Lincoln Lore

Bulletin of the Louis A. Warren Lincoln Library and Museum. Mark E. Neely, Jr., Editor.
Mary Jane Hubler, Editorial Assistant. Published each month by the
November, 1978 Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801. Number 1689

DON E. FEHRENBACHER ON THE DRED SCOTT CASE: A REVIEW

The date and place of his birth are unknown. His real name may have been Sam, but history knows him by a very different and unforgettable name. Some described him as a shiftless troublemaker; others commended his character. He was a slave. He had several masters over the years, and his master for an important period of the slave's life was a hypochondriac and a ne'er-do-well who was syphilitic and may have died of syphilis, though genteel doctors rarely wrote such diagnoses on the death certificates of genteel slaveholders. When he sued for his freedom, the resulting legal battle made his name a household word; yet it is not at all clear who owned him at the time of the suit. The man whom the slave sued was too insane by the time of the trial to care about the result and died in a mental institution. His real owner may have been an antislavery politician from Massachusetts. The slave's lawyer would become a member of Abraham Lincoln's cabinet, but the lawyer's deepest desire was to send the slave "back" to Africa if he won the case. The slave lost his case for freedom and was almost immediately freed by his master.

The slave's name, of course, was Dred Scott. His syphilitic owner, Dr. John Emerson, carried Dred to Illinois (a free state) and to territory north of 36° 30′ latitude acquired in the Louisiana Purchase (and, therefore, free territory). The doctor later died, officially of consumption, in Davenport, Iowa Territory. His insane owner and the man he sued was named John F. A. Sanford, misspelled "Sandford" in the official report of the Supreme Court — a fitting symbol of the errors that have plagued the history of this complex case. The antislavery politician was Calvin Chaffee, who married the widowed Mrs. Emerson (*nee* Sanford), the sister of John F. A. Sanford. Scott's famous lawyer was Montgomery Blair, an ardent advocate of black colonization.

Professor Don E. Fehrenbacher of Stanford University has written what is sure to be the definitive book on the subject: *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). Yet "definitive" is not a good enough word, for a definitive book can also be ponderous, poorly written, and doggedly comprehensive without a hint of brilliance or innovation. On the contrary, this book is so clearly written as to be a model for all constitutional history written hereafter. It is as lively a treatment as is possible of an extremely difficult subject. Its conclusions are both sane and balanced on the one hand, and brilliantly perceptive and original, on the other. It is an achievement to be envied by any historian.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 1. Roger B. Taney (1777-1864) feared that the "South is doomed to sink to a state of inferiority, and the power of the North will be exercised to gratify their cupidity and their evil passions, without the slightest regard to the principles of the Constitution."

Moreover, *The Dred Scott Case* is more than the best book ever written on the only Supreme Court case "every schoolboy" has heard of, it is practically a primer on constitutional law and the law of slavery, a brief history of the sectional issue in American politics, and a carefully reasoned argument about the causes of the Civil War. These are serious subjects, of course, and not ones that can merely be read about every night before going to sleep. They must be studied, and Professor Fehrenbacher's book must be studied. There is no problem with the writing style, which is lucid and lively, but the subject matter is difficult. Suffice it to say, that a chapter discussing the Lecompton constitution for Kansas, which many historians of the Civil War period regard as a nearly hopeless labyrinth of confusion, comes as a *relief* after the discussion of the issues raised in and by the Dred Scott decision.

Since *The Dred Scott Case* comprehends so many different subjects, its thesis cannot be neatly summarized in a sentence or two. In fact, it abounds in useful distinctions and insights on many different points. However, if one must say what the book argues in the main, it might be this: the Dred Scott decision was not an aberration, an inexplicably explosive decision from the hands of an otherwise restrained and erudite Chief

Justice, Roger Brooke Taney. The decision was consistent with his pro-Southern record and his willingness to see the United States Supreme Court intervene in difficult problems that plagued American politics. Moreover, the decision can be aptly characterized as a sloppy and tortured defense of Southern political interests from what militant Southerners perceived as a merciless Northern onslaught. As Fehrenbacher puts it, "the true purpose of Taney's Dred Scott opinion" was "to launch a sweeping counterattack on the antislavery movement and to reinforce the bastions of slavery at every rampart and parapet." The tone of Fehrenbacher's characterization of Taney's decision goes a good deal farther than the acknowledgment by Taney's judicious and fair-minded biographer, Carl Brent Swisher, that the Maryland-born Chief Justice wrote a decision that was defensive of the only section of the country he knew and the section he loved.

