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# Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack

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## INTRODUCTION: HISTORY AND BIOGRAPHY

In 1975, upon her appointment to the District of Columbia Court of Appeals, Julia Cooper Mack broke the double barrier of race and gender by becoming the first woman of color ever appointed to any American court of last resort. Over the last two decades, Judge Mack has authored hundreds of opinions articulating a powerful critical jurisprudence previously unheard on the highest level of our judiciary. In the pages that follow, several scholars join the Editors of the *Howard Law Journal* in suggesting that Judge Mack's life and work warrant careful scrutiny. This symposium explores the roots, development, and substance of Judge Mack's distinctive legal philosophy. As advocate and judge, in her fresh and original jurisprudential voice, Judge Mack speaks truth to power.[1]

This symposium was conceived shortly before the recent passage of Judge Mack's second decade of judicial service on the bench of the District of Columbia Court of Appeals. Just a few years ago, only six other women of color were simultaneously serving on courts of last

1. You have undoubtedly observed the polyvalence of our symposium title, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack.* In what will soon be the century before last, another strong-willed, intelligent, African-American woman made a name for herself by linking the words Truth and Sojourner. More recently the subversive injunction "Speak Truth to Power!" adorned the abandoned marquee of an empty Times Square theater on Forty-Second Street in New York City. As applied to Judge Mack, "Speaking Truth to Power!" is at least ambivalent: an incitement to veracity in the face of authority, or a rare biographical memoir of personal integrity winning political influence? The critical jurisprudence of Judge Julia Cooper Mack bears multiple interpretations.

resort.[2] This mere handful, coupled with the length of Judge Mack's judicial tenure, prompted the historical conjecture that she might be the earliest such appointment to any American high court. Legal historian Professor Walter J. Walsh investigated and apparently confirmed this hypothesis, drawing heavily upon the unpublished research of Justice Charles Z. Smith (who has worked extensively to diversify the judiciary by promoting women of color);[3] on the published research of Professor J. Clay Smith, Jr. (who has written an authoritative history of black lawyers up to 1944);[4] and on interviews with various knowledgeable sources around the nation.[5] The resulting new historiography inspired this symposium.

Other scholars were then invited to contribute. Collectively, they selected the *Howard Law Journal* as their first choice for publication, due to its historic role as the leading African-American legal periodical; and also because it was from Howard University School of Law that Judge Mack earned her law degree almost half a century ago, before the United States Supreme Court first decided Brown v. Board of Education.[6] Aware of the significance of this collective research,

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2. In 1993, Judge Mack was listed among seven women of color then sitting on American courts of last resort. These fifty-two tribunals include the United States Supreme Court as well as the highest courts of each state and the District of Columbia. ABA TASK FORCE ON MINORITIES IN THE JUDICIARY, WOMEN OF COLOR IN THE JUDICIARY (1993) (listing minority women judges by jurisdiction, court, and racial/ethnic identification); Judith Resnick, *Ambivalence: The Resiliency of Legal Culture in the United States,* 45 STAN. L. REV. 1525 (1993).

3. *See, e.g.*, Charles Z. Smith, *Truth, Justice and Freedom: The Imperative for Racial and Ethnic Diversity on the Courts, in* WOMEN OF COLOR IN THE JUDICIARY, *supra* note 2, at 9.

4. J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 (1994).

5. Including Lynn Schafrann of NOW Legal Defense and Education Fund, New York City; Alan Beck of the Fund for Modern Courts, New York City; Esther Ochsman, Executive Director of the National Association of Women Judges, Washington, D.C.; and John Crump, Executive Director of the National Bar Association, Washington, D.C.

6. Brown v. Board of Educ., 347 U.S. 483 (1954); Brown v. Board of Educ., 349 U.S. 294 (1955). The *Brown* decision was the culmination of a cause lawyering strategy crafted by Howard Law School faculty and graduates, including Dean Charles Houston and Justice Thurgood Marshall. As Professor Smith has previously stated, perhaps anticipating the theme of our symposium:

> Howard Law graduates have been reformers, and we have remade everything in the nation. There is nothing that we, our graduates, have not touched and remade. More importantly, we have renounced lies. We have renounced the lie of inequality from the very beginning. We have renounced the lie that African-Americans did not possess the intellect to become lawyers. We have renounced the lie that we would never be able to understand and comprehend abstract thoughts. We have renounced the lie that African-Americans would never be on the Supreme Court. Yet, we *must* continue to renounce those lies. We have played a crucial part in restoring the word of truth—truth in the courts; truth in the legislative halls; and truth in the people who had lost hope.

