

**“FATHER CHIEF JUSTICE”**: E.D. WHITE AND THE CONSTITUTION is a portrait of Edward Douglass White, born of Bayou Lafourche, Thibodaux, Louisiana, 1844, Confederate soldier boy captured at Port Hudson in the Civil War, United States Senator, Associate Justice, 1894, and Chief Justice of the United States, 1910-1921. His life is magically portrayed through scenes that invite you into his boyhood home to climb its “staircase to the Supreme Court,” place you in the Valley of Antietam facing death with Captain Oliver Wendell Holmes, Jr., and seat you at Holmes’s elbow with Fanny Holmes and Justice Brandeis at 1720 I. Street during World War I, when freedom of speech was at risk in the “Campaign of the Constitution.” Holmes and White—“THE BLUE AND THE GRAY AS ONE”—sit together side by side as Brothers on the Supreme Court in the *Selective Draft Law Cases* and Chief Justice White voices his immortal “Rule of Reason” under the Sherman Antitrust Act, while Harlan, J., erupts like a volcano. White’s Court anticipated the rule of *Miranda v. Arizona* long before the Warren Court and it was the first to breathe life into the post-Civil War Amendments, protecting the voting rights of blacks. You share the joy of life lived to its top, a veritable fairy tale of home. “*Father Chief Justice*” premiered in the Theater of the Jean Lafitte National Historic Park, Thibodaux, Louisiana, March 8, 1997—Holmes’s birthday. Most recently, it played at Louisiana’s Old State Capitol, Baton Rouge, April 29, 2000.

“We hear the story of Chief Justice White and his enemy in arms, Oliver Wendell Holmes, Jr., exchanging red roses every Constitution Day, September 17th the anniversary of the Battle of Antietam, where Holmes took a Confederate ball through the back of the neck and, by God’s grace, lived. With Mr. Baier’s play, “*Father Chief Justice*,” the magic continues.

—JOHN A. DIXON, JR., Chief Justice of Louisiana, Retired

“I think you know that I support you in all your endeavors, but none more so than when you are illuminating the history of a great institution to which I have devoted 40 years of my life.”

—JUSTICE WILLIAM J. BRENNAN, JR.

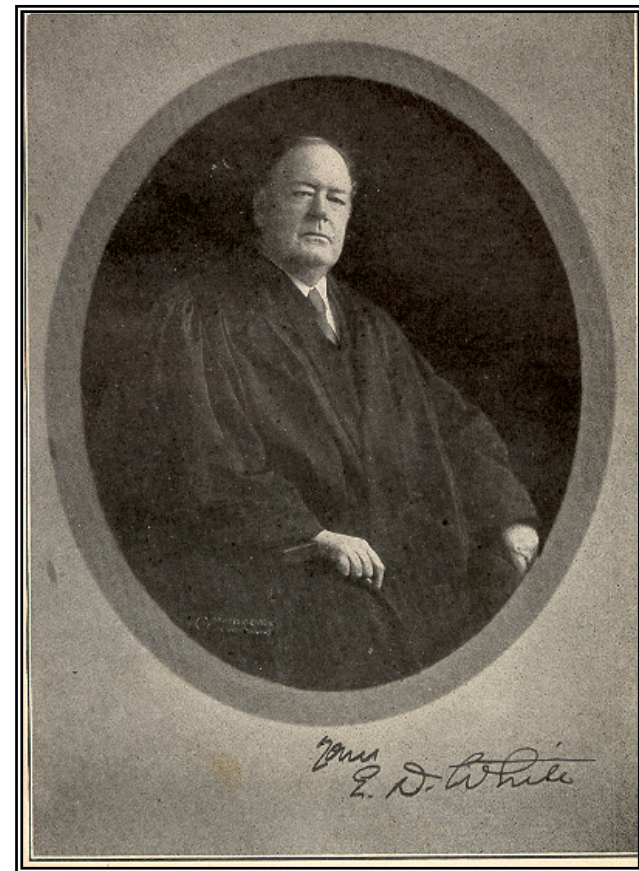
“I don’t think you ought to change your name to Professor Jesse—how about Shakespeare? I especially appreciated your *Note on Sources*. And I was especially delighted to see that you used the rose exchange on the anniversary of Antietam so effectively.

