

# YEARBOOK 1981

SUPREME COURT HISTORICAL SOCIETY



MELVILLE W. FULLER  
Eighth Chief Justice, 1888-1910

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# YEARBOOK 1981

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## Supreme Court Historical Society

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### In Memoriam

William O. Douglas: the Man <i>Cathleen H. Douglas</i>	7
Stanley F. Reed <i>Warren E. Burger</i>	11
Mr. Chisholm and the Eleventh Amendment <i>William F. Swindler</i>	14
The First Woman Candidate for the Supreme Court <i>Beverly B. Cook</i>	19
The Era of Melville Weston Fuller <i>Jeffrey B. Morris</i>	37
The Defense of General Yamashita <i>George F. Guy</i>	52
Court Nominations and Presidential Cronyism <i>Merlo J. Pusey</i>	68
Charles Evans Hughes: The Eleventh Chief Justice	
Chief Justice Hughes — a Recollection <i>William T. Gossett</i>	75
Justice Hughes' Appointment — The Cotton Story Re-examined <i>Frederick Bernays Wiener</i>	78
A Note on the "Joe Cotton Story" <i>James M. Buchanan</i>	92
Hughes Exhibit Catalogue <i>Gail Galloway</i> <i>Susanne Owens</i>	95
De Minimis, or, Judicial Potpourri	
The Justice and the Lady: A Postscript <i>Alfred J. Schweppe</i>	114
Toward 1987 — Two Milestones of 1781 <i>William F. Swindler</i>	117
Contributors	121
Acknowledgements	122

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*In Memoriam*

WILLIAM O. DOUGLAS  
1898-1980

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# *William O. Douglas: The Man*

Cathleen H. Douglas

I have always been amazed by how much Bill Douglas drew from his own personal experiences. Most people are affected by the life events that have touched them, but some are more deeply affected than others. Charles Evans Hughes, we are told, was greatly influenced by the devoutly religious environment of his home and the sermons of his father, a Baptist minister. Felix Frankfurter's views on race were, in all likelihood, at least partially shaped by his early experiences of religious discrimination. Bill Douglas is certainly not a unique example of a jurist who drew upon his own experiences in forming his legal philosophy; but he may perhaps be best remembered for the way in which he incorporated the experiences of his own life into the fabric of the law and his work on the Court.

In the beginning I'm sure that Bill's tendency to draw on his own experience was rather uncertain and done unconsciously. All of us have family and friends who have affected our development, and have had experiences that have shaped our growth. Bill had no control over his origin, and, like most of us, little control over the opening chapters of his life's story. Born the eldest son of a Presbyterian minister who died when Bill was only five, he knew poverty first-hand, and from a very early age struggled merely to survive. He observed as a child the difference in treatment accorded to the children of the rich and the children of the poor in the small Washington town of Yakima where he grew up. Although he worked to help support his family from the time he was six, he graduated as the valedictorian of his high school, an honor which gained for him a scholarship to Whitman College. Bill rode a bicycle from Yakima to Walla Walla where Whitman is located; after graduating from Whitman, he jumped a freight train and rode it

east to New York City. He enrolled in law school at Columbia, working odd jobs to pay for his tuition. Although he was employed in one of the most prestigious law firms in the nation upon his graduation from law school at the top of his class, Bill was never able to forget the early experiences of his life, and rather than trying, he turned to them repeatedly for inspiration and a sense of renewal.

While teaching law at Columbia, and later at Yale, Bill became impatient with the static formalism of the law as it was then being taught. Together with several other "young turks," he demanded that law be taught, not in a vacuum, but within the framework of real life. An outspoken advocate of the so-called "new sociological jurisprudence," Bill agreed with Holmes that the life of the law has not been logic, but experience. Searching for new teaching materials to use in his classes, and finding none available, Bill set out with several collaborators to publish a new series of books. Characteristically, Bill's approach was vastly different from the traditional and the conventional; he sought, first and last, to find the realities of legal problems and to assess their social impact. Seeking the facts, he pursued reality—a reality tested against his own experience.

When Bill became Chairman of the Securities and Exchange Commission in 1937, he had been out of law school only twelve years. His "Vesuvian" reaction to the failure of the New York Stock Exchange to prosecute several prominent individuals for embezzling over a million dollars from the Exchange's Trust Fund was, as he confided in me years later, kindled by his memory of Yakima injustices. He wrote in a draft report:

When persons of outstanding wealth are involved, the Exchange cannot be trusted to do its own housecleaning. Unhappily, we are forced to conclude that

discipline by the Exchange authorities of its own members will be exerted only if the offending person is of relatively little importance; that there is, so far as the Exchange is concerned, one law for the very powerful and wealthy and another for those of little wealth or influence.

From our many talks, I know that his concurring opinion in *Edwards v. People of the State of California*, 314 U.S. 160 (1949), was based in part upon his experience with migrant workers on the wheat and fruit farms of eastern Washington. The case arose from California's attempt to block the migration of "Okies" looking for work during the middle of the Depression. Bill argued in his opinion that the "right to travel" was a guarantee of federal citizenship under the Fourteenth Amendment's privileges and immunities clause—a view not adopted by the Court until 1969 in *Shapiro v. Thompson*, 394 U.S. 618.

In his civil rights decisions, the impact of Bill's travels on his legal analysis is also clearly visible. Everywhere he went, he sought to discover how local minorities were treated. What kinds of jobs did they perform? Were they allowed to vote? What laws were enacted that limited their horizons and burdened their paths? He studied the plight of the overseas Chinese in Thailand, the Muslims in India, the tribal people in Iran, the Jews in North Africa. The stark realities of the treatment of minorities abroad made more vivid for him, I think, the inequalities and injustices of his own country.

My life with Bill Douglas leads me to believe that in addition to his reliance on his early experiences, he came increasingly to seek out new experiences as a conscious way to expand his social, political, and legal insights. Having exhausted the potential lessons of his adolescence, Bill began to draw new inspiration from the lives and experiences of others. In developing new criterion by which the impact of law on the individual could be judged, Bill made the individual the focus for the further advancement of his own legal philosophy.

By the time I met Bill Douglas, the path connecting his laboratory of life and his life with the law was very well worn. From each new experience, he seemed anxious and able to expand his understanding of justice and the role of the law in achieving it. Our summers were spent at "Prairie House" in Goose Prairie, Washington. Nestled in the Cascade Mountains, without a telephone and with few neighbors, the Prairie provided us

with time to think and reflect. An idea which Bill mentioned frequently during the Summer of 1972 was the importance of trying to comprehend the lessons taught by nature. Surrounded by the trees and sparkling rivers, the wild elk and bear, and the beauty of untended wildflowers, Bill was often moved to consider the true relationship of the law to life.

One sunny afternoon, we were standing in front of the house, when a doe, fleeing in panic from unseen pursuers, sped across the lawn. She stopped hesitantly near Bill, as if seeking his help. Sensing that the deer was trying desperately to escape some evil, Bill walked toward the river, motioning quietly for the deer to follow. At first cautiously, and then with more assurance, she did. As she fled toward safety, a pack of wild dogs broke from the woods, but stopped short when they saw us.

I'm sure that Bill thought of this experience the following term as he wrote his dissent in *Sierra Club v. Morton*, 406 U.S. 727, 741 (1972). The question of how the values represented by still pristine lakes in the State of Washington would be treated by government agencies and protected by the courts became an important jurisprudential question for Bill, one which ultimately led to a dissenting opinion that would have given standing to sue to the inanimate elements of nature. Drawing on an analogy to the legal personality of ships and corporations created by legal fictions, he refined his inarticulate philosophical sensitivities into a technical rule of law.

But if experience was vital to Bill's understanding and interpretation of the law, humor was an essential characteristic of his experience. Bill loved to laugh at a good joke, particularly his own. Over the years, his unique sense of humor protected him from a sometimes hostile environment. On the day that he had his paralyzing stroke, I told Bill as he lay on his back in the hospital in the Bahamas that President Ford was sending a special plane to fly us back to Washington, D.C. After expressing his relief and gratitude, Bill's face brightened. He reminded me of the disagreements he and the former Congressman had had, and quipped, "We better watch out. He might be sending us to Cuba!"

Some years earlier, a summer's day had found us on horseback in the Cascade Mountains, three days out from Goose Prairie. After about a half

... sleeping bags, and  
... that we had left the  
... us. From about one  
... until daybreak the next  
... huddled around a  
... two half-eaten Her-  
... It began to rain, and  
... ed to snow. As we sat  
... es, Bill entertained us  
... remember most viv-  
... out being asked to give  
... ar Association Prayer  
... odium and stared into  
... uld think was an ad-  
... ad given her sons as  
... : "Easy on the butter,  
... !"  
... who were closest to  
... his humor. When we  
... ublic of China in 1973,  
... Shanghai by the Vice  
... shifted from hospitals  
... appended to Lui Chou  
... Tse Tung's who had  
... Cultural Revolution.  
... was as heavy as the  
... D.C. during August;  
... what taken aback by  
... ntiness. Without any  
... ing the subject, Bill  
... Mayor whether he was  
... wrestler in the United  
... that there had been no  
... on, the Vice Mayor  
... ce, and noted that he  
... that I was an accom-  
... of my slight build.  
... with an absolutely  
... rs. Douglas is so fa-

it's done." I fended off sincere offers to demon-  
strate my technique for the remainder of our visit  
in Shanghai.

On another occasion, Bill and I were attend-  
ing a wedding in a church in Georgetown. Dur-  
ing the service, I noticed Bill scribbling on a card  
he'd found on the back of the pew. I didn't pay  
much attention to it, since he wrote all the time,  
anywhere, and on whatever was available. I did  
take notice a few days later when the pastor of the  
church telephoned to ask about the nature of my  
spiritual crisis. Unaware that I had a spiritual  
crisis, I asked the pastor why he had sought me  
out. It turned out that Bill had not been scribbling  
notes on the card, but filling it out! It was a form  
to be completed by parishioners who wanted the  
pastor to visit because of an illness, depression,  
or other personal need. Mustering such compo-  
sure as I could, I thanked the well-meaning  
pastor for his concern, and explained that my  
crisis had been resolved.

I have said very little in this tribute about Bill's  
skills as a lawyer, author, or scholar—about his  
brief practice of law, his influence as a legal  
educator, or his years of distinguished govern-  
ment service. Perhaps it is more appropriate for  
his colleagues and collaborators to provide in-  
sights into these dimensions of his career, and for  
more objective historians to assess his contri-  
butions as a member of the Supreme Court. For  
myself, I have chosen to remember Bill Douglas  
as the man who always had a love for life that  
exceeded the vagaries of the moment, who had a  
love of people that seemed endless, and who  
expressed a special joy in living that touched and  
changed all who knew him. For Bill Douglas,  
each day, no matter how hard or difficult, was  
something special to value and something spe-  
cial to enjoy.







# Stanley F. Reed

Warren E. Burger\*

Stanley Reed's career as a lawyer, government official and jurist was one of consistent distinction. In his own unobtrusive, imperturbable and conscientious manner, he rendered great service to his nation.

Trained in the law at the University of Virginia, Columbia, and at the Sorbonne, Reed returned to his home town of Maysville, Kentucky to practice law. It did not take long for his reputation to spread to other states. His standing as an advocate was such that the Republican Hoover Administration brought Reed, a leading Kentucky Democrat, into the government — first as Counsel for the Federal Farm Board, then as General Counsel to the Reconstruction Finance Administration — where he took a pay cut of half his salary. When the new Democratic Administration took office a few years later Reed's reputation was such that he was continued.

Stanley Reed could be described as a moderate, who believed that much good could be done when government power is wielded discerningly in the public interest. Soon Reed became Solicitor General of the United States and by that time he had already argued before the Supreme Court the *Gold Clause Cases* — and prevailed in that important case. During a tumultuous era for Court and country, Reed then argued many of the important cases involving the constitutionality of Roosevelt's New Deal legislation against some of the finest legal talent in the country. Reed saw the potential for legitimate social change within the Constitution, recognizing that the Constitution is "not a gaoler to preserve the status quo." He worked for fresh approaches drawn from old understandings to meet the crisis caused by the Great Depression and the pervasive social and economic changes that came in the wake of World War I.

Reed lost a few cases, to be sure, but even in defeat his performance was marked by thor-

oughness of preparation and his arguments characterized by clear down-to-earth presentations. History records, however, that he won most of his cases as Solicitor General, and those cases remain landmarks in American constitutional law. The pressures on an advocate responsible for so many highly charged cases over a relatively brief period took their toll and on one occasion Reed collapsed at the lectern while arguing a case.

Homer Cummings, Attorney General in the early years of the New Deal, came to regard Stanley Reed as "qualified to fill any post." It was in January, 1938 that Franklin Delano Roosevelt chose Reed to succeed George Sutherland as Associate Justice of the Supreme Court. It was a popular appointment. Those who were ready to predict how Reed-the-jurist would act based upon the work of Reed-the-Solicitor General were mistaken. When Stanley Reed put on his judicial robes, he shed the attitudes of the advocate.

As Solicitor General, Reed had not always waxed enthusiastic about the manner in which the Supreme Court was exercising its power of judicial review. As Mr. Justice Reed, he was well aware that while judicial review might sometimes interfere with the prompt action of the government, it also assured deliberate judgments which contributed to sparing America those "gusts of popular frenzy that sweep away the rights of the individual, and excessive centralization that shrivels local political administration."

But as one born and bred a Southern Democrat he believed that a Court entrusted with the great power of judicial review, could not and should not usurp the role of the democratically elected branches. It is told that once a law clerk suggested to Reed that he judge by looking to the desirable solution. That was not, for Reed, the proper criterion of the function of the Court. He was not a result oriented, problem solving judge. He sent that law clerk to an unabridged dictio-

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nary to look up the word "krytocracy." The clerk discovered the word meant "government by judges" which Reed opposed. Throughout his judicial career he sought to restrain his colleagues — and himself — from reaching "desirable" results because they fitted a particular social philosophy.

Reared in a border state, Reed made a major contribution to helping this nation move towards racial equality. He wrote opinions in those cases where all-white primary elections and segregation in interstate transportation were held unconstitutional. He approached the Court's opinion in *Brown v. Board of Education* cautiously because he weighed whether the decision might impede rather than assist race relations in America. In his thoughtful, careful way he was to call *Brown* the most important decision of his years on the Court, and one of the most important in the history of the Court.

During his nineteen years of dedicated service as Associate Justice, Reed authored 231 opinions for the Court, 20 concurring opinions, and 88 dissents. The eighteen Justices who sat with him respected his intellect. They knew that he was "keenly aware of the constitutional burdens which rested on his shoulders." He was a superb colleague — devoted to his duty, tremendously hardworking, conscientious and painstaking.

There was nothing in him of the prima donna. Nor did he offer good copy to the press. Others might make the front pages. Others might hector their colleagues. But Reed — serious, modest, retiring — and always courtly — went about his job. Kindly and warm, he could not help but be popular with his colleagues, for his unfailing courtesy, even temper, and dry sense of humor. He was a moderate in all things and exemplified the virtues of a true Eighteenth Century gentleman — the epitome of civility.

Mr. Justice Reed stepped down from the Court in good health at the age of seventy-two. Like John Jay, Thomas Johnson and George Shiras before him, he had decades of life left. He maintained chambers in the Supreme Court building and continued some activities as a Senior Judge into his tenth decade. Like his colleague, Tom Clark, Justice Reed continued to render inestimable service sitting on lower federal courts and as Special Master by appointment of the Supreme Court. He sat by designation of the Chief Justice in more than 250 cases in the U.S. Court of

Appeals for the District of Columbia Circuit and the U.S. Court of Claims. I had argued cases before him, but I came to know him well sitting on panels of the D.C. Circuit on a number of cases from 1958 to 1961. He maintained chambers at the Court of Appeals and regularly joined at the judges' lunch table where he often regaled us with stories of Kentucky and of the New Deal days.

Mr. Justice Reed was the longest lived man ever to have been a Justice of the Supreme Court — a rich, full life of over ninety-five years. In our age with so much instability in family life, we ought to remark upon the joy Stanley Reed derived from his marriage to his hometown sweetheart, Winifred Davis Elgin and his two lawyer sons. He said, "All the success I have I owe to my wife, the beautiful Winifred Reed." They were married over seventy-one years — Mrs. Reed still survives — and they were also blessed with three grandchildren.

Kentucky has contributed mightily to the history of the Supreme Court of the United States. Ten of the 101 Justices were either born in Kentucky or appointed from that state — among them the first John Marshall Harlan, Samuel Miller, Louis D. Brandeis, and Chief Justice Fred Vinson. Stanley Reed was a Kentuckian who never lost his great affection for the state. He used to speak of his forebears who "[b]efore we were a nation . . . traversed the Wilderness Road to the Bluegrass." When he was in his ninth decade he recalled that "spot on Raccoon Creek where I shot my first quail."

His funeral took place "but a stone throw" from where he had lived as a boy, "scarcely a block distant from his first law office." He was proud of his Kentucky roots, of membership in the Kentucky bar for over seven decades, of his term in the Kentucky General Assembly, of honorary degrees from Kentucky Wesleyan, the University of Kentucky, and the University of Louisville. He loved to return to his farm in Kentucky. Indeed, he told his colleagues on the Supreme Court that he "worked for fifty-six years in order to maintain the dairy cows" on his farm "in the manner to which they've been accustomed."

The Maysville paper once asked, "what did Mr. Justice Reed look like in the prime of his life when he was making epochal decisions in the nation's capital and earning the tribute of 'Un-

shaken Reed' by his colleagues and the people in the press?" Their answer was:

Well, he looked like any farmer in work clothes coming to town on a hot summer day to visit the Mason County ASC office to attend to farm matters or to buy something needed to get his farm into shape. He was a tall, lean, straightbacked man who looked forbidding until he smiled. After that you felt comfortable with him.

Stanley Reed smiled often and in the years I knew him well he dined in our home and we in his. His delight in small, gentle banter is revealed in an exchange at our home when he was served a pre-dinner aperitif, "and where did this come from, may I ask?" My response was, "why from the only place good Bourbon is made." Every Christmas after I came to the Court, Stanley Reed came to my chambers bearing a package of Kentucky's famous produce. I in turn sent him a bottle of Bordeaux or Burgundy.

As Stanley Reed never forgot Kentucky, neither did Kentucky forget him. He was invited back to speak at County fairs and on other occasions. In 1957 Maysville observed Stanley Reed Day and renamed in his honor the street where he once had his law office. Chief Justice Warren and Justice Sherman Minton attended those festivities. At his death his hometown newspaper wrote that "we here who knew him as a fellow townsmen feel that the Nation was the richer for his shining integrity, the depth of his wisdom, and his profundity of knowledge."

It is appropriate that Justice Reed has been buried in Maysville, bearing out the words of a poem written by Alice K. Roberts for Stanley Reed Day:

He will go, back to quiet lanes  
where cities hum shall cease  
to walk again the gentle ways  
the paths of rest and peace.



## Mr. Chisholm And The Eleventh Amendment

William F. Swindler

One of the touchiest questions raised in the Constitutional Convention of 1787, and one of the most sensitive issues in the ratification debates of 1787-88, had to do with the sovereignty of the states within the proposed Federal system. Immunity from suit by an individual was firmly held to be a fundamental attribute of sovereignty — “the sovereign may not be sued without his consent,” was a legal maxim rooted in feudal law and universally proclaimed by each state. This was all well and good within the borders of each state, where its own courts had exclusive jurisdiction; but what of a suit brought in another forum, e.g., a Federal court?

The Convention had been at pains to allay the fears of the state sovereignty defenders, but the jurisdictional clause in the judicial article of the Constitution, as finally drafted, was hardly reassuring. It gave the Federal courts jurisdiction in cases where there was a suit between a state and a resident of another state, and in such cases, where the state was a party, the Supreme Court was to have original jurisdiction. The theory behind the language was pragmatic enough: it assured a national, uniform forum for issues which before then had had to be litigated in distant and unfamiliar courts where — even if consent to suit was granted — the chance for an objective determination of the matter was dubious. The problem was that the constitutional language clearly inferred that a state was suable without its consent; and while supporters of ratification tried to minimize the liability of sovereign states under these provisions, they simply were blinking at the obvious and plain meaning of the words.

It was, accordingly, only a matter of time before the discrepancy between the language of the Constitution and the apologetic commentary on this language would be tested in the courts. Indeed, it cropped up in the dockets of some of the earliest terms of the Supreme Court. In February 1791 a group of Dutch bankers brought a debt action against the state of Maryland; the

following year a Pennsylvania executor, Eleazar Oswald, sued the state of New York in the process of gathering in the assets of an estate, while a private land corporation in Indiana (Northwest) Territory brought a contract action against the Commonwealth of Virginia.

In all three instances, outraged screams rent the air, not only in the affected states but in all the others. The Maryland action provoked a grim prediction that if the case were pursued to judgment (it was not), “each State in the Union may be sued by the possessors of their public securities and by all their creditors.” The Virginia legislature formally rejected the assumption that it could be made to answer in a Federal court to any individual or private corporation. In New York, although the Oswald suit gave Governor George Clinton and his anti-Federalist cohorts the satisfaction of being able to say “I told you so,” Oswald’s suit was answered by a state officer. Maryland, at least tacitly, appeared to acknowledge the constitutionality of the action against it, for its attorney general appeared and answered the Dutch complaint; but the issue there, as well as in the case of Virginia, then was settled out of court.

Finally, in the August term of 1792, the question was presented in a case which became the first major constitutional decision in the history of the new government and this was only part of the story of *Chisholm v. Georgia*. For in upholding the right of South Carolina citizens to sue the sovereign state of Georgia, the decision provoked Congress in drafting the Eleventh Amendment which, when eventually adopted, overturned the rule in the case and made the first substantial alteration in the original language of the Constitution of 1787.

James Wilson, a delegate to the Philadelphia Convention and subsequently a Justice of the Supreme Court, in 1787 had made the analogy between an individual, “naturally a sovereign over himself,” who would not be thought of as retaining all of that sovereignty when he “be-

came a member of a civil Government," and a state which logically should accept a limitation upon its own sovereignty when it "becomes a member of a federal Government." This proposition was now to be submitted to a judicial test: Did the right of *both* the individual and the state in a federal constitutional order undergo such changes that the sovereign immunity of that state no longer was absolute?

In the ratification debates in New York and Virginia, Alexander Hamilton and James Madison respectively had argued that the order of the words, "cases . . . between a state and citizens of another state," confirmed rather than curtailed state immunity. The states could sue the individual, according to this argument, but not vice versa. It was fundamentally a strained argument; in the *Chisholm* case, Chief Justice Jay would specifically reject it — but in the Eleventh Amendment, Congress would substantially rehabilitate it.

The jurisdictional question—did the Constitution make states answerable to action by a private party in a federal court — was the sole issue argued in the *Chisholm* case. As so often has been true of major constitutional litigation, the factual basis for the contest had to be gleaned from the preliminary papers and from other sources. Alexander Chisholm, as it turned out, was an executor in South Carolina for the estate of one Captain Robert Farquhar, who on October 31, 1777 had sold goods "brought into Georgia" by two agents of the state of Georgia, Thomas Stone and Edward Davis. The agreed price of the goods was \$169,613.33, payable either in Georgia currency or in South Carolina money pegged to the market value of indigo, that state's predominant cash crop. Farquhar's day book, itemizing the sale, was offered in evidence and authenticated as in his hand by his "trading partners," Colin and Laurens Campbell of South Carolina. After Farquhar's death his executor sought to collect the amount allegedly due the estate from the state of Georgia, presumably to satisfy a settlement made between Farquhar and his partners before his departure for England.

Meantime, Georgia, like most of the rebelling states, had by statute sequestered or extinguished claims of loyalist subjects and thus in effect expropriated the goods which Farquhar had sold to Stone and Davis. Chisholm, the executor, in his petition argued that the sequestering statute had

been enacted after the contract of sale and thus should not have retroactive effect. The Attorney General of the United States, Edmund Randolph, as was customary in these early days, took over Chisholm's private suit and sought a writ (*distringas*) which would compel the federal marshal to enforce any judgment rendered against Georgia by the Supreme Court. Georgia chose not to respond to the suit, but did make a special appearance through two Philadelphia lawyers, Alexander Dallas and Jared Ingersoll, denying jurisdiction. Randolph then submitted Chisholm's case and the Court entered a default judgment against the state of Georgia.

As was also true in these early days of the Court, before Chief Justice John Marshall introduced the institutional "opinion of the Court," each Justice submitted his independent opinion on the issue. Of the five jurists present (Thomas Johnson of Maryland was absent, and would resign two months later), only James Iredell declined to find jurisdiction; and even in his case, his opinion rested on the proposition that Congress had the power explicitly to vest such jurisdiction, an early example of what the twentieth century would call "judicial restraint." James Blair's opinion limited sovereign immunity of the states to their own state courts, declaring that "when a state, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty." Justice Wilson



*Edmund Randolph of Virginia was the first Attorney General of the United States, and took Alexander Chisholm's case on behalf of the government and the private party, as was the custom of the day.*

stressed the moral argument that a state government should not evade an obligation by attempting to make state sovereignty a means of reneging on a promise for which Federal sovereignty provided a remedy. William Cushing addressed, and rejected, the argument that states should not be liable to private suit when the United States was not, with the statement, ominous to states' rightists, that the sovereignty of the nation was superior to that of the states. Chief Justice Jay then summed up the opinions by declaring that the Constitution had in essence transferred certain elements of sovereignty from the states to the nation, and that one of the objectives of Article III of the document was to insure equal justice for all by making all states and all citizens equally subject to federal jurisdiction on federal questions.

The decision sent a shock wave through the young nation. It meant the end of the states, wailed some; through the "craft and subtlety of lawyers," the national power would now sweep over dividing lines and consolidate all local governments into units of the Federal power. A Boston paper declared that the decision confirmed that "the absorption of state governments has long been a matter determined on by certain influential characters in this country who are aiming gradually at monarchy." Others, however, admitted the real reason for alarm: the pre-Revolutionary claims of refugees and Tories would now flood the courts, and this ruling would "give the key to our treasury to the agents of . . . men who were inimical to our Revolution, to distribute the hard money now deposited in that office to persons of this description."

In Massachusetts, Governor John Hancock called a special session of the state legislature which adopted a resolution praying Congress to draft "such Amendments to the Constitution as will remove any clause or Article . . . which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States." Similar action, from other states, would lead Congress in that precise direction; but meantime, in the next term of the Supreme Court, Georgia was initiating action in the same tribunal to establish its right to answer a creditor's claim against it. The suit on the claim, in fact, had already been litigated in the Federal Circuit Court in Georgia before the Chisholm

suit had been brought in the Supreme Court: A British creditor, Samuel Brailsford, sued a Georgia private citizen on a pre-war debt which had been sequestered by the same state law affecting the assets in the Chisholm suit. The questions were distinguishable but fundamentally related: In the Chisholm action against Georgia in the Supreme Court, the issue was state sovereign immunity; in the Brailsford suit against one James Spalding, the issue was whether Georgia should be entitled to join a party defendant in order to protect its public policy which otherwise would be put in hazard by litigation between private parties.

Circuit Justice James Iredell had denied Georgia's petition to be joined as a party defendant in the circuit court suit, primarily because he had ruled that the Georgia law was nullified by the treaty of peace between the United States and Great Britain. Georgia had then sued for an original bill in equity in the Supreme Court to compel the circuit court to allow its joinder; and the Supreme Court had added to the confusion by issuing a temporary injunction to the lower court. In disgust, the Attorney General wrote to James Madison that the injunction issued because of the "premier or prime minister" (Chief Justice Jay) seeking for "cultivation of Southern popularity," the general ignorance of equity jurisprudence on the part of the "professor" (Justice James Wilson) and the readiness of Iredell to reverse his own circuit ruling upon pressure applied to his North Carolina interests by Georgia. Everyone by now was quite testy; an order to the Federal marshal to execute the judgment in favor of Chisholm would almost certainly have been unenforceable — so no order was issued.

The Eleventh Amendment was the states' specific response to the *Chisholm* decision, and it was drafted by Congress, submitted to the states and, as Justice Felix Frankfurter was to put it in 1949, adopted with "vehement speed." The opinions were handed down on February 18, 1793; two days later, a resolution for such an amendment was introduced into the Senate of the Second Congress. This failed to pass both Houses in the brief remaining period of the session; but in the first session of the Third Congress the bill had passed both Houses by March 4, 1794. Within the same month, New York became the first state to ratify, and less than ten months later the necessary three-fourths of



the states completed the process with North Carolina's action of January 5, 1795. Rather ironically, in view of what the states manifestly considered to be a matter of greatest urgency, three more years would pass before President John Adams, on January 8, 1798, formally announced that the Amendment had been ratified. There was, as one historian of the Court has stated, an "extremely informal and careless" procedure for announcing such adoptions of amendments. (The Court itself, in 1922, held that such amendments become part of the Constitution, regardless of formal announcement by the Executive Department, upon the approval of the last state to make up the required three-quarters majority.)

One month after Adams' announcement, Chief Justice Oliver Ellsworth's Court held that in consequence it had no jurisdiction "in any case past or future in which a State was sued by citizens of another State." By this decision (*Hollingsworth v. Virginia*), the Court not only appeared to acknowledge the nullifying of the *Chisholm* decision but the limiting of its own jurisdiction by the amendment. Twice again in national history the amending of the Constitution would serve to reverse a constitutional decision, although hundreds of proposed amendments in reaction to an unpopular Court decision would be introduced over the years. The fateful opinion in *Dred Scott v. Sanford* was at least rendered moot by the Thirteenth Amendment's abolition of slavery; while the Income Tax decision (*Pollock v. Farmers Loan & Trust Co.*) of 1895 was eventually overturned by the Sixteenth Amendment in 1912.

However, the Pandora's box opened by Alexander Chisholm was still pouring out related constitutional issues for the fledgling nation and Court. Shortly after his Court's opinion in the cases against Georgia, Chief Justice Jay had been sent to London to negotiate a supplemental treaty disposing of British prewar claims against American debtors, while fresh suits on these claims simmered in the state and lower Federal courts. By 1795, when the treaty had been negotiated, Jay had resigned his judicial post, convinced that the office would never amount to much. President Washington thereupon named the brilliant South Carolina jurist, John Rutledge, to become the second Chief Justice.

Rutledge had never doubted his own abilities,

or the mistake the President had made in selecting Jay over him as the first choice to head the Supreme Court in 1789. His brief tenure as Associate Justice had not included any time on the bench itself, although he did ride circuit as did the other Justices. Now he did not hesitate to remind Washington of the opportunity to correct his earlier mistake, and the President gave him the interim appointment, which by provision of the Constitution would expire at the end of the next term of Congress if the Senate failed to confirm.