J. Clay Smith, Jr., *Be Reformers and Remakers*, 38 How. L.J. 9, 10 (1994).

the editors of the *Howard Law Journal* undertook to publish the following original scholarly essays as this symposium.

In several respects, this scholarship makes an important contribution to twentieth-century jurisprudence. From the perspective of institutional history, diversity on the bench marks a distinct transfer of judicial power from a historically narrow and unrepresentative social and political elite. This symposium adds to a growing literature tracing the history of black lawyers.[7] It also makes an important contribution to the history of women lawyers. It is unique in focusing scholarly attention on a pioneering advocate and jurist who has developed her jurisprudence from the perspective of both historically silenced groups. Because Judge Mack was born and raised through her girlhood in the segregated South, she has brought to her lawyering and later to the bench, vivid personal experiences which have not been shared by any other holder of such high judicial office. In this important respect, her voice will never again be replicated. On the bench, Judge Mack's distinctive perspective is apparent from her opinions, in which she consistently rejects the artificial premises of formal legal doctrine and exposes the underlying questions of disparate power and moral justification. Having broken previously impregnable barriers and gained access to the immeasurable power of the state, Judge Mack has introduced a transformative jurisprudential discourse that challenges conventional assumptions about judicial authority. By studying her work, we can now test the theoretical foundations that lie at the intersection of feminist jurisprudence and critical race theory. Because Judge Mack's reasoning so frequently departs from that of her judicial colleagues, this symposium raises important issues concerning the claimed objectivity and neutrality of dominant legal ideologies. This symposium invites the reader to wonder what American jurisprudence might become if we systemically break apart the structures of social privilege that hide deep hermeneutic and political turmoil.

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7. *See also* Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161 (1994); Dorothy A. Brown, *Faith or Foolishness*, 11 HARV. BLACKLETTER J. 169 (1994); Avis Marie Russell, *Black Women Attorneys in the Legal Profession*, 40 LA. B. J. 463 (1993); J. Clay Smith, Jr., *In Freedom's Birthplace: The Making of George Lewis Ruffin, the First Black Law Graduate of Harvard University*, 39 HOW. L.J. 201 (1995); AFRICAN AMERICANS AND THE LEGAL PROFESSION IN HISTORICAL PERSPECTIVE (Paul Finkelman ed. 1992).

## THE HISTORY OF BLACK JUDGES

At this point, it may be helpful to recall the historic exclusion of both blacks and women from the American judiciary. Since first gaining admission to practice in the courts, black lawyers have understood the fundamental importance of representation on the bench. Remarkably, albeit under unusual historical circumstances, the very first African-American man admitted as an attorney was also the first to hold judicial office. Macon Bolling Allen, a native of Indiana, was admitted in Maine in 1844, but was soon drawn to Massachusetts by its larger black community.[8] Just three years later, antislavery governor George N. Briggs appointed attorney Allen as justice of the peace.[9]

During Reconstruction, Jonathan Jasper Wright became the first African-American appointed to an American court of last resort.[10] Justice Wright took his seat on the South Carolina Supreme Court at a time when most states refused to recognize the right of either blacks or women to practice law. Soon after the Civil War, Justice Wright was admitted to practice in Pennsylvania—a state which had previously blocked his admission due to the color of his skin.[11] Sadly, Justice Wright's appointment was the exception that proved the rule; it would take almost a century for another African-American jurist to be appointed to an American court of last resort.

These early individual achievements by black men did not indicate any national movement towards diversification of the judiciary. However, in another intriguing story at the turn of the century, Thomas McCants Stewart left New York, practiced law in the territory of Hawaii,[12] and was ultimately appointed to the Liberian Supreme Court.[13] Also, in 1949, William H. Hastie became the first African-American to receive a lifetime appointment to the federal bench when he was appointed by President Truman to the Circuit Court of Appeals.[14] In 1961, Judge Hastie was followed by President Kennedy's