The two traits which most distinguish every part of Fehrenbacher's large book (595 pages of text and over 100 pages of footnotes) are balance and rigorous logic. Professor Fehrenbacher shares with his late colleague at Stanford, David M. Potter, a remarkable ability to show no sectional bias in any of his interpretations of American sectional conflict. He treats the causes and personalities of North and South with even-handed justice without at the same time excusing extremism and unreasonableness. It is this record of balance in appraising the sectional controversy up to the time of the Dred Scott decision which makes all the more devastating Fehrenbacher's relentless destruction of the court's opinion in that case.

The weapon of destruction is logic based on close and thoughtful reading of Taney's decision. Well before the point where he analyzes Taney's opinion, Fehrenbacher has repeatedly split arguments and distinctions into As and Bs and 1, 2, 3s — all to the benefit of the reader, always for the sake of clarification, and never with a false step. When he treats Taney's decision with the same precision, the results are remarkable.

To look closely at Taney's decision is in itself innovative despite the great fame of the Dred Scott case. The reasons for its being ignored in the past are many. Republican critics at the time, for example, were anxious to say that much of the decision was *obiter dictum*, that is, present in Taney's opinion but not crucial as a reason for deciding the case. Therefore, to many Republicans, there was no reason to examine much of the decision closely because much of the decision consisted of the irrelevant opinions of the Chief Justice on matters not at the heart of the case. Republican critics at the time, and a host of historians since, have tended also to focus on the question of the authoritativeness of the opinion as judged by how many of the Court's Justices concurred with or dissented from each of the various points made in the case. This has led to what Professor Fehrenbacher calls the "box-score method" of analyzing the Dred Scott decision, and he shows how absurd such interpretations are.

Fehrenbacher thinks it an error to seek ways of ignoring the decision. He looks at the decision itself, and what he sees in it is remarkable. Taney, for example, said that every "citizen" was a member of "the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives." This, Fehrenbacher points out, was a "gross inaccuracy": "A large majority of American citizens — namely, women and children — were not members of the sovereign people in the sense of holding power and conducting the government through their representatives." Negroes may not have been citizens but not for the reason Taney here described.

Likewise, Taney's assertion that, in the times of the Founding Fathers, Negroes "had no rights which the white man was bound to respect" was a "gross perversion of the facts." Taney's statement confused free Negroes with slaves, and, even then, "the statement was not absolutely true, for slaves had some rights at law before 1789." In fact, there were some respects in which "a black man's status was superior to that of a married white woman, and it was certainly far above that of a slave." The free black man "could marry, enter into contracts, purchase real estate, bequeathe property, and, most pertinently, seek redress in the courts." Republicans quoted Taney's harsh statement about white respect for Negro rights out of context as though it represented the Chief Justice's own views. Taney's defenders have pointed out that these were the opinions Taney said the Founding Fathers had; Taney was writing "historical narrative" here. Fehrenbacher shows that the statement was grossly prejudiced even as "historical narrative."

Taney's tortuous efforts to deny Negro citizenship were functions of his sectional fears and even of his Maryland background. He feared free Negroes, and he imputed this fear to the Founding Fathers, arguing that the slave states would never have ratified the Constitution if free Negroes had been included in the meaning of "citizens." Said Taney:

> For if they were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the right to enter every other State whenever they pleased, . . . to go where they pleased at every hour of the day or night without molestation, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

Maryland was a state with a high population of free Negroes, and Taney's experience in such a state led him to forget that earlier in his opinion he had said that free Negroes were so few in number when the republic was founded that they "were not even in the minds of the framers of the Constitution." By his own admission, almost, Taney's mind and not the minds of the framers was dictating constitutional law here. In fact, as Fehrenbacher shows, Taney went to such lengths to exclude Negroes from the possibility of being naturalized citizens that his opinion made them *"the only people on the face of the earth who (saving a constitutional amendment) were forever ineligible for American citizenship."*

