *that* one-- elevator operator in *that* building. I want you to find him and give him a thousand dollars. Tell him it's expenses to hear the *Tyson* opinion firsthand. He'll have to be here every Monday until we hand it down. It'll take several weeks. My guess is about April First. Tell him he gets another thousand on Decision Day. But he's got to be in court then to get it. Make up something. Tell him it's sponsored by the Sons of Justice. Tell him anything. Just get him here. No, Evans, I can't talk about it. It's just a hunch. Oh, one more thing, bring him in the first day yourself, and show him where he has to sit-- well up front, where Ben Edmonds can see him easily."

* * *

Tweedledee: If it were so, it would be; but as it isn't, it ain't. That's logic.

-- Lewis Carroll, *Through the Looking Glass*

* * *

It was Friday Conference again.

"We have been discussing *Tyson* now for over two hours. Agreement seems impossible." The voice of the Chief Justice was measured, controlled. But Edmonds thought he detected a note of grim amusement. His other colleagues, in contrast, seemed morose, almost sullen, as though only now they realized certain impossible aspects of their task. Pendleton continued as though in brooding monologue. "We must make an end and vote, even though it but defines our differences. I will begin by summarizing my own position. If clairvoyance does not exist, then clearly the warrant was invalid, and we must reverse New York. But I cannot reach that conclusion. There are too many documented cases of clairvoyance. Yet it is admittedly erratic, cannot be called up at will, and generally requires verification by the normal senses. Its most fervid proponents do not claim that it has the certainty of ordinary seeing and hearing. Any magistrate called upon to issue a psi warrant would certainly be entitled, perhaps even *required*, to look into the antecedents and previous record of the psi-informant. Some psi's of international reputation and long histories of demonstrated police success might be sufficiently reliable to support a warrant if there were no other fault in the arrangement. But unfortunately for this argument, I think there *is* a fault, and a grave one. Granted this is not wiretapping. Neither the electric current nor electromagnetic radiation is demonstrably involved in psi transmission. A Faraday cage shuts out electromagnetic radiation but cannot shut out psi. Absent interception and publication of an electrically generated message, Section six-oh-five of the Federal Communications Act has not been violated. So our long line of wiretapping cases-- *as such*-- is not directly controlling. And yet an invasion of privacy has occurred in a depth that far surpasses wiretapping. The intrusiveness, and the breach of privacy, goes far beyond the sounds and sights available to bugging and spy TV. Our very thoughts are laid bare. It's worse than truth serum: we needn't even be present to have it done to us. I think *Tyson's* constitutional rights were invaded. I think we should reverse. And now I'm done. Mr. Godwin?"

"I agree up to a point. The problem as I see it turns on whether this particular bit of clairvoyance involved reading *Tyson's* mind, that is, assuming there's such a thing as clairvoyance in the first place-- which I very much doubt. I don't see how *Tyson* could have known exactly where the movers had put that particular box in the warehouse. Or even if he did know, we haven't been shown that it was *Tyson's*

mind that was read. For all we know, the clairvoyant might have read the warehouseman's mind. Or nobody's mind. Tyson's privacy wasn't invaded unless his mind was read, and I just don't think it was read, whether or not psi is for real. But my main point is, we shouldn't interfere. These are very complex procedural matters better left to the state courts. Look at it this way. If a person is indicted for murder, the determination of his guilt or innocence should not be considered as a sporting event, to be governed by the Marquis of Queensberry Rules, but by a practical and actual determination of the guilt of the inditee, with the state, in order to prevail, being required to establish guilt beyond any reasonable doubt. In my view the State of New York has fully discharged its burden. Psi isn't even relevant. Roly?"

"Psi certainly *is* relevant, Mr. Godwin," said Burke calmly. "It's the sole question certified."

"I didn't vote to grant certiorari," said Godwin bluntly. "But now that we have the case, I can decide on any basis I like."

"Most illogical," snorted Burke. "But no matter." He turned to Helen Nord. "You say you believe in psi?"

"Yes."

"And also in logic?"