But the albatross of the *Chisholm* case, and its relation to the underlying question of British debts, now hung around Rutledge's neck. Jay's treaty was politically unpopular, particularly with Southern plantation owners whose economy in colonial times had revolved about a continual indebtedness to British merchants, and in a violently critical speech at Charleston that summer, Rutledge had attacked Jay and his treaty with such vigor that fellow Federalists were aghast. After all, it was going to be hard enough to answer to constituents for the Senate confirmation of the treaty without an intra-party quarrel to add a further handicap.

Rutledge proceeded to assume the duties of Chief Justice, and preside at the fall term of the Supreme Court; but when Congress met in December, there was strong sentiment for rejecting his nomination. On December 19, 1795, Rutledge was rejected, 10-14, by the Senate.

Still the issue of the prewar debts would not subside. Daniel L. Hylton, a Virginia merchant who would also figure in another major constitutional case of this era (*Hylton v. United States*), or the "carriage tax" case which would later lead to the *Pollock* case of 1895 and thence to the Sixteenth Amendment in 1912), had found himself in the position of Messrs. Spalding, Stone and Davis and the state of Georgia—defendants in suits on pre-Revolutionary debts. John L. Ware, like Chisholm the administrator for a deceased British creditor, William Jones, brought a suit in the Circuit Court in Richmond to recover on a note of Hylton's dated July 7, 1774 in the amount of nearly 3,000 pounds sterling.

Hylton and a co-defendant, Francis Eppes, offered as a plea in bar the sequestration statute in Virginia which, like Georgia's, purported to extinguish debts of citizens of the state which were settled in the state office created for the purpose.



The Circuit Court, made up of Jay and Iredell and District Court judge Cyrus Griffin, found for Hylton and Eppes, two to one, with the Chief Justice dissenting, and the appeal to the Supreme Court eventually found its way there by the Winter of 1796, where the underlying question was whether Jay's treaty, just ratified by both countries, had become the "supreme law of the land," in the language of the Constitution and by retrospectively validating preexisting debts to British creditors operated to nullify any state law to the contrary. Despite the elaborate argument of Hylton's attorney, a Virginia lawyer named John Marshall, the five-man Court (Rutledge having failed confirmation as Chief Justice and his successor not having taken office) by a vote of four to one in effect affirmed the treaty's supremacy and reversed the Circuit Court.

On February 29, George Washington proclaimed that the treaty was in effect, both the United States and Great Britain having ratified.

On March 4, the judgment in *Ware v. Hylton* was handed down.

On March 8, Oliver Ellsworth of Connecticut, chief draftsman of the Judiciary Act, became third Chief Justice of the United States.

Although the Eleventh Amendment, as has been described above, had actually been ratified by the requisite number of states nearly fourteen months earlier, it would be almost two years more before John Adams as President would finally notify Congress that the amendment was part of the Constitution. Thus, almost six years after Alexander Chisholm had begun his litigation on the prewar debts allegedly owing Robert Farquhar, the question was finally laid to rest.

# *The First Woman Candidate for the Supreme Court— Florence E. Allen*

*Beverly B. Cook\**

Florence E. Allen almost became the first woman appointed to the Supreme Court of the United States. After President Roosevelt placed her on the U.S. Court of Appeals in the Sixth Circuit, in 1934, she was highly visible in the federal judicial hierarchy. A campaign for her elevation to the High Court was run primarily by enthusiastic women from a variety of reform and professional groups. Her presence on the Supreme Court was a goal well worthy of the efforts of veterans of the suffrage movement, who expressed great pride in the achievement of each woman who would break the male monopoly over a governmental position.

Judge Allen's attitude towards the ambitions of her supporters was ambivalent. Within weeks of her confirmation for the Sixth Circuit seat, she wrote:

Do not block in the future too optimistically because there are some things that will never happen in our lifetime. In other words, when my friends delightfully tell me that they hope to see me upon the Supreme Bench of the U. S., I know two things: First, that will never happen to a woman while I am living, and second, that perhaps it is just as well not to mention that possibility at the present time because there is a certain type of lawyer that immediately becomes fighting mad when that possibility is mentioned.<sup>1</sup>

Her political instinct was to restrain her supporters from a premature effort, before she gained experience and recognition as a federal appellate judge. She was realistic in her assessment of the limits of opportunity for women in the law in her era. When she retired as chief judge of the Sixth Circuit in 1959 (and when she died as a senior judge in 1966) the Supreme Court still was all-male, while the tier of circuit courts reverted (for two years) to a male monopoly.<sup>2</sup>

## *Qualifications for a Supreme Court Appointment*

Many individuals possess the necessary attri-

butes for service on the Supreme Court, but never come to the attention of those who make the selection. Four offices together control the process of selection—the Presidency, the Office of Attorney-General, the Senate, and the Supreme Court. While Florence Allen had most of the qualifications for the office, she lacked leverage with the inner circle which drew up the short list of viable candidates. Even intervention by Eleanor Roosevelt and by the Women's Division of the National Democratic Committee was not enough to overcome resistance from the four central offices.

In the making of a Supreme Court Justice, the President is the central figure. Many Presidents prefer to know personally the qualities of the person placed in a position to interpret the fundamental national law and to affect public policy for a generation. The Attorney-General, as the chief legal adviser to the President, with close ties to the overlapping political and legal professional communities, may bring other candidates to the President's attention. Through the facilities of the Department to gather information and make judgments, he may eliminate or im-



*The Hon. Florence Allen as a member of the Ohio Supreme Court. One of the first women jurists in the United States, she subsequently served as judge of the U. S. Court of Appeals for the Sixth Circuit.*

\*Partial support for the research for this article was provided by the Graduate School, University of Wisconsin-Milwaukee.

prove the chances of candidates.<sup>3</sup> Justices sitting on the Court have a sense from their immediate experience of the pertinent abilities and appropriate personality for the position. Some Justices have volunteered names and evaluated (and probably vetoed) candidates whom they felt would not be compatible or contribute to their small and intimate working group.<sup>4</sup> As the Senate must confirm Supreme Court appointments, the nominee to the Court must appear suitable to the Senate majority, to the leaders of the President's party in the Senate, and to the Judiciary Committee.<sup>5</sup>

The qualifications for candidacy for the highest bench have been described under three categories: ideological, professional, and representational.<sup>6</sup> The candidate must first have the "right" values and public policy views to satisfy the administration and the key Senators of the President's party. The recognition of the independence of the "third branch" provides the very incentive to avoid placing a person with a different political philosophy in a position to interpret or veto administrative programs. As a substitute for a candidate with a stable and reliable set of political opinions, the President may look for personal loyalty, which will have the same short-run effect. The professional competence of the candidate is a necessary but not sufficient criterion. "Eminence" in public service compensates for less experience as a legal practitioner. Judicial experience has never been considered a requisite to sit on the constitutional court, but such service provides the appointing agents with a jurisprudential record from which to draw conclusions about ideological soundness.

The search for candidates with the appropriate views and professional qualifications may occur within the boundaries of certain representational requirements. Although the geographical background of the prospective judge is no longer important to the function of circuit-riding, the President takes account of the pride of major regions. The geographical claim, like other representational criteria, may be closely related to areas of party strength and electoral strategies of the President's party.<sup>7</sup> Most nominees have the appropriate party identification. In the minority of instances where the President sees some advantage in a cross-party choice, the individual must at least meet the ideological or loyalty

standard. The religion, the race, or the ethnicity of the nominee may fit the coalition of interests which the President needs to satisfy. The male sex of any Supreme Court nominee was taken for granted until Florence Allen came to public notice in the 1930's. But her female constituency did not have sufficient organizational strength to demand representation in high public office. Catholics and Jews had attained such strength earlier. Blacks were to achieve it by the mid-1960's. By the 1980's women have probably also reached this stage.

Florence Allen's failure to reach the Supreme Court was not due to lack of qualifications, but to her inability to penetrate the selection process. Her sex identity was not a complete bar. Even had she been male, there would probably have been only two realistic opportunities for a person with her combination of qualities on a circuit bench in the Midwest — the seats ultimately filled by William O. Douglas and Wiley Rutledge. How Judge Allen fit the three categories of qualification can be appreciated by a brief review of her public life.

#### *Ideological Standards for Appointment*

The reformist bent of Allen's career fit the dominant themes of the New Deal. She was stirred to action by the plight of those deprived or mistreated by authority, and worked out her own creative solutions for problems ranging from inefficiency to war. After her first year of law school at the University of Chicago, she worked for the New York League for the Protection of Immigrants, living at the Henry Street Settlement House.<sup>8</sup> Her law degree came from New York University in 1914. She then returned to Ohio to open a practice. As soon as the 19th amendment was ratified in 1920, she ran for trial judge in Cleveland. As a Judge of the Court of Common Pleas, whenever she identified a problem involving the jailing of witnesses, the bail policy, or the administrative weakness of the court, she would introduce her own experiment, a court rule, or even propose revision of a state statute.<sup>9</sup> As a Justice on the Ohio Supreme Court from 1922-1934, she made rulings consonant with New Deal support for the rights of labor. She held, for example, that picketing without violence or any form of coercion was lawful.<sup>10</sup> She also interpreted the Ohio workman's com-

pensation law broadly to extend benefits and coverage.<sup>11</sup> Her approach to social justice was compatible with that of Franklin D. Roosevelt, perhaps even more so with that of Eleanor Roosevelt.

Her stance on the rights of racial minorities to equal treatment was generally ahead of the times. However, one of her decisions against the complaint of a black student in the Home Economics Program at Ohio State was questioned during consideration of her confirmation to the Sixth Circuit. Judge Allen attempted to distinguish between academic rights and social prerogatives related to residence on campus.<sup>12</sup> After her death the Federal courts were still trying to separate the private right to discriminate from the public right to equal treatment.<sup>13</sup>

Florence Allen's party credentials were good. Although her father was the first Republican member of Congress from Utah, (her childhood home state), she entered politics as a Democrat in a different state, Ohio. She joined the central committee in Cleveland at the time Newton Baker was county chairman. In 1916, she campaigned for President Wilson in the west under Baker's direction. When Baker advocated compulsory military service, she resigned as head of the Democratic Women of Ohio. Because the 19th Amendment was ratified too late for her to apply for Democratic party endorsement for trial judge, she got on the ballot in 1920 by petition upon the urging of the Woman Suffrage Party. Republican women leaders worked on her campaign along with Democratic women, all of whom belonged to nonpartisan women's groups, such as the Business and Professional Women, the League of Women Voters, women lawyers' clubs, church groups, university women, and other local societies. Labor and the press also gave support to her candidacy; and she led the field of candidates.<sup>14</sup>

Her campaigns for the Ohio Supreme Court also had bipartisan backing. Although she cleared first with Newton Baker, the Democratic party did not endorse her.<sup>15</sup> She created her own organization of Florence Allen clubs from the remnants of the suffrage organization. Again, Republican women who had worked with her in the Ohio campaign for the 19th Amendment from 1910 to 1920 joined the Democratic women.

Florence Allen had the kind of continuing

interest in vital public policies typical of Supreme Court Justices. She considered running for the state legislature before the opportunity for the trial judgeship occurred. She felt that she could work more effectively for certain policy ends, including world peace, from a legislative rather than a judicial body.<sup>16</sup> While she was serving on the Ohio Supreme Court, she decided to run as the Democratic candidate for U.S. Senator, based on Newton Baker's advice. However, the incumbent changed his mind about retiring and she released the state party from its endorsement, continuing her campaign through her women's ad hoc organization, but losing. She was the bona fide candidate of her party for the first time in 1932, losing a race for the House of Representatives, but receiving 41% of the vote.<sup>17</sup> Her court seat was not endangered by these candidacies. She won a second six-year term as a non-partisan in 1928.

Florence Allen faced the same difficulty in establishing her credentials as a successful party candidate and office-holder as women fifty years later. Her membership and active participation were accepted within limits; when she offered to take on leadership roles, particularly candidacies for high public offices, the party showed little interest in giving her real opportunities. The party used her services in unlikely congressional races. Her own victories were independent of the Democratic party and contingent upon her organization of existing women's political clubs into a working state-wide unit. The decline of female activism in the 1930's was one reason she was happy to take the life-tenured federal seat and avoid a third state-wide race for the Ohio Supreme Court in 1934. Allen's credentials for the Supreme Court nomination did not include those "party chips" which many male politicians, even those on the bench, have been able to accumulate during their careers.

#### *Professional Standards for Appointment*

By the 1930's Judge Allen was the most eminent woman legal professional in the country. She had the scholarly credentials typical of Supreme Court Justices.<sup>18</sup> She had been Phi Beta Kappa as an undergraduate, second in her graduating class at New York University Law School, and counsel on the winning side of landmark cases for women's rights in Ohio.<sup>19</sup> She was an active member of the American Bar Association





An ardent suffragette, Florence Allen is shown at the left, above, preparing for a demonstration march. Note the slogan on the handbag of her companion, "Votes for Women."

and the International Bar Association, and an international law leader in the peace movement. She had worked with national leaders of the woman suffrage movement (Carrie Chapman Catt, Anna Howard Shaw, Harriet Taylor Upton, and Maude Wood Park); with leaders of the social welfare movement (Florence Kelly, Frances Kellor, and Sophonisba Breckinridge); and with leaders of the movement to outlaw war (whose membership largely overlapped the other two). She had developed a constituency outside Ohio and the Sixth Circuit through her speeches to women's clubs, university and law school convocations, and bar associations in major cities.<sup>20</sup> The only woman in public office in the New Deal with higher stature was Frances Perkins, Secretary of Labor. But Perkins was not a lawyer.

Judicial experience is not essential to be considered for the High Court. Indeed, it often interferes with the development of political contacts which assure such consideration. Only one of Roosevelt's appointees had the circuit court preparation which Judge Allen would have brought. The meaning to the President of service on the bench is not just proof of competence, but

also a "readily available index of the personal and intellectual qualities of potential candidates."<sup>21</sup> More importantly the portfolio of opinions discloses the pattern of the judge's policy preferences.

Florence Allen showed her colors in her major case, the TVA trial, where she displayed clearly her agreement with a symbolically significant economic recovery program of the New Deal and her ability to reconcile skillfully the legal provision undergirding the program with the Constitution. The Chief Judge of the Sixth Circuit assigned Judge Allen in 1937 to preside over the three-judge court.<sup>22</sup> She heard the case in Chattanooga with two Tennessee district judges. One of them, Judge John D. Martin, became a life-long friend and supporter of her elevation to the Supreme Court. After months spent in hearings and opinion drafting she upheld the validity of the TVA statute. The fact that the decision was vitally important to the administration, after other programs had been effectively destroyed by the Supreme Court between 1933 and 1936, does not detract from the professional skill with which she supervised the trial process, handled complicated evidence, and arranged the legal arguments in her opinion.

#### *Representational Basis for Appointment*

In many respects, Florence Allen fit the model of a typical Supreme Court Justice which has been described by John R. Schmidhauser: white, Protestant, of British ethnic stock, and born into comfortable circumstances in an urban or small town environment.<sup>23</sup> She was white, Protestant, descended from British settlers, and raised in Utah towns.<sup>24</sup> Justices are also drawn from political-legal families.<sup>25</sup> Allen's father was a lawyer who served in the Utah legislature and the U.S. Congress. Her college-educated mother was a leader on the state level of women's policy oriented clubs. Her geographical base had been fixed in Ohio, a major supplier of Justices, since her undergraduate days at Western Reserve (1900-1904). But Judge Allen did lack one requirement of powerful political status—the right sex.

Except for her sex, Florence Allen met the basic political, professional, and representational standards for Supreme Court selection. Still, as we know, few of the many potentially

acceptable candidates, appear on short lists, and fewer are accepted. Recognition of candidates and their winnowing to the nominee depends upon the particular persons involved in the process and the contemporary political situation within which the events occur.<sup>26</sup> The most important elements are the party membership of the President and of the candidates. Florence Allen was a Democrat. During the period of her professional maturity, two Democratic Presidents were in office from 1933 to 1952. President Roosevelt made eight new appointments (excluding his elevation of Justice Stone, a Coolidge appointee, to the center chair). President Truman made four appointments. Thus, Florence Allen was "available" for twelve vacancies. To understand why she finished her career after twenty-five years still on the Sixth Circuit bench, we shall examine the campaign for her elevation to the Supreme Court, and the situation within which each appointment of a male candidate occurred.

#### *Campaigning for The Supreme Court — The Backers*

The campaign on behalf of Florence Allen for the Supreme Court stretched across two administrations. With each vacancy the hopes of some of her followers were rekindled, but the urgency of the effort was to decline in the 1940's. From beginning to end her efforts to reach the bench were carried by women.

Her friends began to push her interests openly in 1936 in anticipation of the first available seat. When the Van Devanter vacancy occurred, supporters wrote to President Roosevelt that the women of the country wanted to see Allen on the Supreme Court bench.<sup>27</sup> Although her adherents were active at the time of the Black appointment, they were better prepared for the second Supreme Court vacancy in 1938, when her name was mentioned publicly. One supporter wrote from Florida that a host of her friends determined that her final goal should be the highest Court.<sup>28</sup> Lawyers who knew her on the federal bench in Cincinnati, and older associates from her days on state benches in Columbus and Cleveland, worked by mail and in person. One lawyer tried "to further her cause" in Washington.<sup>29</sup> Another lawyer wrote to Franklin Roosevelt and to Eleanor Roosevelt separately and sent Allen

copies. He urged FDR that fitness rather than sex should be the main consideration and reported that male members of the bar considered her an outstanding judge.<sup>30</sup> To Mrs. Roosevelt he emphasized that Allen's influence on eight men would be humanizing.<sup>31</sup>

The work in her behalf continued for the next vacancy, the Cardozo seat. Judge John D. Martin of Tennessee, her colleague in the TVA case, wrote of his disappointment that the President did not select her. He was keeping score by the geographical criterion and predicted that the next appointment would go west. He also urged a concentrated effort during the Roosevelt administration when her chances were greatest: "... now is the time to bring forward all the pressure of strong endorsements ... for the next vacancy."<sup>32</sup> Florence Allen was returning the compliment during the same period by recommending Judge Martin to the Attorney-General for appointment to the Sixth Circuit.<sup>33</sup>

The participants in the letter-writing campaign in 1939 ranged from little known women lawyers in small midwestern towns to New Deal officeholders in Washington with useful contacts. Letters which were written to the President were screened by his staff. Unless a letter bore a special tag, it was unlikely that the President would be aware of the character and variety of support for Allen's candidacy. The head of the Women's Division wrote to Stephen Early in 1939 asking him to show specific "important letters" to the President—those from Judge Dorothy Kenyon, New York City; Judge Annabel Matthews, D. C.; Dean Harriet Elliott, Women's College of North Carolina; Professor Grace Abbott, University of Chicago; Mrs. Earlene White, BPW national president, and Dr. Emily Hickman of the YWCA.<sup>34</sup> His response that all endorsements were considered at the time of an appointment was hardly satisfactory. Allen was supported by such organizations as the American Association of University Women, the Business and Professional Women, the General Federation of Women's Club, New York Women's Trade Union League, American Legion Auxiliary, Women's Bar Association of D. C., and Women Lawyers of New York City.<sup>35</sup>

Within the federal courts, secretaries of the judges corresponded, arranging for the endorsements. One secretary wrote to Judge Allen: "We had some plain and fancy cussing around

here about the last Supreme Court appointment. We are all pulling for you on the next go-round . . ."<sup>36</sup> Her judge sent a tribute of Judge Allen to a college Dean, who in turn passed the evaluation on to the White House.<sup>37</sup> The secretary to a Chicago federal judge wrote to a woman lawyer in that city offering further help and commenting "... we feel she is better equipped than most men."<sup>38</sup> However, Allen's secretary fell into an embarrassing situation in writing to federal judges for endorsements. Judge Gore died when a letter asking for his help was in the mail and she feared that it might reach the wrong hands. Judge Martin took care of the mishap.

Women judges also rallied behind the only woman in the federal court system (Article III courts). Judge Sarah Hughes, later appointed to the U.S. District Court by President Kennedy, wrote several times on her Texas state court stationery: "I believe that she is thoroughly qualified and that she would bring honor to the Court."<sup>39</sup> Judge Dorothy Kenyon of The New York Municipal Court wrote to the President that "So many distinguished women have urged her elevation to the bench that it is perhaps unnecessary to add my voice to the others." She enclosed a summary of Allen's legal opinions.<sup>40</sup> Judge Anna M. Kross, New York City Magistrate, wrote to Mary Anderson at the Women's Bureau in D.C. that she had been conducting a quiet campaign for Allen through a "Committee for the Advancement of Women Lawyers to High Judicial Office of the National Association of Women Lawyers" and was planning to broaden the coalition for the next vacancy.<sup>41</sup> Judge Anabel Matthews, the first woman on the Tax Court, and a Republican, wrote that women lawyers took great pride in Allen's record as a great liberal and jurist.<sup>42</sup> However, Mabel W. Willerbrandt, the second woman to serve as assistant Attorney-General, and the only other woman in the country with credentials for a Supreme Court appointment, from a Republican president, was somewhat less generous. She asked FDR to appoint "a woman."<sup>43</sup>

Support from young women in the party which struck a chord in the White House: "I know of nothing that will unify the Democrats more than the act of your appointing the Honorable Florence Allen to the Supreme Court." The writer made a complaint and a plea which were just as valid forty years later:

Recently in my attendance of conventions of Democratic women I have noticed that many of their discussions have been given over to expressions of disfavor in that women of the Democratic Party do much of the work, including precinct, county, state and national activities—but even women with outstanding ability rarely receive equal responsibilities, honors, privileges or opportunities of service with men.<sup>44</sup>

Two maverick Senators, Borah and Norris, were in her corner.<sup>45</sup> Her other male supporters included a few judges and lawyers, the husbands of female backers, men in the peace movement, and journalists. Her good friend, William Allen White of the *Emporia Gazette* reminded FDR in 1941 that he had only asked three favors, including the nomination of Florence Allen.<sup>46</sup>

A woman columnist in the D.C. *Times-Herald* wrote a highly complimentary background sketch.<sup>47</sup> Several papers carried headlines which brought public attention to her candidacy.<sup>48</sup>

Although the Baltimore *Sun* headlined that "Roosevelt Hints at Court Post Surprise,"<sup>49</sup> the nominee for the fourth vacancy as expected by the White House and Justice Department staffs, was William Douglas. Judge Allen's supporters tried to repeat their endorsement campaign for the Butler vacancy which Murphy received in 1940. But when Justice McReynolds departed in 1941 her group had second thoughts about contending for the sixth seat. A friend in Washington wrote:

When the news broke the clan gathered to decide what we should do. Some wanted to fly into print again for you—send messages, etc. to the White House. I took the position that we had to consider you and I insisted that we should find out through Mrs. Roosevelt if the President had an open mind on this appointment. The word came back that he had made up his mind . . .<sup>50</sup>

A few old friends persisted in a disorganized fashion after 1941, but there was no strong effort in 1943, when a circuit judge finally won the prize from FDR.

### *The Candidate*

Florence Allen took the public position that she had "no political ambition whatever,"<sup>51</sup> that "I am not a candidate for any appointment."<sup>52</sup> This was the correct stance for a serious candidate. But even if she felt a realistic pessimism, she must have been caught up by the spontaneous and indefatigable enthusiasm of her supporters; she never specifically forbade them from work-

ing for her elevation between 1936 and 1949. She recognized that she was serving the interests of all women through the important public roles which she played and was pleased by letters which said "My best wishes for the U.S. Supreme Court and for you — the trail blazer."<sup>53</sup> She knew that it must appear that the position came to her rather than she to the position. This attitude was best expressed to Professor Sophonisba P. Breckinridge of the University of Chicago (the first woman to receive a Ph.D. in political science):

Of course, my real task is to do my work here with all of the intelligence and energy and uprightness that there is in me, and I am trying to do that without thought of anything else.<sup>54</sup>

The timing of the second vacancy was awkward, since Judge Allen was presiding over the critically important TVA case.<sup>55</sup> A nomination to the Supreme Court before the decision came down might appear to be the most blatant form of bribe. But she evidently cherished some hope for elevation, nevertheless, which the district judges

working on the TVA case with her recognized. On the morning of the announcement of Reed's appointment to the Sutherland seat, Judge John Gore told Judge Allen to smile when she entered the courtroom, so that the watching reporters could not impute to her a disappointment.<sup>56</sup>

By early 1939, following the failure to win the second vacancy, the headquarters of the campaign was firmly established out of Florence Allen's own home and office. Judge Allen's cousin, who made her home with the judge, was in charge of communications among the scattered supporters. She agreed with Judge Martin's analysis that the letter campaign must be organized before the next (Brandeis) retirement.<sup>57</sup> The cousin reported: "Things seem to be moving in the right direction as far as I know: I can only hope for the best."<sup>58</sup>

At the time of the 1939 vacancies, Florence Allen made her claim to intellectual qualification for the court by preparing a book, entitled *This Constitution of Ours*.<sup>59</sup> The book was written at the level of a course in good citizenship, appro-



Judge Allen is shown in this family group photograph with her mother, left; a niece, Corinne Allen; Judge Allen; Dr. Esther Allen Gow, a sister, dean of women at Ohio State University; and their father, Clarence E. Allen, retired professor at Western Reserve University.



priate for the immigrants for whom she showed so much compassion at the settlement house and later at naturalization ceremonies in the federal court. Since her time was absorbed by her speeches and writings, she assigned the task of collation and the integration of other research material to women friends in New York. Upon publication she sent autographed copies to the Justices of state Supreme Courts, to university professors, to Solicitor-General Biddle, to Eleanor Roosevelt, to William Allen White, and to lawyers in large firms. She even persuaded a friend to write a complimentary review for the *University of Chicago Law Review*. The content of this book revealed her fierce dedication to constitutional principles. Had Roosevelt invited Frankfurter to evaluate the book, she would necessarily have come off poorly as a scholar.

In 1939 she also began work on an autobiography, with the help of a ghost writer. Putnam's provided an advance and expected a manuscript by the fall of 1940.<sup>60</sup> If the story of her life sold widely, as Eleanor Roosevelt's had, she might be able to develop the national constituency which she needed to undergird her Supreme Court ambitions. She also put her hopes on the income from book sales to help pay off heavy debts, incurred during the crash of 1929 from signing notes for friends.<sup>61</sup> However, the autobiographical project was lost in the press of other business, and did not appear until a year before her death.

By the period of the Truman Administration Judge Allen had forgotten how seriously she had pursued her Supreme Court ambitions. Carrie Chapman Catt wrote to Judge Allen in 1946 that she had been asked to join a campaign to put her on the Supreme Court and replied that she was proud of her "holding the highest court position of any woman in the world." Mrs. Catt warned that the politics of the Truman era "doesn't include giving more places to women" and asked forgiveness for her unresponsiveness.<sup>62</sup> Judge Allen answered that "I have many times told my friends things very similar to what you say in your letter; and I have not lifted my finger to stimulate or even to encourage any campaign in my behalf."<sup>63</sup> There was little prospect of lightning striking at this late stage of her career, although she continued to work as a judge for twenty more years. The 1948 dinner, which she proudly described to her family members in California in terms of the famous federal and

state judges who honored her, was a valedictory to her ambition.<sup>64</sup>

### *The Intermediaries*

Eleanor Roosevelt and Molly Dewson, the director of the Women's Division at the Democratic National Committee, were the insiders who acted as intermediaries for those women who wanted a voice or a place in the Roosevelt Administration, but had no direct access to the President, Cabinet, or Presidential staff. These two invited effective women to campaign for the New Deal. They then demanded patronage awards for these workers on the same basis as for men who helped politically.

Joseph Lash has claimed that Eleanor Roosevelt was "at the center of this growing New Deal political sisterhood,"<sup>65</sup> but Molly Dewson spent full time on the interests of the party and women in the party. One year after the first inauguration, Eleanor Roosevelt persuaded Jim Farley to provide funds and status to the Women's Division. In January, 1934, Molly Dewson arrived to accept the director's position with a list of sixty women qualified by their participation in the 1932 campaign and by their abilities to take high public office. Whenever Dewson was unable to move the males who had the appointing power, she appealed to Eleanor to take the matter up with the President or with the appropriate cabinet members.<sup>66</sup>

Molly Dewson and Eleanor Roosevelt were key factors in Allen's nomination to the Sixth Circuit. Judge Allen wrote to Dewson in 1934: "I never can tell you how I feel about your coming to the front for me as you did . . . you helped me over the biggest hurdle."<sup>67</sup> When Allen's Supreme Court ambitions were in flower, Molly Dewson had retired, but she sent a brief personal note with her usual light touch to FDR: "Of course if you did appoint Florence Allen it would be STUPENDOUS for us girls, My love to you."<sup>68</sup>

There is no doubt that Florence Allen made an effort to develop a friendship with Mrs. Roosevelt, but her court work often interfered with her opportunities. The judge believed that Mrs. Roosevelt had known about her for a long time through mutual friends connected with the Henry Street Settlement.<sup>69</sup> Right after the 1933 inauguration, Florence Allen got in touch with Mrs.