Fehrenbacher not only labels but proves Taney's history of the United States "phantasmal." He repeatedly demonstrates the Chief Justice's "chronic inability to get the facts straight." The important *obiter dictum* in the decision was not what Republicans usually criticized, but rather Taney's statement that a territorial government could not forbid slavery — "a question that had never arisen in the Dred Scott case." This, too, was a function of Southern fears. Fehrenbacher concludes that Benjamin Curtis and John McLean, the dissenting Northern Justices, "were in many respects the sound constitutional conservatives, following established precedent along a well-beaten path to their conclusions." By contrast, "Taney and his southern colleagues were the radical innovators — invalidating, for the first time in history, a major piece of federal legislation; denying to Congress a power that it had exercised for two-thirds of a century; sustaining the abrupt departure from precedent in *Scott v. Emerson* [an earlier stage of the case on its way to the Supreme Court]; and, in Taney's case, infusing the due-process clause with substantive meaning. And even though McLean did indulge his weakness for playing to the antislavery gallery, the southern justices were by far the more idiosyncratic and polemical."

It all sounds too pro-Northern to be true, but the balance with which Fehrenbacher treats the sectional crisis leading up to the decision and the balance of his appraisal of the decision's effects are the reader's assurance that Fehrenbacher's arguments have been carefully weighed. In the section of the book preceding the treatment of *Dred Scott v. Sandford*, Fehrenbacher traces the sectional controversy from the early period when the slave *interest* always triumphed over the antislavery *sentiment* in American politics, to the time when both became interests and tangled American politics in bitter and unresolvable disputes. There are far too many useful insights in this graceful, but thorough, survey to catalogue them all here, but one can at least see an example of Fehrenbacher's balanced approach.

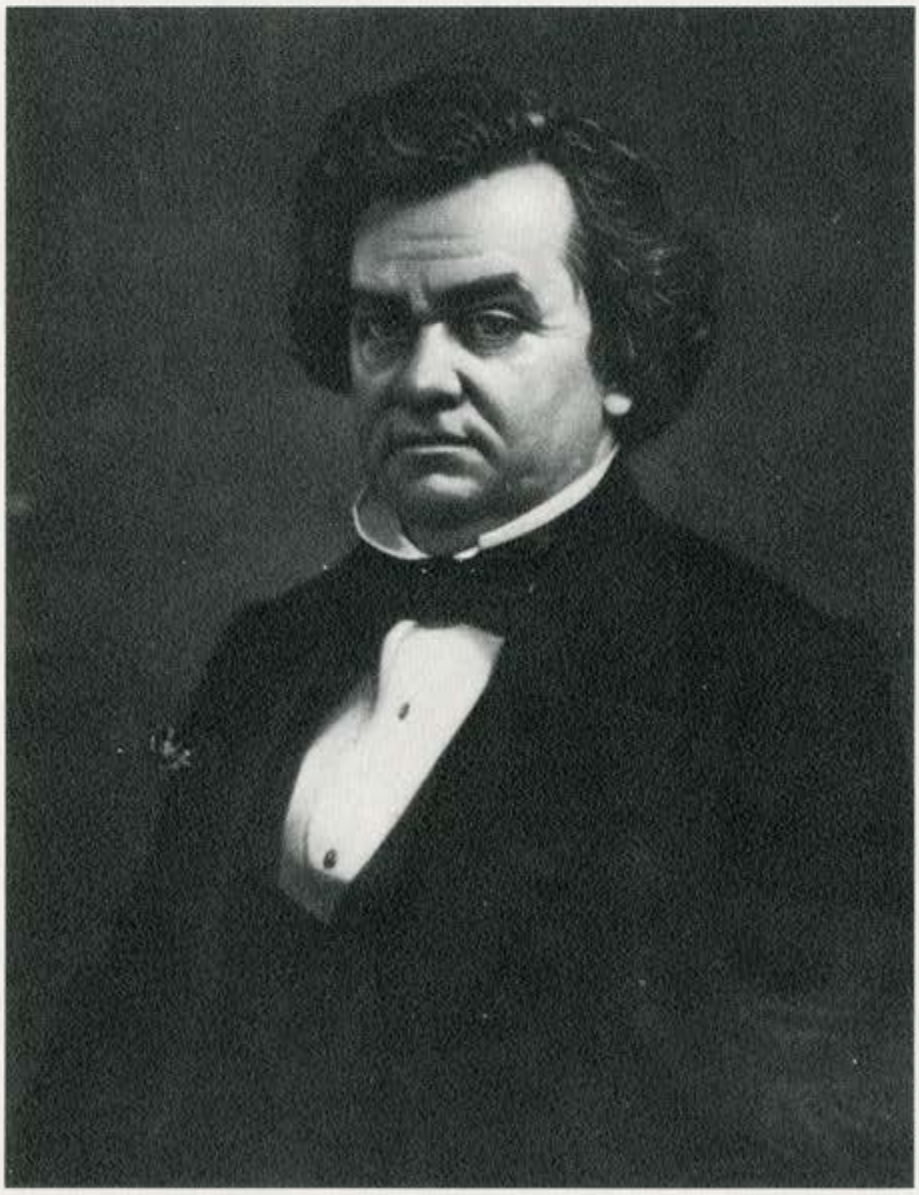
The fugitive-slave clause in the Constitution was a matter of little interest to the convention which passed it — late in the proceedings, by unanimous vote, and after little debate. Yet the myth soon arose that its passage had been essential to the acceptance of the Constitution by the slave states, a myth which was mouthed by the great Joseph Story in *Prigg v. Pennsylvania* (1842). He said the clause "constituted a fundamental article, without the adoption of which the Union could not have been formed." Thus the South gained unfair advantage here, Fehrenbacher says, and the federal govern-