8. SMITH, JR., *supra* note 4, at 95.
9. *Id.* at 96.
10. *Id.* at 216.
11. *Id.* at 153. *See also*, Robert H. Woody, *Jonathan Jasper Wright, Associate Justice of the Supreme Court of South Carolina 1870-77*, 18 J. NEGRO HIST. 114 (1933), *reprinted* in AFRICAN AMERICANS AND THE LEGAL PROFESSION IN HISTORICAL PERSPECTIVE (Paul Finkelman ed. 1992).
12. SMITH, JR., *supra* note 4, at 492.
13. *Id.* at 493-94.
14. In 1937, Judge Hastie had already been appointed to the United States District Court for the Virgin Islands, a term appointment. SMITH, JR., *supra*, note 4 at 138-39.

federal district court appointees James Parsons of Chicago and Wade H. McCree of Detroit.[15]

Further, in 1961, Otis M. Smith was appointed to fill an unexpired term on the Michigan Supreme Court.[16] Thus, after the lapse of almost a century (spanning the Civil War and two world wars), Justice Smith followed South Carolina's Justice Wright as only the second African-American ever appointed to an American court of last resort.[17]

Seven years later, during the Johnson Administration, Thurgood Marshall became the third black lawyer on a court of last resort by winning his historic appointment to the United States Supreme Court.[18] Hubert B. Pair was the fourth black lawyer appointed to the District of Columbia Court of Appeals[19] (which Congress vested with jurisdiction equivalent to that of a state supreme court in 1971).[20]

Following in the footsteps of Justice Wright on the South Carolina Supreme Court, Justice Smith on the Michigan Supreme Court, Justice Marshall on the federal Supreme Court, and Judge Pair on her own court, Judge Mack thus became only the fifth black jurist to sit on the highest court of an American jurisdiction when she took office in August 1975.[21]

A few months later, in November 1975, Joseph W. Hatchett took his seat on the Florida Supreme Court, serving there for four years before accepting President Carter's nomination to the federal circuit court.[22] Like Justice Marshall and Judge Mack, Justice Hatchett had graduated from Howard Law School.[23] On the District of Columbia Court of Appeals, Judge Pair and Judge Mack were soon followed onto the bench by black judges Theodore Newman in 1976 and Wil-

15. GERALDINE R. SEGAL, BLACKS IN THE LAW PHILADELPHIA AND THE NATION 223-34 (1983). Dates of judicial service can be easily ascertained from several directories such as THE AMERICAN BENCH (annual editions). However, researchers should realize that such biographical entries rarely reveal information on race. This is in sharp contrast to gender, which is revealed by name; and in lesser contrast to ethnicity, which is suggested by name. Hence, alternate methodologies must be devised to ascertain the identities of judges of color. Only then can biographical directories be consulted.

16. *Id.* at 224.

17. *Id.*

18. THE AMERICAN BENCH, 52 (Marie T. Hough et al. eds., 6th ed. 1991-92). *See generally* MICHAEL DAVIS & HUNTER CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992).

19. THE AMERICAN BENCH, 518 (Marie T. Finn ed., 8th ed. 1995-96).

20. District of Columbia Courts Reorganization Act of 1970, Pub. L. No. 91-358, §11-102. 84 Stat. 475 (1970).

21. THE AMERICAN BENCH, *supra* note 19, at 523.

22. *Id.* at 37.

23. *Id.* at 37.

liam C. Pryor in 1979.[24] Numerous other courts of last resort nationwide have since been complemented by judges of color.[25]

## THE HISTORY OF WOMEN JUDGES

While Judge Mack was the first woman of color to be appointed to an American court of last resort, she was also among the first women of any race to attain such high judicial office. The earliest women judges were usually appointed to trial courts of limited jurisdiction.[26] For example, Georgia Bullock headed the experimental Los Angeles Women's Court in the 1920's.[27]

A true pioneer was Florence Allen, whose election to the Ohio Supreme Court in 1922 made her the first woman to serve on an American court of last resort.[28] Judge Allen had previously been the first woman to serve on a trial court of general jurisdiction when she was elected to the state Court of Common Pleas.[29] She was later appointed to the federal circuit court from 1933 to 1962, making her the first female federal appointee, and probably also the first female appellate judge.[30]

Like Jonathan Jasper Wright, however, Florence Allen was the exception that proved the rule: along with African-Americans, women were effectively excluded from American courts of last resort right up to the 1960's. The second female high court judge was Lorna Lockwood, who joined the Arizona Supreme Court in 1961. In 1962, Suzie Sharp joined the North Carolina Supreme Court,[31] and in the same