Roosevelt to report on the "excellent reaction . . . to the appointments that the President has made of outstanding women."<sup>70</sup> Mrs. Roosevelt responded with an invitation to see her in Washington.<sup>71</sup> In the fall Judge Allen let Mrs. Roosevelt know of a court holiday when she planned to be in D.C. but Mrs. Roosevelt was out of town and their closer acquaintance further delayed.<sup>72</sup>

Allen described her later relationship with the Presidential couple thus:

While the president appointed me to this really distinguished position, he never set eyes on me until long after the appointment. I have met Mrs. Roosevelt casually a number of times, but I do not feel that I have anything like the connection with her that I do have with other women who have worked in the woman movement just as she did.<sup>73</sup>

After 1934, Mrs. Roosevelt found many occasions to notice Judge Allen's position and accomplishments in her published articles. Allen appreciated that Mrs. Roosevelt was able to give her some of the national attention which she would need to become a viable candidate for the Supreme Court.<sup>74</sup> She was quick to tell Mrs. Roosevelt of her embarrassment when a women's group announced support for Allen as a presidential candidate in 1936.<sup>75</sup> Although she could not participate as openly as she had in 1932, Allen wanted no doubts raised about her loyalty to FDR. Immediately after his landslide victory in 1936, Allen wrote on her circuit letterhead of her joy at the outcome: "My only regret is that I could not have lifted my voice here and there."<sup>76</sup>

Judge Allen always gave priority to her court business, although it interfered with her development of a close relationship with Mrs. Roosevelt, which could have been instrumental in her further ambitions. In 1936 she refused an invitation from a Cleveland women's group to introduce Mrs. Roosevelt because she could not leave the court in Cincinnati without a quorum. She explained to Mrs. Roosevelt: "I am torn greatly between my desire to hear you speak and to be able to say in public what admiration I have for your courage . . . But after all my first obligation is here . . ."<sup>77</sup> The Judge politely refused Mrs. Roosevelt's somewhat indiscrete invitation to sup at the White House, while she was sitting on the TVA case in Chattanooga.<sup>78</sup>

Judge Allen kept up a careful friendly correspondence with Eleanor Roosevelt, noting the

setbacks and successes of the Roosevelt family.<sup>79</sup> She was also very anxious to defend her integrity to Mrs. Roosevelt. When a Detroit columnist made accusations about her payment of federal income taxes she wrote to Mrs. Roosevelt that the statements were entirely untrue: "I have paid income tax ever since my appointment to this bench, have never questioned the tax, and in fact have repeatedly stated that judges ought to be taxed like any one else." Mrs. Roosevelt noted on the letter that she showed it to the President and "he understands."<sup>80</sup>

Mrs. Roosevelt herself had a deep commitment to the participation of women in politics, particularly in pursuit of peace and social welfare goals, but no specific dedication to Florence Allen's advancement above the circuit court. Her view, expressed in the negative, was that there was "no reason why a woman should not be appointed to the Supreme Court."<sup>81</sup> But Mrs. Roosevelt did use her "My Day" column for a trial balloon for the Allen Supreme Court candidacy.<sup>82</sup> Allen reported that Mrs. Roosevelt told her at the White House that she regretted that Allen had not been appointed to the Supreme Court,<sup>83</sup> (and no doubt she did). Yet, there is no evidence that she put her full efforts into the elevation. At the 1948 New York University Law School dinner in honor of Judge Allen, Mrs. Roosevelt sent a powerful message, a compliment with little practical political force because of the judge's age:

... if a President of the United States should decide to nominate a woman for the Supreme Court, it should be Judge Allen. She will be a nominee with backing, on a completely non-partisan basis, of American women who knew her career and accomplishments.<sup>84</sup>

### *Opposition to Judge Allen*

While Judge Allen generally enjoyed good relations with the press,<sup>85</sup> two papers made direct assaults upon her character and her ability when she was under consideration for the Supreme Court in 1939. In a gossip column about Washington events, a *Detroit Free Press* reporter wrote, crediting the Treasury Department for the information, that Judge Allen was "egging" on Eight Circuit Judge Joseph Woodrough in his suit questioning the constitutionality of federal taxation of federal judicial salaries.<sup>86</sup> Following

the advice of two jurist-friends, Harold Stephens of the U.S. Court of Appeals for the D.C. Circuit and Judge Martin in Tennessee, she sent a private explanation to Mrs. Roosevelt.

In early 1939 Drew Pearson reported that FDR had considered "the Ohio jurist" but dropped her from consideration because the Attorney-General showed him a record of reversals worse than that of any other prominent federal judge.<sup>87</sup> To repair the damage, Judge Allen phoned the Reporter of the Ohio Supreme Court and asked him to follow up on the cases she decided in Columbus,<sup>88</sup> while the Clerk of the Sixth Circuit checked the fate of her federal opinions since 1934. In eleven years on the Ohio Court she was reversed twice by the U.S. Supreme Court. In five years on the Sixth Circuit she had been reversed once.<sup>89</sup> While some women friends in Chicago wrote to Attorney-General Murphy asking for an explanation, others passed on the correct information to influential women in Washington.<sup>90</sup> The Attorney-General responded directly to Judge Allen that "I have frequently had occasion to express the highest regard for your ability and qualifications for judicial service and accordingly it distresses me greatly that a statement should be published that does so great an injustice to you."<sup>91</sup> Such calumnies indicate that some persons involved in the selection process took Florence Allen's candidacy in 1939 very seriously. Her own reaction also reveals the deep ambition below her public disclaimers: "They meant to kill me off forever."<sup>92</sup>

### *The Roosevelt Justices*

*First Appointment (Hugo Black)*—The defeat of the President's bill to pack the Court in 1937 was to influence Roosevelt's selection of nominees for the Court. He was to reward those who supported him during the bitter fight. Those who openly rejected the plan forfeited any future claims to a seat.

Senator Joseph T. Robinson of Arkansas, who had managed the court-packing bill, had been promised the first available seat. When Robinson died of a heart attack during the battle, the President realized that the bitterness that had been engendered in the Senate almost required another Senator be chosen to fill the seat being vacated by Justice Van Devanter. In Hugo Black,

FDR found a Senator who met his own requirements on loyalty or court packing, New Deal ideology, reasonable youth, and geography (from the South or West).<sup>93</sup> Professional competence was subordinate to political confidence as a criteria for selection at the time of Black's appointment, although a brilliant tenure was to result.<sup>94</sup> While Judge Allen was the right age and had the right New Deal views, she was not really in a position to compete, because she came from the wrong region and was not a senator.

*Second Appointment (Stanley Reed)*—When George Sutherland left the Court, FDR's concern about under-representation from the west (Sutherland was from Utah) was secondary to his personal knowledge of the character and loyalty of his Solicitor-General, who had defended New Deal programs against heavy odds, and had kept out of the court-packing controversy. Florence Allen's decision in the TVA case had rescued only one important New Deal program, and she lacked personal acquaintance with the President.

*1939 Appointments (Felix Frankfurter and William O. Douglas)*—There were two vacancies to fill in 1939—the seats of Cardozo and Brandeis. Protestant Judge Allen was eliminated for consideration for one of the seats by ethnic considerations. FDR was to decide upon his long-time policy adviser, Felix Frankfurter, for the Cardozo seat. Roosevelt and Frankfurter were intimate friends, who had known each other for over thirty years. However, before he selected Frankfurter, Roosevelt, aware of Western claims to a Supreme Court seat, had Frankfurter "check out" University of Iowa Law School Dean, Wiley Rutledge, and read the opinions of several sitting judges. It is quite possible that Florence Allen was among that list of judges. However, no judge on an inferior court could match Frankfurter's long and close association with FDR.

The second vacancy in 1939 went to another academic, who had firm credentials as an office-holding member of the New Deal, William O. Douglas. Like Frankfurter, Douglas had stayed out of the court-packing controversy. Douglas thought that Justice Brandeis suggested him to FDR as his own successor.<sup>95</sup> Although Douglas was a registered voter in Connecticut, his supporters, including Senator Robert La Follette and Attorney-General Frank Murphy, worked to convince FDR that his childhood in the state of Washington made him acceptable to



Western senators. Douglas had firm backers inside the White House in Thomas Corcoran, Ben Cohen, and Jerome Frank.<sup>96</sup> Douglas' closest competitor was Senator Lewis B. Schwelienback of Washington state, a close friend of Justice Black, and a vigorous campaigner on behalf of court-packing,<sup>97</sup> who received as consolation prize a district judgeship.

There were, however, others on the Attorney-General's list of candidates, including another academic lawyer, Lloyd Garrison, Dean of the University of Wisconsin law school; western circuit judges — Joseph C. Hutcheson (Texas), Sam A. Bratton (New Mexico) and Judge Harold M. Stephens (Utah).<sup>98</sup> Florence Allen did not appear on this list circulated in the White House, although the newspapers reported that she and Wiley Rutledge — who had been considered for the Cardozo seat — were contenders.<sup>99</sup>

*Fifth Appointment (Frank Murphy)*—In 1940 the President filled the seat vacated by Pierce Butler of Minnesota with Attorney General Frank Murphy of Michigan, satisfying the representational requirements of religion and geography. Murphy had a range of executive experiences as Mayor of Detroit, High Commissioner of the Philippines, and Governor of Michigan. His appointment also permitted FDR to reshuffle his cabinet prior to his third term campaign.

In his role as Attorney-General, Murphy, had provided the president with a list of fourteen eligible males,<sup>100</sup> including the three circuit judges who had been considered for the Brandeis seat, and a number of cabinet members. Roosevelt ignored the list. Despite Murphy's protestations of lack of technical competence, FDR moved him up and out of the Department of Justice. Judge Allen did not appear on the list. She did not fit the religious criterion, nor the President's inclination to place members of his administration team on the bench.

*Third Term Choices (James Byrnes and Robert Jackson)*—In the first year of his third term, as U.S. entry to the war approached, the President filled the seats vacated by McReynolds and Stone (elevated to the Chief Justice chair upon Hughes' retirement). FDR again made his choices from the Congress and the Executive branch. He had asked Justice Frankfurter to check out Judge John J. Parker of the Fourth Circuit. Years before Parker had been nominated

by Herbert Hoover, but had failed of confirmation. Frankfurter gave a luke-warm evaluation of "clear and painstaking," but not "fresh and creative" opinions.<sup>101</sup> James Byrnes, Senator from South Carolina, was appointed in his stead, rewarded with the seat left by another southerner, for being an "effective agent" of administration policies in the Senate since 1933. Quick and unanimous confirmation saved Presidential energies for the more critical foreign issues.<sup>102</sup> Robert Jackson had known Roosevelt in his Albany days. He had worked in the FDR campaign in 1932, and came to Washington as General Counsel of the Internal Revenue Service. He had made a superb reputation as Solicitor-General. Jackson had taken a whole-hearted part in the court reorganization fight. His book, *The Struggle for Judicial Supremacy*, expressed his views on the proper role of the Court.<sup>103</sup>

Thus, the selections again came from inside the political family. Although Florence Allen was an ardent New Dealer, she had not shared in the New Deal's Washington battles, nor was there a need to "get her out of politics."

*The Last Chance: Eighth New Nominee (Wiley Rutledge)*—When Justice Byrnes left the bench, Roosevelt finally chose a circuit judge, who represented the west (Iowa) and was not close to the New Deal. Wiley Rutledge had been waiting in the wings, the candidate of many, since 1939. He had been appointed to the U.S. Court of Appeals for the D.C. Circuit, the day after he had lost the Brandeis vacancy to Douglas. He met the ideological requirements, as he had been sympathetic to the President over the court-packing struggle, and possessed liberal economic and nationalistic beliefs. During wartime, Roosevelt's attention was elsewhere and a fierce competition developed among the backers of a number of other viable candidates, among them Judge Learned Hand of the Second Circuit (supported by Chief Justice Stone and Justice Frankfurter), Senator Alben Barkley, Solicitor-General Charles Fahy, Judge Parker, and Dean Acheson. The Attorney-General invited three Justices — Black, Douglas and Murphy — to react to the published opinions of Rutledge. Their reactions were favorable. Rutledge's followers arranged for letters and endorsements to flow from bar associations, law faculty, and newspaper editors to the White House and the Justice Department to offset his lack of political

clout.<sup>104</sup>

Indeed, Rutledge was the only Roosevelt nominee without strong political credentials. His claim was based on his intellectual and legal skills. Allen's background was appropriate for this appointment. The other Roosevelt appointees had combined an academic background with executive public offices, or trial court experience with elected office. Florence Allen lacked academic connections, extensive executive responsibilities, and a legislative background, although by the time of FDR's first appointment in 1937, she had had seventeen years of bench experience (fifteen on important appellate courts). She was well prepared for the judicial role, but, without the opportunities afforded by positions in the other two branches, she was unable to demonstrate her mettle as a partisan and policy-maker. FDR wanted persons on the Court who would be representative and who would be sensitive to political demands and needs. Allen was a professional judge.

*The Truman Justices* — President Truman made four appointments to the Supreme Court. He used the first vacancy to solidify an "era of good feeling" with the Republican opposition by choosing his crony, Senator Harold Burton, to take the place of Owen Roberts, replacing one Republican with another. According to the newspapers, the others on the short list were also Republicans — Under Secretary of War, Robert Patterson, who was also a former federal judge; and Senator Warren Austin of Vermont.<sup>105</sup>

Florence Allen clearly was well located geographically for this appointment, as an Ohio man was selected. She lacked the personal relationship with the President and membership in the Republican Party. In addition, the influence of women on the appointing president was weak.

The women in the party who pushed women candidates for appointment did not develop close relations to the President until his second term. During the Roosevelt administration Molly Dewson, director of the Women's Division, could and did go directly to the White House with her demands. She continued her pressures from retirement upon FDR's successor, writing in 1946:

Dear Mr. President: If there ever should be an opening on the U.S. Supreme Court bench and you thought it a psychological moment to make a grand dramatic gesture toward women — who claim they are pretty sad about their lack of

recognition by you — why do you not appoint Florence Allen of Ohio now on the U.S. Circuit Court of Ohio, Michigan and Kentucky to the Supreme Court?<sup>106</sup>

India Edwards had to work through the chairman of the Democratic National Committee, until she showed Truman what the women could do in the 1948 campaign.<sup>107</sup> Edwards did think that Truman had a high general evaluation of women's brains and ability and that he came close to naming Florence Allen.<sup>108</sup> Lucy Howorth agreed that Truman had no personal opposition to women in office or politics. However, women had no direct access to the President. His White House coterie was all male.<sup>109</sup> Nor did Bess Truman play the role of facilitating ambitious women that Eleanor Roosevelt had played with her husband. Thus while Truman may have had generous attitudes towards women, he did not translate them into judicial appointments. Of 27 nominations to the circuit level, all were male. Of 93 appointments to the district court, only one was female. As a result, his record was the same as FDR's — one woman appointed to the federal courts.

In 1946, in an attempt to reduce internal dissension, President Truman selected a new Chief Justice from outside the Court. Fred Vinson was another close associate of the President, but he did bring an unusual combination of public experiences. Florence Allen was not in competition to be Chief Justice. No politician in the middle 1940s would have made a woman Chief Justice.

A group consisting of Donald Dawson, of the President's staff, Peyton Ford for the Attorney-General, and Senator J. Howard McGrath for the Democratic National Committee, discussed a list of six names for the vacancy caused by Frank Murphy's death. There were four sitting judges, the Secretary of War (a former federal judge) and McGrath himself.<sup>110</sup> Truman selected someone *not* on the list, his Attorney-General Tom Clark, a personal friend whom he knew as chief of war frauds during his investigating committee period. Clark was a Texas protege of the powerful Senator Tom Connally. It was reported at the time that Chief Justice Vinson approved of the choice.<sup>111</sup>

Personal friendship was also the basic factor in Truman's last appointment to the Court: Sherman Minton. They entered the Senate together

as freshmen and sat at adjoining desks.

Florence Allen did not have the New Deal congressional experience, nor the wartime cabinet experience, which made the four male Justices viable candidates to Truman. She had a longer preparation on the circuit level than Vinson or Minton. Their judicial background gave them credibility, but did not significantly improve their entitlement to the place. It is clear that the odds were against Florence Allen, regardless of her sex, for at least ten or eleven of the twelve appointments during these two Democratic administrations.

#### *Objective Criteria: Age, Sex, and Veteran Status*

Most of the qualifications for a position of authority are subjective. It is difficult to measure and to compare the attributes of candidates. A few qualifications are objective: once the appointer decides whether he wants to apply an age, or a sex, or a race, or a religious criterion, the candidates can be appropriately included or excluded on that basis. From the examination of the twelve appointments, it is clear that Allen was excluded from several competitions on the basis of religion; never on the basis of race. The extent to which her age and her sex and related veteran status had an impact upon her candidacy will be discussed.

*Age: the Flexible Criterion* — Following the court-packing struggle, the Democratic presidents took care to select persons at an age which would ensure ten or fifteen years of service prior to a reasonable retirement age. The average age of the Roosevelt nominees was 54 and of Truman's nominees 55.<sup>112</sup>

Florence Allen met the age requirement during the FDR period. At the time of the Black selection in 1937 she was 53. When the Byrnes seat was relatively open to competition in 1943, she was 59. But during the Truman period she was over sixty. When India Edwards felt that she came close to persuading Truman to make the appointment, she was 65, a matter which would certainly have been raised at confirmation hearings.

*Sex/Veteran Status* — Florence Allen lacked a qualification closely associated with sex identity which has been throughout U.S. history an important credential for public office — veteran status. Nine of the twelve new appointees during the Democratic administrations had some mili-

tary status during and after World War I. President Truman, whose 1918 overseas experience was a significant event in his personal life, only chose veterans.<sup>113</sup> Florence Allen was not eligible for combat service. Indeed, she opposed the draft. Her most significant personal ideal was world peace. She was closer to Eleanor than to Franklin in her foreign policy views; more alien to Truman's perspective than to FDR's. Both her age and her sex/veteran status disqualified her for the four Truman seats; but not for the eight FDR places.

#### *Why Florence Allen did not reach the Supreme Court?*

Attaining high judicial office is a chancy matter. The pool of candidates with the necessary political and professional qualifications is small in comparison with the general population, but large in proportion to the number of places at the top. In the pool of candidates, Florence Allen was the first and the only woman in the 1930s and 1940s. As one of her woman backers who was also a judge pointed out: "Judge Allen is at the present time the only woman lawyer in the United States, whose ability, training, experience, and personality qualify her for the position . . ."<sup>114</sup>

If the President's political intuition had told him that the country was ready for a woman on the Court and that such an appointment would benefit his administration, he would have had no choice among representatives of the female sex. She was the only available woman. The first woman is likely to go on the Court when the President has more room for selection. The female pool of legal professionals in important judgeships and other political offices did not expand until the 1970s.

President Roosevelt would have been moving ahead of public opinion in choosing a woman justice in the 1930's. The Gallup polls, responsive to the news reports of Allen's candidacy, posed the issue to the public in 1938: "Would you favor the appointment of a woman lawyer to be a judge on the U.S. Supreme Court?" A very large minority, 39%, were favorable.<sup>115</sup> But the public was expressing a theoretical support for females in government, because the Gallup poll reported a different level of response to a more concrete question: "Would you like to see the next appointment to the U.S. Supreme Court go to a



man or a woman?" Only 18% wanted a woman who would necessarily have been Florence Allen.<sup>116</sup> News reporters sensed that the political elite as well as the public rejected the notion of a woman on the Court in the 1930's. The Baltimore *Sun* claimed that: "A lot of people have recoiled from the prospect of a woman on the Supreme Court. To them the thing is almost unthinkable."<sup>117</sup> President Roosevelt knew that his nomination of Allen would suit only a small minority of his constituents. Although he did not hesitate to disappoint particular persons or groups, he was sensitive to the larger forces of public approval.

To what extent did the wishes of the sitting Justices to keep their sanctum all-male influence the appointing authorities? As long as the appointer is concerned about the productivity of the work group, the feelings of the incumbents will necessarily be taken into account. But the ability of sitting Justices to influence the choice of a colleague depends upon a variety of conditions. Roosevelt was certainly not concerned to cater to the prejudices of the "nine old men." A President who was willing to throw a "tiger" into the Court in 1937 would not have hesitated to send in a lioness. After he had placed a number of close associates on the Court, particularly Frankfurter, he consulted their preferences on prospective colleagues. However, the biases of the incumbents are never the most salient considerations for a President.

President Truman apparently bowed to the wishes of his Court, but as we have seen in the brief review of the appointment process, there were other candidates whom he had good reason to prefer. India Edwards, director of the Women's Division of the Democratic National Committee in 1949-1950, reports that Truman was responsive to her recommendation of Florence Allen for the Supreme Court. In her oral history, she reports his reaction: "Well, I'm willing. I'd be glad to. I think we ought to have a woman. But I'll have to talk to the Chief Justice about it and see what he thinks." When she returned to the White House to hear the decision, the verdict was: "No, the Justices don't want a woman. They say they couldn't sit around with their robes off and their feet up and discuss the problems." India Edwards said: "They could if they wanted to."<sup>118</sup>

The fates were not kind to Judge Allen. If



*Judge Allen of the U.S. Court of Appeals for the Sixth Circuit, on her seventy-fifth birthday in 1959.*

Truman had been in confrontation with the Court, he would not have hesitated to ignore their preferences based upon this flimsy ground. But he did have a male's understanding of their resistance, and during this period such reasons were still socially acceptable.

Justices clearly do have some input into the evaluation of candidates. Sometimes they have a veto, although their critical evaluation of a candidate's experience and ability may simply cloak their prejudices. Sometimes Justices may provide the approval which tips the scales among contenders. There is no indication that Florence Allen had a champion from within the Court. During her campaign for the circuit bench, former Justice John H. Clarke, an old friend of her father, had played an important part.<sup>119</sup> But he was not involved in her Supreme Court effort. In any event, in retirement in California, he would not have had the influence of a sitting Justice.

Why was President Roosevelt willing to nominate Florence Allen to the Court of Appeals but not to the Supreme Court? Her supporters assumed that a seat on the Supreme Court could be achieved with the same kind of campaign and

for the same reasons as the intermediate appellate position. Florence Allen was less naive than her dedicated supporters. She understood the difference in the two selection processes. In retrospect she wrote that from the first mention of her name for the Supreme Court "I did not then nor ever expect such an appointment."<sup>120</sup> She knew that selection was a political lottery. For that reason she did not discourage the efforts of friends, but she also realized that she was not personally close enough to the President or to the Washington inner circle.

When she was appointed to the circuit bench, the Ohio Senator had been the key figure. President Roosevelt invested little of his own political capital in sustaining the Senator's choice through his party, Justice Department, and White House apparatus. In contrast, his appointments to the Supreme Court could become his own political liabilities. He had not been close to the reactions of the judges on the Sixth Circuit, who were opposed to her joining them,<sup>121</sup> nor would the unhappiness of the party in Ohio affect him as much as it would the Senator. On the other hand, he was immediately cognizant of the feelings of the Supreme Court Justices in Washington, of the Supreme Court Bar, of his Solicitor-General, and national party leaders in Congress and the Democratic National Committee. The political costs might escalate. As the public opinion polls showed, the political rewards would be small. The letter-writing campaign which worked so well in 1934 to win an office largely controlled by state political figures was simply not effective in winning a nomination which involved the complex political calculations of a President.

The theory behind the efforts of her supporters was the selection of a Supreme Court Justice

hinged upon personal qualities. They were offering a marvelously qualified candidate, and they did not appreciate the multitude of other considerations involved in the President's choice of a Justice. From the President's perspective, Florence Allen was satisfactorily placed where she was, exemplifying his concern for women's status. Nor did FDR need to free her position to someone else, as the size of her circuit bench doubled, giving him three more appointments. Nor did he need her in Washington as a personal advisor. He did not view her as a potential rival for the Presidency, who needed to be side-tracked. Nor was he indebted to her or her friends for an important contribution to his administration's legislative or executive policies or to the party's coffers. While trial judges have found themselves on the circuit bench for their management of cases important to some administrations, a single case, even the TVA decision, was not the kind of continuing service which created a reason for a High Court appointment. Finally, Allen's nomination would have created problems to which Roosevelt did not want to divert administration energies. Confirmation hearings would probably have been long and vexing.

Thus from the presidential perspective there were few reasons to make such a choice. Apart from personal qualities, Allen's claim to a seat was representational. The forces behind her campaign sprang from the energies of the woman suffrage and reform movements. But women were a dwindling force in politics after 1920. Florence Allen did not have a large enough constituency to demand the recognition of a Supreme Court seat. Women were not able to build that constituency for many more years.<sup>122</sup>

#### Notes

<sup>1</sup> Florence Allen to H. C. Herring, March 17, 1934, Florence Allen Papers, Western Reserve Historical Society Library (hereafter FA Papers), Container 6, Folder 5.

<sup>2</sup> Shirley M. Hufstедler was the second woman appointed to a U.S. Court of Appeals, the 9th Circuit, in 1968, almost ten years after Florence Allen's retirement. She accepted President Carter's appointment to his Cabinet as Secretary of the new Department of Education in 1979. The eleven women now on the circuit level were appointed by President Carter between 1978 and 1980: Patricia Wald and Ruth Bader Ginsburg (D.C.); Amalya Kearse (Second); Dolores Sloviter (Third); Phyllis Kravitch and Carolyn Randall (Fifth); Cornelia Kennedy (Sixth); Mary Schroeder, Dorothy Nelson, and Betty Fletcher

(Ninth); and Stephanie Seymour (Tenth).

<sup>3</sup> Robert Scigliano, *The Supreme Court and the Presidency* (New York: The Free Press, 1971), p. 89.

<sup>4</sup> *Ibid.*, p. 124.

<sup>5</sup> David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W.H. Freeman & Co., 1976), pp. 103-106.

<sup>6</sup> Scigliano, *supra* n.3, pp. 105-124.

<sup>7</sup> *Ibid.*, p. 113.

<sup>8</sup> Florence Ellinwood Allen, *To Do Justly*, Cleveland, Ohio: The Press of Western Reserve University, 1965, pp. 24-25.

<sup>9</sup> *Ibid.*, pp. 46-49.

<sup>10</sup> *La France Electrical & Supply Co. v. IBEW*, 108 Ohio 61 (1923).

<sup>11</sup> *Ohio Automatic Sprinkler Co. v. Fender*, 108



Ohio 149 (1923).

<sup>12</sup> *State ex rel Weaver v. Board of Trustees*, 126 Ohio 290 (1933).

<sup>13</sup> The first woman nominated to the Sixth Circuit after Florence Allen, Cornelia Kennedy, faced in 1979 similar opposition from black organizations, which accused her of racism in the handling of criminal cases as a federal District Judge. Helen Fogel, "What's all this about Cornelia?" *National Law Journal*, May 14, 1979, pp. 1, 12.

<sup>14</sup> Allen, *supra* n. 8, pp. 41-44.

<sup>15</sup> *Ibid.*, p. 63.

<sup>16</sup> *Ibid.*, pp. 41, 77.

<sup>17</sup> Congressional Quarterly Guide to U.S. Elections, 1975, p. 774. The incumbent Republican who defeated her served in the House for five terms. He was succeeded by his wife, Frances Bolton.

<sup>18</sup> John R. Schmidhauser, *Judges and Justices* (Boston: Little, Brown & Co., 1979) p. 211.

<sup>19</sup> Allen, *supra* n. 8, pp. 36-37.

<sup>20</sup> FA Papers, Cont. 6, Folders 5, 6.

<sup>21</sup> Schmidhauser, *supra* n. 18, p. 94.

<sup>22</sup> Allen, *supra* n. 8, pp. 109-111.

<sup>23</sup> Schmidhauser, *supra* n. 18, p. 96.

<sup>24</sup> Beverly B. Cook, "Florence Ellinwood Allen," in *Notable American Women: The Modern Period*, in (eds) Barbara Sicherman and Carol H. Green, (Cambridge, Mass.: Harvard University Press, 1980), pp. 11-13.

<sup>25</sup> Schmidhauser, *supra* n. 18, p. 52.

<sup>26</sup> See, e.g., David J. Danielski, *A Supreme Court Justice is Appointed* (New York: Random House, 1964).

<sup>27</sup> Grace S. McClure to Florence Allen, May 19, 1937, FA Paper, Cont. 6, Fold 6.

<sup>28</sup> Raymond Robins to Florence Allen, January 26, 1938, FA Papers, Cont. 6, Fold 6.

<sup>29</sup> Robert S. Marx to Florence Allen, Jan. 11, 1938, FA Papers, Cont. 6, Fold 6.

<sup>30</sup> Mr. Nichols to Franklin D. Roosevelt, Jan. 11, 1938, FA Papers, Cont. 6, Fold 6.

<sup>31</sup> Mr. Nichols to Eleanor Roosevelt, Jan. 11, 1938, FA Papers, Cont. 6, Fold 6.

<sup>32</sup> John D. Martin to Mary C. Pierce, Jan. 16, 1939, FA Papers, Cont. 6, fold 6.

<sup>33</sup> Homer C. Cummings to Franklin D. Roosevelt, Roosevelt Official Files, Franklin D. Roosevelt Presidential Library (hereafter FDR Papers), June 11, 1938, OF 209-F, Cont. 6.

<sup>34</sup> Dorothy McAllister to Stephen Early, Mar. 9, 1939, FDR Paper, OF 41-A, Cont. 127, File A.

<sup>35</sup> Kathryn McHale to Franklin D. Roosevelt, Nov. 24, 1939; Mary Drier to Franklin D. Roosevelt, Dec. 6, 1939; Helena D. Reed to Franklin D. Roosevelt, Dec. 5, 1939; Annabel Matthews to Franklin D. Roosevelt, Feb. 28, 1939; copies in FA Papers, Cont. 6 Fold. 6, and FDR Papers, OF 41-A Cont. 127, File A.

<sup>36</sup> Sue Lakes to Florence Allen, Feb. 2, 1939, FA Papers, Cont. 6, Fold. 6.

<sup>37</sup> John Martin to Mary Pierce, Feb. 23, 1939 and March 4, 1939; John Martin to Harriety Elliott, Mar. 4, 1939, FA Papers, Cont. 6, Fold. 6.

<sup>38</sup> Celia M. Howard to Alice Greenacre, Jan. 27, 1939, FA Papers, Cont. 6, Fold. 6.

<sup>39</sup> Sarah T. Hughes to FDR, December 16, 1939, FDR Papers, OF 41-A, Cont. 127, File A.

<sup>40</sup> Dorothy Kenyon to FDR, December 18, 1939, FDR Papers, OF 41-A, Cont. 127, File A.

<sup>41</sup> Anna M. Kross to Mary Anderson, March 28, 1941, Mary Anderson Papers, Schlesinger Library, Folder 36.

<sup>42</sup> Annabel Matthews to FDR, December 16, 1939, FDR Papers, OF 41-A, Cont. 127, File A; Annabel Matthews to FDR, March 4, 1938, FA Papers, Cont. 6, Fold. 6.

<sup>43</sup> Mabel W. Willerbrandt to FDR, February 16, 1939, FDR Papers, OF 41-A, Cont. 127, File A.

<sup>44</sup> Mignon Patterson to FDR, December 11, 1939, FDR Papers, OF 41-A, Cont. 127, File A.

<sup>45</sup> Washington, D.C. *Times-Herald*, March 15, 1939.

<sup>46</sup> W.A. White to FDR, November 28, 1941, FDR Papers, OF 335-E, Box 12.

<sup>47</sup> Helen Essary, "Dear Washington" column, Washington, D.C. *Times-Herald*, March 15, 1939.

<sup>48</sup> e.g. "Florence Allen Gains Favor as High Court Candidate," in Washington, D.C. *Times-Herald*, March 14, 1939, p. 2; Celia Howard to Alice Greenacre, January 27, 1939, FA Papers, Cont. 6, Fold. 6; *Baltimore Sun*, March 12, 1939, FDR Papers, OF 41-A, Cont. 127, File A.

<sup>49</sup> *Baltimore Sun*, March 12, 1939.

<sup>50</sup> Harold Elliott to Florence Allen, January 30, 1941, FA Papers, Cont. 7, Fold. 1.