—GERALD GUNTHER, William Nelson Cromwell Professor of Law Emeritus, Stanford Law School

# “FATHER CHIEF JUSTICE”

## E. D. WHITE AND THE CONSTITUTION

*A Play by Paul R. Baier*



Design Artist: Cynthia Bland

Cover photograph, Collection Supreme Court of the United States



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HOLMES'S Living Room.

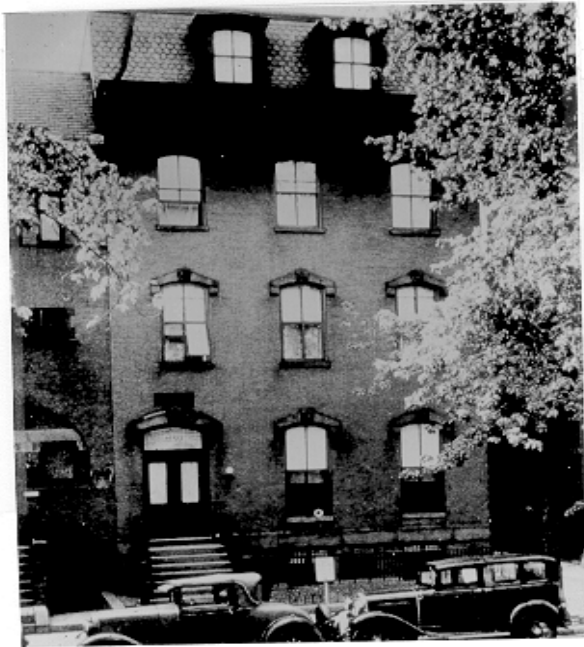
**ACT III.**

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**AT HOME.**

ACT III. AT HOME.

SCENE I.—1720 EYE STREET.



HOLMES'S home: 1720 Eye St., N.W.,  
Washington, D.C.

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□ ACT III. AT HOME. □

SCENE i.—HOLMES'S HOME.

1720 I. STREET.

*Four-story brick; slate shingles, Mansard roof; two dormers jut out over fourth floor; framed in tree branches; second- and third-story windows are propped open in pursuit of fresh air. HOLMES likes fresh air. Two early motor cars are parked curbside. It is Constitution Day, September 17th, anniversary of the Battle of Antietam.*

**JESSE:** [*Voiceover.*] Holmes's home: 1720 I. Street, N.W., Washington, D.C. Four-story brick, framed in tree branches. Notice the second-story windows . . . propped open in pursuit of fresh air. Holmes likes fresh air! It is Constitution Day, September 17th, Anniversary of the Battle of Antietam. The audience is advised that Mr. Justice and Mrs. Holmes are "at home." They expect Chief Justice White to come calling for what is a yearly exchange of red roses between Captain Holmes and his Confederate enemy in Arms, Ned White. Chief Justice White is given to leaving a rose for Fanny and Baccarat cigars for Holmes — gladly received — but on Constitution Day, September 17th, White always brings a long-stemmed red rose for "MY BROTHER HOLMES OF THE TWENTIETH MASSACHUSETTS" as the yearly card reads.

Mr. Justice Brandeis is already on the domestic scene, having greeted Fanny. He is now with Holmes, in the study on the second floor.

**HOLMES'S STUDY.**



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“A cozy setting in which to read, write, and ‘jaw’ the law.”

**JESSE:** [Voiceover.] Holmes’s desk, his reading lamp and vase of fresh flowers. Book cases packed floor to ceiling — not an empty slot on the shelf! Notice Captain Holmes’s Civil War sword hanging above the hearth—a sword in its scabbard, a sword of oblivion and peace. A cozy setting in which to read, write, and “jaw” the law.

**O. W. HOLMES, Jr.,** *in horse-hair armchair.*

**JESSE:** [Voiceover.] Mr. Justice Holmes is sitting in his favorite horse-hair arm chair, holding a copy of his book “*SPEECHES*,” Little, Brown, and Co., open in his lap. This is the fifth edition, which dates the scene sometime after 1913. Holmes is reciting to Brandeis, from his speech “The Soldier’s Faith,” a Memorial Day address, which takes Holmes back to Antietam, September 17th — Constitution Day—, 1862.

**HOLMES:** Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war. . . . War, when you are at it, is horrible and dull. But some teacher of the kind we all need. Out of heroism grows faith in the worth of heroism. The proof comes later, and even may never come.