24. THE AMERICAN BENCH, 542-43 (Marie T. Finn et al. eds., 9th ed. 1997-98).

25. JUDICIAL ADMIN. DIVISION TASK FORCE ON OPPORTUNITIES FOR MINORITIES IN THE JUDICIARY, A. B. A., DIRECTORY OF MINORITY JUDGES IN THE UNITED STATES (1994). *See also*, African-American Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts: Methods of Initial Selection (Jan. 1996) (unpublished study, on file with American Judicature Society); George W. Crockett, National Roster of Black Judicial Officers (Mar. 1977) (unpublished manuscript, on file with author); *The Black Judge in America: A Statistical Profile*, 57 JUDICATURE 18 (1973); Beverly B. Cook, *Black Representation in the Third Branch*, 1 BLACK L.J. 260 (1971); SEGAL, *supra* note 15 at 224.

26. *See generally* Beverly B. Cook, *Women Judges: A Preface to their History*, 14 GOLDEN GATE U. L. REV. 573 (1984); Beverly B. Cook, *Women Judges: The End of Tokenism*, *in* WOMEN IN THE COURTS (Hepperle & Crites eds., National Center for State Courts, Williamsburg, Va. 1978); Beverly B. Cook, *Raising the Consciousness*, 77 JUDICATURE 168 (1993); Larry Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 292 (1982).

27. Beverly B. Cook, *Moral authority and gender difference: Georgia Bullock and the Los Angeles Women's Court*, 77 JUDICATURE 144 (1993).

28. David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156 (1993).

29. *Id.*

30. *Id.*

31. THE AMERICAN BENCH, *supra* note 19, at 1809.

year, Anne X. Alpern was briefly appointed to the Pennsylvania Supreme Court to serve out an unexpired term. In 1965, Rhoda Lewis became the fifth woman justice to serve on an American court of last resort when Hawaii joined the union (Justice Lewis had already sat on the territorial court for the previous six years). Under somewhat similar circumstances, in 1971, Catherine B. Kelly became the sixth woman judge on a court of last resort when Congress vested the District of Columbia Court of Appeals with jurisdiction equivalent to that of a state supreme court. Judge Kelly had already sat on the District's predecessor tribunal (the Municipal Court of Appeals) since 1967.

Upon joining Judge Kelly on the District of Columbia Court of Appeals in 1975, Judge Mack apparently became only the eighth woman of any race to sit on an American court of last resort. Earlier that year, Janie L. Shores had taken her seat on the Alabama Supreme Court,[32] while later that year Elsijane Trimble Roy briefly served out an unexpired term on the Arkansas Supreme Court (and now sits on the federal district court).[33]

The following decade, in the 1980's, Sandra Day O'Connor was appointed to the federal Supreme Court,[34] where she has since been joined by Ruth Bader Ginsburg.[35] By 1993, 60 women had served on the highest courts of forty states, the District of Columbia, and the federal system; of those early high court women judges, over 90% had taken their seats since 1970, and almost 70% had been appointed since 1980.[36]

## THE HISTORY OF WOMEN JUDGES OF COLOR

While Judge Mack was the first woman of color to sit on any American court of last resort, a few African-American women had previously served on trial courts. The earliest was Jane Matilda Bolin, who was appointed in 1939 to New York City's domestic relations court.[37] In 1966, Constance Baker Motley was the first African-American woman appointed to the federal trial bench, taking her seat in the Southern District of New York.[38] Soon after, Judge Parsons

32. THE AMERICAN BENCH, *supra* note 19, at 129.
33. *Id.* at 209.
34. *Id.* at 59.
35. *Id.* at 34.
36. Allen & Wall, *supra* note 28, at 156.
37. SMITH, JR., *supra* note 4, at 406.
38. THE AMERICAN BENCH, *supra* note 19, at 1712.

and Judge McCree were appointed in Chicago and Detroit.[39] In 1979, four years after Judge Mack's appointment to the District of Columbia Court of Appeals, Amalya Kearse became the first African-American woman appointed to the intermediate appellate court in the federal judicial system.[40]