<sup>51</sup> Florence Allen to H.G. Fuerst, May 18, 1936, FA Papers, Cont. 6, Fold. 6.

<sup>52</sup> Florence Allen to Grance S. McClure, FA Papers, May 21, 1937, Cont. 6, Fold. 6.

<sup>53</sup> Josephine Montgomery to Florence Allen, Feb. 9, 1937, FA Papers, Cont. 6, Fold. 6.

<sup>54</sup> Florence Allen to Sophonisba P. Breckinridge, Mar. 11, 1937, FA Papers, Cont. 6, Fold. 6.

<sup>55</sup> Allen *supra* n. 8, p. 110.

<sup>56</sup> *Ibid.*

<sup>57</sup> John D. Martin to Mary C. Pierce, Feb. 23, 1939, FA Papers, Cont. 6, Fold. 6.

<sup>58</sup> Mary Pierce to John Martin, Mar. 2, 1939, FA Papers, Cont. 6, Fold. 6.

<sup>59</sup> (New York: G.H. Putnam's Sons, 1940)

<sup>60</sup> Earl H. Balch to Florence Allen, Jan. 28, 1939; Kenneth L. Rawson to Florence Allen, Mar. 9, 1939, FA Papers, Cont. 6, Fold. 6.

<sup>61</sup> Allen, *supra* n. 8, p. 78.

<sup>62</sup> Carrie Chapman Catt to Florence Allen, May 10, 1946, FA Papers, Cont. 7, Fold. 1.

<sup>63</sup> Florence Allen to Carrie Chapman Catt, (n.d.), FA Papers, Cont. 7, Fold. 1.

<sup>64</sup> Florence Allen to "Girls," Nov. 12, 1948, FA Papers, Cont. 7, Fold. 1.

<sup>65</sup> Joseph Lash, *Eleanor and Franklin* (New York: W.W. Norton & Company, 1971), p. 387. In describing the book, *Ladies of Courage* (1954) on women in politics which she was writing with Eleanor Roosevelt, Lorena Kickok noted to Molly Dewson: "If it weren't for you and Florence Allen, we could call the book *Housewives in Politics*." Hickok to Dewson, November 18, 1952, Molly Dewson Papers, FDR Library, Box 2.

<sup>66</sup> *Ibid.*, p. 388.

<sup>67</sup> Florence Allen to Molly Dewson, March 7, 1934, Dewson Papers, FDR Library, Box 1, File "Allen."

<sup>68</sup> Molly Dewson to FDR, March 16, 1939, FDR Papers, OF 41-A, Cont. 127, File A.

<sup>69</sup> Allen, *supra* n. 8, p. 110.

<sup>70</sup> Florence Allen to Eleanor Roosevelt, May 2, 1933, Eleanor Roosevelt Papers, FDR Library, Box

Herring, December  
Fold. 6.  
Roosevelt, January 4,  
File 1327.  
Roosevelt, February  
Roosevelt, November  
File 1364.  
Roosevelt, February  
File 1364; and Florence  
September 23, 1938, Box  
Roosevelt, September  
D, File 1448; Florence  
November 10, 1944, ER  
Eleanor Roosevelt to  
D, 1936, FA Papers,  
Roosevelt, December  
File 1448.

*Troitt Free Press*, Dec.  
Round," *Washington*  
e Allen, Apr. 5, 1939,  
en, *supra* n. 8, p. 112.  
ence Allen, April 18,  
6; Kathryn McCarthy  
1939, *Ibid.*; Catherine  
April 17, 1939, FDR  
le A; Frances Kellort to  
1939, Mary Anderson  
older 30.  
e Allen, May 5, 1939.

*Roosevelt: The Lion*  
Court, Brace, and Co.,  
*L. Black: A Study in*  
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p. 459, 463.  
*s-Herald*, March 14,  
460.  
*ice Rutledge and the*  
opolis: Bobbs-Merrill,  
*s-Herald*, March 14,  
*Mr. Justice Murphy*  
68), p. 216.  
*Roosevelt and Frankfur-*  
-1945 (Boston: Little,

<sup>106</sup> Shannon, *The Truman Merry-Go-Round* (New York: Vanguard Press, 1950) p. 376.

<sup>107</sup> Mary McGrory, "One of the Democratic Party's 'Big Men' Is a Woman: India Edwards," *Washington Star*, 1948, in Howorth Papers, Schlesinger Library, Box 5, Folder 136.

<sup>108</sup> India Edwards Oral History, January 16, 1969, p. 84, Truman Library, Oral History Interview Collection.

<sup>109</sup> Memorandum by Lucy S. Howorth (1958), Howorth Papers, Box 6, Folder 120.

<sup>110</sup> Peyton Ford to William M. Boyle, Jr., Aug. 2, 1949, *Truman Papers*, Truman Library Of 41.

<sup>111</sup> Allen, *supra* n. 8, p. 388.

<sup>112</sup> John R. Schmidhauser, *supra* n. 18, p. 388.

<sup>113</sup> Harry S. Truman, *Memoirs: Years of Decision*, 1 (Garden City, N.Y.: Doubleday & Co., 1955), pp. 127, 132. The non-veterans were Byrnes, Jackson, and Rutledge.

<sup>114</sup> Annabel Matthews to Franklin D. Roosevelt, Mar. 4, 1939, FA Papers, Cont. 6 Fold. 6.

Before Allen went on the Circuit Court there was no woman in the country considered ready for the Supreme Court, including herself. The *Christian Science Monitor* proposed her name to President Hoover for the Sanford vacancy in 1930, at the time she was on the Ohio Supreme Court. Attorney-General William Mitchell wrote, "I would like very much to appoint a woman to a distinguished position if I could find a distinguished woman to appoint." William Mitchell to Herbert Hoover, Aug. 5, 1929, quoted in Schmidhauser, *supra* n. 18, p. 59.

<sup>115</sup> *Gallup Polls*, AIPO, Nov. 4, 1936; Jan 18, 1938.

<sup>116</sup> Gallup Poll, AIPO, 1/18/38. In 1972 a Harris poll reported that 63% of the women and 54% of the men polled would like to see a woman Justice on the Court. Popular approval grew along with the size of the pool of eligibles. See: H. Erskine, "The Polls: Women's Role" *Public Opinion Quarterly* 35:271,282 (Summer 1971); Naomi Black, "Changing European and North American Attitudes towards Women in Public Life," *Journal of European Integration* 1:221-240 (January 1978).

<sup>117</sup> *Baltimore Sun*, March 12, 1939, p. 6.

<sup>118</sup> India Edwards Oral History, Jan. 16, 1969, Truman Library, p. 85.

<sup>119</sup> Florence Allen to John H. Clarke, Mar. 20, 1934, FA Papers, Cont. 6, Fold. 5.

<sup>120</sup> Allen, *supra* n. 8, p. 110.

<sup>121</sup> *Ibid.*, p. 95.

<sup>122</sup> During the presidential campaign of 1980, President Carter invited the members of the National Association of Women Judges attending their 2nd annual convention in D.C. to the White House and told them that he would fully consider women candidates although he would not promise the next vacancy on the Supreme Court to a woman. Press release, text of the President's remarks, East Room, October 3, 1980, Office of the White House Press Secretary. Ronald Reagan, the Republican candidate, a week later in Los Angeles, pledged to name a woman to the Supreme Court. *Milwaukee Journal*, October 15, 1980.



# The Era of Melville Weston Fuller

Jeffrey B. Morris†

During the twenty-two years that Melville Weston Fuller was presiding over the Supreme Court, the United States experienced a wave of social tension, followed by a period of reform. Possessed by a spirit of jingoism, the United States acquired a small empire, and involved itself in great power politics to a greater degree than ever before. These were pivotal years as America, already the world's greatest economic power, moved from slower, rural times to a more urbanized and recognizably modern nation.

While the results of some of the great cases to come before the Fuller Court seem unfortunate to today's observers, judged by the standards of its own time, the Court picked its way through an extraordinarily heavy docket of difficult issues. Its decisions were generally in tune with both the nation and consistent with its great tradition of independence. By the end of the era, the Court had greatly enhanced its power and that of other courts as overseers of the nation's economy. While the personnel of the Court numbered fewer "superstars" than in other times, they nonetheless worked together harmoniously, and had at the helm, a genuine leader of men.

## THE JUSTICES

History has not been kind so far to the Justices who served while Fuller was Chief Justice. For decades the prevailing view of scholars has been that the Justices were mediocre<sup>1</sup> and their jurisprudence sterile.<sup>2</sup> One distinguished observer wrote of the Fuller Court that it was

a body dominated by fear—the fear of populists, of socialists, and communists, of numbers, majorities and democracy.<sup>3</sup>

In retrospect, the Court seems to have chosen the wrong direction in such significant areas of the law as government regulation of the economy,

the rights of labor, and racial equality. But, even if this is so (and the most significant recent scholarship offers a somewhat different interpretation<sup>4</sup>), this was a Court of hardworking and honorable men, who mastered a huge caseload whose character was transformed from that of a predominantly common law docket to one dominated by questions of public law.

Nineteen Associate Justices served with Chief Justice Fuller. Eight of these were "holdovers" from the time of Chief Justice Morrison R. Waite. The impact of five of these on the Fuller era came primarily from their previous decisions, for they died within half a decade: Stanley Matthews (1881-89), Samuel F. Miller (1862-90), Joseph P. Bradley (1870-92), Lucius Quintus Cincinnatus Lamar (1888-93), and Samuel Blatchford (1882-93). Matthews was ill when Fuller took his oath and the two never sat together. Miller and Bradley were two of the most able figures ever to sit on the Court. Lamar's historic importance comes from his career in the Congress where he symbolized North-South reconciliation. Blatchford was the "workhorse," who could be called upon to pen annually a huge quantity of cases in such areas as admiralty, patent, bankruptcy, and copyright law.<sup>5</sup> Blatchford wrote the opinion in *Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota*,<sup>6</sup> the pivotal case when the Court accepted the due process clause as a substantive limitation on state legislative powers. Miller concurred in that decision, while Bradley and Lamar were two of the three dissenters.<sup>7</sup>

Stephen J. Field (1863-97) was intermittently senile during his last years on the Court as he stubbornly insisted on breaking John Marshall's record for tenure.<sup>8</sup> Nonetheless, Field contributed to the triumph of his jurisprudential views, linking vested rights and the due process clause.



The seventh hold-over Justice, Horace Gray, brother of the renowned Harvard Law Professor, John Chipman Gray, had served seventeen years on the Supreme Judicial Court of Massachusetts, eight as Chief Justice. In 1875 his legal secretary at that court was none other than Louis D. Brandeis. In twenty years on the Supreme Court of the United States (1882-1902), Gray distinguished himself as a legal scholar, whose long and somewhat heavy opinions were thorough essays in legal history.<sup>9</sup>

John Marshal Harlan was the only man to serve throughout Fuller's tenure (1877-1911). Harlan's judicial work has resonated throughout modern constitutional jurisprudence to a far greater degree than any of his colleagues, save Holmes. The Supreme Court came to accept much of his view that the Fourteenth Amendment should be incorporated against the states and that the Reconstruction Amendments required racial equality. Convinced of his moral rectitude, and better at leading than at following,<sup>10</sup> Harlan dissented with opinions 119 times, often passionately.<sup>11</sup>

Eleven Justices were appointed by five Presidents (Benjamin Harrison, Grover Cleveland, William McKinley, Theodore Roosevelt and William Howard Taft) to the Court during Ful-

ler's years. These eleven were, on the whole, able men and appealing personalities, but only one, Oliver Wendell Holmes, Jr., proved to be a mighty jurisprudential figure. The tenure of several was very short. Howell E. Jackson served but two years (1893-95) and William T. Moody but two full terms in less than four calendar years (1906-10). Horace H. Lurton (1909-1914) took his oath as an Associate Justice almost six months to the day before Fuller's death, and did not leave much of an imprint in that short time. Jackson is probably best known for his brave trip from Nashville to Washington, while gravely ill, to hear the reargument of the *Income Tax* case. Although the Court had previously divided four to four on the crucial issue of the constitutionality of the personal income tax, Jackson's vote did not ultimately prove decisive as one of the other Justices changed his vote. But he had signed his death warrant by attending the Court session.

Moody's impact was to prove greater. Looking like Theodore Roosevelt and sharing with him a love of the vigorous outdoors life, Moody was stricken by rheumatoid arthritis, much shortening his judicial career. Nonetheless, Felix Frankfurter grouped him with Benjamin R. Curtis and Benjamin Cardozo as "the only three Justices who left an impress despite a short



*The 1888 Fuller Court: (seated, left to right) Justices Bradley, Miller, Fuller, Field, and Lamar; (standing left to right) Matthews, Gray, Harlan, and Blatchforth.*



tenure."<sup>12</sup>

Henry Billings Brown (1891-1906) and George Shiras, Jr. (1892-1903) each served a little more than a decade. Brown usually took the center position, doing what he could to prevent splits on the Court. His deep sympathy for the plight of Indians did not extend to the black American, for it was Brown who wrote the opinion for the Court in *Plessy v. Ferguson*, although he later admitted to doubts about the decision.<sup>13</sup> Brown believed in adapting the Constitution to new conditions.<sup>14</sup>

Shiras was concerned with the human consequences of his jurisprudence. According to Arnold Paul, Shiras may be "viewed primarily as a traditional individualist, who feared the growth of centralism but was willing to allow state experimentation."<sup>15</sup> Like Stanley Reed, a half-century later, Shiras retired in good health while in his early seventies and lived on into his nineties.

William Rufus Day (1903-22) and Joseph McKenna (1898-1925) served considerably longer terms than Brown and Shiras. Day came to the Court after a distinguished public career, which included service on that legendary Court of Appeals for the Sixth Circuit where William Howard Taft and Horace Lurton had been his colleagues. He had led the vain diplomatic effort to avert the Spanish-American War while he was Assistant Secretary of State. Briefly, he held the office of Secretary of State. As a member of the Peace Commission, Day attempted to limit acquisition of empire. Day was a moderate on the Supreme Court, whose tact, charm, and ability to compromise made him a harmonizing figure. He construed national powers strictly, state powers liberally, and was a vigorous champion of antitrust enforcement.<sup>16</sup>

Joseph McKenna arrived at the Supreme Court with superficial legal training, an undistinguished record as a Circuit Judge, poor writing style, and what appeared to be too-close connections with the Southern Pacific Railroad. He seemed so ill-equipped for the Court that Chief Justice Fuller paid a call on President William McKinley unsuccessfully attempting to talk him out of the appointment.<sup>17</sup> Yet, McKenna would grow in office "with a certain grace, skill and even sophistication."<sup>18</sup> While his opinions were often prolix and he could be accused of inconsistencies, McKenna worked "terribly

hard" and refused to judge reflexively.<sup>19</sup>

As an Associate Justice (1894-1910), Edward Douglass White was a strong and well-liked figure. In but a few years he was able to bring the Court around to his views on the issues raised in cases involving the newly acquired overseas possessions, and by 1911, to his interpretation of the Sherman Act. [White succeeded Fuller as Chief Justice and served over a decade (1910-21). He will be the subject of a more thorough treatment in next year's "Portfolio" section.]

Along with White, two other able figures have received insufficient scholarly attention. Rufus W. Peckham (1896-1909) resembled Chief Justice Fuller physically, with his bushy white hair, white mustache, cameo face, and piercing eyes.<sup>20</sup> Confident of the rightness of his results, Peckham's style of opinion writing "more nearly approached that of an essayist than any other Justice."<sup>21</sup> His most notable opinions, those in *Allgeyer v. Louisiana*<sup>22</sup> and in *Lochner v. New York*,<sup>23</sup> elevated liberty of contract to a constitutional right and confined state regulatory process. Yet, he also rendered a number of notable opinions which to some degree restored vigor in enforcement of the Sherman Act.<sup>24</sup>

David J. Brewer (1890-1910) generally has been considered to be the most property-conscious member of the Court of this period. He was, after all, the nephew of Stephen J. Field. In the 1890's, he gave a series of speeches "railing against anarchism and the attack of the masses upon property."<sup>25</sup> But John E. Semonche reminds us that Brewer gave other speeches, opposing American colonialism and supporting women in their quest for political rights. Semonche considers Brewer to be a more complex figure than has generally been thought, concluding that as a judge he was more pragmatic than ideological, that he was "sensitive and responsible," seeking to "come to grips with himself and his society in a changing age."<sup>26</sup>

In marked contrast to most of the Justices who have been appointed to the Supreme Court, Oliver Wendell Holmes, Jr., did not need much time to become accustomed to it, to enjoy it immensely, or to become a force with which to be reckoned. He brought to the Court learning, independence, his pragmatic skepticism, and literary felicity.<sup>27</sup> With his conception of law as an integral part of the historical and social fabric, Holmes' approach to judging differed greatly

from that of Peckham, Brewer, or even Harlan. In his very first opinion, he stated:

While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass on it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree.<sup>28</sup>

Although Holmes could read restrictively legislation such as the Sherman Act, the Interstate Commerce Commission Act, and the Pure Food and Drug Act,<sup>29</sup> his approach generally permitted the legislature great latitude, because he realized that:

Great constitutional provisions must be administered with caution. Some plan must be allowed for the joints of the machine, and it must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.<sup>30</sup>

Holmes would be the last survivor on the Court of these years, serving after Fuller's death for over two more decades.

In Fuller's early years, he may have found this a difficult group of men to manage. Henry Steele Commager suggests as much:

It was a difficult court for anyone to manage, a court of *prima donnas*. There was the magisterial Field, who had come to think of himself as a savior of the Constitution; there was the powerful and cantankerous Harlan, the Great Dissenter of his day; there was Miller, before whose blasts from the bench young attorneys paled and fainted; there was the erudite Gray, successor to Story, and like Story, champion of precedents. Soon White, who was to be Chief Justice, joined the court, and the Olympian Holmes. All of them knew more law than Fuller—or so it seemed; all of them had long judicial experience; all of them were public figures.<sup>31</sup>

But, after Field's retirement, rather than *prima donnas*, the Court appears to have been composed of a lively and good-natured group of men, who enjoyed each other's company and shared interests outside the law. Gray and Shiras were fishermen. Gray and Harlan loved to take walks together. Day hurried from the bench to the ballpark, and passed bulletins to his colleagues. Shiras was an enthusiastic card player. Harlan was a golfer, and, off-the-bench, a "light hearted and warm colleague."<sup>32</sup> To Fuller, Brewer was "one of the most lovable of them all."<sup>33</sup>

But, even if Shiras, Brown, White, Day, Moody, Holmes, and Brewer were all congenial personalities, they were also strong men who had

definite opinions on the great issues the Court faced. That this was a Court dominated by congeniality rather than temperament was due in large measure to the man at the helm, who was remarkably successful at bringing out the harmonious sides of his colleagues.

### THE CHIEF JUSTICE

Melville Weston Fuller was an excellent manager of the business of the Court. He was unusually successful at fostering a warm environment, where the Justices could work relatively free of friction. He was as well the first modern Chief Justice to successfully influence Congressional consideration of major legislation affecting the jurisdiction and structure of the federal court system. During his tenure Fuller performed with energy, dignity, and integrity the increasingly demanding roles of the Chief Justice.

Fuller came to his great office less well-known than any man who has ever served as Chief Justice. He had less experience in public life than any Chief Justice other than Waite. Fuller had been Solicitor and President of the Common Council in Augusta, Maine. He had served one term in the Illinois State House of Representatives (1863-65), and played an influential role at the Illinois Constitutional Convention of 1862. He was an influential Democrat, who had attended four Democratic National Conventions. Fuller was compatible with President Grover Cleveland personally and politically.<sup>34</sup> He came from the right circuit and the right state.<sup>35</sup> He was the right age, fifty-five, and he had a reputation for integrity.

Although he was hardly a Daniel Webster or Phillip Phillips in his experience at practicing before the Supreme Court, Fuller had appeared before the Court a number of times.<sup>36</sup> He was experienced at the kind of business which came before the Supreme Court.<sup>37</sup> He was a successful Illinois attorney, who had represented such clients as Marshall Field and the Illinois Central Railway. While not a profound thinker like Holmes, nor a distinguished scholar of the type of Holmes or Gray, Fuller was a cultivated man, who had a library of more than 6,000 volumes.<sup>38</sup> He wrote poetry, contributed to literary magazines, and adored the theater.

Fuller was appointed Chief Justice of the

United States by President Grover Cleveland on April 30, 1888, confirmed by a vote of forty-one to twenty, commissioned on July 20, and took the oath of office on October 8, 1888.<sup>39</sup> He was to serve until his death at the age of seventy-seven on July 4, 1910.

Those "accustomed to the massive and somewhat leonine aspect of Chief Justice Waite,"<sup>40</sup> were surprised to see as the new Chief Justice, "a dapper little man," just five and one-half feet tall, weighing about 130 pounds. His seat had to be elevated, and he was given a hassock to keep his feet from swinging in the air.<sup>41</sup> Still, his appearance was striking. Visiting the Court on May 7, 1895, Arthur Brisbane reported:

His white hair is the most wonderful white hair ever seen. It is very thick—perhaps an inch and half thick on top of his head. It is very long, and rolls away in waves on each side of his skull. Where the part is made it doesn't look like hair, but like waves of silver cut in two by the keel of some little ship. Chief Justice Fuller has a mustache that is as white and as glossy as anything on earth except Chief Justice Fuller's hair. His hair and mustache monopolize attention to such an extent that the rest of him was not noticed much; but the Chief Justice has a most beautiful smile, which shows at either end of his mustache, and when he talks a lot of pleasant, good-natured wrinkles gather around the corners of his eyes.<sup>42</sup>

After Waite's death, Attorney General August Hill Garland had written to President Cleveland, expressing his belief that the Chief Justice amounted "in weight to two-thirds of the Court."<sup>43</sup> If Garland meant that Chief Justices had exercised such dominance on substantive matters, this was not historically correct then, nor has it happened since. The Chief Justice has somewhat greater opportunities for influence than the Associate Justices, but probably only Marshall has ever exercised such substantive dominance over the Supreme Court, and then for less than half his tenure. There was, therefore, no "Fuller Court," if by that we mean a Court dominated by a Chief Justice on substantive matters.

Fuller more than "pulled his oar" in writing opinions. He ranks fifth among the first 100 Justices in total opinions (892); third (behind Holmes and Waite) in number of opinions written for the Court (750); second (to Waite) in average number of opinions written per year (42.48).<sup>44</sup> In the 1894 term alone, Willard L.

King, his biographer, credited him with writing seventy opinions.<sup>45</sup>

But his opinions have not had lasting influence. While he was not a "lightweight," he did not have an overpowering legal mind. Whatever literary qualities attached to his poetry and speeches deserted him when he penned opinions. His jurisprudential views were sympathetic to constitutional protection for the rights of property. The *Dictionary of American Biography* reports that he approached the major questions which came before the Court as

an old-time Democrat, friendly to the doctrine of state rights, and as a sincere believer in individualism. He inclined toward strict construction of all governmental powers as against the political liberty and economic initiative of the citizen, and of federal powers as against the rights of the states. He was resolute in insisting that the powers of Congress were limited, being derivable only from specific grants, reasonably construed, and not from any assumption of an underlying "national sovereignty." On the other hand, when he deemed the line rightly drawn he was unhesitant in giving to both the states and the federal government the logical and liberal development that constructive statesmanship required.

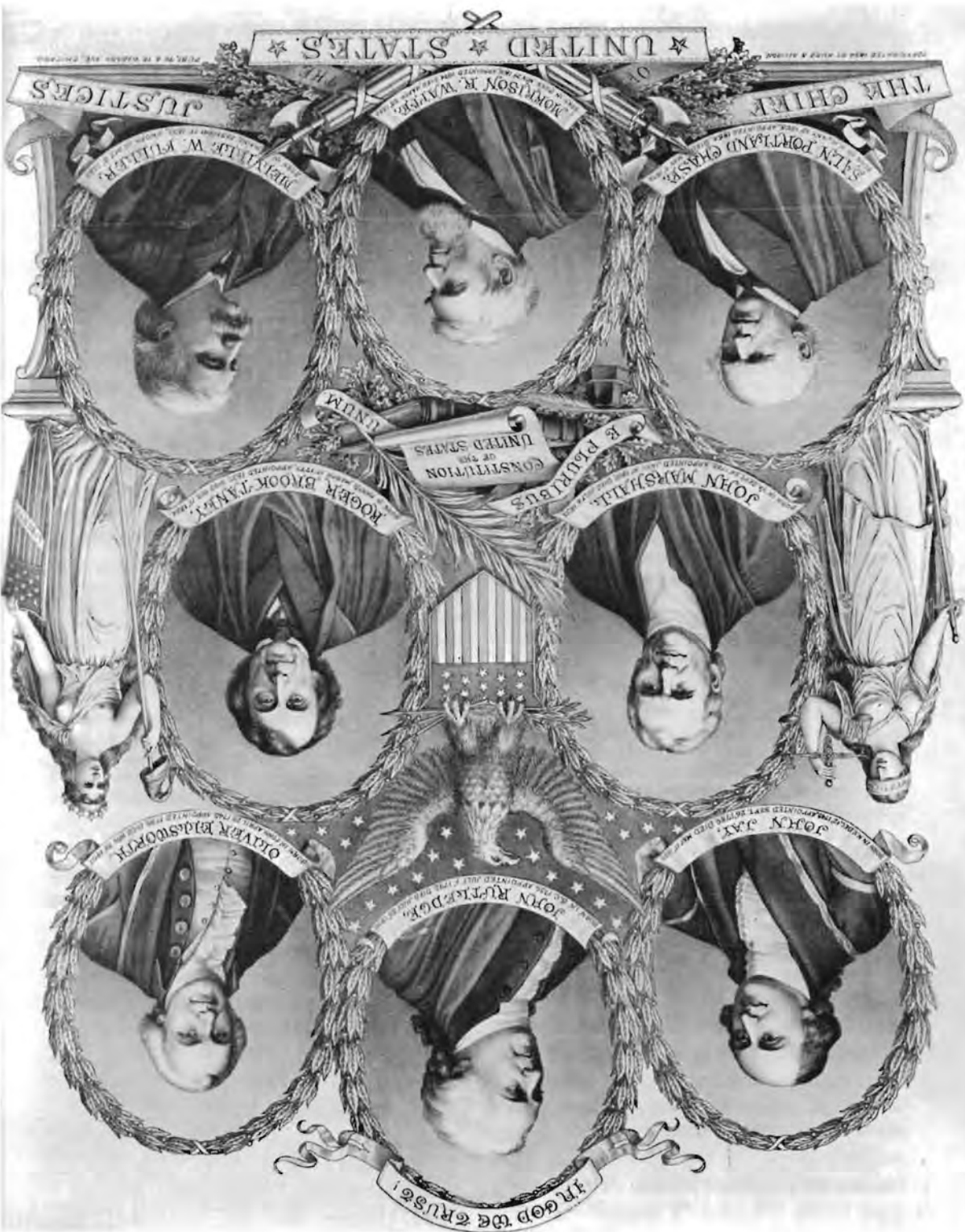
And though his human sympathies were frequently displayed in solicitude for the protection of women and family interests and for improved conditions of labor, his voice was consistently raised for the upholding of traditional rights of person and property against the regulating tendency of the time. He had too much human sympathy and scholarship to be a reactionary or obstructionist, tested by the views of his day; nevertheless, legislatures and courts (including his own) began within a few years after his death to move swiftly away from the principles of "property" and "freedom of contract" which he, with his colleagues, accepted as fundamental.<sup>46</sup>

The Chicago Bar, in its memorial, stated that Fuller was conservative and old-fashioned, but not a reactionary, and never a Philistine or Tory.<sup>47</sup>

Yet, Fuller's influence on the way the Court worked was profound. He was one of the best chairmen of the nine-man committee in history. A conciliator par excellence, Fuller could quell the acrimony which frequently occurs when strong personalities are grappling with great issues. He created an atmosphere which made carrying out the job of a Justice much easier. This he could do because he was a lovable man, who knew how to deal with men. The adjectives gentle, kind, sympathetic, and patient were used to describe a man "whom anyone would be proud to have as a friend."<sup>48</sup>

Fuller knew how to cultivate men. Naturally





warm, he deliberately sought the friendship of his colleagues. He had dinners for each newly appointed Justice. His modesty and willingness to defer to his colleagues became useful tools. He could have spoken at the centennial celebration of the organization of the federal judiciary, but instead asked Field to speak. His great success at assigning opinions was due in part to the fact that he did not choose to write the "great cases," at least after the 1894 term. Fuller assigned such opinions to others. Perhaps he lacked self-confidence; maybe he did not wish to be at the focal point of great national controversies; or perhaps it was a conscious strategy to facilitate intra-court harmony.<sup>49</sup> Whatever the reason, it worked, and a responsibility which often has bred resentments, was largely free of them.<sup>50</sup>

An agreeable companion, with charm and a sense of humor, Fuller presided over the conference of the Justices with firmness and dignity. His wit was a great solvent when tempers flared. Fuller originated the custom of requiring each Justice to greet and shake hands with every other Justice,<sup>51</sup> a tradition which continues to this day. He was willing and able to modify language in his opinions. He respected the opinions of others, disagreed without being disagreeable, and did not seem to bear a grudge. He was a placator, who had, to paraphrase Holmes, the talent for "tinkering a compromise."<sup>52</sup>

But no matter how able Fuller was at dealing with men, like all Chief Justices (other than Marshall for some of his term) he proved unable to eliminate dissent. The Court was often greatly divided. There were 64 five-to-four decisions during this era, more than in the twenty-two following years.<sup>53</sup> There were times, especially when Harlan was dissenting, when this generated great passion in open court.<sup>54</sup> Although Fuller was unable to eliminate dissent (and dissented without opinion himself an increasing number of times in his later years), he did succeed in preventing destructive feuds from developing.