"Yes, at least as long as it makes sense."

The rotund justice looked over at her sharply. She returned his look with expectant interest. He knotted his jaw muscles and continued. "Logic by definition is that which makes sense: nothing more, nothing less. No miracles. No supernatural hocus-pocus. Everything that takes place, every event, every effect, is logically caused by something, something which preceded it in time, and which provided the physico-chemical causative chain that resulted in the effect. These premises are the foundations of our intellectual existence. Psi violates them. Therefore psi is false; it does not exist."

"I'm not very bright at logic," said Godwin, "but why can't you turn it around the other way? Psi exists: therefore the foundations of our intellectual existence are false."

"Just what I might have expected from you, Brother Godwin. You are using the conclusion to destroy the premise. The mental effort required for logical thinking is quite beyond a party of your years, I'm afraid."

Godwin sat up straight. His mustache began to twitch. Helen Nord broke in hurriedly. "All that sounds very complicated."

"Perhaps so, perhaps so," conceded Burke, "at least to those unaccustomed to disciplined cogitative processes." He touched his fingertips together and considered the matter. "Perhaps we can benefit from an example, taken from a sub-species of logic known as operationalism. So. If a loaded gun is pointed at my heart, the trigger is pulled, and the bullet proceeds toward me in a straight line, I would certainly be killed, would I not?"

"Of course."

"My death is the effect of the bullet in motion?"

"Agreed."

"And the bullet in motion is the effect of the pressure of the hot gases within the barrel of the gun?"

"Yes."

"And the gases are the effect of the ignition of the gunpowder by the primer, in turn the effect of the firing pin striking the primer cap?"

"Certainly."

"And the movement of the firing pin is caused by the trigger pull, in turn the effect of the squeeze of the gunman's finger?"

"True."

"So we have a complete chain of cause and effect?"

"Yes."

"And it is logical to assume that every effect must have some identifiable cause? Nothing happens without a specific cause?"

"It may be logical. But there may be a reasonable doubt as to whether the rules of logic apply to psi. Psi seems to operate without any cause-effect linkage. For example, if psi takes over, your bullet might

vanish in midair."

Burke sighed. "I give up. I absolutely give up."

Pendleton hid a grin.

Godwin leaned forward querulously. "Are we to understand, Roly, that in *this* case you are trying to get by on *logic*?"

The insinuation was insidious; it implied that Burke's analysis was superficial; and indeed, that the justice had not devoted the necessary time and study to grasp all the fine points of the case.

Burke's face turned slowly pink. He glared back at Godwin. "I would like you to understand exactly that. Law has no other basis."

But it was no good. The others were looking at him almost sympathetically. Who are they to judge me, he thought bitterly. Logic is... logic!

Pendleton cleared his throat. "We'll have to go on. Mr. Moore?"

"I agree with our brother Godwin. You call it clairvoyance. If that's what it is, nobody's mind was read. By definition, clairvoyance excludes telepathic cognition of the mental activities of another person. And if nobody's mind was read, there was no invasion of privacy protected by the Fourth. I would affirm."

"Mr. Blandford?"

"In my view the evidence shows clairvoyance exists, but it also shows it is erratic, often not available on call, generally not reproducible, so I feel that clairvoyance is too unscientific for use as a 'probable cause.' Reverse."

"Mr. Lovsky?"

"I agree with Burke, *supra*, that clairvoyance is an impossibility. But I don't agree that it must follow that the warrant was improperly issued. The warrant was duly sworn. It pinpointed what was to be searched, and the rifle was in fact found, exactly as described on the information. Pendleton, *contra*, I would affirm. *Cf.* Godwin, *id.*"

"Mr. Randolph?"

CONCVR

"Mr. Edmonds?"

"Personally, I believe in psi. But I don't think it should be used as a police technique without the consent of the suspect, and any evidence thus discovered should be inadmissible. Reverse."

"Madam Nord?"

"I, too, believe in psi. And I think the warrant was valid and the rifle admissible. But I would reverse. Tyson didn't do it."