For seven years following her landmark judicial appointment in 1975, Judge Mack remained the only woman of color on any American court of last resort. Since Judge Mack's appointment, the District of Columbia Court of Appeals has far outstripped all other American courts of last resort in achieving diversity. In 1983, Judith W. Rogers became the second African-American woman on any American high court, when she joined Judge Mack on the same bench.[41] In 1989, Senior Judge Mack and Chief Judge Rogers were joined by a third African-American jurist, Annice M. Wagner.[42] The number of women of color on the D.C. court has since increased even though Judge Rogers moved across the street to the federal circuit court in 1994 (Judge Wagner taking over as chief judge); Vanessa Ruiz, a Latina, filled the vacancy left by Judge Rogers.[43] Finally, in 1995 the District of Columbia Court of Appeals was joined by another African-American jurist, Inez Smith Reid.[44]

In contrast to these five women of color who have served on the District of Columbia's highest court since Judge Mack's appointment two decades ago, until last year, no court of comparable stature could boast more than one such judge. Indeed, outside the District of Columbia, women of color remain conspicuous by their rarity on American courts of last resort, a pattern which is beginning to change only slowly.

It was not until the 1980's that this gradual change began to gather momentum. In 1982, Judge Mack was followed by Dorothy Comstock Riley, appointed to the Michigan Supreme Court, who thus became the second woman of color and the first Latina to join any American court of last resort.[45] In 1985, Rosemary Barkett (a Latina)

39. SEGAL, *supra* note 15.

40. THE AMERICAN BENCH, *supra* note 19, at 49.

41. *Id.* at 74.

42. *Id.* at 531.

43. *Id.* at 528.

44. African-American Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts: Methods of Initial Selection (Jan. 1996) (unpublished study, on file with the American Judicature Society).

45. THE AMERICAN BENCH, *supra* note 19, at 1292.

followed Judge Mack, Judge Riley, and Judge Rogers, winning election to the Florida Supreme Court.[46] In 1988, Juanita Kidd Stout (an African-American) joined the Pennsylvania Supreme Court.[47] In 1989, Joyce Luther Kennard joined the California Supreme Court, and so became the first Asian-American woman on any highest court.[48] In 1992, Leah Sears-Collins (an African-American) was appointed to the Georgia Supreme Court.[49] In 1993, Paula Nakayama (an Asian-American) joined the Hawaii Supreme Court.[50] Since then, three more African-American women have been elevated to courts of last resort: in 1994, Bernette Johnson was appointed to the Louisiana Supreme Court;[51] in 1995, Myra Selby was appointed to the Indiana Supreme Court;[52] and in 1996, Janice Rogers-Brown was elected to join Justice Kennard on the California Supreme Court.[53]

Of these several pioneering women jurists of color, most continue to serve on their respective courts of last resort: Judge Mack is now on active senior status on the District of Columbia Court of Appeals, often sitting alongside Chief Judge Wagner, Judge Reid, or Judge Ruiz. Justice Kennard and Justice Brown sit together on the California Supreme Court. In addition, Justice Sears-Collins, Justice Nakayama, Justice Selby, Justice Johnson, and Justice Riley respectively sit on the state supreme courts of Georgia, Hawaii, Indiana, Louisiana and Michigan. Further, Justice Stout has retired from the Pennsylvania Supreme Court; Justice Barkett now sits on the federal circuit court; and Judge Rogers has moved across the street from the District of Columbia Court of Appeals to the U.S. Court of Appeals for the District of Columbia Circuit.[54]

In short, of the fourteen women jurists of color elevated to American courts of last resort since Judge Mack's historic 1975 appointment (including five to the District of Columbia Court of Appeals), eleven still serve today.

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46. THE AMERICAN BENCH, *supra* note 19, at 15.

47. THE AMERICAN BENCH, 2047 (Marie T. Hough et al. eds., 4th ed. 1988-89).

48. THE AMERICAN BENCH, *supra* note 19, at 320. In the same year, as we have already noted, Judge Wagner joined Judge Mack and Judge Rogers on the District of Columbia Court of Appeals.

49. THE AMERICAN BENCH, *supra* note 19, at 715-16.

50. *Id.* at 743.

51. *Id.* at 1088.

52. *Id.* at 932.

53. African-American Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts: Methods of Initial Selection (Jan. 1996) (unpublished study, on file with American Judicature Society).