Along with the ability to manage men, Fuller had the ability to manage the business of the Court. He was hard-working and attentive to detail. He acted decidedly and promptly when action was necessary. He understood the Court's practices and procedures, and kept the docket moving.<sup>55</sup> He worked well with his colleagues,

and it appears, with the Court's other officers and other employees. He presided with grace and dignity. Felix Frankfurter stated that "there never was a better administrator of the court than Fuller."<sup>56</sup> Miller and Holmes, spanning seventy years of the Court's history (1862-1932) and six Chief Justices, both considered Fuller the best presiding officer during the years in which they sat.<sup>57</sup>

While Fuller did not have the responsibility for the Supreme Court building or for overseeing the several hundred employees that his successors would, he did have to deal with some personnel problems. The first of two court Reporters who served during this period, John Chandler Bancroft Davis (1883-1902), was a great source of irritation to some of the Justices. In the best of times, with the best of men, the work of the Reporter had been a focus for tension. But, according to Willard L. King, Reporter Davis was condescending to the Justices and somewhat inattentive to his work. Davis would fail to make corrections and grow angry at those who requested them. As he aged, "the loftiness of his condescension increased as his capacity to do his work diminished."<sup>58</sup> Fuller's attention to detail extended to matters of punctuation and capitalization. He handled Davis (and Davis' critics from within) with diplomacy, ultimately securing his resignation.<sup>59</sup>

As Chief Justice, Fuller was responsible for presiding over the public sessions of the Court and symbolizing its dignity. Former Attorney General Richard Olney stated that:

[d]uring his Chief Justiceship the court at Washington has been universally acclaimed as the most agreeable tribunal in the country to appear before.<sup>60</sup>

In presiding over argument, Fuller has been described as dignified, patient, and attentive, and hailed for putting lawyers at ease. Olney noted that he was:

... especially considerate of the debutant whether young or old, and many a first appearance at the bar of the court at Washington has been saved from wreck by the encouraging nod and smile of the Chief Justice.<sup>61</sup>

Felix Frankfurter, who argued before Fuller, wrote:

He presided with great but gentle firmness. You couldn't but catch his own mood of courtesy. Advocates, too, sometimes lose their tempers, or in the heat of argument, say things they should



not. Soon these men, who looked at him out of the corner of their eyes, felt that they were in the presence of a chief whom they could greatly respect.<sup>62</sup>

Fuller was aware of the importance of ceremony, and during his tenure even the procession for the Justices to the Courtroom inspired profound respect.<sup>63</sup>

Although the Nineteenth Century Chief Justices were not called upon to be "head of the federal court system," Fuller played an important role in securing passage of the Circuit Court of Appeals Act of March 3, 1891, one of the most important pieces of legislation in the history of the federal court system.

While the roots of the legislation can be traced back to the 1790's, that Act was the culmination of two generations of increasing concern. Fuller had campaigned for relief for the Court while he was an attorney. As President of the Illinois Bar, one year before his appointment as Chief Justice, he recommended legislation to aid the Court.<sup>64</sup> When he became Chief Justice a year later, he saw first hand how the Court was drowning in filings. When he assumed office, there were 1,500 pending cases. During his first term, the Court disposed of over 400 appellate cases (242 with written opinions). But during that term 550 cases were filed. In 1890, 623 cases were filed.<sup>65</sup>

Less than two years after Fuller became Chief Justice, he gave a dinner in honor of newly appointed Justice David Brewer, to which he invited the members of the Court and those of the Senate Judiciary Committee. Fuller had already been cultivating the Committee Chairman, Republican Senator George F. Edmunds of Vermont, who had opposed his confirmation. Several weeks after the dinner, the Committee sent to the Chief Justice copies of all pending bills for the relief of the Supreme Court, requesting the views of the Justices. Fuller asked Justice Gray to draft a response. Gray's report, with eleven recommendations, six involving Courts of Appeals, was unanimously approved by the Justices and transmitted to the Committee, on March 12, 1890.<sup>66</sup> Legislation was passed within a year.

The new law was far from perfect, but its immediate effects were salubrious. Nine new Courts of Appeals were created as clearly defined intermediate appellate courts. They were given jurisdiction for final disposition over vari-

ous classes of cases (such as diversity, patent, admiralty, revenue, and most commercial law), subject to discretionary Supreme Court review via certiorari or certification. The flood of litigation receded. 623 appellate cases had been filed in 1890; in 1891, 379 were filed, and only 275 in 1892.<sup>67</sup> The backlog in the appellate docket, which had been over 1,100 cases in 1889, dropped to 700 in 1893, and to 300 by 1900. The average of 250 cases decided with full opinion from 1888 to 1896 declined to under 200 the succeeding eight years (although an additional twenty cases were decided by opinions *per curiam* annually). The Justices were able to enter a new century with a manageable job.

Fuller took the duties of the Chief Justice as Chancellor of the Smithsonian Institution seriously. He missed only one meeting of the Board of Regents during his entire tenure.<sup>68</sup> He carried on extensive correspondence with Smithsonian Secretaries, Samuel P. Langley and Charles D. Wolcott, on a variety of matters including the subject of legislation affecting the Institution. He gave the Smithsonian legal advice, and handled such ministerial matters as the arranging of meetings and the approval of minutes.<sup>69</sup>

Under Fuller the Office of Chief Justice once again had an international dimension. A century before Jay and Ellsworth had carried out diplomatic missions abroad at Presidential request. Fuller, like his colleague, David Brewer, was committed to the idea of settling disputes between nations by orderly legal process through courts of arbitration.<sup>70</sup> He was a vice president and an executive councilor of the American Society for International Law (Brewer was a founder). As one of four American representatives on the Permanent Court of Arbitration at the Hague, he was chosen by the British Government as its representative in the matter of the *Muscat Dhows*.<sup>71</sup>

By far the most important and demanding of these assignments was the Venezuela-British Guiana Arbitration. Fuller was chosen to serve by the President of Venezuela while, under the terms of the arbitration treaty, the U. S. Supreme Court appointed Brewer (who had been Chairman of an American Commission to determine the boundary) as the second of the five arbitrators. As arbitrator, Fuller read thirty volumes. There were fifty-five days of argument and six days of conference, which took place during the

hot summer of 1899 in Paris.

Fuller did, however, decline to allow his name to be considered for appointment to the *Peace Commission, which negotiated the treaty which ended the Spanish-American War*, stating that:

My duty to my country lies in the discharge of my duty to the Court over which I preside and the labors of the Court are, as you know arduous and many matters of detail necessarily devolve upon the Chief Justice. Nothing but some imperative exigency ought to be allowed to interfere in any way with the conduct of the business that we are appointed to perform and I am quite sure that the Chief Justice should not take on any additional burden.<sup>72</sup>

With such varied obligations, it is no surprise that Fuller, like all who have been Chief Justice since Waite, felt constantly "driven." At the end of the first term he confessed, "I am so weary I can hardly sit up," noting that "all of the time a hundred other things intervene to take precious minutes."<sup>73</sup> The cumulative fatigue was from time to time aggravated by having to travel to South Carolina to preside in hot weather. While Fuller's predecessors had presided over the Fourth Circuit (from Marshall on), he would have preferred the Seventh Circuit, so he could visit Chicago. His brethren decided against him and left that Circuit to Harlan. Fuller also suffered more interruptions from judges of the Fourth Circuit, who were close by, than he would have, had he been granted the Seventh Circuit.<sup>74</sup>

But, if Fuller was, like other Chief Justices, over-worked, like his predecessors and successors, he also enjoyed the Office. Turning down Cleveland's offer to be Secretary of State in 1893, he admitted that:

I am fond of the work of the Chief Justiceship. It is arduous, but nothing is truer than "the labor we delight in physics pain."<sup>75</sup>

Fuller may also have been motivated in turning down the State Department by a desire to protect the prestige of the Office of Chief Justice. His letter to Cleveland is reminiscent of the letters of Morrison Waite in 1876 disavowing Presidential ambitions.<sup>76</sup> Fuller wrote:

I am convinced that the effect of the resignation of the Chief Justice under such circumstances would be distinctly injurious to the court. The surrender of the highest judicial office in the world for a political position, even so eminent, would tend to detract from the dignity and weight of the tribunal. We cannot afford this.<sup>77</sup>

Melville Weston Fuller served almost twenty-two years as Chief Justice, the third longest tenure in that Office. If his intellect was not extraordinary,<sup>78</sup> his executive abilities were.<sup>79</sup> No less an observer than Holmes was moved to write:

I think the public will not realize what a great man it has lost. Of course, the function of the Chief Justice differs from that of the that of the other judges only on the administrative side, but on that I think he was extraordinary. He had the business of the Court at his finger ends, he was perfectly courageous, prompt decided. He turned off the matters that daily called for action, easily, swiftly, with the least possible friction, with inestimable good humor and with a humor that relieved any tension with a laugh.<sup>80</sup>

#### THE LIFE OF THE COURT

Looking back at the Court during the Fuller years, there is much to remind us of the activities of the Court of our day. The term was long—from mid-October to May or June. The Justices worked hard. More cases were heard and decided with opinions on the merits by the Court under Fuller than by the Court under any other Chief Justice—5,465. The Court averaged 248 cases each year, second only to that of Waite.<sup>81</sup> Eight of the nineteen Justices of the era rank among the sixteen most productive opinion writers in the history of the Court.<sup>82</sup> Seven Justices averaged over twenty-five majority opinions per year.

Then, as now, the Court's docket was remarkably varied and interesting. For example, the Court decided suits aimed at blocking construction of the Panama Canal,<sup>83</sup> cases involving legal bans on oleomargarine,<sup>84</sup> ownership of the Chicago Lake Front,<sup>85</sup> and the question of pollution over state boundaries.<sup>86</sup>

Then as now, salaries were low. In a time when the cost of living was far, far lower (the cost of beef and veal was ten cents a pound in Junction City, Kansas in 1900<sup>87</sup>), the Chief Justice was paid \$10,500 (raised to \$13,000 early in the first decade of the twentieth century) and the Associate Justices, \$10,000 (later \$12,500). For some Justices this proved to be a severe hardship, as in the case of Justice Miller, who after twenty-eight years on the Court, left his widow a charity case.<sup>88</sup>

Then, as throughout the Court's history, the institution was from time to time short-handed due to illness. Perhaps the worst term in the



*The 1904 Fuller Court: (seated left to right) Justices Brown, Harlan, Fuller, Brewer, and White; (standing, left to right) Justices Holmes, Peckham, McKenna and Day.*

entire history of the Court was Fuller's last. Moody was incapacitated and Harlan was aging. Peckham died in October. Brewer in March, and Fuller in July.

Then, as now, the quality of attorneys who appeared before the Court varied greatly. One day a young lawyer from Kansas argued an appeal dressed in a yellow tweed suit, flowing necktie, pink shirt, and tan shoes. In the midst of his argument, Justice Brewer interrupted to ask, "Mr. Counselor, what do *you* think the status of an allottee is?" The attorney exclaimed, "If you fellows up there don't know, how do you think us fellows down here should know?" Court Reporter Butler related the reactions on the bench:

The shocked expression on the face of dear Chief Justice Fuller will never be forgotten. Justice Holmes, shaking with laughter, buried his face in his arms on the bench to hide his amusement, and there was a sort of dazed expression on the features of the other members of the Court.<sup>89</sup>

Then, as now, the Chief Justice tightly controlled the sessions. With two minutes left until the end of the day, Former President Grover

Cleveland reportedly said that he would only detain the Court for a few minutes. His old friend, Fuller, interrupted, "Mr. Cleveland, we will hear you tomorrow morning."<sup>90</sup>

Perhaps the outstanding piece of lawyering during this period was Brandeis' celebrated performance in *Muller v. Oregon*. The "Brandeis Brief," which relied upon facts to justify Oregon's ten hour law for women, impressed the Court. Sustaining Brandeis' argument, Justice Brewer noted:

It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters . . . significant of a wide-spread belief that woman's physical structure . . . justify special legislation.<sup>91</sup>

#### JURISPRUDENCE

Throughout its history the Supreme Court has been called upon to respond to the great issues dividing the nation. From 1888 to 1910 the Court



dealt with such questions as the treatment of monopolies, industrial expansion, the rights of labor, Chinese aliens, and blacks, as well as issues arising from the acquisition of an overseas empire. In interpreting the Commerce and Due Process clauses of the Constitution, the Fourteenth Amendment, and the ICC and Sherman Acts, the Fuller Court chose directions, which, although consonant with the spirit of its age, needed to be corrected by almost 180 degree turns at a later time in order to avoid national crises.

In 1890 the Court had found a lodging for vested rights in the Constitution.<sup>92</sup> In a mighty trio of cases which were handed down at the end of the 1894 term, the Court struck down the income tax, emasculated the Sherman Act, and sanctioned the injunction as a weapon against labor.<sup>93</sup> Three years later the court read into the Due Process Clause protection of liberty to contract.<sup>94</sup> The high point of liberty of contract was reached in *Lochner v. New York*, where the Court held unconstitutional a state law making the employment of a baker for more than ten hours a day or sixty hours a week a misdemeanor.<sup>95</sup>

During this period the Court rendered other major decisions hostile to the rights of labor. It struck down a federal law prohibiting yellow dog contracts (promises not to unionize).<sup>96</sup> In the *Danbury Hatters* case the Court held that unions could be sued for treble damages under the Sherman Act.<sup>97</sup> The Court also struck down a law which was intended to reverse common law barriers protecting common carriers from strike this world employee injury suits.<sup>98</sup>

While the Court may not have been worse than the rest of the federal government, the state governments, or the public, it did erect constitutional barriers which were to make racial equality impossible, until overturned a half-century later. The failure of the Force (Federal Elections) Bill, which would have permitted supervision of federal elections in the South to protect the black vote, was a cue to the Court to acquiesce in laws disenfranchising blacks and creating apartheid. Along with the *Plessy* decision came decisions sanctioning mechanisms to deny the vote to the black American.<sup>99</sup> The Court did, to some extent, attempt to deal with the critical problem of lynching. For the only time in history, defendants were held in contempt of the Supreme Court of the United States. In

*United States v. Shipp*,<sup>100</sup> a sheriff, jailer, and members of the bar were ultimately jailed for conduct which led to the lynching of a defendant whose case was before the High Court.

Decisions of the Court were generally unsympathetic towards the claims of Chinese aliens,<sup>101</sup> Indians,<sup>102</sup> religious minorities,<sup>103</sup> and women,<sup>104</sup> although there were exceptions.<sup>105</sup>

In the area of criminal law, the Court refused opportunities to incorporate provisions of the Bill of Rights to protect individual rights against state action,<sup>106</sup> while giving broad meaning to Fifth Amendment protections in ICC investigations.<sup>107</sup> The Supreme Court did scrutinize extremely closely appeals from the decisions of the notorious "hanging judge," Isaac C. Parker, Territorial Judge for the Western District of Arkansas. In seven terms, the Court reversed thirty-one death sentences with written opinions and another four summarily. Parker attacked the Court for freeing guilty men on mere technicalities.<sup>108</sup>

While this was by no means a "modern court" in its approach to civil liberties questions, this does not mean that the Justices were totally insensitive to the claims of the outcasts and the disadvantaged. Brown was particularly understanding of the plight of Indians. Field, Peckham, and Brewer were sensitive to the claims of Chinese aliens, and Gray fought to secure citizenship for the children of Chinese parents born in the United States. While in his early years on the Supreme Court, Holmes could hardly be regarded as a civil libertarian, he would with Brandeis in years to come forge the beginnings of the modern jurisprudence of the First Amendment. In *Weems v. United States*, McKenna's opinion emphasized the need to interpret rights guaranteed to individuals with sensitivity to present conditions.<sup>109</sup> It was Harlan whose commitment to civil liberties seems most modern, as he left a heritage of significant dissents in the areas of Fourteenth Amendment incorporation, race, and free speech.

In the most important recent book about the Court of these years, John E. Semonche argues that while the Court's rhetoric was formalistic and conservative, its results were pragmatic. He argues that "an activist court"

seemed quite willing to read sweeping principles into the law of due process, which, if applied in conformance with the breadth of their statement

would have had a devastating effect on the ability of state and local governments to respond to needs of society . . . But the way the majority habitually coped with such principles was to temper logical deduction in favor of a determination of whether within the total facts of a case their application seemed advisable.<sup>110</sup>

To Semonche the Court of the Fuller (and White) years modernized fundamental law, making it practical for the complex world of the Twentieth Century.

While the jurisprudence of the Court during the years when Fuller was Chief Justice continues to be reassessed, it is fair to say that the Justices were hardworking, and honorable, that they were able to concert their efforts, that they were led by an extraordinary manager, and that they upheld the great tradition of the Supreme Court of the United States as that strong, independent institution which is the ultimate arbiter of the Constitution.



Associate Justices who served during Fuller's years not previously pictured are (left to right) Justices Shiras, Jackson, Moody and Lurton.

#### FOR FURTHER READING

Two works in the New American Nation series (ed. Henry Steele Commager and Richard B. Morris) taken together constitute a fine general history of the period: Harold U. Faulkner, *Politics, Reform and Expansion 1890-1900* (New York: Harper & Row, 1959) and George E. Mowry, *The Era of Theodore Roosevelt and the Birth of Modern America 1900-1912* (New York: Harper & Row, 1958). By far the most enjoyable social history is the idiosyncratic work of Mark Sullivan, *Our Times 1900-1925* (New York: Chas. Scribner's Sons, 1926-35).

There are relatively few acceptable full-length judicial biographies of the Justices who served during this era. See especially Willard L. King, *Melville Weston Fuller, Chief Justice of the United States 1888-1910* (Chicago: University of Chicago Press, 1950). See also George Shiras, *3rd Justice George Shiras Jr. of Pittsburgh* (Pittsburgh: University of Pittsburgh Press, 1953),

and Joseph E. McLean, *William Rufus Day, Supreme Court Justice from Ohio* (Baltimore: Johns Hopkins Press, 1946).

Brief, brilliant summaries of doctrinal developments are contained in Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960). See also Arnold Paul, *Conservative Crisis and the Rule of Law* (New York: Harper Torchbook ed., 1969); G. Edward White, *The American Judicial Tradition* (New York: Oxford University Press, 1926), and another volume in the New American Nation Series—Loren P. Beth, *The Development of the American Constitution, 1877-1917* (New York: Harper & Row, 1971). The most interesting recent scholarship is contained in John E. Semonche, *Charting the Future, The Supreme Court Responds to a Changing Society 1890-1920* (Westport, Ct.: Greenwood Press, 1978).



## Footnotes

† I acknowledge with deep appreciation the research assistance of Mary Beth Clark and Daniel C. Richman.

<sup>1</sup> In a 1972 poll of constitutional law scholars, Harlan and Holmes were voted "great;" Miller, Field, Bradley and White were graded "near great." All the others were rated average, save Howell Jackson, who was rated "below average." Albert P. Blaustein and Roy M. Mersky, "Rating Supreme Court Justices," 58 *ABA J* 1183 (1972).

<sup>2</sup> See, e.g., Albert S. Abel, Review of Willard L. King "Melville Weston Fuller," 53 *W. Va. L. R.* 99, 100 (1950).

<sup>3</sup> Alpheus Thomas Mason, Review of Willard L. King, "Melville Weston Fuller, Chief Justice of the United States, 1888-1910," 36 *Corn. L. Q.* 606, 607 (1951).

<sup>4</sup> John E. Semonche, *Charting the Future, The Supreme Court Responds to a Changing Society, 1890-1920* (Westport, Ct.: Greenwood Press, 1978).

<sup>5</sup> Willard L. King, *Melville Weston Fuller, Chief Justice of the United States 1888-1910* (Chicago: University of Chicago Press, 1950), p. 134, and George E. Shiras, 3rd, *Justice George Shiras Jr. of Pittsburgh* (Pittsburgh: University of Pittsburgh Press, 1953), p. 110.

<sup>6</sup> 134 U.S. 418 (1890).

<sup>7</sup> Horace Gray was the third.

<sup>8</sup> Field, who had been averaging twenty-five to thirty opinions per term dropped to nine (1893 term), to six (1894 term), to four (1895 term), and to zero (1896 term).

<sup>9</sup> John E. Semonche, *Charting the Future*, supra n. 4, pp. 146-7.

<sup>10</sup> George E. Shiras, *Shiras*, supra n. 5, p. 106.

<sup>11</sup> On Justice Harlan, see G. Edward White, *The American Judicial Tradition* (New York: Oxford University Press, 1976), pp. 129-45; John E. Semonche, *Charting the Future*, supra n. 4 in *passim* esp. pp. 99, 264ff; Alan F. Westin, "Mr. Justice Harlan" in (eds.) Allison Dunham & Philip B. Kurland, *Mr. Justice* (Chicago: University of Chicago Press, rev. enl. ed. 1964), pp. 93-128; Louis Filler, "Mr. Justice Harlan," in (eds.) Leon Friedman & Fred L. Israel, *The Justices of the United States Supreme Court 1789-1969, Their Lives and Major Opinions* (New York: R. R. Bowker, 1969), II, 1281-95.

<sup>12</sup> Quoted in Paul T. Heffron, "Theodore Roosevelt and the Appointment of Mr. Justice Moody," 18 *Vand. L. R.* 545, 566 n. 88 (1965). See also Paul Heffron, "Profile of a Public Man," 1980 *Ybk SCHS* 30; James F. Watts, Jr., "William Moody," in *Friedman and Israel, The Justices of the United States Supreme Court*, supra n. 11, III, 1799-1812.

<sup>13</sup> 163 U.S. 537. See Joel Goldfarb, "Henry Billings Brown," in *Friedman and Israel, The Justices of the United States Supreme Court*, supra n. 11, II, 1562; Henry B. Brown, "Dissenting Opinions of Mr. Justice Harlan," 46 *Am. L. Rev.* 336-38 (1912).

<sup>14</sup> See Henry B. Brown, "Response," *Dinner Given May 31, 1906 in Honor of Mr. Justice Henry Billings Brown* 19 (Bar of the Supreme Court of the United States, ed. 1908). See also Charles A. Kent, *Memoir of Henry Billings Brown* (New York: Duffield & Co., 1915).

<sup>15</sup> Arnold M. Paul, "George Shiras, Jr.," in *Friedman and Israel, The Justices of the United States*

*Supreme Court*, supra n. 11, II, 1577-92 at p. 1584. See also John E. Semonche, *Charting the Future*, supra n. 4, p. 149 and George E. Shiras, *Shiras*, supra n. 5.

<sup>16</sup> Joseph E. McLean, *William Rufus Day, Supreme Court Justice from Ohio* (Baltimore: The Johns Hopkins Press, 1946).

<sup>17</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, pp. 228-30.

<sup>18</sup> John E. Semonche, *Charting the Future*, supra n. 4, p. 434.

<sup>19</sup> James F. Watts, Jr., "Joseph McKenna," in *Friedman and Israel, The Justices of the United States Supreme Court*, supra n. 11, III, 1719.

<sup>20</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 191.

<sup>21</sup> Walter F. Pratt, "Rhetorical Styles on the Fuller Court," 24 *Am. J. Legal Hist.* 189 at 208, 210, 213 (1980).

<sup>22</sup> 165 U.S. 578 (1897).

<sup>23</sup> 198 U.S. 45 (1905).

<sup>24</sup> See, e.g., *United States v. Trans-Missouri Freight Association* 166 U.S. 290 (1897); *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899). On Peckham, see Richard Skolnick, "Rufus Peckham," in *Friedman and Israel, The Justices of the United States Supreme Court*, supra n. 11, III, 1685-1703 at p. 1698.

<sup>25</sup> John E. Semonche, *Charting the Future*, supra n. 4, at p. 244.

<sup>26</sup> *Ibid.*, pp. 244-5. See also Francis E. Bergan, "Mr. Justice Brewer: Perspective of a Century," 25 *Alb. L. R.* 191 (1961); Robert E. Gamer, "Justice Brewer and Substantive Due Process: A Conservative Court Revisited," 18 *Vand. L. J.* 615-41; Walter F. Pratt, "Rhetorical Styles," supra n. 21, p. 213ff.

<sup>27</sup> Rarely was a Holmes opinion longer than twelve pages of *U. S. Reports*. See John E. Semonche, *Charting the Future*, supra n. 4, p. 161.

<sup>28</sup> *Otis v. Parker*, 187 U.S. 606, 608 (1903).

<sup>29</sup> John V. Orth, Book Review of John E. Semonche, "Charting the Future," 58 *N.C.L. Rev.* 399, 402 (1980).

<sup>30</sup> *Missouri, Kansas and Texas Railway Company v. May*, 194 U.S. 267, 270 (1904).

<sup>31</sup> Quoted in Charles Warren, Book Review of Willard L. King, "Melville Weston Fuller, Chief Justice of the United States, 1888-1910," 45 *Ill. L. R.* 816, 818 (1951).

<sup>32</sup> George E. Shiras, *Shiras*, supra n. 5, pp. 106, 108-9, 123; Joseph E. McLean, *William Rufus Day*, supra n. 16, pp. 108-9; Alan F. Westin, "Stephen J. Field and the Headnote to *O'Neill v. Vermont*: A Snapshot of the Fuller Court at Work," 67 *Yale L. J.* 363, 375 (1958).

<sup>33</sup> Quoted in Francis E. Bergan, "Mr. Justice Brewer," supra n. 26, at p. 202.

<sup>34</sup> Fuller had previously turned down Cleveland's offers of the offices of Chairman of the Civil Service Commission and Solicitor General.

<sup>35</sup> Illinois furnished more litigation in the Supreme Court than any state other than New York. See Edward R. Finch, Book Review of Willard L. King, "Melville Weston Fuller: Chief Justice of the United States, 1888-1910," 51 *Col. L. R.* 142, 143 (1951).

<sup>36</sup> Fuller had been admitted to practice before the Bar of the Supreme Court in 1872. The third case he argued there became Waite's first opinion as Chief

Justice. *Tappan v. Merchants' National Bank*, 19 Wall. (86 U.S.) 490 (1874). See also 19 Wall. (86 U.S.) iii.

<sup>37</sup> Felix Frankfurter, "Chief Justices I Have Known," reprinted in (ed.) Philip B. Kirkland, *Felix Frankfurter on the Supreme Court* (Cambridge, Mass.: The Belknap Press, 1970), 471-95 at p. 475.

<sup>38</sup> Willard Leroy King, "Some Experiences of a Biographer," 48 L. Lib. J. 370, 372 (1955); Frankfurter, "Chief Justices I Have Known," supra n. 37, p. 476.

<sup>39</sup> Fuller was the first Chief Justice whose Commission bore the title "Chief Justice of the United States." See Charles Fairman, *Reconstruction and Reunion, 1864-88*, in (Gen. Ed.) Paul A. Freund, *The Oliver Wendell Holmes Devise History of the United States*, vol. VI, Part I (New York: MacMillan Co., 1971), 171.

<sup>40</sup> Remarks of Mr. Henry A. M. Smith, *Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Melville Weston Fuller*, December 10, 1910 (Washington: 1911), p. 50.

<sup>41</sup> See Smith in *Proceedings* supra n. 40; Frankfurter, "Chief Justices I Have Known," supra n. 37; Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 137.

<sup>42</sup> Quoted in Gerald G. Eggert and Phillip E. Stebbins, "The Chief Justice: The Image of an Office," 5 *Am. Hist. Illus.* No. 2, pp. 32, 38 (1970).

<sup>43</sup> August Hill Garland to Grover Cleveland, April 4, 1888, quoted in Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 111.

<sup>44</sup> Albert P. Blaustein and Roy M. Mersky, *The First One Hundred Justices* (Hamden, Ct: Archon Books, 1978), 99, 101, 144, 148.

<sup>45</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, pp. 339-40. King's statistics and Blaustein & Mersky's, supra n. 44, do not always agree.

<sup>46</sup> "Melville Weston Fuller," in (ed.) Allen Johnson and Dumas Malone, *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1931), VII, 60-62 at p. 61. Compare with Willard L. King, *Melville Weston Fuller*, supra n. 5.

<sup>47</sup> "In Memoriam, Melville Weston Fuller, Chief Justice of the United States" in (ed.) Memorial Committee, *In Memory of the Members of the Chicago Bar Association who have died during the year 1910-1911* (Chicago: Chicago Bar Association, 1911), 19-20.

<sup>48</sup> Charles B. Nutting, Book Review of Willard L. King, "Melville Weston Fuller," 12 *U. Pitt. L. R.* 654, 655 (1951).

<sup>49</sup> See Alpheus Thomas Manson, Review of Willard L. King, Review of "Melville Weston Fuller," supra n. 3, p. 607; Willard L. King, *Melville Weston Fuller*, supra n. 5, pp. 143, 333, 343; Graham Kirpatrick, Book Review of Willard L. King, "Melville Weston Fuller," 3 *Ala. L. R.* 268 (1950).

<sup>50</sup> There appears to have been some jealousy of Fuller's reliance upon Gray during the 1890's. There is also some evidence that Fuller occasionally assigned opinions from the minority. Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 245.

<sup>51</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 134.

<sup>52</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, pp. 138-9.

<sup>53</sup> Fuller was in the majority of thirty-eight of these sixty-four fivefour cases. Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 138.

<sup>54</sup> *New York Times*, May 21, 1895, pp. 1-2.

<sup>55</sup> The Chief Justice was called upon to handle the

disposition of practice cases, motions to dismiss for want of jurisdiction and correspondence — duties which were not shared by the other Justices.

<sup>56</sup> Felix Frankfurter, "Chief Justices I Have Known," supra n. 37, p. 478.

<sup>57</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 335.

<sup>58</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, at p. 231. See also Alan F. Westin, "Stephen J. Field and the Headnote to O'Neil v. Vermont," supra n. 32.

Davis' successor, Charles Henry Butler (1902-16) was much less of a focal point of tension.

<sup>59</sup> Little is known about Fuller's relations with other employees of the Court, but it is known that his custom of giving each page boy a five dollar gold piece on Christmas Day was popular! George E. Shiras, *Shiras*, supra n. 5, p. 117.

<sup>60</sup> See *Proceedings*, supra n. 40, p. 9.

<sup>61</sup> See *Proceedings*, supra n. 40, pp. 8-9. See also Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 330.

<sup>62</sup> Felix Frankfurter, "Chief Justices I Have Known," supra n. 37, p. 477.

<sup>63</sup> Benjamin S. Grossup, "The Late Chief Justice Fuller," 1910 *Wash. St. B. Ass'n. Rpts.* 159, 160.

<sup>64</sup> "Annual Address by M. W. Fuller, President," 59 *Proc. Ill. S. B. A.* 65 (1887).

<sup>65</sup> Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: The MacMillan Co., 1928), 86-102.

<sup>66</sup> See Willard L. King, *Melville Weston Fuller*, supra n. 5, pp. 149-50.

<sup>67</sup> Frankfurter and Landis, *The Business of the Supreme Court*, supra n. 65, p. 102.

<sup>68</sup> Charles D. Wolcott, "Melville Weston Fuller—1833-1910," *Annual Report of the Board of Regents of the Smithsonian Institution* 1910, p. 113.

<sup>69</sup> Memorandum to the author from Mary Beth Clark, April 26, 1980.

<sup>70</sup> "In Memoriam, Melville Weston Fuller," supra n. 47, pp. 20-21.

<sup>71</sup> He declined the request of the Japanese Government to arbitrate the Window Tax case. Not long before his death he was requested to act as sole arbitrator in a dispute between Panama and Costa Rica. See Remarks of A. J. Montague, in *Proceedings*, supra n. 40, pp. 41-2.