HOLMES *snaps SPEECHES shut, rises from his armchair, and approaches BRANDEIS, standing left, at desk.*

**HOLMES:** Now there, Louie, is a faith for the ages! Yesterday my belly kissed the ground at Antietam and Ned White was a prisoner at Port Hudson. [With gusto:] “The C. J. and I had been enemies,” I like to say to friends. Now look at us! C.J. WHITE and CO. want to put [with double gusto]: “PUNY ANONYMITIES” in jail for uttering a few doubts about Woodrow Wilson and the War . . . — and you and I, Louie, must fight ‘em off.



Collection Supreme Court of the United States

“Those who won our independence knew it is hazardous to discourage thought, hope, and imagination.”  
—Louis D. Brandeis

**BRANDEIS:** The First Amendment is a dull sword these days, I am sorry to say! Our faith is different. Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. Those who won our independence knew it is hazardous to discourage thought, hope, and imagination. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form!

**HOLMES:** That’s our *Abrams* dissent, Louie!

HOLMES, *really roused*, charges his desk, picks up a page of manuscript opinion, and recites aloud from his dissent in *Abrams v. United States*, 250 U.S. 616 (1919):

**HOLMES:** [*Up center, addressing audience.*] “Ladies and Gentlemen, *Abrams v. United States*:— ‘MR. JUSTICE HOLMES dissenting’:—

“Congress certainly cannot forbid all effort to change the mind of the country!

“Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger.

“Why, I believe the defendant has as much right to publish these two leaflets as the Government has to publish the Constitution of the United States now vainly invoked by them.”

HOLMES, *still on his steed*, returns to his desk, addressing BRANDEIS.

**HOLMES:** [*A bugler blowing the charge.*] —Why, it’s battle, I tell you, Louie — the CAMPAIGN OF THE CONSTITUTION!—; the JOUST OF THE FIRST AMENDMENT! And we’ve got to fight like hell to win the banner back!—never mind C.J. White and MRS. Holmes want me to shut up!



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*Enter FANNY, carrying a long-stemmed red rose.*

*Enter FANNY, carrying a long-stemmed red rose. She has heard HOLMES, J., roaring like a lion.*

**FANNY:** Captain Holmes! . . . calm yourself! [*Putting her foot down.*] Chief Justice White is expected and it is MRS. [*with her own gusto*] . . . it is MRS. JUSTICE HOLMES'S opinion that you should fight your War on the Bench, not at home!

**BRANDEIS:** [*With wit, aimed at WENDELL.*] MRS. JUSTICE HOLMES is authorized to say that MR. JUSTICE BRANDEIS joins her opinion!

**FANNY:** It's Constitution Day, Wendell, and there will be peace and quiet on the Holmes's domestic front. You will not charge the enemy all over again at 1720 I. Street.

*FANNY presents the red rose to her husband. WENDELL melts.*

**HOLMES:** My sincere apology, LADY HOLMES, and to you, Louie. [*Sweetly, purring like a kitten.*] Not a bad thing a rose [*placing it on his desk*] . . . and romance! [*Kisses FANNY on the cheek, bows to her as though a Knight to a Fairy Tale Princess.*]

*A doorbell sounds off stage. FANNY exits stage left. HOLMES expects it is the CHIEF JUSTICE. He thinks out loud on his Confederate friend.*

**HOLMES:** [*Up center, with BRANDEIS.*] Before you came on the Court, Louie, White was my most constant associate among our judges. He is a very able man, and the fact that he thinks more like a legislator than as a pure lawyer is no objection where there are a lot of other judges who have an equal voice. There are profound differences in the interest of my friend the C. J. and myself —so profound that I never talk about my half.



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“But White has the grand manner and is of the 18th Century:  
‘*Ley est resoun.*’ ”

**BRANDEIS:** I assure you, Wendell, Chief Justice White talks about your half!—on our walks home from Court. “Captain Holmes has fallen out of line!” he exclaims. Then he threatens to put his big arm around you and apply what he calls “THE PHYSICAL APPLICATION OF THE LAW!”

**HOLMES:** I would run away like a Union jack rabbit!

**BRANDEIS:** White is an immense man physically, but his step is as light as a boy’s. He is like Taft in that—the object of admiration by many a fair ballroom partner!