Pendleton took a deep breath. "*Why* do you think he didn't do it?"

She looked back defiantly. "*Because*, that's why."

Pendleton exhaled slowly, then smiled at her reassuringly. "Quite all right. So be it. Let me sum up. We have five to reverse, four to affirm. And in neither the majority nor the dissent do we have the slightest unanimity of rationale." He studied his notes. "Madam Nord, you're up next on the opinion list. Will you please draft the majority opinion? With the variation of views, and especially considering your own, your task will be cut out for you."

"I'll do my best," said Helen Nord. "In fact, in the interests of reconciliation of divergent views, I'll even go along with the rationale of the majority-- that either psi doesn't exist, or if it does, the psi-based search warrant was defective."

"Yes?" said Pendleton, surprised.

"On one condition."

"Such as what?" demanded Burke suspiciously.

"That we open the safe on Decision Day."

"Preposterous!" cried Burke. "Exhibit Q was never properly admitted into evidence, and even if it had been, the question of its probative value would be within the exclusive jurisdiction of the trial court. The Supreme Court of the United States never decides facts except in rare cases of original jurisdiction!"

"Then I'll file a specially concurring opinion to reverse on the plain and simple ground I don't think

Tyson is guilty!"

Godwin chuckled. "And she'd to it, too!"

"If I might make a suggestion," said Pendleton, with an enigmatic smile, "we could order the safe opened after handing down both the majority and dissent. It could of course have no bearing on our decision as then rendered, but both Tyson and New York could use it, if they choose, and if its contents truly merit it, as basis for rehearing. Mrs. Nord? Gentlemen? Then it's agreed.

"Just one more point. Despite the gravity of the case, we have a duty to the defendant and to the country to act as promptly as possible. Hopefully, we can hand down the decision on April First."

* * *

When the penalty is death, we are tempted to strain the evidence and even the law in order to give a doubtfully condemned man another chance.

-- Justice Robert H. Jackson

* * *

It was Monday, April 1, Decision Day, in the Marble Palace. Practically every appellate court in the country-- saving only the United States Supreme Court-- distributes printed or typewritten copies of its decisions to its litigants as the sole means of stating the outcome of the case. But from time to immemorial the Supreme Court-- the only appellate court with its very own printing shop on the premises-- had "handed down" its decisions orally. And "orally" means whatever the delivering justice chooses it to mean. It might mean reading an entire ninety-page opinion-- a favorite tactic of Justice Lovsky; or it might mean a very brief oral summary of the salient law and facts, after the manner of Justice Randolph. Or, as in the case of Justice Burke, it would start out as a summary and develop, willy-nilly, into a profound exposition of logic-in-law, through the historical framework of the Justinian Code, the Magna Carta, Coke, Comyn's Digest, the Constitutional Convention, the probable (corroborative) views of John Marshall, and would inevitably conclude with appropriate selections from Burke's Logic in Appellate Decisions. The law students of George Washington and Georgetown Universities might have to get the printed decision to discover who had won, but all agreed it was an enthralling experience.

After he was seated, Edmonds surreptitiously searched the first row of the pewlike red-cushioned seats and found there the face he had noted on previous Mondays, and the face he did not want to find: a bald man, burly, bearded, his eyes a study in controlled, violent cunning. Edmonds moaned inaudibly. Let this pass. But it would not pass. Everything was here, waiting. He looked over at the safe on the marshal's cart. It was still locked, still inviolate, but within minutes all that would be changed forever.

When he had taken office ten years ago he had sworn to uphold the Constitution and the laws of the United States. A month ago he had flung down Orwell's 1984 on the conference table. Beware! he had cried. And beware of whom? Of Benjamin Edmonds, Ph.D., J.C., Associate Justice of the United States Supreme Court, and *psi* extraordinary. For he thought it very likely that he was now going to violate his oath, and in so doing, the constitutional rights of another. And thereby he would strike down, besmirch, and discredit for decades the enshrouded institution he had sworn to preserve. For Helen Nord (and how did *she* know?) was right. Tyson had *not* pulled the trigger of that fateful rifle. He *knew*. (And for that matter, how did he know?) And so there remained a thing for him to do, a thing so simple, so devastating, that the Tyson case would be decided instantly and forever. It was not lawful; it had only justice to excuse it.