<sup>72</sup> Melville Weston Fuller to William McKinley, Aug. 19, 1898, quoted in Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 247.

<sup>73</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 149. Perhaps it was to conserve time and energy; perhaps it was because of his concern about protocol or because of his dislike of Washington parties; but Fuller began to refuse invitations to attend social gatherings. This may have started the trend which resulted in the seclusion of the Court from formal Washington society. *Ibid.*, 174, 252, 317-8. See also John E. Semonche, *Charting the Future*, supra n. 4, p. 8.

<sup>74</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, p. 158.

<sup>75</sup> Melville Weston Fuller to Grover Cleveland, Jan. 2, 1893, quoted in Willard L. King, *Melville Weston Fuller*, supra n. 5, pp. 165-6 at p. 166.

<sup>76</sup> See Jeffrey B. Morris, "Morrison Waite's Court," *Ybk. SCHS* 1980, 39 at p. 46.

<sup>77</sup> Melville Weston Fuller to Grover Cleveland quoted in Willard L. King, *Melville Weston Fuller*,

supra n. 5, p. 165. Fuller did risk embarrassment by continuing to correspond with Cleveland about political matters and by attempting from time to time to drum up support for Cleveland. See especially Fuller's correspondence with Judge Lambert Tree seeking to secure *Chicago Times* support for Cleveland. *Ibid.*, pp. 163-4.

<sup>78</sup> John Frank placed Fuller on the bottom of the list of Chief Justices from Marshall to Stone regarding legal attainments, accomplishments as a Judge, and impact on our time. John P. Frank, review of Willard L. King, "Melville Weston Fuller," 60 *Yale L.J.* 202, (1951).

<sup>79</sup> Louis P. Haller, Book Review of Willard L. King, "Melville Weston Fuller," 49 *Mich. L.R.* 778, 779 (1951).

<sup>80</sup> Oliver Wendell Holmes, Jr. to Judge William L. Putnam, July 12, 1910, in "Judge Putnam's Recollections of Chief Justice Fuller," 22 *The Green Bag* 526, 529 (Sept. 1910).

<sup>81</sup> Richard E. Johnson, "Some Comparative Statistics on U.S. Chief Justice Courts," 9 *Rocky Mt. Soc. Sci. J.* 89, 93 (1972).

<sup>82</sup> Holmes (2nd), Fuller (5th), Harlan (6th), Miller (8th), McKenna (9th), Field (10th), Brewer (12th), Brown (16th). See Blaustein and Mersky, *The First One Hundred Justices*, supra n. 44, pp. 99, 147-9.

<sup>83</sup> *Wilson v. Shaw*, 208 U.S. 412 (1908).

<sup>84</sup> See, e.g., *Plumley v. Massachusetts*, 155 U.S. 461 (1894).

<sup>85</sup> *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387 (1897).

<sup>86</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

<sup>87</sup> (ed.) Time-Life Books, *This Fabulous Century*, 1, 1900-1910 (New York: Time-Life Books, 1969), p. 141.

<sup>88</sup> Charles Fairman, *Mr. Justice Miller and the Supreme Court* (New York: Russell & Russell, 1939).

<sup>89</sup> Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* (New York: G. P. Putnam's Sons, 1942), pp. 74-5.

<sup>90</sup> Willard L. King, *Melville Weston Fuller*, supra n. 5, pp. 161-162. The argument was in *Peake v. New Orleans*, 132 U.S. 342 (1981).

<sup>91</sup> *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

<sup>92</sup> See *Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890).

<sup>93</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895); *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895); *In re Debs*, 158 U.S. 564 (1895).

<sup>94</sup> *Allgeyer v. Louisiana*, 165 U.S. 78 (1897). c.f. *Atkin v. Kansas*, 191 U.S. 207 (1903).

<sup>95</sup> 198 U.S. 45 (1905).

<sup>96</sup> *Adair v. United States*, 208 U.S. 161 (1908).

<sup>97</sup> *Loewe v. Lawlor*, 208 U.S. 274 (1908).

<sup>98</sup> *Employees Liability Cases*, 207 U.S. 63 (1908). See also John E. Semonche, *Charting the Future*, supra n. 4, pp. 212-4.

<sup>99</sup> See, e.g., *Williams v. Mississippi*, 170 U.S. 213 (1898) and *Giles v. Harris*, 184 U.S. 475 (1903) (opinion per Holmes, J.).

<sup>100</sup> 203 U.S. 563 (1906); 214 U.S. 386 (1909); 215 U.S. 580 (1909).

<sup>101</sup> *Chinese Exclusion Cases; [Chae Chan Ping v. United States]*, 130 U.S. 581 (1889).

<sup>102</sup> *Ward v. Race Horse*, 163 U.S. 504 (1896).

<sup>103</sup> *Davis v. Beason*, 133 U.S. 33 (1900).

<sup>104</sup> *In re Lockwood*, 154 U.S. 116 (1894).

<sup>105</sup> See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896); *New York Indians v. United States*, 170 U.S. 1, 23 (1898); 173 U.S. 64 (1899); *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>106</sup> See, e.g., *Twining v. New Jersey*, 211 U.S. 78 (1908); *Maxwell v. Dow*, 176 U.S. 581 (1900). c.f. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 266, 235 (1897).

<sup>107</sup> *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

<sup>108</sup> John E. Semonche, *Charting the Future*, supra n. 4, pp. 51-5.

<sup>109</sup> 217 U.S. 349 (1910).

<sup>110</sup> John E. Semonche, *Charting the Future*, supra n. 4, pp. 167, 426.

## The Defense of General Yamashita

George F. Guy\*

George F. Guy (1904-80) was one of the most distinguished attorneys in the State of Wyoming of our era. In a long and distinguished career at the bar (which included service in the Wyoming Legislature, as Cheyenne City Attorney, and as Attorney General of Wyoming from 1955-1957), the case which most excited him was his participation in the defense of Japanese General Tomoyuki Yamashita in 1945.

The Yamashita case remains a milestone both in international law and American constitutional law. Yamashita was accused of violating the laws of war for failing to control his troops and for permitting them to commit atrocities. He was convicted by an American military commission and was sentenced to death. Petitions for habeas corpus and for the writ of prohibition were rejected by the Supreme Court of the Philippines. The United States Supreme Court rejected similar petitions as well as an appeal from the Philippine high court over the passionate dissents of Justices Murphy and Rutledge. General Yamashita went to the gallows on February 23, 1946. A generation later the Yamashita case proved relevant to debates over the responsibility of the American command for atrocities committed in Vietnam.

During his defense of this Japanese General, "the Tiger of Malaya,"<sup>1</sup> which occurred during the height of American resentment of Japanese conduct during the war, George Guy came to respect General Yamashita and to believe in his innocence. After the General's execution, Guy maintained a close relationship with Yamashita's family in Japan. A few years later, in 1950, Guy published his account of the Yamashita defense in the *Wyoming Law Journal*.

Almost three and one-half decades after Yamashita's trial, Guy, a conservative and deeply

patriotic Republican, related the story of the defense of the Japanese General with deep feeling. The Associate Editor of this *Yearbook* was privileged to spend an evening talking with Guy about the case. His plan to convince Guy to return again to the case in print with the perspective of three more decades was frustrated by Guy's death on April 28, 1980, at the age of seventy-five, the same day his daughter Gina was admitted to the Bar of the Supreme Court of the United States.



Major George F. Guy, author of this article and one of General Yamashita's team of defense lawyers, is shown standing in center, rear. Others include (front row, left to right), Lt. Col. J. G. Feldhaus, Col. Harry E. Clark and Lt. Col. W.C. Hendrix, Jr. Back row, flanking Major Guy, are Capt. A. Frank Reel and Capt. Milton Sandberg.

While George Guy believed that the Supreme Court had erred in handling the Yamashita case, his respect for the Court was profound. In his memory, Guy's family has given to the Supreme Court Historical Society the original charge served upon Yamashita in Japanese and several original photographs as well as a sketch of the way the courtroom looked during the trial.

In lieu of the article George Guy did not live to write, in his memory, but more importantly because of its contribution to the history of a cele-

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*brated case, the editors of this Yearbook are republishing an edited version of Guy's original article on the Yamashita case. The original article can be found in 4 Wyoming Law Journal beginning at page 153 in the Spring 1950 issue.*

*Jeffrey B. Morris*

After four years, I still remember the blazing headlines of February 23, 1946; those big black headlines announcing: "YAMASHITA DIES ON GALLOWS" . . . "YAMASHITA HANGS LIKE COMMON CROOK" . . . "THE TIGER HANGS" etc., etc. All across the nation they screamed, yes even across the world press they shouted the exultant and triumphant message . . . "YAMASHITA DIES" . . . But for those of us who had been assigned the task of defending Tomoyuki Yamashita, General, Imperial Japanese Army, for "violation of laws of war" for "failing to control his troops" and for "permitting them to commit atrocities" . . . February 23, 1946 was no day of triumph or exultation. It was the final climax of the international drama that had its opening scene in the mountains north of Baguio, Luzon, Philippines, on September 3, 1945, when General Yamashita, pursuant to the orders of his government, surrendered himself and his remaining troops to the American Army.

The front cover of YANK FAR EAST, the American Army newspaper, carried a full length picture of Yamashita striding down the mountain trail, followed by his staff and flanked by the American doughboys against whom he had fought so long and so bitterly. I remember his cheerfully autographing copies of that YANK for me later in New Bilibid Prison and I remember the description bestowed upon him by my old friend, Lt. Col. (then Major) A. S. Kenworthy of the Military Police. "Jack" Kenworthy had made the official arrest of Yamashita and had furnished the security and escort for him down from Baguio and to New Bilibid and was later Bailiff at the trial. When I asked Jack, "What kind of guy is this Yamashita?" . . . Jack looked at me and smiled a bit and said slowly, "Well, George, you'd be surprised. He is quite a character." This was some weeks before I had any inkling that I would ever see Yamashita, let alone assist in defending him.

# I

It was about October 1, 1945 when first indications were received that I might be associated with the case. I had just returned from Japan, where I had landed with Headquarters 8th Army, when Colonel Chas. C. Young, Staff Judge Advocate to Lt. General Wilhelm D. Styer, Commanding General of American Forces Western Pacific (AFWESPAC), informed me that my name was being submitted with others as defense counsel.<sup>2</sup>

I am sure that the officers assigned to the defense approached their task with uncertainty, concern and curiosity. We had all seen the ravages and destruction in Manila itself and many of us had seen similar sights out in the provinces and in other cities in the Philippines. We all knew that Yamashita was entitled to a defense, but we all wondered, "Why does it have to be us?"

The war was so recently over that it was difficult to regard any Japanese other than as an enemy and it was particularly difficult to regard the Commanding General of the Japanese Forces in the Philippines as anything but the representative of all that was repugnant and brutal and cruel and treacherous in the Japanese system—as the prime standard bearer of that inhuman power that had looted, burned, murdered and raped Manila, the "Pearl of the Orient" and her sister cities of the Philippines. Therefore, it was indeed with mixed emotions, including no small amount of curiosity, that we six, who had been appointed as defense counsel, approached our task and our first interview with our client at New Bilibid Prison, Muntinlupa Province, Luzon, on October 4, 1945.

New Bilibid Prison is about 25 miles south of Manila and the trip was made in staff cars. The six defense counsel, accompanied by WAC Sergeants Elizabeth Scholder of Los Angeles and Arline Walker of Cleveland, Ohio, made up the group that were ushered by the MPs into one end of the Prison Chapel, the room that was to serve as our "conference room" for that initial interview and for a number of others. In a few minutes, General Yamashita, accompanied by General Akiro Muto, his Chief of Staff and General U. Utunomiya, his Assistant Chief of Staff and Mr. Masakatsu Hamamoto, his Harvard educated (Class of 1927) interpreter, crossed the courtyard from their cell blocks and entered

# THE SURRENDER OF JAPA



YAMASHITA  
COMES IN

**YANK**  **FAR EAST**

By and for men in the service

SEPT. 28, 1945 VOL. 3 NO. 9

10 CENTAVOS  
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PHILIPPINES

the chapel. All of them stopped when inside the doorway and turned toward the altar and bowed, and then all turned toward us and bowed before coming all the way into the room and to the benches which had been set out for them. Colonel Clarke proceeded with the introductions, which took some time because General Yamashita neither spoke nor understood English. Generals Muto and Utunomiya both spoke and understood English, the latter quite well.

During all this time, I studied Yamashita quite closely. He stood about 5'7" tall and was clad in the gray green Japanese field uniform. He was a large man for a Japanese but his clothes hung in folds on his body, he having lost a very considerable amount of weight as a result of the reduced diet upon which Japanese troops had been subsisting during the last months of the Philippine Campaign. His uniform tunic was adorned by the red cord fourragere of the Japanese General Staff and with the two lapel insignias of three gold stars each, the insignia of a full General of the Emperor's Army. On his left breast were rows of ribbons, the "lettuce" that soldiers of all armies have worn since that clever device of campaign ribbons was first invented by that craftiest of soldiers, Napoleon himself. A pair of highly polished boots, complete with gold spurs completed the ensemble. Little did I realize then that the gold spurs were later to become my own possession as a gift from the General on that fateful December 7, 1945, when he was sentenced to die.

Our client stood facing us, his peaked forage held in his large hands. His figure was erect but not stiff and he acknowledged each introduction with a little bow and in a rather solemn manner, although there were traces of a smile about the corners of his large mouth and his large brown eyes brightened perceptibly as they rested in turn on each of us. His head seemed to be unusually large, particularly so for a Japanese and the face was marked with heavy lines. His neck was thick and bull like and the back of his neck and head ran in almost a vertical line from the white shirt collar which was turned down over his tunic collar. The shirt collar was open, exposing the full and deep throat. The nose was quite large and was not flat as is true with so many Japanese and perhaps the most distinctive characteristic of the face was the inordinately long upper lip. The eyes were deep and expressive and without the

usual oriental slant. The man's face so interested me that I determined then and there to ask him to allow me to try to sketch him. Opportunity for this did not come until November 18 when, during an interlude of a few hours on a Sunday afternoon, General Yamashita did sit for me. It was a hot afternoon and when I had taken about an hour to do his face and head and, noticing that he was tired, offered to call the whole thing off because I couldn't sketch anyhow, he courteously insisted that I proceed. This I did, and the completed sketch was finally autographed by the subject himself. He politely suggested that he would like to do another sometime, one that he might keep or send to his wife, whom I had met while I was in Japan. However, it seemed that chance never permitted us the time to do a second one. Or perhaps, the Almighty—seeing the first sketch, decided that no matter what Yamashita might have done, he didn't deserve *that* fate again!

We shortly and quickly got down to the serious business at hand and, working through Mr. Hamamoto, were soon in the midst of the allegations of the charge against Yamashita:

"Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October, 1944 and 2 September, 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General TOMOYUKI YAMASHITA, thereby violated the laws of war.

Dated 25 September, 1945

/s/ Alva C. Carpenter  
ALVA C. CARPENTER  
Colonel, JAGD  
United States Army."

That charge had been served on Yamashita a few days before by Captain D. C. Hill,<sup>3</sup> Wamego, Kansas, one of the Prosecution staff, but it was not until this afternoon that Yamashita, after conference with his counsel, had any real concept or understanding of the nature of the charge against him. At that very first moment of comprehension of the full import of the charge, Tomoyuki Yamashita firmly and solemnly maintained his innocence of such charge. His position on the matter was unequivocal — "NOT



GUILTY" — on that day, on the day of his arraignment, October 8, 1945, and throughout his trial and even on the fateful night of February 23, 1946 when he mounted the scaffold at Los Banos to pay with his life for the crimes of his troops. His forthright manner, his candor and his strength of character made a distinct impression on me that first interview and those qualities continued to impress me as time went on and as my contacts with him became more frequent. I am confident that my associates on the defense staff had the same impressions. This confidence arises because men of the caliber of Colonel Clarke, Lt. Colonels Feldhaus and Hendrix, and Captains Reel and Sandberg, while they would have devoted sincere effort to any case to which they would have been assigned, would not, in my opinion, have exhibited the genuine zeal and intense industry displayed in this case, had they not felt these characteristics in General Yamashita which are here described.

We all worked steadily from the day of the initial interview until October 8, 1945, the day of the arraignment. At the arraignment, the charges were formally read to Yamashita, who was present in the Courtroom with his counsel. He stood before Major General Russell B. Reynolds, the President of the Commission, and announced loudly in Japanese "Not Guilty," when the charges had been translated to him in his own tongue. The arraignment was over in a few minutes and just 21 days later, on October 29, 1945, the trial opened . . . a trial which marked the first time in history that the United States as a sovereign power has tried a General of a defeated enemy nation for alleged war crimes. While no one on either side said much about it, there was a general unspoken feeling that there indeed was something new in the ancient field of law . . . that we were about to make law . . . that here was stare decisis in its real meaning, because it would build up another branch of the law, the inexact science to which we were all devoted.

Colonel Clarke, foreseeing the length of the battle ahead and also its complexity and intensity, "departmentalized" the defense. I was cast the role of "liaison man" between the Commission, the Defense and any and all other Army agencies with whom we might have to deal. My first job was to secure a "headquarters" for the defense. The Real Estate Section finally allocated us a large two-story house at 1621 Taft

Avenue, Manila. This edifice was surrounded by a high stone wall and permitted the secrecy essential in bringing so highly sought after a person as Yamashita into the heart of the city he was charged with having ravished. Doubtless, there were thousands of Manilans who would have welcomed the chance to take the law into their own hands had the opportunity presented itself. I moved into the house at 1621 Taft in order to be in constant touch with the situation.

The great mass of publicity that had grown up around the impending trial and the proceedings already, had convinced Colonel Clarke that the defense, if possible, must disassociate Yamashita from the extreme Japanese "Military Class". By mid-October, it seemed that all of America, yes, all of the occidental world, not to mention all the Philippines, believed firmly that all Japanese army officers were "Samurai fanatics," "Greater East Asia exponents," "Empire Imperialists," etc., whose hands dripped with blood of helpless and innocent women and children. All Japanese officers were regarded alike, regardless of what individual records might be. In the case of Yamashita, the popular concept was even darker and bloodier, because he was commonly referred to in the press of the world as "The Tiger of Malaya." This appellation gave rise to the popular picture of Yamashita as the Japanese conqueror who raged down the Malayan Peninsula like a roaring Tiger, devouring and destroying as he went. (Incidentally, Yamashita described the Malayan campaign to me in great detail one day in most interesting fashion.) By virtue of this press buildup, Yamashita was already convicted in the eyes of the world, and certainly in the eyes of the Filipinos, even before a shred of evidence had been introduced against him. I fear that a great majority of American military personnel in the Philippines was satisfied, from this mass of publicity, that Yamashita was guilty of anything that might be said of him.

Under such conditions, and with the trial held in Manila, the very center and vortex of these swirling animosities and predetermined public concepts of guilt, the task confronting the defense seemed enormous indeed. On October 20, Colonel Clarke assigned me to the mission of obtaining and developing character evidence on behalf of the accused. I was particularly charged with the task of obtaining evidence as to



Yamashita's life, his history, his background, his family, and — most important of all — his military career. I thereupon entered into numerous conferences with him and with Generals Muto and Utonomiya concerning these important elements. With the basic information thus obtained, and with a list of names of persons to see in Japan, I flew to Tokyo on October 25th (and remained two weeks).

I spent all the day and many evening hours at the task and managed to keep two Japanese army interpreters busy all the time. We also made one trip outside Tokyo to Maguoka to interview General Kazunari Ugaki, who had twice been War Minister and who had once been Foreign Minister of Japan.<sup>4</sup>

General Ugaki had been in political eclipse for some ten years because of his liberal ideas and his belief that Japan's destiny lay in understanding and cooperating with the Western Powers and in avoiding aggression and in terminating the "China Incident." He firmly believed that General Yamashita could not have been guilty of complicity in the Philippine atrocities.

When the time came for the presentation of the character evidence, we arranged for seven witnesses to be flown from Japan and appear before the Commission to testify on behalf of General Yamashita. Among these were:

Colonels Hiruimu Hosoda and Nobutake Takayama, who had served under Yamashita when the latter had headed the Japanese Army Military Mission to Germany from January to June, 1941;

Mr. Keichoku Yoshida, a prominent Tokyo lawyer who had been a close friend for many years;

Mr. Shigesmasa Sunada, a lawyer and for 24 years a member of the Japanese Diet, and who had served under Yamashita in Malaya as legal advisor on civil affairs.

In addition, the defense also introduced statements sworn to by General Masataka Yamawaki of the Imperial Japanese Army, and by General Yoshijir Umezu, Chief of the Imperial General Staff of the Japanese Army. General Umezu was one of the signers of the Japanese Surrender on the deck of the battleship Missouri, and was a defendant before the International Military Tribunal Far East in Tokyo but died prior to the conclusion of that trial.

The testimony of all was to the same general effect—that Yamashita had never been a "political" General, that he had earned his high rank by

sheer efficiency, that he was not a Samurai, that he was not of the extremist military group, that he opposed war with the western powers, and that he had always had a reputation for fairness for being a firm and strong disciplinarian. One of the most significant facts which emerged from the character testimony as a whole, was the uniform statement of all witnesses that Yamashita was definitely out of favor with General Tojo and the "military extremists."

## II

The trial before the Military Commission was no trial in the ordinary sense of the term — a criminal trial with a judge, learned in law, sitting as the trier of questions of law and with a jury sitting as the trier of questions of fact of the evidence presented to it within the usual rules of admissibility as determined by the judge. The Military Commission which tried General Yamashita had no "judge learned in the law" sitting with it. True, one of the officers was designated as "law member," but he is not a lawyer and is not "learned in the law" and not a member of the legal profession. The Commission as a whole — that is, the five members, all Generals — sat also as a jury in determining the facts as presented. The Rules of Evidence were especially prepared for this trial. They provided numerous exceptions to the usual safeguards thrown about accused persons in criminal or military proceedings. A clear exception, for example, was made in the case of hearsay evidence. One of the basic rules of our law of evidence for hundreds of years has been the hearsay rule: i.e., a witness cannot testify as to what someone else told him. This was entirely eliminated in the Yamashita rules. Under this elimination, hearsay was freely accepted as were statements of absent and even unidentified persons. These rules also permitted the introduction of diaries of Japanese troops and enemy orders found on the battlefield without identification of the authors or the units to which they belonged. All of these were unquestionably inadmissible under the usual rules of evidence. The defense vigorously contested these rules and carried that part of the fight into the Supreme Court of the Philippines and finally into the Supreme Court of the United States itself.

The trial opened on October 29th, and the final arguments were not concluded until De-

cember 5, 1945. The Commission was in session every day during this period, with the exception of Sundays and one or two Saturdays, from 8:30 to 11:30 and from 1:30 to 5:30. The proof of murder, torture, rape, and maltreatment of thousands of Filipinos and of hundreds of Americans and of some scores of other nationalities, was clear and overwhelming. These outrages occurred at points in the Philippines from Bataan Island north of Luzon itself to Davao in southern Mindanao. There is no denying that Japanese personnel indulged in the most revolting outrages and in some instances, seemed to conduct their activities on almost an organized basis with officers and noncoms directing the activities. The Japanese personnel involved were variously identified as Navy, Army and Merchant Marine, but there is no doubt that the atrocities complained of did occur. Witness after witness testified to these crimes until tales of horror, death, mutilation, starvation, maltreatment, and abuse became almost commonplace. The defense consistently fought back with every possible weapon at its disposal. Cross-examination of the prosecution witnesses was conducted, for the most part, by either Captain Reel or Captain Sandberg. In many, many instances, their effective questioning brought forth the fact that the witness had been engaged in guerrilla activities in one way or another, giving the inference, at least, that the treatment the witnesses had suffered at the hands

of the Japanese was just punishment by the Japanese because the law of war has universally recognized that a guerrilla is an illegal fighter and, when captured, is not entitled to the rights and protection usually afforded a prisoner of war.

The most significant point made by the defense was that throughout the great mass of prosecution testimony and evidence, there was not one word or one shred of credible evidence to show that General Yamashita ever ordered the commission of even one of the acts with which he was charged or that he ever had any knowledge of the commission of any of these acts, either before they took place, or after their commission.

At the conclusion of the prosecution's case, the defense made a motion for a finding of "Not Guilty" on the ground generally that there was no proof of any kind to connect Yamashita with what did happen. This motion was over-ruled and the defense was directed to proceed with its evidence. A defense motion for continuance, based upon an indication given at the time the trial opened that such continuance would be granted at the close of the prosecution's case, was denied. Thereupon the defense evidence was presented.<sup>5</sup>

Numerous witnesses testified for the defense. I have already detailed the "character evidence" because that was the portion of the defense with which I was particularly charged. General Muto, Yamashita's Chief of Staff, was perhaps the most



*Scene in courtroom during the war crimes trial of General Yamashita. The defendant is seated at far left, surrounded by his defense lawyers.*

important defense witness, aside from the accused himself. Muto had been Chief of Staff in Sumatra and did not arrive in the Philippines until about October 20, 1944 or at the time of the initial American assault on Leyte. He, like his commander, had never served in the Philippines and he didn't even know where Leyte was! General Muto had had a long record in the Japanese army and was a most capable officer.<sup>6</sup> He testified in considerable detail as to the difficulties confronting Yamashita upon his assuming command. He positively testified that never at any time had Yamashita ordered the commission of any atrocities against the Filipinos or anyone else. There never had been any prosecution evidence that such orders *had* been given, but any inference of their having been given or having been condoned, was certainly effectively refuted by General Muto's testimony. As Chief of Staff, he was certainly in a position to have known of any such orders being given or of any information of such atrocities that might have reached his Commander.

Numerous other Japanese officers testified as to various elements involved in the specifications of the charge, and in answer to the prosecution evidence. None, however, made the impression that the accused, Yamashita, made. He took the stand in his own behalf, after explanation by General Reynolds that he did not need to, and that he could make an unsworn statement or remain silent as he liked, but that if he did take the stand as a witness, he would be subject to cross-examination. He elected to take the stand and did so, and was on the stand for about 18 hours. His testimony was frank, forthright, full and complete. He related in detail the situation confronting the Command on October 9, 1944, just a bare week before our initial blow fell at the beaches off Tacloban; then he went on to relate in similar detail the problems and tasks that continued to confront him in ever increasing size and number as the devastating American attacks by land, sea and air mounted in constantly rising fury. The superiority of American Arms in every category was so great that the Japanese cause was indeed a lost one and the only thing that Yamashita could do was to hope to prevent the full use of the Philippines as a base itself. Our ceaseless and tremendous assaults literally cut Yamashita's Army to pieces. His communications between his own Headquarters on Luzon

and his troops in the Visayas and in Mindanao were practically non-existent after the middle of November, 1944 and virtually such even with Leyte after the end of December. His own Headquarters were moved from Fort McKinley on the outskirts of Manila to Ipo, in the mountains east of Manila late in December, 1944. He remained at Ipo until the pressure of the American attacks forced him to remove to Baguio, high in the mountains, to which place President Jose Laurel<sup>7</sup> of the Philippine "puppet republic" and the Japanese Ambassador to the Philippines, Murata had already fled. On March 21, 1945, these two worthies took plane for Japan and on April 16th, Yamashita was forced to remove his Headquarters from Baguio further back into the mountains to Banban.

I myself had the experience of going to Baguio on April 28th about 48 hours after the capture of that Summer Capitol by our 37th and 33rd Divisions, 1 Corps, 6th Army. Devastation was everywhere. The city had been under effective American air and artillery attack for weeks and its untenability by the enemy was readily apparent. Dead Japanese lay in the streets and all about were smashed and strafed Japanese staff cars, trucks, caissons, wagons and other vehicles, all giving mute testimony to the power and fury of the American air attacks which had been such an important factor in driving Yamashita from lair to lair. Later that afternoon, I stood on the high Cathedrala Hill in Baguio and saw our P-38s bomb and strafe Jap positions on the ridge to the north of the city and then watched as the American artillery opened up a terrific fire on the Japanese emplacements. The artillery fire was so intense that within a short time, the top of the ridge was ablaze from the underbrush ignited by the 105s and 155s. In all that smoke and flame, I could see the flashes of additional shells as they exploded on the target, adding further to the holocaust already raging. I was witnessing then, although not realizing it, another step on the long road that was driving Yamashita, step by backward step, to surrender — and — to trial for "failure to control his troops" and to the final end on the gallows at Los Banos.

On May 20th, the pressure of the military situation was such that Yamashita had to move his Headquarters again — this time to Riangan where he remained until again forced to move on June 18th. His final headquarters establishment



was at a place called Rest House No. 9 in the vicinity of Takben, set up on July 22nd and where he remained until ordered by Tokyo to surrender on September 2nd. Yamashita himself carefully recited all those moves to me the day I sketched him.

Thus almost from the outset of the campaign, Yamashita was confronted with the overwhelming power of the American attack — so great in volume, intensity and diversity that his own headquarters were constantly on the move, harried and pressed, and ever fleeing further and further into the mountains of northern Luzon in desperate moves to escape capture and destruction by his inexorable nemesis, General Douglas MacArthur. Is it any wonder that his control over his troops might not have been all that it should have been to insure that excesses would not be committed? In effect, this situation at the trial might be summarized by the following: "We Americans did everything we could to destroy your army and cut your communications and to prevent your being able to control your troops, but we are now trying you for failure to control them."

The whole essence of the Charge against Yamashita was that he "failed to control" his troops, thereby "permitting" them to commit crimes, etc. He was subjected to a long and searching cross-examination by Major Kerr, the Chief Prosecutor, the dramatic climax of which was reached in the following cross-examination, appearing at page 3660 of the record of trial:

"Q. You admit, do you, that you failed to control your troops in the Philippines?"

A. I have put forth my maximum effort in order to control the troops, and if this was not sufficient, then somehow I should have done more, but I feel that I have done my very best.

Q. Did you fail to control your troops? Please answer 'yes' or 'no'.

A. I believe I did control my troops."

But, as Captain Frank Reel ably pointed out in his phase of the final argument to the Commission:

"His answer, 'I believe that I did control my troops' is of course a legal and factual conclusion which only this Commission can decide, but also it must be taken in the context of his previous answers, particularly the long answer which preceded it. Now, actually there is no question about this. General Yamashita did not have full control over all his troops at all times. While these at-

rocities were being committed, he did not actually control the actual perpetrators in a strictly factual sense. Yet on paper, as a Commander, he can give no other answer. I suppose there have been rapes and that there has been mistreatment of prisoners of war by all armies—isolated cases at least. And I don't suppose that any Commander would say that he controlled a man while he was in the act of committing rape or mishandling a prisoner of war, but if you asked any of those Commanders whether they controlled their troops they would certainly say they did."