**HOLMES:** White is a great pal of mine, but he is always thinking what will be the practical effect of a decision — which of course is the ultimate justification of condemnation of the principle adopted! I think of its relation to the theory and philosophy of the law — if that isn’t too pretentious a way of putting it.

I like to read a little philosophy into the law, Louie, —like an olive after lunch purifies the palate. Of course, my notion of the philosophic movement is simply to see the universal in the particular. I abhor speculation *in vacuo*—what I call “churning the void to make cheese!”

**BRANDEIS:** I should rather stick to facts, Wendell. “*Ex facto jus oritur.*” — “From the facts arises the law.” That ancient rule must prevail in order that we may have a system of living law.

**HOLMES:** Louie!—You sound like our Chief White— with his big Latin *Digest!* Chief *Justinianus* and I generally come out the same way by very different paths. But we sometimes come together head on [*driving his fists together*] with a whack!

**BRANDEIS:** As in the *Abrams* case! . . . “But White has the grand manner and is of the 18th Century: “*Ley est resoun.*” — “Law is reason.”



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“White has a warm hug, with a big right arm and heart!”

**HOLMES:** That’s White exactly: “Law is reason.” . . . “By the light of reason” this! . . . “By the light of reason” that! He is a great Jesuit all right! I believe in reason with all my heart, but I think its control over the actions of men when it comes against what they want is not very great. But our Chief has secular insights! His thinking is profound! The other day he told me, “You profess skepticism, and yet act on dogma.” He recognized my “CAN’T HELPS” — “I can’t help but believe that” . . . — as “dogma in disguise.”

Yet I believe, Louie, our Confederate Chief is a big high-minded man, worthy of the place. His qualities always appeal to one’s affections.

**BRANDEIS:** White has a warm hug, with a big right arm and heart! [*Looking at his pocket watch.*] I wonder what is keeping our BROTHER THE CHIEF JUSTICE?

**HOLMES:** Probably kiddies on the street. He escorts them across Pennsylvania Avenue against busy traffic. They love him for it! They like pocket candy from the Chief Justice of the United States!

White rides a bicycle you know—not a pretty picture on a wheel! But I admire his regimen of daily exercise. Next to philosophy, it’s important to keep one’s bowels clean!

*FANNY’s voice is heard off stage, left. She is coming up the stairs with the C.J.*

**FANNY:** [*As though a Bugler at Antietam.*] “THE CHIEF JUSTICE OF THE UNITED STATES AND MRS. CAPTAIN HOLMES!”

*Enter FANNY and CHIEF JUSTICE WHITE, arm in arm, in peace and quiet. WHITE is carrying two red roses; he has not forgotten MR. JUSTICE BRANDEIS and, in turn, Mrs. Brandeis.*





Chief Justice White, 1910.  
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“Ah, my Boston Boys! I assume you were talking behind my back.”

**WHITE:** Ah, my Boston Boys! I assume you were talking behind my back. What was it, Law or Fact?

**HOLMES:** [*With gusto.*] Your blessed “Domain of Theory!” . . . “Celestial Reason!”

**WHITE:** Ah, swell Boys! It shows how great minds lift themselves up above the mist and pettiness of things low into the region of things supernal! I suppose you were in joint dissent!

[*To HOLMES.*] In the domain of theory minds may differ. The moment we advance an abstraction, one mind takes one view, and the other takes another, and the union of the two minds becomes impossible because of the divergent premises or the contradictory deductions which the minds make.

**HOLMES:** Louie, are you taking notes!

**WHITE:** [*To BRANDEIS.*] But when we enter the domain of absolute and unchallengeable fact, then the only question which remains is first to ascertain the truth and then follow it!

**BRANDEIS:** [*To the audience.*] MR. JUSTICE BRANDEIS concurs separately:—Sometimes, if we would guide [*with emphasis, aimed at WHITE*] “BY THE LIGHT OF REASON,” we must let our minds be bold!

**WHITE:** The Court will take the matter under advisement!—God help us! [*Presenting rose to BRANDEIS.*] My Brother Brandeis of Boston, I give you [*as though proposing a toast*]: “The Constitution — all wrapped up in a rose.”

**HOLMES:** [*With gusto, up center.*] By Jove! . . . that’s poetry,— from a Jesuit! I told you, Louie, our Chief has insights. . . . Now he shows himself a Goethe come round on Constitution Day!