ment became "a bulwark of slavery [,] . . . a development permitted but not required by the Constitution. It reflected not only the day-to-day advantage of interest over sentiment and the predominance of southern leadership in the federal government but also the waning of the liberal idealism of the Revolution." Here Professor Fehrenbacher sounds almost like the Republican Lincoln. He seems to voice an anti-Southern view of American history as a decline from the libertarian virtues of the Founding Fathers, a decline brought about the gradual erosion of the sentiment that slavery was wrong for the sake of the South's economic interest in slavery. Yet just five pages later, Fehrenbacher notes that Southerners were fair in their willingness to distinguish between "domicile" and "sojourn" in cases involving the presence of slaves in free states. If the slaveowner had taken up residence, the slaves were clearly free. If he was merely passing through on a sojourn, the slaves retained their original servile status. At first, Southern courts did not embrace the doctrine of "reattachment," whereby a slave returned to his home-state status when he returned to his home state, even if he had been in residence on free soil. Fehrenbacher says plainly, though, that the "northern states were the first to turn away from the tacit understanding" whereby courts in the two sections recognized the difference between domicile and sojourn. The quality of Southern justice did not change without provocation. This is balance.

Likewise, Fehrenbacher gives a balanced appraisal of the aftermath and consequences of the Dred Scott decision, and, as C. Vann Woodward has pointed out in another review of this book in the *New York Review of Books*, it is a modest appraisal. Fehrenbacher does not exaggerate the effects of the decision in his own views of the causes of the Civil War. If anything, he argues that the case was not as significant as historians have vaguely thought it was in causing the war.

One of Fehrenbacher's most interesting points is that the fight over the Lecompton constitution for Kansas and the personal image and reputation of Stephen A. Douglas were far more important than the Dred Scott decision in causing the war. A narrow decision which said nothing about Negro citizenship or the constitutionality of the Missouri Compromise line might not have averted sectional disaster. The effect of the Dred Scott decision was indirect. It "had no immediate legal effect of any importance except on the status of free Negroes. . . . it provoked no turbulent aftermath, presented no problem of enforcement, inspired no political upheaval." The Dred Scott decision "was in some ways like an enormous check that could not be cashed" by Southern leaders. The psychological frustration of intangible victory played a role but "only belatedly and indirectly." What was vital was "certain later developments."