To me, it seems that the real answer is that Yamashita did all in his power to control his troops, but that the effectiveness of American military operations against him was so great that he was prevented by those operations, and those operations alone, from effectively controlling his troops.

### III

The reader must understand that the evidence presented to the Commission and the actual appearances in the Court room were only portions of the labors required to present the defense. Portions of the defense staff were constantly engaged in important tasks outside the Court room—maintaining our headquarters, checking records and files, maintaining liaison with the prosecution and the Commission, interviewing witnesses and laying plans for future action. As I mentioned earlier, one of the "outside" tasks assigned was that allocated to Lt. Colonel Walter Hendrix, who devised a theory whereby we could get into the Supreme Court of the Philippines on a Writ of Habeas Corpus and Writ of Prohibition. Colonel Clarke and Captains Reel and Sandberg were deeply involved with the trial itself and Colonel Clarke then assigned me to assist Colonel Hendrix in the proposed civil court procedures. Colonel Hendrix and I immediately embarked on this assignment and, in the process, rounded up all the Philippine law books that we could find. The building housing the Supreme Court of the Philippines had been burned during the Intramuros fighting and, consequently, we were handicapped by a lack of library, not to mention the fact that we were sallying forth on litigation in a strange jurisdiction. Colonel Hendrix was Judge Advocate to the Military Police Command and had made one previous appearance in the Philippine Supreme Court in contesting a habeas corpus action by three Philippine women collaborators who



sought release from alleged illegal detention by the American Army. We were assisted by finding many of the books of the library of that brilliant lawyer, Mr. Jose Laurel, which books were assembled in Colonel Hendrix's office by Mr. Julian Wolfson, a veteran American Manila lawyer, who had survived over three years internment in Santo Tomas Internment Camp.

Our research into the Philippine Law concerning the questions at hand brought forth a number of interesting examples of the workings of Anglo-Saxon Justice on the matter of the Writs of Habeas Corpus and of Prohibition. Some of these cases went back to the days when the Philippines had scarcely been liberated from the long heavy rule of Spain. I will not attempt to enumerate the cases in this article as it will suffice to say that our research showed that the power and majesty of our civil law had closely followed our flag and that individual rights had been jealously guarded by the courts even from the earliest days of American influence in those islands. Some of these cases arose while General Douglas MacArthur's father, the illustrious General Arthur MacArthur, was Governor General of the Philippines.

Service of the papers in the Habeas Corpus and Writ of Prohibition action was made upon Lt. General Wilhelm D. Styer on November 13th by a bailiff of the Supreme Court of the Philippines. The proceedings required that General Styer, as the respondent in the action, appear or file his answer within five days from the date of service. On the required date, no appearance was made by or on behalf of General Styer, but on November 14th the Manila Law firm of Delgado, Dizon, Flores and Radrigo appeared amicus curiae on behalf of the general public of the Philippine Islands. The theory of the appearance of this firm as amicus curiae was embodied in the following excerpts from their petitions:

"That the trial of General Tomoyuki Yamashita is of vital significance to the cause of democracy, for in the conduct of this trial is put to a test the ability of a democratic institution to administer justice with dispatch and efficiency, without sacrificing those fundamental rights accorded to the accused by democratic tenets;

"That said trial is of paramount interest to the People of the Philippines, who in their uncompromising adherence to the cause of democracy, bore the direct and full impact of the enemy's wanton barbarity. . . ."

No appearance was ever made in the Philippines



*General Tomoyuki Yamashita, conferring with counsel in a recess in his trial.*

Supreme Court by or on behalf of General Styer. The matter then went to oral argument before the Court on the 23rd of November.

Appearance before the Philippine Supreme Court had to be made by Colonel Hendrix and myself. The case had, of course, attracted a great deal of attention and the prospect of the Commander in Chief of the hated Japanese forces seeking judicial redress in the courts of the country which Japanese armies had occupied for so long and in the courts of the very country whose people had suffered so much at the hands of invaders, was one that generated public interest to a high pitch. Consequently, when Colonel Hendrix and I drove up to Malacanang Palace in a jeep, there was such a crowd in front of the annex, which was then being used as a temporary court house, that it was all we could do to get into the place. The temporary court room itself was small and the space required for seating the nine supreme justices who heard the argument, plus the clerks and other officials of the court, occupied a goodly portion of the room. The room was so filled with newspaper correspondents and with the general public that Colonel Hendrix and I found ourselves virtually a part of the crowd.

While there was no hostility in the atmosphere, nevertheless there was an over all feeling of tenseness as the case was called. Mr. Delgado appeared amicus curiae and the argument on behalf of General Yamashita was opened by

Colonel Hendrix. We had divided the argument so that Colonel Hendrix presented to the Court our plea for writ of habeas corpus, leaving to me the plea of writ of prohibition. The principal points which were presented to the highest tribunal in the Philippines were the same points which were later presented to the Supreme Court of the United States, namely:

1. That the Military Commission, then trying General Yamashita, was without jurisdiction over, or to try him.
2. That the charge upon which he was being then tried failed to state any offense against the laws of war.
3. That "due process of law" guaranteed to the accused by both the Philippine and the American Constitutions was being denied to the accused because of the manner in which the trial was being conducted.

Colonel Hendrix, an able and successful lawyer from Atlanta, Georgia, opened the argument in the somber atmosphere of tension that I have already described. He launched into his prepared argument and was proceeding smoothly when various justices of the Court commenced interrupting and asking numerous questions. This is a habit which judges of all appellate tribunals seem to have. It is a practice which no doubt has its merits, in that it enables the justices to satisfy themselves on various points as they occur in the mind of the judge. However, to the attorney appearing before the court, this practice can be, and oftentimes is, most disconcerting. In the Yamashita case, a number of the questions asked, in my mind, indicated a bias against the petitioner which amounted to almost open hostility.

The judges, being Filipinos, were naturally resentful to all Japanese and most of all to the Japanese Commander In Chief. Hence, it was not too long before the verbal exchange between Colonel Hendrix and some of the justices took on some warmth. The impatience of some of the judges with the plea on behalf of Yamashita was hardly in keeping with the fact that some of their number had served in their present capacities under the Japanese. Some of the things which were said before the Philippine Supreme Court that morning made excellent copy for newsmen and accounts of the proceedings went out around the world.

Upon the conclusion of Colonel Hendrix's argument, concerning habeas corpus, I then took up the task on behalf of the writ of prohibition.

The same legal theory obtained for it as obtained for the writ of habeas corpus, save and except that on behalf of the writ of prohibition, it was necessary to emphasize the manner in which the trial, before the Military Commission, was being conducted. Particular emphasis was laid upon the disregard, by the Military Commission, of the rules of evidence and the protective features of the Articles of War.

The argument on behalf of the petitioner was completed on Friday and court adjourned until Saturday, November 24th, at 10:00 A.M., at which time Mr. Delgado made a long and stirring speech against the petition. It was apparently entirely proper for him to appear *amicus curiae* on behalf of the Philippine public, and even the world at large. We could not feel that his argument was really an answer to the legal points which we had raised, but that it was nothing more than a rehash of the anti-Yamashita propaganda which had already flooded the press and the radio. Upon the conclusion of the argument, the Philippine Supreme Court took the case under advisement and on November 28th, issued a memorandum opinion denying the relief-sought. However, Mr. Justice Ozoatoa dissented as to the theory of the majority opinion but concurred in the result. Mr. Justice Perfecto voted to deny the habeas corpus but to grant the writ of prohibition. Mr. Justice Perfecto wrote a very long dissenting opinion in which he gave an interesting and learned dissertation upon the history of international law. The opinion itself would be interesting reading from the standpoint of the historical coverage alone, if not for the fine composition and excellent expression which characterizes it. Mr. Justice Perfecto said, in part:

"The peoples of all nations who are keenly watching the prosecution of Yamashita should be convinced by conclusive evidence that said prosecution is not a mere parody of the administration of justice devised to disguise the primitive impulses and vengeance and retaliation and of the instinctive urge to crush at all costs no matter by what means, a hated fallen enemy. The prosecution, trial and conviction of Yamashita must impress all the people of the world that the principle of law is paramount and supercedes and wipes out all other considerations dealing with war and commanders as war criminals. Otherwise, their faith in the supremacy of law as the invulnerable bulwark of all fundamental human rights will be shaken as will be the moral position of the victorious United Nations. The ethical value of the grandiose pronouncements of their great leaders and the profound significance of the lofty ideals for which millions have died, will be weakened and diminished."

The reader must realize that our system of law does not permit any direct appeal from the decision of a court-martial or Military Commission; in other words, there is no procedure provided whereby an appeal can be taken from conviction by this military tribunal to civilian courts for the purpose of reviewing those decisions. The only means of judicial escape for Yamashita, or for that matter, for an American so convicted by military court, is by habeas corpus and prohibition. In order to make these remedies available, it is essential that the petitioner show that the military court which tried him was without jurisdiction. That was the under-lying theory of the action of the Supreme Court of the Philippines and for that matter, was the position which the defense took and maintained throughout the trial before the Military Commission itself. The Philippine Supreme Court announced its decision denying the petition on December 4th, the day before the conclusion of the final argument before the Military Commission.

#### IV

On the afternoon of December 5th, Major General Russell B. Reynolds, the president of the Commission, announced that the Commission would meet at 2:00 P.M., December 7, 1945, to announce its decision. That session was as brief as it was dramatic. Just prior to the opening of the court room, Pat Robinson, of International News Service, took a straw vote of the twelve newsmen who had conscientiously covered the trial. The question submitted was: "On the evidence produced before the Commission, would you hang Yamashita?" The vote of the twelve newsmen was twelve to nothing in the negative. This was taken by some of the defense counsel as a favorable sign, for the reason that the press, with a few exceptions, had not been too kindly disposed toward Yamashita. Others of the defense staff, however, including myself, felt that the die had been cast and that the finding of the Commission would unquestionably be "guilty" and that the sentence, surely as unquestionably, would be death. General Yamashita was brought into the jam-packed court room amidst the exploding of flash bulbs and the grinding of newsreel cameras. He was directed to take a stand in front of General Reynolds accompanied by Colonel Clarke, senior defense counsel. Almost immediately General Reynolds com-

menced reading the prepared statement which constituted the Commission's findings, judgment and sentence. It was indeed a dramatic moment and history was being made in the field of international law, for this was the first time in American history that a commander of a defeated enemy army was convicted as a war criminal upon the theory of command responsibility alone.<sup>9</sup>

There had not been one word or one shred of evidence in the entire seven weeks of trial to show that Yamashita had ordered or condoned any of the things that had taken place, or that he had even had knowledge thereof. We were witnessing the conviction of a defeated and surrendered enemy general upon the charge that: "While Commander of the armed forces of Japan . . . he unlawfully disregarded and failed to discharge his duties as Commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." Here also was an official pronouncement that a commanding general was automatically criminally liable for such occurrences without the showing of any direct connection whatsoever with the offenses themselves. When the vital words, "and sentences you to death by hanging," had been spoken, there was a moment of dead silence which hung over the entire room, and then Yamashita and the other Japanese were taken away.

I closely watched his face throughout the proceedings and looked attentively for change in expressions as the translations were made. For myself, I feel that he must have known what was coming. When the final words were translated, there was scarcely a change of expression on his quiet and solemn face. At no time had he ever exhibited any resentment or bitterness toward the United States, or toward those who were charged with the task of conducting the trial. I had talked with other Japanese officers of high rank who were arrogant, mean, bitter and resentful, but Yamashita, the man who must hang as the first proven example of this new theory of international criminal law, was quiet, dignified and philosophical.

Prior to the actual passing of sentence, he had made a brief statement, through Mr. Hamamoto, in which he thanked the Military Commission for the courteous manner in which he had been treated and thanked the American Army for



providing him with defense counsel and publicly expressed his appreciation to defense counsel himself. That morning he had asked each of the defense counsel in and had grasped us by the hand and had personally expressed his heartfelt appreciation for the efforts that we had exhibited on his behalf. To each of us he presented some item of uniform or equipment that was particularly dear to him. Colonel Clarke received a Chinese tea service that Yamashita had carried for many years through Manchuria, China, Malaya, Japan and the Philippines. Colonel Clarke also received the General's array of ribbons. Lt. Colonel Feldhaus received his general staff fourragere cord and one of his three star gold General's insignia. Lt. Colonel Hendrix received another General's insignia and Yamashita's cordovan saber belt. Captains Reel and Sangberg received his sets of Chinese poetry brushes and the General presented to me, as the one Cavalry officer on the defense staff, his gold plated presentation spurs and also a 24K Gold Chinese good luck piece. These presentations were all made on the morning of December 7th and I feel that Yamashita knew at the time what the verdict would be.

Very shortly after that, he was removed from his cell in the High Commissioners Palace to confinement at the prisoner of war area south of Manila, and there held incommunicado. I never saw him again, but our efforts on behalf of the defense were by no means over. On that very day, December 7th, we forwarded by air mail to the Supreme Court of the United States an original petition for writ of habeas corpus and prohibition. In the meantime, we were frantically getting together the necessary record to take an appeal from the adverse decision of the Supreme Court of the Philippines. That record was finally made up and dispatched by air mail in the evening of December 7th. It was indeed an odd turn of fate that the Japanese Commander should be sentenced to die and should direct his appeal to our highest court on the 4th anniversary of the attack on Pearl Harbor. Shortly thereafter, we addressed a telegraphic request to the Supreme Court for a stay of execution and this was granted. There then followed a period of great uncertainty as to whether or not the United States Supreme Court would even hear the case, and if it would, whether or not the matter would be heard orally, and if so, when and by whom such

argument would be made. At about that same time, Lt. Colonel Feldhaus and I were relieved from duty in the Pacific, as we then had each served over 30 months in that theater. We both departed for home before the end of December. In the meantime, authority came through for three of defense counsel to go to Washington to present the case to the United States Supreme Court, and that task was undertaken by Colonel Clarke and Captains Reel and Sandberg. Lt. Colonel Hendrix had been assigned to the Staff of Mr. Paul McNutt, United States High Commissioner of the Philippines, where he served until after Philippine Independence, July 4, 1946.

The case was set down for oral argument before the United States Supreme Court on January 7, 1946 and it was presented there by my three colleagues, who had flown to Washington from Manila. The Government's case was presented by the newly appointed Solicitor General, Mr. Howard McGrath, his assistant, Mr. Judson, and the Attorney General, Mr. Tom Clark. Both the original application and the appeal from the Philippine Supreme Court were heard together. The principal contentions that had been made throughout, were renewed in the United States Supreme Court, and they were:

1. That the Military Commission was unlawfully created and that no Military Commission to try the petitioner for the violation of laws of war could lawfully be convened after the cessation of hostilities by the United States and Japan. (Captain Reel).
2. That the Charge preferred against the petitioner fails to charge him with the violation of the law of war. (Colonel Clarke).
3. That the Commission was without authority and jurisdiction because the order covering the procedure of the Commission permitted the admission in evidence of depositions, affidavits, hearsay and other documents in violation of the 25th and 38th Articles of War and the Geneva Convention and deprived the petitioner of a fair trial in violation of the due process clause of the 5th Amendment. That the Commission was without authority and jurisdiction because of failure to give advance notice of the trial to the neutral power representing Japan as a belligerent, as required by Article 60 of the Geneva Convention. (Captain Sandberg).

The matter was taken under advisement, and on February 4th, the Supreme Court announced its momentous denial of the writs sought and this meant death for Yamashita. The majority opinion was read by the late Mr. Justice Stone. It consid-



ered each of the points made by the defense and concluded that the Articles of War did not apply to Yamashita and that he, therefore, could not complain if the procedure did not conform to the standards set by our military code. The majority opinion concluded in the following words:

"It thus appears that the order convening the Commission was a lawful order. That the Commission was lawfully constituted. That petitioner was charged with violation of the law of war and that the Commission had authority to proceed with the trial and in doing so, did not violate any statutory or Constitutional command. We have considered and find it unnecessary to discuss other contentions which we find to be without merit. We therefore conclude that the detention of petitioner for trial and his detention after his conviction subject to the prescribed review by the military authorities, were lawful and the petitions for the . . . writs . . . should be and they are DENIED."

Mr. Justices Murphy and Rutledge wrote vigorous dissenting opinions. Mr. Justice Murphy was particularly impressed with the inadequacy of the charge upon which Yamashita was convicted, and also with the contention that he was denied Constitutional rights under the 5th Amendment. Murphy wrote:

"He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander, to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of International Law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to the petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years. Also in my opinion such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind, the high feelings of the moment doubtless will be satisfied. But in the sober after-glow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in the army, from sergeant to General, can escape those implications. Indeed, the fate of some future president of the United States and his chiefs of staff and military advisers may well have been sealed by this decision . . ."

I think that Mr. Justice Murphy had the reputation of being a humanitarian and he was certainly a man of deep religious convictions and of high



*Sketch of General Yamashita made by Major George F. Guy during the period when the author served as part of defense team at the war crimes trial.*

ideals. His service as Governor General of the Philippine Islands brought him into close contact with those Islands and with the Filipinos. I am sure that he had the highest regard and the warmest affection for the Filipinos, and that the wrongs which they had suffered grievously affected him. There could be nothing in the case which would create any sympathy for Yamashita, insofar as Mr. Justice Murphy was concerned; yet he dissented from the majority opinion and would have saved Yamashita's life because his convictions concerning the moral and legal principles involved were so strong.

Mr. Justice Rutledge was particularly impressed with the belief that Yamashita was entitled Constitutional rights and there had been denial of those rights:

"More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien

enemies or enemy belligerents. It can become too late . . .

"This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations or duty. Much less have we condemned one for failing to take action. The novelty is not lessened by the trial's having taken place after hostilities ended and the enemy, including the accused, had surrendered. Moreover, so far as the time permitted for our consideration has given opportunity, I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in the other internationally binding authority or usage.

"The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand."<sup>10</sup>

Following the action of the United States Supreme Court, Colonel Clarke made supreme final effort on behalf of Yamashita by taking an appeal for clemency to President Truman. The President, however, declined to act and thereby left the matter entirely in the hands of the military.

## V

There is no doubt but that that situation presented to General MacArthur a difficult and momentous question. The brutalities and criminal excesses of Japanese personnel in the Philippines had without a shadow of doubt been widespread and shocking. As I have stated previously in this article, there were instances when the massacres, brutalities and excesses appeared to have been carried on an organized scale, and under the direction of Japanese noncoms and commissioned officers. The contention made by the prosecution was that these excesses and criminal acts were so widespread and so numerous that General Yamashita as the Commanding

General must have known of them, or if he did not know of them, he should have known of them. The Military Commission took that view and the Supreme Court of the Philippines declined to intervene. The Supreme Court of the United States with the two dissenting Justices whose opinion I have referred to herein, likewise declined to interfere. Military control of the case was thereupon entirely undisturbed.

In due time, General MacArthur announced that he had confirmed the sentence of the Commission and on February 23, 1946, at Los Banos Prison Camp, 30 miles south of Manila, Tomoyuki Yamashita paid with his life for the crimes of his troops. Before mounting the scaffold, he issued a statement which I quote herewith. Unfortunately, the quality of interpretation was not what it would have been had our old friend, Hamamoto, been doing it. The statement is as follows:

"I were carrying out my duty, as Japanese high commander of Japanese Army in the Philippine Islands, to control my army with my best during wartime. Until now I am believing that I have tried to my best throughout my army.

"As I said in the Manila Supreme Court that I have done with my all capacity, so I don't ashamed in front of God for what I have done when I have die. But if you say to me 'you do not have any ability to command the Japanese Army' I should say nothing for it, because it is my own nature. Now, our war criminal trial going on in Manila Supreme Court, so I wish to be justify under your kindness and right.

"I know that all your American and American military affairs always has tolerant and rightful judgment. When I have been investigated in Manila court I have had a good treatment, kindful attitude from your good natured officers who all the time protect me. I never forget for what they have done for me even if I had died. I don't blame my executioner. I'll pray God bless them.

"Please send my thankful word to Col. Clark and Lt. Col. Ferdhouse (Feldhaus), Lt. Col. Hendrie (Hendrix), Maj. Goi (Guy), Capt. Surburn (Sandburg), Capt. Real (Reel), at Manila court, and Col. Arnard, Capt. Cara, Capt. Herdman and Brunner.

"I thank you."

Thus the final act was played and Yamashita plunged to his death at the end of a rope on American gallows. A new era was conceived in the field of international criminal law. We are still too close to the event to determine its effect for good or bad, but what is done has been done and we can only hope that history will vindicate the judgment of the moment.

## For Further Reading

The classic treatment of the Yamashita case remains the book of another of the counsel for the Japanese General: A. Frank Reel, *The Case of General Yamashita* (Chicago: University of Chicago Press, 1949). Among more recent studies are John Deane Potter's biography, *A Soldier Must Hang* (London: Frederick Muller, Ltd., 1963); two more militarily oriented studies: A. J. Barker, *Yamashita* (New York: Ballantine Books, Inc., 1973) and Stanley L. Falk, *Decision at Leyte* (New York: W. W. Norton and Co., Inc., 1966); and a particularly well done comparative history which emphasizes the commonality of background among four Japanese generals: Arthur Swinson, *Four Samurai* (London: Hutchinson and Co., Ltd., 1968).

Renewed interest in the case of Yamashita arose as a result of the Vietnam conflict. Based upon the precedent of Yamashita, Professor Telford Taylor held the commanders of American combat forces in Vietnam responsible for failure properly to control troop conduct in massacres such as My Lai. Telford Taylor, *Nuremberg and*

*Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), especially, pp. 53, 91-2, 94, 181-2. Taylor's thesis is disputed in Lt. Col. Franklin A. Hart, "Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised," 25 *Naval College Review* 19-36 (September-October, 1972).

The Supreme Court decision, *In re Yamashita*, is reported at 327 U. S. 1, 66 S. Ct. 340 (1946). The formulation of the dissenting views of Justices Murphy and Rutledge is treated briefly in J. Woodford Howard, Jr., *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1968) especially, pp. 367-71, 375.

References to orders given by General Yamashita as well as some description of his subordinates may be found in a work more notable for its detail of Japanese war crimes: Lord Russell of Liverpool, *The Knights of Bushido* (London: Cassell and Co., Ltd., 1958) especially, pp. 243, 251, 257 n, 296, 319, and appendix, 313-326.

—Steven Zelinger<sup>11</sup>

## Footnotes

<sup>1</sup> Although militarily educated, Yamashita was not of the Samurai class. He was born in 1885, the son of a father—a travelling village doctor of peasant stock—and a mother, who came from a wealthy farm family. Yamashita did revere the Emperor but he definitely was not part of the Tojo clique.

<sup>2</sup> The complete personnel of the defense as finally constituted was as follows:

Colonel Harry E. Clarke, JAGD, Altoona, PA;  
Lt. Col. Gordon Feldaus, JAGD, Pierre, S.D.;  
Lt. Col. Walter C. Hendrix, JAGD, Atlanta, Ga;  
Major George F. Guy, Cavalry, Cheyenne, Wyo;  
Captain A. Frank Reel, JAGD, Boston, Mass;  
Captain Milton Sandberg, JAGD, Keyport, N.J.

<sup>3</sup> (Ed. Note: Delmas Carl Hill, later U.S. District Judge for Kansas, and Judge of the United States Court of Appeals for the Tenth Circuit.)

<sup>4</sup> General Yamashita had served in the War Ministry under General Ugaki on both of the latter's administrations in 1924-25 and 1931-32, and had assisted in the drafting of plans for the reduction of the Japanese Army by four divisions. For this reduction, forced through the Diet in spite of opposition of the militarists in 1931, Ugaki earned the undying hatred of the extremists.

<sup>5</sup> While sections of the Press were not prejudiced in their reporting of the Yamashita trial, yet it seemed to me that the general public really got only the prosecution's side of the case. Pat Robinson, I.N.S. correspondent, seemed to be particularly fair to the defense in his dispatches, but nevertheless, the general impression at home seemed to be one of preconviction of the accused.

<sup>6</sup> He was subsequently tried along with several others including General Tojo before the International Military Tribunal Far East in Tokyo and was finally executed.

<sup>7</sup> This same Jose Laurel who fled the American advance in March of 1945 and who was subsequently apprehended by our troops in Japan, managed to escape trial of any kind even though he had brought his country into war against the United States. He not only managed to escape trial but also succeeded in redeeming his former political position to the extent that he was a nearly successful presidential candidate in the 1949 Filipino election!

<sup>8</sup> The petition was actually filed by Mr. F. A. Delgado, a leading Manila lawyer, and the Philippine representative to the United Nations.

<sup>9</sup> The German General Dostler had been already convicted and shot in Italy, but the proof, in his case, was clearly that he had personally ordered the execution of American prisoners.

<sup>10</sup> (Ed. note: Justice Rutledge commended Yamashita's counsel, stating:

"One basic protection of our system and one only, petitioner has had. He had been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties".)

<sup>11</sup> Steven L. Zelinger, a senior at Harvard College, served as a Judicial Intern during the summer of 1980 in the Office of The Administrative Assistant to the Chief Justice.



## Court Nominations and Presidential Cronyism

Merlo J. Pusey

The nomination of justices of the Supreme Court is one of the most awesome responsibilities of the President of the United States. Most of our Presidents have so regarded it, but a few have yielded to the temptation of using vacancies on the Court to reward friends or to pay political debts. Fortunately those instances have been sufficiently rare to attract special attention.

George Washington set an admirable example in making the first appointments to the Supreme Bench. In a letter to Chancellor Robert R. Livingston of New York he had set forth his resolve to choose judges "with a sole view to the public good" and to "bring forward those who, upon every consideration and from the best information I can obtain, will in my judgment be most likely to answer that great end."<sup>1</sup> The first Chief Justice of the United States, he felt, must

be not only a great lawyer but also a great statesman, executive and leader. In his view John Jay of New York met this test, although he was only in his forty-fourth year, because of his diplomatic and political career and his two years as Chief Justice of New York.

Washington's nominees to the Court did include one personal friend, Robert Hanson Harrison, but Harrison had been chief judge of Maryland's General Court for eight years. He did not actually serve, although he appears to have accepted his commission at the President's urging (See "Welcome Back, Justice Harrison?," *Judicial Potpourri*, *Yearbook* 1979). Three members of the first Supreme Court had been participants in the Convention of 1787 and signers of the Constitution: John Blair, who had also served ten years in the state courts of Virginia; John Rutledge, who had been governor of South Carolina and a judge of the State Court of Chancery for six years; and James Wilson, who was deemed the best qualified lawyer in Pennsylvania. The other members of the first Court were William Cushing, who had been chief justice of the Massachusetts Supreme Judicial Court and a leader in the state convention which ratified the Constitution, and James Iredell who had been a judge and attorney general in North Carolina and also a leader in his state's ratification of the Constitution. Later, Washington named to the Court two other members of the Constitutional Convention — William Paterson (former Senator and Governor of New Jersey) and Oliver Ellsworth.

Washington discovered, however, that good intentions did not always save him from disappointment and embarrassment in regard to the Supreme Court. When Jay resigned, Washington tried to induce his former Secretary of the Treasury, Alexander Hamilton, to accept the chief justiceship. On Hamilton's refusal, Washington acquiesced in a bid for the post from John Rut-



*"If politics is the primary consideration," John Adams told Washington, appoint Jay John Chief Justice. Politics—in the inclusive sense of experience, contacts and pragmatic awareness—were conclusive considerations in the choice of the first head of the national judicial system.*





*When Jay resigned, John Rutledge of South Carolina did not hesitate to remind Washington that he was superior to Jay in "law knowledge" and ought to have been named Chief Justice at the outset. Washington named him as Jay's successor, but the Senate refused to confirm him.*

ledge who had previously resigned as Associate Justice. But Rutledge sat through only one brief term of the Court. When it was learned that Rutledge had expressed vehement opposition to the Jay Treaty of 1794 with Great Britain, the Federalist Senate refused to confirm his nomination.

The harried President then offered the position to Patrick Henry, the famous Virginia patriot, who declined. The next choice was Justice Cushing, the eldest member of the Court, who reluctantly decided after his confirmation by the Senate not to accept the responsibility at his advanced age. Washington then named Oliver Ellsworth, who had been a judge in the highest court of Connecticut, a senator, and one of the authors of the Federal Judiciary Act of 1789.

In a very narrow sense the naming of John Marshall to be Chief Justice in 1801 might be regarded as a personal favor. Marshall was certainly a good friend and trusted advisor to President John Adams, who had previously offered him appointments as Attorney General and as Associate Justice of the Supreme Court. Marshall had declined both those posts. At the time of his nomination to head the Court he was serving as Adams's Secretary of State. But the cordial relations between them are scarcely worthy of mention in the face of Marshall's eminent qualifications for the office. A President

cannot rationally be accused of cronyism when the friend on whom he confers an office is the best qualified citizen to discharge its duties.

When Thomas Jefferson became President, he was determined to water down the Federalist domination of the Court. Upon the resignation of Justice Alfred Moore in 1804, Jefferson wrote to Secretary of the Treasury Albert Gallatin: "The importance of filling this vacancy with a Republican and a man of sufficient talents to be useful, is obvious, but the task is difficult."<sup>2</sup> His choice was not a crony but an able South Carolina lawyer, William Johnson, then only thirty-two, who had been a state legislator and judge of the state's highest court. Jefferson's next two nominees to the Supreme Court were also judges—Henry Brockholst Livingston of the New York Supreme Court and Thomas Todd, chief justice of the Kentucky Court of Appeals.

Good fortune seemed to flow from a series of curious ventures regarding the Supreme Court during the administration of James Madison. When Justice Cushing died in 1810, the Court consisted of three Federalists—Marshall, Samuel Chase and Bushrod Washington and the three Republicans named by Jefferson. With a new appointment, the Republicans would have a majority. Jefferson hastened to write Madison: "The death of Cushing gives an opportunity of closing the reformation, by a successor of unquestionable republican principles."<sup>3</sup> Jefferson's choice for the position was Levi Lincoln who had served as his Attorney General. Madison compliantly offered the position to Lincoln, and even after the latter declined because of his impaired eyesight and advanced age, the President sent the nomination to the Senate and Lincoln was confirmed. When he persisted in refusing to serve, Madison nominated Alexander Wolcott, a little-known Republican leader in Connecticut who for many years had been collector of customs. An indignant Senate rejected the nomination. Madison's third choice was John Quincy Adams, then minister to Russia. The Senate approved, but Adams declined partly because he was "conscious of too little law."