**BRANDEIS:** [*To WHITE, with emphasis.*] “FATHER CHIEF JUSTICE”— . . . I concur!

**HOLMES:** Whoa! [*Riding at Antietam again.*] What’s that?— “FATHER CHIEF JUSTICE”? I dissent:— “Congress shall make no law respecting an establishment of religion” [*he is quoting the First Amendment*], why Louie—

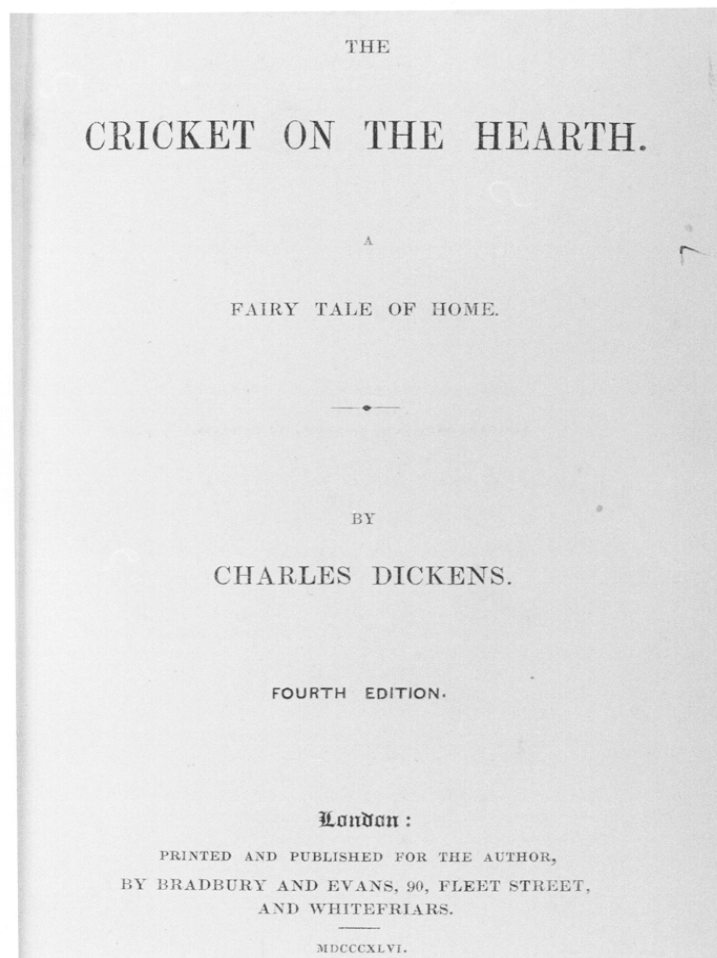


Photo by Mark Kleiner, LSU Instructional Resources Center

“By DICKENS! Fanny, you got me!”

**FANNY:** [*Breaking in.*] Wendell, be still! Aren't you the one always advising the world to “Think things, not words!”

There is such a thing, my dear MR. JUSTICE, as a hearth and a home . . . , even at the Supreme Court!

**HOLMES:** By DICKENS! Fanny, you got me! [*HOLMES is tickled pink with his literary retort.*] I plume forgot “*Cricket on the Hearth.*” Let's see: [*Mockingly.*] Do we have it on the shelf? [*Looking over the bookcases.*] . . . The glory of a library, Louie, is an empty slot on the shelf! [*Not finding it, addressing audience up center with gusto.*] I shall call our Brother White . . . “CHIEF OF THE CRICKET TRIBE!”

*HOLMES is doubly tickled with himself. He turns from the audience and addresses BRANDEIS AND THE CHIEF JUSTICE.*

**HOLMES:** And, by Jove!, have I heard Chirps in the Conference Room! . . . —except for my [*loudly*] Lionhearted Friend, Brother Harlan. He doesn't chirp. . . . He only roars!

**FANNY:** [*Sternly.*] Wendell, will you please dismount your STEED! Remember . . . it's Constitution Day.

*HOLMES picks up the rose from his desk and presents it to the CHIEF JUSTICE.*

**HOLMES:** [*Peacefully, with reverence.*] “FATHER CHIEF JUSTICE” [*HOLMES has yielded!*]: I give you “THE UNITED STATES OF AMERICA.”