The later developments in question revolved around the Lecompton controversy, "the last sectional crisis to end in compromise" and, therefore, "the close of the antebellum era in national politics." Fehrenbacher explains in a believable way the hopes and fears that were invested in that controversy. The Northern Democrats, having accepted as best they could the pro-Southern court decision, were in no condition to bear the weight of another Southern victory, and President Buchanan made a terrible error in asking them to do so. Stephen Douglas, who was much more the great compromiser of the 1850s than Henry Clay, seems out of character in spurning a practical political compromise on the Lecompton issue. Fehrenbacher carefully notes, however, Douglas's increasing inflexibility before that controversy, as



From the Louis A. Warren Lincoln Library and Museum

FIGURE 2. Stephen A. Douglas, determined but a little dissipated, became the focus of fierce Southern animosity in the year of the Dred Scott decision, but not because of the decision. His break with the Buchanan administration over the Lecompton constitution for Kansas made him "suddenly, . . . a party insurgent and a doctrinaire, taking an inflexible stand on principle and in the end rejecting a compromise that satisfied even many of his fellow insurgents." Southern newspapers declared "war to the knife," and some expressed "serene indifference" to the outcome of his race against Lincoln for the United States Senate in 1858. The Mobile *Register* saw Douglas as "the worst enemy of the South and the most mischievous man now in the nation." When Democrats tried to select a nominee for President in 1860, Fehrenbacher says, "a majority . . . from the Deep South preferred to break up their party rather than accept the nomination of Douglas."

he participated in "the fashion of constitutionalizing debate on slavery in the territories." He had already moved from recommending his solution for the territorial issue to saying that the Constitution *demanded* his solution to the issue.

When Douglas took his anti-Lecompton and anti-Southern stand, it "proved to be the crucial event that set the Democratic party on the path to disruption." The intensity of Southern attacks on Douglas was the intensity of hatred, not for an alien enemy, but for a *traitor*. As a Georgia editor put it, "Douglas was with us until the time of trial came; then he deceived and betrayed us." His defection was a symbol of the failure of the last hope for Northern fairness. Thereafter, the South was desperate and frantic. The coming of the war was at times a function of an almost *ad hominem* argument by Southerners against Douglas. Many historians have thought that the "Freeport Doctrine," announced by Douglas in his famous debates with Lincoln, made Douglas unacceptable to the South. Fehrenbacher is prepared to say, on the contrary, that the doctrine was made unacceptable by Douglas's advocacy of it.

Professor Fehrenbacher has long been associated with the view that the importance of the Freeport question has been greatly exaggerated. That was one of the revolutionary points of his brilliant book, *Prelude to Greatness: Lincoln in the 1850's*. In *The Dred Scott Case*, he is able to argue an even more convincing case for it by focusing more on Douglas than Lincoln. But what about Lincoln? How does he figure in this new work?

Fehrenbacher makes some interesting points. First, Lincoln's criticism of the Dred Scott case was not like the mainstream of Republican criticism which tried to dismiss the controversial parts of the decision as mere *obiter dicta*. Lincoln, instead, took the tack that a Supreme Court decision, though it must ultimately become authoritative, did not necessarily reach that authoritative status unless it were grounded in sound historical facts, were repeated by the Court in several decisions, represented the views of the bulk of the Justices, and met numerous other conditions that were functions of time. Likewise, Lincoln's first (and truest?) response to the decision was to denounce the historical absurdity of Taney's assertions about the state of opinion of the Founding Fathers on the Negro and to document a decline in recent times from the rather decently libertarian sentiments of the framers of the Constitution. His better-known response came a year later, in 1858, and in the midst of a dogged struggle with Douglas for the United States Senate. In negrophobic Illinois, Lincoln did not need to be seen, as Douglas tried to picture his opponent's opposition to the Dred Scott decision, as primarily concerned about Taney's denial of Negro citizenship. Illinois did not want Negro citizens, but Illinois feared Southern political power, and Lincoln thereafter characterized Taney's decision as part of a conspiracy, begun by Douglas in 1854 and continued by Presidents Pierce and Buchanan, to nationalize slavery. Lincoln concentrated less and less on the lamentable doctrines in the Dred Scott decision itself. Instead he warned of a *second* Dred Scott decision which would make not only Congress and territories but also *states* incapable of outlawing slavery.

Professor Fehrenbacher further establishes his reputation as a fine writer in this book. It does seem that his prose has become slightly less formal than it used to be. He occasionally uses colloquial terms: "mixed bag" (page 342); "continuing on" (page 366); and "finish up" (page 536). Whether by calculation or by virtue of the spirit of the times, which have altered our language more in the direction of the common man, this has the effect, not of spoiling his excellent writing, but of making this book on a subject of forbidding complexity more palatable to the reader.