54. THE AMERICAN BENCH, *supra* note 19, at 74.

## JUDGE MACK'S PATH TO THE BENCH

Judge Mack was born Julia Perry in Fayetteville, North Carolina, on July 17, 1920.[55] Her father's name was Dallas and her mother's name is Emily (formerly McKay). As a girl, she was raised in segregated Fayetteville. Julia Perry graduated with her B.S. from the Hampton Institute in 1940.[56] In 1943 she married Jerry S. Cooper, and soon gave birth to her only daughter, Cheryl. In 1951, Judge Mack graduated from Howard University School of Law[57] at a time when most opportunities in the legal profession were completely closed to her as a black woman.[58] Practicing as Julia P. Cooper, Judge Mack's first jobs were in the legal departments of the postwar federal government's Office of Price Stabilization; and then the General Services Administration, where she was both the first woman and the first African-American hired as an attorney.[59]

In 1956, Judge Mack joined the criminal appeals division of the U.S. Department of Justice,[60] where she formed a close personal and professional relationship with Beatrice Rosenberg, one of the earliest women to specialize in Supreme Court practice. Over the next twelve years, Ms. Rosenberg and Julia P. Cooper constituted a formidable team, filing over 250 briefs together in the U.S. Supreme Court. These briefs carried the names of five successive Solicitors General: Simon E. Sobeloff, J. Lee Rankin, Archibold Cox, Erwin Griswold, and finally Thurgood Marshall.

On December 5, 1961, Judge Mack argued two cases before the U.S. Supreme Court: *Hill v. United States*,[61] and *Machibroda v. United States*.[62] The Supreme Court bench consisted of Chief Justice Warren, and Justices Black, Douglas, Brennan, Clark, Frankfurter and

55. THE AMERICAN BENCH, *supra* note 19, at 523.
56. *Id.* at 523.
57. *Id.* at 523.
58. George M. Johnson, *Legal Profession*, *in* THE INTEGRATION OF THE NEGRO INTO AMERICAN SOCIETY (E. Franklin Frazier, ed., 1951). This study of the African-American legal community was published the year that Judge Mack graduated from Howard University School of Law. Its author was the Dean of Howard University School of Law from 1946-58. In his unpublished autobiography, Dean Johnson specifically recounted his great pride in the professional endeavors of Judge Mack and some of his other students. *See also* Peter J. Levinson, *George Marion Johnson and the 'Irrelevance of Race'*, 15 U. HAW. L. REV. 1 (1993) *citing* GEORGE M. JOHNSON, THE MAKING OF A LIBERAL: THE AUTOBIOGRAPHY OF GEORGE M. JOHNSON (1984) (unpublished memoir on file in University of Hawaii law school library).
59. THE AMERICAN BENCH, *supra* note 19, at 523.
60. *Id.*
61. 368 U.S. 424 (1962).
62. *Id.*

Harlan. Just six weeks earlier, on October 17, *Hamilton v. Alabama*,[63] was argued for the NAACP by Constance Baker Motley (who would be appointed to the federal district court five years later). Judge Motley and Judge Mack were thus apparently the first two African-American women lawyers to argue before the bar of the federal Supreme Court.

In 1968, Judge Mack left the Justice Department to lead the Appellate Section of the recently formed Equal Employment Opportunity Commission ("EEOC"). Over the course of the next seven years, Julia P. Cooper filed over 100 briefs in civil rights cases in all of the federal circuits. During this period, Judge Mack introduced the EEOC's innovative practice of filing amicus curiae briefs in employment equality cases around the nation. Through this lawyering, and in her capacity as the EEOC's top legal strategist, Judge Mack contributed much to the shaping of early federal equality jurisprudence, and to institutionalizing the antidiscrimination ideal that was considered radical only a decade earlier. As the EEOC's chief appellate counsel, Judge Mack also trained a host of civil rights litigators during the most active period of that agency's antidiscrimination enforcement. Among the many distinguished lawyers who worked with her on these briefs and arguments was Beatrice Rosenberg, her old friend and mentor at the Justice Department.

After beginning as Chief of the Appellate Section, Julia P. Cooper had risen to Acting General Counsel of the EEOC by the time she was elevated to the bench in 1975. Judge Mack was the first judge to be nominated to the District of Columbia Court of Appeals under the new Merit Selection Procedure, which was designed to enhance equal opportunity and to avoid partisan political appointments to the judiciary.[64]

As she was about to take judicial office, Judge Mack's second husband, Clifford S. Mack, passed away. They had been together since Judge Mack worked at the Justice Department in the mid 1950's. It was only after his demise that Judge Mack adopted his name for professional purposes, so that the erstwhile advocate, Julia P. Cooper, became Judge Julia Cooper Mack as she ascended to the bench.