Edmonds noted that Pendleton seemed to be studying him from the corner of his eye. But then the Chief Justice turned and nodded gravely to Helen Nord, at the far left. She nodded back. She was on her own.

This, thought Edmonds, was the crowning paradox. Helen Nord, who knew that *psi* existed, had joined with four of her brothers in the majority opinion that would hold, in effect, that *psi* was unproven. And she would do this because it would free a man whom she thought was innocent.

The woman's voice was clear and strong. Briefly she recited the undisputed facts, read the single question certified to the Court, then came directly to the point. "It is the view of a majority of this Court that the search warrant was not issued upon probable cause, as is required by the Fourth Amendment, in that the basis of the information was not explained to the magistrate who issued the warrant. *Aguilar v. United States*. This finding requires the further finding that the evidence obtained by the search is inadmissible under the Fifth Amendment. And it must follow that Tyson's conviction must be reversed, and that he is entitled to a new trial, in which this tainted evidence must be excluded."

There was more, but Edmonds now heard only snatches. His eyes were looking into-- and through-- the eyes of Philip Dopher. In a strange, nearly real sense, both of them were for the next few minutes not even in this great chamber, but in a deserted room in an office building on Manhattan's East Side, where Dopher was kneeling at an open window, caressing a rifle resting on a window sill, and waiting.

Somehow, the voice of Helen Nord floated by, wisplike, fragmented. "...the consequences of the reasoning urged by New York... the thrust of the constitutional command... we do not recede from..."

And now he watched the kneeling figure grow tense and still. The bearded cheek lay in lethal affection against the wooden stock, the eye peering through the telescopic cylinder, and the gloved finger beginning to squeeze its unspeakable message to the trigger.

"...if clairvoyance *does* exist-- and this we do not decide-- this source of information should have been brought to the magistrate's attention, so that he could fully understand and evaluate what was being sworn to as a fact... and assuming *arguendo* that clairvoyance exists, we rule, nevertheless, that it is not such a generally accepted basis for experiential information that the magistrate could take judicial notice of it..."

One year and a couple of hundred miles away, a puff of smoke appeared at the muzzle of Dopher's rifle. Ben Edmonds closed his eyes and withdrew from the mind of the murderer.

"In summary, it is the decision of this Court that the warrant did not issue upon probable cause. The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

She was done.

Everyone in the courtroom knew what had happened. It would be futile for New York to retry Tyson without the evidence of the rifle. He would have to be released, a branded assassin, the mark of Cain on his forehead, with every hand against him. How long had Tyson to live?

Dopher appeared to be reflecting silently. To Edmonds the man seemed only mildly disappointed. Dopher had no way of knowing what had just happened to him: that the image Dopher dreaded most, the horrid secret one, had been carefully lifted from his mind, and had been carried away and laid down in another place, and there made permanent, as a flowing modulated pattern of light-sensitized silver bromide molecules in a gelatin emulsion.

Edmonds knew that his face was covered with tiny drops of perspiration, and that he was cold.

As Helen Nord closed her case folder, the Chief Justice turned and nodded to Oliver Godwin.

The old man's voice rasped out. "I must respectfully dissent from the majority opinion, and my Brothers Moore, Lovsky, and Randolph have authorized me to state that they join in this dissent. We do not contend that the discovery of the rifle justifies the search, but we think this not the point. We think the search was made on a lawfully issued warrant, and that the rifle was properly admitted for that reason. In any event, the matter is procedural. We think, if perchance the constable blundered, this should not set the criminal free. Society has the right to be protected against the return of this man. A great deal has been said about psi and clairvoyance in the proceedings below, and here. Some of the authors of this dissent have asked me to confirm their satisfaction that the record amply supports the existence of psi. Personally, I am far from convinced. But no matter, for our dissent is not founded either on the belief or disbelief in psi. We might observe that the use of psi as a police technique necessarily requires corroboration. But the only useful corroboration necessarily involves the subject matter of the search. It seems to us of the minority, that when the clairvoyant (assuming he was such) has been duly corroborated, the warrant stands self-validated, and further inquiry is superfluous. In our minority view the warrant was issued upon probable cause. We would, therefore, affirm.