**WHITE:** [*Exchanges rose.*] MY BROTHER HOLMES OF THE TWENTIETH MASSACHUSETTS: “THE BLUE AND THE GRAY AS ONE.”

**HOLMES:** [*Up center, with red rose, addressing audience.*] It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet it's red is our life-blood, its stars our world, its blue our heaven.



*Oliver Holmes*

Harvard Law Art Collection

“Perhaps it is not vain for us to tell the new generation what we learned in our day, and what we still believe.”

**WHITE:** [*Aside his BROTHER HOLMES, up center, to audience.*] I can recollect the day when to me Old Glory was but the emblem of darkness, of misery, of suffering, of despair and despotism.

But ah! in the clarified vision in which it is now given to me to see it, [*with reverence*] although the stars and bars have faded away forever, the fundamental aspirations which they symbolized find their imperishable existence [*with loyalty*] in the stars and stripes!

HOLMES *returns to his arm chair and bows to his BROTHERS WHITE AND BRANDEIS. Like a Prince to his Princess, HOLMES gives the red rose to FANNY. He picks up SPEECHES, eases in, and resumes reading from “The Soldier’s Faith.”*

**HOLMES:** Perhaps it is not vain for us to tell the new generation what we learned in our day, and what we still believe. That the joy of life is living, to ride boldly at what is in front of you, be it a fence . . . or the enemy! We learned also, and we still believe, that love of country is not yet an idle name.

As for us, our days of combat are over. Our swords are rust. Our guns will thunder no more. We have shared the incommunicable experience of war; we have felt, we still feel, the passion of life to its top. In our youths, our hearts were touched with fire.

HOLMES *rises from his armchair, comes up center, and recites in a hushed voice.*

**HOLMES:** Three years ago died the old colonel of my regiment, the Twentieth Massachusetts. He gave our regiment its soul. No man could falter who heard his “Forward, Twentieth!”



Fanny Dixwell at Seventeen Reading to  
Five Brothers and Sisters

Harvard Law Art Collection

I went to his funeral. The church was empty. No one remembered the old man whom we were burying, no one save those next to him, and us. And I said to myself, The Twentieth has shrunk to a skeleton, a ghost, a memory, a forgotten name which we older men alone keep in our hearts.

And then I thought: It is right. It is as the colonel would have it. This is also a part of the soldier's faith: Having known great things, to be content with silence.

*FANNY approaches WENDELL, up center, with her own copy of SPEECHES in hand. She has her own part in a moment. It is evident that they have recited "The Soldier's Faith" together many times before.*

**HOLMES:** Just then there fell into my hands a little song sung by a warlike people on the Danube, which seemed to me fit for a soldier's last work, another song of the sword [*looking at his own sword and scabbard above the hearth*], . . . but a song of the sword in its scabbard, a song of oblivion and peace.

*HOLMES breaks off. It is FANNY's turn.*

**FANNY:** [*Reciting, at Holmes's side.*]  
A soldier has been buried on the battle field.  
And when the wind in the tree-tops roared,  
The soldier asked from the deep dark grave:

**HOLMES:** "Did the banner flutter then?"

**FANNY:** "Not so, my hero," the wind replied, "The fight is done, but the banner won, Thy comrades of old have borne it hence, Have borne it in triumph hence."

**HOLMES:** Then the soldier spake from the deep dark grave:  
"I am content."

**FANNY:** Then he heareth the lovers laughing pass, And the soldier asks once more:



National Archives

HUGHES, C.J. and HOLMES, J., in Chambers, March 8, 1931,  
HOLMES's 90th birthday.

**HOLMES:** “Are these not the voices of them that love, That love and remember me?”

**FANNY:** “Not so, my hero, the lovers say, “We are those that remember not; For the spring has come and the earth has smiled, And the dead must be forgot.”

**HOLMES:** Then the soldier spake from the deep dark grave: “I am content.”

### UNIVERSAL NEWSREELS.

JESSE: [*Voiceover.*] The front doors of 1720 I. Street fling open. Out pops Fanny's hero, the old soldier himself—courtesy of National Archives's Universal Newsreels. Unearthed from oblivion and peace, MR. JUSTICE HOLMES surveys his viewers as if to ask, “Are these not them that love and remember me?” Holmes eases down the front steps, law clerk on his arm, slips into a waiting coupe, and is off to Court to face the motion picture cameras on his 90th birthday, March 8, 1931, at home in chambers with Chief Justice Charles Evans Hughes.