As we have already seen, the available evidence suggests that Judge Julia Cooper Mack is the first woman of color to serve on any

63. 368 U.S. 52 (1961).
64. THE AMERICAN BENCH, *supra* note 19, at 523.

American court of last resort; only the fifth African-American jurist of either gender to do so (after four black men: Justice Wright (South Carolina 1870), Justice Smith (Michigan 1961), Justice Marshall (United States 1968), and Judge Pair (District of Columbia 1972)); and indeed only the eighth woman regardless of race to hold such high judicial office (after seven white women: Justice Allen (Ohio 1922), Justice Lockwood (Arizona 1961), Justice Sharp and Justice Alpern (North Carolina and Pennsylvania 1962), Justice Lewis (Hawaii 1965), Judge Kelly (District of Columbia 1971), and Justice Shores (Alabama 1975)).

## ON THE BENCH

Since taking her seat on the District of Columbia Court of Appeals in 1975, Judge Mack has written almost 400 published opinions, averaging 18 opinions each year (more before she took senior status in 1989). Of this total, 231 (58%) are majority opinions, 39 (10%) are separate concurrences, and 125 (32%) are dissents. It is quite striking that Judge Mack has authored 164 (42%) concurring or dissenting opinions, compared to 231 (58%) majority opinions. This appears to be the highest rate of separate opinion-writing on the D.C. court.[65]

Judge Mack's rate of separate opinion writing is even more striking when broken down further. Roughly half of her caseload has been criminal in nature. The United States appears as a party in 202 of them (and some juvenile and other detention proceedings might also perhaps be thus classified). Of Judge Mack's criminal opinions, 97

65. There is an abundance of literature discussing the dissenting judicial opinion, usually in the context of the federal Supreme Court. *See, e.g.*, ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT (1974); PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT (1969); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227; J. Louis Campbell, III, *The Spirit of Dissent*, 66 JUDICATURE 304 (1983); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186 (1959); C. Herman Pritchett, *Dissent on the Supreme Court, 1943-44*, 39 AM. POL. SCI. REV. 42 (1945); Evan A. Evans, *The Dissenting Opinion: Its Use and Abuse*, 3 MO. L. REV. 120 (1938); William A. Bowen, *Dissenting Opinions*, 17 GREEN BAG 690 (1905). The dissenting opinions of particular judges have also generated extensive discussion. DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISENTER (1954); A. J. Levin, *Mr. Justice William Johnson, Creative Dissenter*, 43 MICH. L. REV. 497 (1944); Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995); ALFRED LIEF, THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES (1929); David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986); Samuel J. Konefsky, *Holmes and Brandeis: Companions in Dissent*, 10 VAND. L. REV. 269 (1957); Vern Countryman, *The Contribution of the Douglas Dissents*, 10 GA. L. REV. 331 (1976); Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591 (1995).

(48%) are majority opinions, 21 (10%) are separate concurrences, and 84 (42%) are dissents. In her criminal opinions, it thus emerges that Judge Mack has written separately on 105 (52%) occasions, compared to 97 (48%) majority opinions. Put bluntly, on criminal issues, Judge Mack is on her own more often than not.

Judge Mack is even more prone to dissent in some other areas — including attorney disciplinary proceedings, commitment proceedings, juvenile proceedings, and certain child custody matters — where her overall rate of separate opinion writing is 17/28 (or 61%), compared to 11/28 (or 39%) majority opinions. In most civil cases, however, Judge Mack's rate of separate opinion writing is much lower, 42/165 (or 25%), but still significant. Again, by way of comparison, Judge Mack's overall rate of separate opinion writing in all cases is 164/395 (or 42%).

Both quantitative and qualitative studies of separate opinion writing are routinely used to discern competing legal philosophies on the bench. Using either method, Judge Mack's spirited concurrences and dissents, perhaps even more so than her majority opinions, reveal a jurist who has carefully traced over two decades of normative jurisprudential vision that is both unique and important.

## CONCLUSION

Like Justice Thurgood Marshall, Judge Julia Cooper Mack's professional career and achievements have done much to advance the cause of equal justice and civil rights; they have also been a great personal inspiration for many young lawyers. Moreover, during her two decades on the bench of the District of Columbia Court of Appeals, Judge Mack's forceful and eloquent judicial opinions have made a major and highly distinctive contribution to modern American jurisprudence.