"And now, with the consent of our brothers representing the majority opinion, we turn to one final

matter. In the record below there is explicit testimony to the effect that the contents of the safe-- Exhibit Q-- will prove that psi exists. Both majority and minority have of course reached our separate conclusions without benefit of the safe-- which, indeed, is not even in evidence and can have no probative value in our decisions. We do now order that the safe be opened. Marshal?"

Walter Sickles leaped to his feet. "Objection, Your Honor! We have had no opportunity to examine the contents!"

"Overruled. Your opportunity will come." The old man added sternly, "And there is no such thing as an objection to this court."

Sickles sat down uncertainly.

"Will the marshal please proceed?" said Godwin testily.

"May I remind Your Honor," said the deputy marshal, "that I do not have the combination."

"Of course. Here it is." Pendleton swiveled his chair around and gave the waiting page an envelope.

In a moment the marshal had the safe open and was staring inside. "It's full-- of something, Your Honor."

"Yes. I imagine that's the urethane foam. You'll have to tear it out with your fingers. But be careful when you get to the camera."

The deputy dug in gingerly. Finally he pulled out the camera, still encrusted with adherent bits of plastic foam.

There was a sudden excited buzz in the great chamber.

Pendleton banged twice with his gavel. "Silence! Or I will ask the sergeants to clear the room!" He added quietly to the marshal: "Remove the film. Do you know how?"

"Yes, Your Honor." He pulled the tab, counted off the seconds, then tore off the assembly and stripped the wet print. His eyes widened as he stared.

"If the court please!" Guy Winters was on his feet.

"The court recognizes New York."

"New York requests permission to see the print."

"Granted, Mr. Winters. And I assume Mr. Sickles would like to see it also?"

"Of course, Your Honor."

Together the two lawyers bent over the composite with the marshal, who held the black-and-white print by the tab as the three of them studied it.

Pendleton's voice was under control, but it had now risen by half an octave. He demanded: "What does the print show?"

Winters looked up at the Chief Justice in wonder. "It seems to be-- *the* rifle. A puff of smoke... just been fired. It's *the* room... *the* window. And the man is still aiming..."

"Man?" demanded Pendleton.

"Yes, Your Honor. It looks like... Philip Dopher!"

"Dopher? The witness below?"

"Sure looks like him," affirmed Winters in irreverent wonder.

And now a commotion in front of the audience. A stocky bearded man exploded into the center aisle. His right hand held a pistol. The spectators shrank away from him.

He cried out, "Yes! I did it! Long live the revolution!"

The defiant, weaponed fist upraised, in weird confrontation of the ultimate lawless force versus the ultimate force of law.

Everyone in the audience was on his feet. A wide empty circle formed around the intruder.

Dopher boomed out again. "If I killed your President, you think I won't kill you? All of you, possessed by the devil! Only way you could know I did it. I have six bullets. I think maybe I start with your chief, Mr. Pendleton." He waved the pistol. "Nobody move! Maybe I miss, and hit the smart lady judge-- you want that, eh?"

Edmonds felt his stomach caving in. The horror was complete. It was futile now, and much too late, to say, never, never again.

But now in the appalling silence, he felt a chill descending into the room. A cold wind struck his face,

and he shivered. Behind him, the great maroon drapes were rustling.

He almost forgot Dopher. What? he wondered. Or-- who?

"Laura...?" Oliver Godwin, struggling out of his chair, mustaches trembling like a questing antennae, had whispered the word. It was at once a statement and a question, fluttering, broken-winged, desolate. It made the hair stand stiff on Edmonds' neck.