No book, of course, is beyond criticism. Because much of the book's import hinges on an accurate appraisal of Taney's personality and political thought, it is a shame the Chief Justice remains such a shadowy figure. The Dred Scott opinion was the opinion of a very old man; it might be interesting to know whether some of the glaring faults of the opinion followed a pattern of declining mental powers generally in his late opinions. It seems odd, given the particular shape Taney's opinion took, that there is no investigation of the doctrines of the age to which it seems an answer. That is, Salmon P. Chase and others had been forging an antislavery interpretation of the Constitution, and the Declaration of Independence loomed large in antislavery arguments. Was Taney's preoccupation with the Founding Fathers strictly a function of a judicial need to know the opinions of the framers of the document from which American law derived? Did not Republican ideology shape his defense as much as the demands of Southern interests and of constitutional law?

There are doubtless other and better questions yet to be answered, but Fehrenbacher's book answers many more questions that it begs. *The Dred Scott Case* is a great book, far too great to be comprehended in any single review (or reading). Every serious student of the period must read it, and, because of Professor Fehrenbacher's careful research and attention to clarity in writing, the reading will be an unalloyed pleasure.

AN IMPORTANT ANNOUNCEMENT

Professor Fehrenbacher has generously consented to present the second annual R. Gerald McMurtry Lecture. The 1979 Lecture will occur on the night of May 10, at the Louis A. Warren Lincoln Library and Museum. The Lecture is free to the public and is followed by an informal reception for the lecturer. For further information, please write Mark Neely, Louis A. Warren Lincoln Library and Museum, 1300 South Clinton Street, Fort Wayne, Indiana 46801.

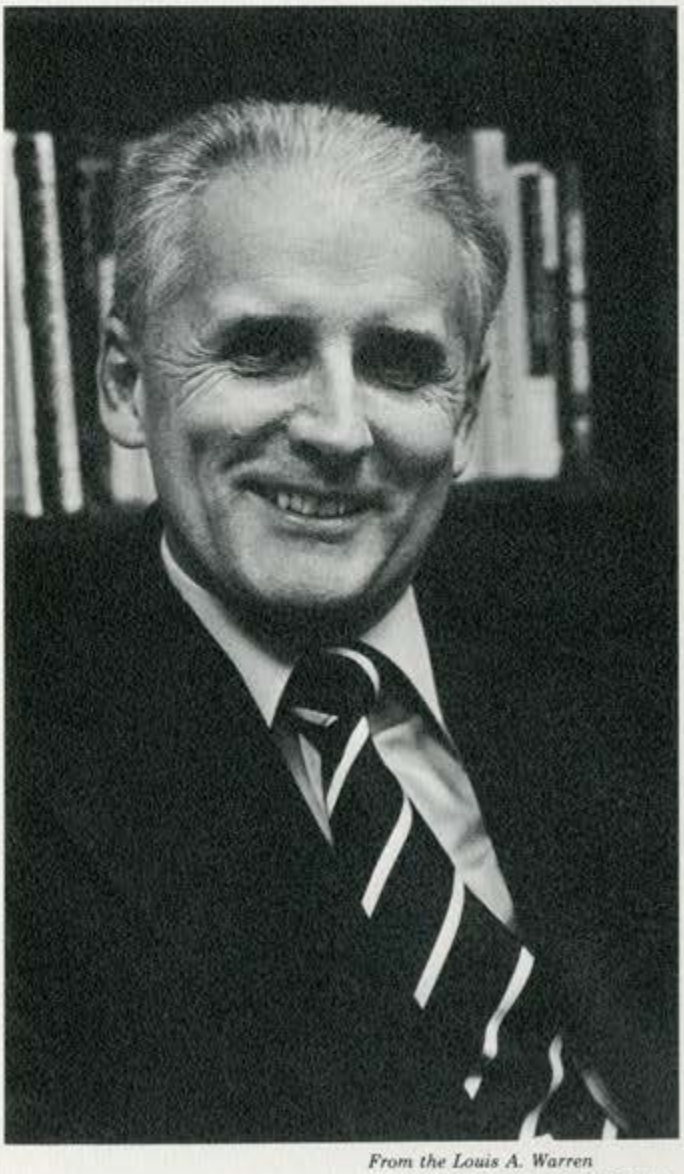


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FIGURE 3. Professor Don E. Fehrenbacher.