Dopher's pistol arm swiveled to the new target. Paralyzed, Edmonds watched the fist squeezing, the dead aim. He heard, unbelieving, the deafening crack, then the reverberations.

Godwin did not fall. Edmonds knew he was untouched, and that a leaden pellet was somewhere sailing, lonely forever in stranger time and space. He turned back to the grotesque figure in the center aisle struggling between the two sergeants-at-arms.

Roland Burke now stumbled to his feet and leveled a shaking finger at Dopher. "*You!* Did you kill President Cromway? Answer me!"

"Don't answer that!" Thunder exploded from the throat of Oliver Godwin. He seemed to stand nine feet tall. "In this Court, the rights guaranteed by the Constitution will be respected. I admonish you, sir, to remain silent until you have the benefit of counsel. Be that as it may, Mr. Dopher, if such be your name, I now place you under arrest, on suspicion of murder of President Cromway, and for attempted murder here. We have no place of detention in this building, but in a moment I rather believe the District Police will arrive and transfer you to the District Jail, there to hold you for further proceedings in accordance with law. Mr. Sickles, will you accept Mr. Dopher as your client, until one of you shall request to the contrary?"

"Indeed yes, Your Honor. And I move that the Court impound and preserve this safe, camera, film, and all associated materials."

"Unless my brothers have any objection--" he did not even look at his colleagues. "So ordered."

As Dopher was led out into the main hall, Godwin turned to the Chief Justice. He was at this moment the reincarnation, the fusion, and the voice of all the great justices who in decades past had guided the flow of American legal thought. He was the great Marshall; he was Taney; he was Hughes. He was the immortal Holmes. "I apologize to my Brother Burke for interrupting him, and to the other members of this Court, and most especially to my Brother Pendleton for any undue presumption of authority." But now he stood silent a moment, looking about the great room, wistful, searching. His body bent over a little, and he put a hand on the bench to steady himself. When he spoke again, the few reporters left in the front row had to strain to hear him. "God's blessing on this place... on these, my brothers..." He looked up at Pendleton. "With the leave of the court, I beg leave to retire."

Pendleton nodded to the clerk. "Adjourn the court."

The reporters, attuned to a generation of Washington arrivals and departures, caught it instantly. "It's *real*. He doesn't just mean retire, he means-- *retire*. Godwin's finally retiring!" They were on their way to phones even as the crier was intoning, "All rise..."

* * *

I think it not impossible that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be-- that man may have cosmic destinies that he does not understand.

-- Justice Oliver Wendell Holmes

* * *

"Thank all of you for coming," said Chief Justice Pendleton to the assembled justices. "After the events of this past noon, I thought it best for one last, highly informal conference, to tie up loose ends on *Tyson*. You've seen the afternoon papers?" He passed the copies around. "There seem to be all kinds of speculation. The Evening Star thinks Dopher's companions took the picture and got it into the safe somehow, and so betrayed him. The Daily News sees it as a plot to assassinate the Supreme Court. They demand a Congressional investigation with full TV and press coverage. Only the Post seems to

have noticed that we released Tyson and simultaneously preserved Dopher's constitutional rights. They don't applaud either. But at least we need not be concerned further with Dopher. He's been extradited and is on his way to New York."

"And he'll bring the identical question right back here, evidence obtained by clairvoyance," said Moore.

"Not necessarily," said Pendleton cheerfully. "I think each and every member of this court is automatically disqualified to participate in any future cause of *Dopher v. New York*. We were all witnesses. If we ever get a petition for certiorari, we would have to deny."

"So New York will have to handle it all by itself," said Helen Nord thoughtfully. "This time, with a confession in open court, in front of several hundred witnesses, how can Winters lose?"

"Especially if he won't have to worry about an appeal to this court," murmured Blandford.

"Why *are* we here, Mr. Pendleton?" asked Roland Burke.

"Well, I thought we'd have sort of a post-mortem discussion. And when we finish that, I'd like your signatures on a memento for Oliver Godwin. His resignation was effective at the close of court this afternoon."

"High time," breathed Burke.

Pendleton looked at him sharply, then cleared his throat. "A great deal has happened in this case that some of us do not understand. A picture has appeared as if by magic. *Two* pictures, as a matter of fact."

Burke sat up suddenly. "Two pictures?"

Pendleton peered at him noncommittally. "Yes, two. I'll come to that later on. I don't know what it all means, not really. Either we are faced with the most colossal fraud of our careers, a fraud that involves a number of people of good repute, or else... we have just experienced a three-ring circus of psi. A pistol was fired point blank at Godwin. But the bullet, if there was a bullet, vanished in midair. Yes, there seems to be a great deal going on around me that I don't know about, and probably wouldn't understand if I did. I want to leave it alone. I will not inquire further. None of this need interfere with, nor is it truly relevant to, the continued performance of this Court. And therefore, in closing, let me assure you that I reprimand no one. Quite the contrary. I think we all owe a great debt to someone, or perhaps to several. Finally, I am very glad we are all alive."

Mr. Justice Burke was perplexed. "You mean that's the end of it? That we went through all that, and we're still not going to decide anything? What kind of logic is *that*? Shouldn't we withdraw our opinion, pull the whole case back for rehearing, and decide something?"

"And just what would we decide?" said Pendleton. "Should we take judicial notice that psi exists?"

"Of course not. You're twisting it all around. All I mean is, we can't dodge it forever. This is only the first case. Next term we'll have half a dozen."

"Exactly what do you think we ought to do, Brother?" asked Blandford.

"I don't know. I do know you're all against me." He stood up. "I would like to be excused from this conference."

"Just one more thing, Mr. Burke." Almost diffidently Pendleton turned around and picked up a portrait folder from the cart behind his chair. He passed it down to the justice. "This is the little farewell memento I mentioned earlier for Oliver Godwin. We wanted to give him a banquet and a suitable gift, but he flatly refuses. It's a photograph, with a signature card on the inside fold. We all plan to sign. Since you are now the Senior Associate Justice, we thought you might like to be the first."

"Of course. Very thoughtful." He opened the boards... and stared. "What on earth! Hands? A photograph of somebody holding hands?" He got out his fountain pen and unscrewed the cap, then looked over at Pendleton. "It's an old man's hand-- in a black silk sleeve. It's Godwin, in robes, isn't it?"

"Yes."

Burke peered again at the portrait. "The other hand. It's a young woman's. The bracelet looks-- familiar. Odd. Who is she?" He looked around the table uneasily. "Where did you get this?"

"It was on the negative from the *Tyson* camera. You may recall, I mentioned two pictures. The FBI developed the whole strip. This was on it, too. Ben Edmonds made the blowup."

"Who *is* she?" whispered Burke. He looked at Helen Nord's wrist. "It wasn't you. *You* don't wear a

bracelet like *that...* of laurel... leaves?" As he considered this, doubt began to undermine doubt, and finally left him at the edge of some awesome mental precipice, unbalanced, and clawing to return to his warm, predictable, three-dimensional continuum. "No!" he gasped. "It can't be. And even if it is, I don't have to believe it!"

Chief Justice Pendleton looked at the gray face. He said soothingly, "Of course you don't, Mr. Burke. In this country, and on this Court, nobody has to believe anything."

And now it seemed to Roland Burke that this cheerful band had been illuminated by a flash of lightning, that he was now seeing their faces for the first time-- and they were strangers, knowing, powerful, and he was helpless, and innocent among them. There was something terrifying about it. Nothing could ever be the same again.

Ben Edmonds knew what must be passing through Burke's mind: psi existed. It was a living thing, without boundary of time, space, life, or death. It was not subject to the laws of logic, or to any law made by man. It was without probable cause.

Burke's pen clattered to the floor. From the great black table he picked up the current volume of United States Reports, clutched it to his breast as though it were a talisman to ward off a horrifying unknown, and walked slowly from the room.

Edmonds leaned over and took the photograph from Pendleton. "Helen and I will sign first," he said simply. "It would please them."