In one of the most inexplicable maneuvers in American judicial history, Madison then turned to Joseph Story, who, though only thirty-two, had been speaker of the Massachusetts House of Representatives and had served one term in Congress. Jefferson had opposed Story as a pseudo-

republican because of his opposition to the Embargo Laws. While many were appalled by this elevation of a supposed young radical, Story's thirty-four years on the bench demonstrated that he was one of the greatest legal minds produced by the U.S.A. and a consistent exponent of the constitutional doctrines laid down by Marshall.

President Andrew Jackson was no less eager than Jefferson to change the direction of the Marshall Court, but he was caught in a strange conflict of objectives. The vacancy on the Court when Jackson was inaugurated went to John McLean of Ohio who had been an able Postmaster General under both James Monroe and John Quincy Adams and continued to hold that post briefly under Jackson. Apparently he was shifted to the Court because of his opposition to the use of postmasterships as political spoils.<sup>4</sup> But McLean had no scruples about playing politics in his own behalf. Jackson exacted a pledge from McLean that he would not be a candidate for the Presidency while on the bench, but McLean threw down that understanding by actively or passively participating in four presidential campaigns.

When Gabriel Duval resigned from the Court in 1835, much to the relief of his brethren because of his deafness and disability, Jackson was accused of using the vacancy to pay a political debt. His Secretary of the Treasury, William Duane, had been dismissed for his refusal to withdraw the federal deposits from the Bank of the United States, and Roger B. Taney had been chosen to carry out that unpopular task. But the Senate later refused to confirm Taney as Secretary of the Treasury, and when Jackson rewarded him with Duval's seat on the Supreme Bench confirmation was again denied. This outcome, however, had more relationship to the political animosities over the bank than to Taney's judicial qualifications. He had been an eminent lawyer and political leader in Maryland and had served as Jackson's Attorney General. Chief Justice Marshall favored his confirmation. The subsequent nomination and confirmation of Taney as Chief Justice to succeed Marshall in 1836, therefore cannot be properly labeled an act of cronyism, even though Daniel Webster concluded that the Supreme Court was "gone."

Few Presidents have had a rougher time filling vacancies on the Court than John Tyler. His first maneuver, upon the death of Justice Smith

Thompson, was to offer the position on the Court to Martin Van Buren who was the leading candidate for the Democratic presidential nomination which Tyler hoped to claim for himself. But that crude effort to immobilize a rival was squelched before any nomination was made, and when Tyler named John C. Spencer of New York, the irate Whigs of the Senate rejected him.

The President's next move was to offer this position to two Philadelphia lawyers apparently because he was impressed by the arguments they had just made in a case before the Court. When John Sergeant declined on grounds of age and recommended his fellow townsman, Horace Binney (at the same time swearing the President's emissary to secrecy about the prior offer to him) a tender was made to Binney, who declined for the same reason and recommended Sergeant, with a plea that his own declination never be disclosed. Tyler then twice offered the judgeship to Silas Wright, Democratic leader of the Senate, who twice declined. In desperation, Tyler sent the name of Reuben H. Walworth, Chancellor of the State of New York, to the Senate in March, 1844. When a second vacancy on the High Bench occurred, Tyler offered the position to James Buchanan, who declined, and then nominated Edward King of Philadelphia. On the last day of its session the Senate laid both nominations on the table. Trying once more in the last days of his administration, Tyler withdrew the King and Walworth nominations and sent in the names of John Meredith Read of Philadelphia and Samuel Nelson of New York. Nelson was confirmed and served on the bench for twenty-seven years, but the Senate did not act on the Read nomination. Only one of Tyler's ten tries was successful. (See "Robin Hood, the Supreme Court and Congress," in *Yearbook* 1978.)

President Millard Fillmore expressed a view that many other Presidents have probably shared when he faced the necessity of finding a successor to Justice Levi Woodbury in 1851. In a letter to Webster, the President said he would like the new justice "to combine a vigorous constitution with high moral and intellectual qualifications, a good judicial mind, and such age as gives prospect of long service."<sup>5</sup> His question to Webster was whether Benjamin Robbins Curtis of Boston "fill the measure of my wishes?" Webster thought the position should be offered first to the famous Rufus Choate and if he declined, Curtis

would be the logical appointee. This course was followed. Choate was not interested, and Curtis proved to be a stalwart on the Court, being one of the dissenters from Taney's incredible opinion in the *Dred Scott* case.

If ever a President had reason to "pack" the Supreme Court, it was Abraham Lincoln. He believed the *Dred Scott* decision to be an appalling error which the Court should overrule. But he did not seek to deprive the Court of its right to pass on the constitutionality of acts of Congress or to deny the validity of the *Dred Scott* decision in that particular case. His attitude was one of refusing to let that decision guide the policy of his administration and of trying to help the Court recover from that self-inflicted wound.

Lincoln's first appointment to the Court was Noah Haynes Swayne, an Ohio lawyer of high qualifications who won confirmation in the Senate by a vote of 38 to 1. The second vacancy was filled by Samuel Freeman Miller of Iowa who had powerful support from the bar of that state and among the western congressional delegations. Lincoln's only concession to personal friendship in the selection of Supreme Court justices was the appointment of David Davis, but Davis had been a judge for fourteen years in the Eighth Judicial Circuit of Illinois. If Lincoln had supposed that this judicial experience would insulate Davis from politics on the High Bench, he must have been disappointed. In 1863 Congress created a new (Tenth) Circuit for California and Oregon, and Lincoln's choice for the additional Supreme Court seat was Chief Justice Stephen Johnson Field of California, a Union Democrat who had powerful backing in the Pacific Coast states.

Lincoln's high-minded attitude toward the Court met with its severest test in the choice of a successor to Chief Justice Taney. When it was supposed that Taney's grave illness might be fatal, Justice Davis, speaking for himself and other members of the Court, urged the President to make Swayne Chief Justice. Davis also begged the President not to appoint Salmon P. Chase, presumably because of his excessive ego and his abrasive personality. Lincoln himself was well aware of Chase's offensive mannerisms from their close association when Chase was Secretary of the Treasury, but he had profound respect for Chase's ability. It was also evident that the imperious Chase was widely associated

with the chief justiceship in the public mind and that his appointment would help to unify the Republican Party and the nation. Lincoln hesitated to make the appointment, not because of Chase's patronizing attitude, but because he feared that Chase might misuse the chief justiceship to further his presidential ambitions. The appointment was finally made after Speaker Schuyler Colfax had reminded Lincoln of Chase's comment that he would rather be Chief Justice than President and expressed confidence that, if appointed, Chase would dedicate the remainder of his life to the bench.<sup>6</sup> Unfortunately, Chase did not forsake his presidential ambitions, and in retrospect Lincoln's estimate of Chase's judicial capacity appears to have been exaggerated.

President Ulysses S. Grant's nominations to the Supreme Bench suggest a strange combination of personal considerations and regard for judicial talent. His first nominee was his Attorney General, Ebenezer Rockwood Hoar, who had been a judge of the Massachusetts Supreme Court. But Hoar's brusque manners and his disregard of "senatorial courtesy" in recommending judges for the newly-created Circuit Court led to his defeat in the Senate. In an effort to placate the disgruntled Senators, Grant reluctantly named former Secretary of War Edwin M. Stanton to succeed Justice Robert C. Grier, who had sent in his resignation December 15, 1869, to take effect February 1, 1870. The Senate hastened to confirm Stanton, but four days later he was dead from a heart attack. This resulted in the curious spectacle of a justice (Grier) attending the funeral of his chosen successor.

Grant's next move was to name William Strong of Pennsylvania as a successor to Grier and Joseph P. Bradley of New Jersey to the judgeship still vacant because of Hoar's rejection. Both were eminently qualified, but the fact that the nominations went to the Senate while Chief Justice Chase was reading his adverse opinion in the *Legal Tender Case* resulted in charges that the President was attempting to pack the Court to reverse that decision. Whether or not that was Grant's intention, the justices he chose were able men, and the *Legal Tender* decision which they helped to overturn when the issue again came before the Court is now regarded as one of the Court's most unfortunate distortions of constitutional principles.



It was in choosing a successor to Chief Justice Chase that Grant encountered his greatest difficulty in regard to the Court. Although a wide array of judicial talent was available, Grant waited for six months and then offered the position to a close friend and political ally, Senator Roscoe Conkling of New York. Probably recognizing his own limited qualifications, Conkling declined the honor. Grant then nominated his Attorney General, George H. Williams, who had served as a judge in Iowa and Oregon but lacked the distinction associated with the highest judicial post in the land. Adverse criticism led to withdrawal of the nomination. Grant then turned to another personal friend, Caleb Cushing, a former judge and Attorney General of unquestioned legal learning, but Cushing was seventy-three years of age and a politician of highly unstable character. Grant's fifth choice was Morrison R. Waite of Ohio who had had no judicial experience and had never argued a case in the Supreme Court. The relieved Senate confirmed the nomination, and Waite served with satisfaction for fourteen years despite his initial handicaps.

Few if any Presidents have spoken more persuasively of the need for energetic and experienced legal minds on the bench than William H. Taft. Having been a judge himself, Taft was alarmed by the disability he found in the Court when he entered the White House and resolved to give it new talent and vigor. Yet when Justice Rufus W. Peckham died in 1909 Taft, over the protests of Attorney General George W. Wickersham, gave the position to his old friend and former associate on the United States Circuit Court, Horace H. Lurton of Tennessee, who was sixty-five years of age.

Having made that concession to friendship, Taft nominated one of the country's greatest lawyers, Governor Charles Evans Hughes of New York, and elevated Justice Edward Douglass White, a Democrat to the chief justiceship. All the subsequent vacancies during the Taft administration went to judges: Willis Van Devanter of Wyoming who had been a judge of the United States Circuit Court; Joseph R. Lamar, who had served on the Supreme Court of Georgia; and Mahlon Pitney, former Chancellor of New Jersey and judge of its Supreme Court.

Taft's interest in the Court remained strong after his return to private life. When Warren

Harding was elected President in 1920, Taft successfully lobbied for his own appointment as Chief Justice. He was also influential in bringing about three other Harding nominations to the Court — those of George Sutherland, Pierce Butler and Edward T. Sanford.

Louis D. Brandeis' effective work for Woodrow Wilson in the 1912 presidential campaign and their resulting friendship were undoubtedly factors in the nomination of Brandeis to the Court in 1916, but Brandeis was the country's most eminent "attorney for the people" and foe of monopolies. His reputation as a brilliant attorney and his subsequent distinguished service on the High Bench completely overshadow any personal element that may have influenced his appointment. It is interesting to note that President Wilson's first choice for the Court was James C. McReynolds, whose abrasiveness as Attorney General was embarrassing the President in Congress and the Cabinet. These two Wilson appointees came to occupy opposite extremes in the Court, especially in the 1930's when the New Deal cases were decided.

Charges of partisanship and special favor echoed through the Senate when President Herbert Hoover named Hughes Chief Justice in 1930, but here again the facts overwhelm superficial conjectures. The two men were indeed friends. They had been close working partners in the Harding and Coolidge Cabinets, and Hughes was active in Hoover's 1928 campaign. But his unique qualifications for the chief justiceship were so unassailable that the fight against him in the Senate turned out to be largely a partisan donnybrook.

At the time of the appointment rumors spread that Hoover had intended to appoint a much closer personal friend, Justice Harlan F. Stone, and that he had first offered the post to Hughes with the expectation that he would decline. This report seemed to gain credibility when a presidential secretary, George Akerson, gave White House reporters a tip that Stone was the President's choice. Actually, however, Attorney General William D. Mitchell had sounded out Hughes's inclination toward the chief justiceship before recommending Hughes to the President. So, in their discussion of a successor to Chief Justice Taft, Mitchell gave Hoover virtual assurance that Hughes would accept the post, and Hoover later denied that he had had any thought



of naming Stone.<sup>7</sup>

In summary, cronyism has played only a minor part in the staffing of the Supreme Court. When appointments have seemed to reflect a high degree of personal favor or political debt-paying the Senate has often refused confirmation, and many charges of cronyism evaporate under impartial examination of the facts.

Some Presidents have been so eager to avoid any suspicion of personal or political motives in staffing the Court that they have crossed party lines. Lincoln chose a Democrat, Justice Field. Republican President Benjamin Harrison selected a Democrat he had come to know well when both were in the Senate, Howell E. Jackson. Taft elevated Justice White to head the Court. Hoover nominated Chief Judge Benjamin N. Cardozo of the New York Court of Appeals, a Democrat, on the advice of Chief Justice Hughes. President Franklin D. Roosevelt promoted Justice Stone, a Republican, to the chief justiceship on the eve of World War II in the interests of national unity. Analysts report that Republican Presidents have appointed nine Democratic justices and Democrats have appointed three Republicans to the Court.<sup>8</sup>

While the motives of Presidents in selecting justices have varied widely, there is much evidence of statesmanship, and most of the Presidents who have tried to impose their views on the Court have been disappointed. Once on the Court justices have reacted to their own views of the law and the judicial function. The Court's high standing in public opinion results from the fact that it has customarily functioned as an independent tribunal with profound respect for its constitutional role.

#### Footnotes

<sup>1</sup> Warren, Charles, *The Supreme Court in United States History* (Little Brown, Boston, 1929) Vol. I, p. 32.

<sup>2</sup> Ibid. p. 287.

<sup>3</sup> Ibid. p. 404.

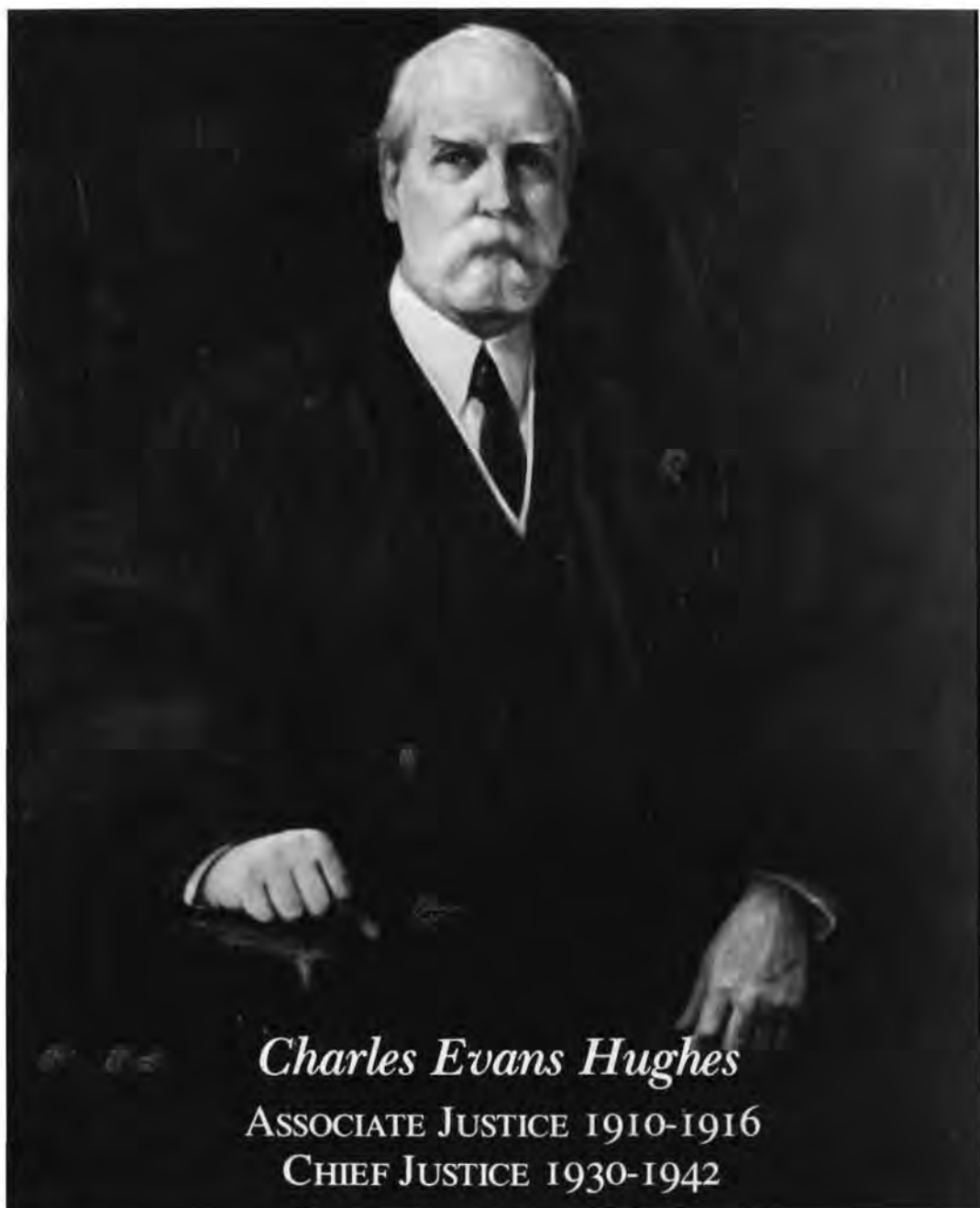
<sup>4</sup> James, Marquis, *The Life of Andrew Jackson* (Bobbs Merrill, New York, 1937) p. 478.

<sup>5</sup> Warren, op. cit., Vol II, p. 226

<sup>6</sup> *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* Vol. VI, part one, p. 23.

<sup>7</sup> Pusey, Merlo J., *Charles Evans Hughes* (Macmillan, New York, 1951) Vol. II, pp. 652

<sup>8</sup> *Guide to the Supreme Court* (Congressional Quarterly, Washington, 1979) p. 684



## EDITOR'S NOTE

*The fiftieth anniversary of the appointment of Charles Evans Hughes as Chief Justice occurred during 1980 and so did the seventy-fifth anniversary of his appointment as Associate Justice. The Yearbook of the Supreme Court Historical Society commemorates these milestones in the life of an extraordinary public servant with a special section in this issue.*

*In this section, Frederick Bernays Wiener's article tenders some additional evidence relevant to Hughes' appointment as Chief Justice. In a note about the*

*literature of the Hughes' appointment, Jim Buchanan attempts to set Wiener's article in context. As an historic document, and especially for those who may not be able to attend, we are reprinting the catalogue of the exhibition devoted to Hughes' life which opened at the Supreme Court on October 3, 1980. We have added photographs of some of the items displayed in the exhibition and are pleased to reprint as well William Gossett's eloquent tribute.*

# Chief Justice Hughes — A Recollection

William T. Gossett

For the last twenty years of the long and productive life of Charles Evans Hughes, I was privileged to be closely associated with him — first as law clerk and later as son-in-law. I came to know him as a singular human being as well as an imposing public figure. He was sensitive in his relations with others without being sentimental, witty without being frivolous, purposeful without being stubborn. He reasoned closely without being closed-minded, was tolerant without being lax, and calm without being indifferent. Above all, he was of rock-ribbed integrity without monolithic righteousness.

Charles Evans Hughes saw the law and the administration of justice not as tangential but at the very heart of our conduct as a people and our course as a nation, radiating out and bearing fatefully on all the apparatus and machinery of society and human relationships. He was far more than a superb legal technician. Indeed, of the fifty-seven years from his admission to the bar until his retirement, he spent fewer than half in the private practice of law and the rest in teaching, in the state and federal executive positions, and in the judiciary. The law to him was the very breath of humanity and of human affairs.

Hughes was born on April 11, 1862, in Glens Falls, New York, to David Charles and Mary Connelly Hughes. His father was a Welsh immigrant Baptist minister and his mother a former school teacher. Reading at three-and-a-half years old and familiar with the New Testament and the Psalms at five, he was able at six to persuade his parents to permit him to exchange formal schooling for a self-designed plan of home study under the guidance of his parents. This and a few years of more formal education at Public School No.

35 in New York City prepared him for college at the age of fourteen.

He attended two years at Madison College, now Colgate University. In 1878 he transferred to Brown University, from which he graduated in 1881. He made Phi Beta Kappa as a junior, was an editor of the *Brunonian*, participated in college politics, and was graduated third in the class at barely nineteen, the youngest member of the class.

The following year young Hughes taught Latin, Greek, algebra, and plane geometry at Delaware Academy in Delhi, New York, and studied law in a local lawyer's office. That experience confirmed his decision to pursue law as a career. He entered Columbia Law School in 1882, was graduated at top of his class in 1884, and was admitted to the bar that year after scoring ninety-nine and a half on his bar examination.



The young Charles Evans Hughes, as a boy in Glens Falls, N. Y.

Having worked without salary during the previous summer at Chamberlain, Carter, and Hornblower, Hughes entered that office as an associate in the fall of 1884 at a salary of \$30 a month, with an increase of \$5 every second month. This was the launching of his career which was to include the roles of public investigator, governor, associate justice, presidential candidate, international jurist and statesman, and chief justice of the United States.

We who were associated with Hughes as an active practicing lawyer between 1925 and 1930 had profound respect for his towering intellect. During that period most of his law business came from other lawyers — from private practitioners or from legal advisers of large corporations, although he also represented such noncorporate clients as the United Mine Workers — for example, in *United Mine Workers v. Coronado Coal Company*, 259 U.S. 344 (1922). He delivered many written opinions to clients and argued appeals involving difficult and complex questions of law. He argued as many cases in the Supreme Court as anyone outside the solicitor general's office, sometimes as many as four cases in a single week in that court. His practice embraced a broad range of clients and legal issues. And Judge Augustus N. Hand said of him: "He was a man whose equal I have never seen at the bar."

Although in the preparation of briefs and opinions he was supported by partners and members of the office staff, the final documents, especially the opinions, were invariably prepared by him. It was his custom to use two or three stenographers; one would be typing her notes while another was taking dictation. Within a few minutes of the completion of dictation, a transcribed draft would be available. Normally the draft of an opinion would be revised but once, although a brief might go through several revisions.

In the preparation of speeches, the same practice would be followed. Using a research assistant's memorandum, Hughes would prepare in longhand a sketchy outline of the speech, usually not more than forty-eight hours before it was to be delivered. From that outline he would dictate rapidly a draft of the speech, which normally would be revised only once. Later he would read the text aloud two or three times. Thus prepared, he would deliver the speech from memory without using the text or notes.

Similarly, in the argument of cases in appellate courts, Hughes's performance was consummate. Not only did he remember the names of the principal cases cited in his and the opposing briefs, he often startled opposing counsel and the judges by remembering the volume and page numbers of many of the cases.

Everyone who knew Hughes was immensely impressed, moreover, with the incredible speed at which he worked. He could absorb an entire paragraph almost at a glance and could read a treatise in an evening and a roomful of papers in a week; and when reading a book or document, he seemed literally to read down the middle of the page. Yet his professional burdens or public obligations were such as to require him to work long hours. When he was chief justice (a position he assumed at almost sixty-eight years of age) he arose at 6:45 a.m., had breakfast at 7:30, followed by a brisk walk, and was at his desk at 8:30. When the Court was in session, it was his custom to work until 10:00 p.m. He then would visit Mrs. Hughes and other members of the family who might be in Washington and would do some light reading before retiring at eleven.

But in spite of the speed at which he worked, he did not give the impression of frenetic or hurried effort. Calmness was, indeed, one of his most consistent characteristics. He always appeared to be composed and in control of his emotions. The only exceptions known to members of the family were when his oldest daughter, Helen, died at the age of twenty-eight and when his wife died shortly after their fifty-seventh wedding anniversary. Although he had been prepared intellectually for his wife's death, when the reality of it came and he realized that it was about to occur, he was overcome.

When Hughes ran for governor of New York for the first time in 1906, the public learned what those who had been close to him already knew: that he was, in the words of one of the great journalists of the period, Ida M. Tarbell, "a buoyant and joyful person, fond of books . . . music, golf, mountain climbing, friends, family, college and church." Justice Frankfurter saw the full dimensions of Hughes when the latter was chief justice, conceding that the public image of the man was inclined to that of an Olympic presence incapable of the light moment or the eye that wandered occasionally from the perception of the duty that history and his countrymen





*As history remembers him — the mature Charles Evans Hughes.*

had imposed on him.

About that image, Frankfurter wrote: although in public office "he may have acted on the realization that aloofness [was] indispensable to the effective discharge of [his] functions. What a caricature! He was genial though not promiscuous, full of fun and whimsey, a delightful tease and sparkling storyteller, a responsive listener and stimulating talker, drawing without show or pedantry on the culture of a man of wide interests and catholic reading. . . . He was self-critical rather than self-righteous, extremely tolerant towards views he did not share and even deemed mischievous. . . ."

The tolerance that Frankfurter noticed was an integral part of the Hughes character, as was his disdain of pettiness. Everyone who knew Hughes — associates, opponents, colleagues, and rivals in the public service — attributed to him a strong and rugged character and strict adherence to his own inflexible code of ethics. Although he represented clients with complete fidelity, his sense of public responsibility always prevailed over the interests, however important, of any private client. "It is hard for some persons to understand," he said, "that when a lawyer of the right sort takes a public place, he brings to the public the same loyalty and singleness of purpose that he displayed in relation to his private clients."

It is difficult—perhaps impossible—to measure with any precision the effect of the lives of great men and women on their times and on history, for they not only shape events but are shaped by them. But the sources of the power of example exercised by great men and women can be measured—by the strength of their characters, by the integrity of their actions, by the brilliance of their intellects, and by the grace and tolerance of their bearing.

By these criteria Charles Evans Hughes stands before the bar of history as a truly great man. And in the slow but certain processes by which the verdict of posterity is reached, his name and his memory will live only in part because of his legal, administrative, diplomatic, and judicial talents and achievements—however exceptional they were. His name will endure largely because he epitomized what the democratic proposition is all about: that those human qualities that make for excellence in an individual will surface in the awareness of his countrymen and attach to their possessor the only nobility created and prized by democratic institutions.

Charles Evans Hughes was such a nobleman.

*AUTHOR'S NOTE: Excerpts from American Bar Association Journal, December 1973, Vol. 59. In addition to my own recollections and sources, some facts and quotations are taken from the two-volume biography by Merlo J. Pusey, Charles Evans Hughes (Macmillan, 1951), and The Autobiographical Notes of Charles Evans Hughes edited by David J. Danielski and Joseph S. Tulchin (Harvard, 1973).*

## Justice Hughes' Appointment — The Cotton Story Re-Examined

Frederick Bernays Wiener

Did President Hoover offer the Chief Justiceship of the United States to Charles Evans Hughes over the telephone in 1930, and was that offer made following a conversation that the President had with Under Secretary of State Joseph P. Cotton?

Along with two others, I heard the original story, which answered that query affirmatively, within a year after the event with which it was concerned, from the lips of the man to whom it had been told by Under Secretary Cotton. Later, when the same account surfaced publicly some years after Cotton's death, it was denied, with varying degrees of emphasis and forthrightness, by a number of persons, including the individuals principally involved. More recently, a distinguished legal scholar concluded that "there are some known facts that support the denial."<sup>1</sup>

But reexamination of the original story in the light of additional evidence not previously available discloses that the primary denials are not

only flawed by omissions, obliquities, and by a significant slip, but are moreover flatly contradicted at a vital point by the newly uncovered materials. Thus one is relentlessly led to the view that the event did indeed take place, precisely as Cotton related it half a century ago.

### I

Mindful of the rule of evidence that testimony to a conversation is inadmissible unless there has first been laid a proper foundation as to place, time, and persons present,<sup>2</sup> I commence my account with those preliminaries.

Place: A dining room of the Providence-Biltmore Hotel in Providence, presently (at one remove) The Biltmore Plaza. Time: Fairly late on the evening of Thursday, February 5, 1931, the Tercentenary of the landing in America of Roger Williams, founder of Rhode Island. Earlier in the evening, at a program sponsored by the Rhode Island Historical Society to commemorate that anniversary, I had delivered the principal address.<sup>3</sup> Among those in the audience to hear me were Professor Felix Frankfurter, who had been my teacher, and was to continue a warm and indeed a devoted friend for 34 years more; and Henry M. Hart, Jr., and Orrin G. Judd, who had been my classmates in the Harvard Law School class of 1930, and fellow editors of volume 43 of the *Harvard Law Review*: Henry had been President, Orrin was Case Editor, I had served as Note Editor.<sup>4</sup> Hart was then doing graduate work at the Harvard Law School, and later was to be Dane Professor of Law there. Judd, then law clerk to Judge Learned Hand, ended his career as a United States District Judge for the Eastern District of New York. At that time I was an associate of the law firm of Edwards & Angell in Providence.

Following the lecture — and this is the third foundational element — persons present — Mr.



Joseph P. Cotton, who was Acting Secretary of State at the time President Herbert Hoover purportedly telephoned the offer of the Chief Justiceship to Charles Evans Hughes.

Frankfurter as host took the three of us, to the Providence-Biltmore for a late supper of Welsh rarebit and near-beer. Justice Frankfurter died in 1965, Professor Hart in 1969, Judge Judd in 1976. In 1972, Judge Judd, next to last survivor of the quartet present that evening, confirmed to me in writing the accuracy of my recollection of what had then been said.

At the supper table, Mr. Frankfurter, after detailing the difficulties President Hoover had encountered in making up his mind about whom to appoint as United States Attorney for the Southern District of New York—where F. F. had served as an assistant to Mr. Henry L. Stimson from 1906 to 1909<sup>5</sup>—told us how Charles Evans Hughes had become Chief Justice.

Not part of the narration that evening were the following facts:

Chief Justice Taft became ill after the Supreme Court's adjournment on December 2, 1929, and entered a hospital in North Carolina early in January.<sup>6</sup> He stayed there for about a week,<sup>7</sup> and returned to Washington literally on the verge of death. According to a contemporary account, "When he arrived at the Union station, onlookers were shocked by his appearance. All color had gone from his deflated cheeks. His eyelids drooped listlessly. He was unresponsive to sights and sounds."<sup>8</sup> A photograph of the Chief Justice showing him being wheeled from the train established all too plainly the accuracy of the foregoing report.<sup>9</sup> His retirement as Chief Justice was dated February 3, 1930, the day of that return to the capital.<sup>10</sup> A little later it was announced that President Hoover had called on the ailing Chief Justice and had spent ten minutes with him.<sup>11</sup> But, between the end of Taft's hospitalization in North Carolina and his return to Washington, members of his family had notified the President that the Chief Justice could no longer continue in office, and that a formal resignation would be forthcoming.

Contemporary accounts show that at this time, the week of January 27, 1930, while Secretary of State Henry L. Stimson was away at the London Naval Disarmament Conference, Under Secretary Joseph P. Cotton was Acting Secretary, occupying the Secretary's suite. He was an old and warm friend of President Hoover who had been a trusted assistant in the U. S. Food Administration in 1917-1918.<sup>12</sup> The President was simultaneously in his temporary office in the State,

War & Navy Building (now the Executive Office Building). It was reported that "Acting Secretary of State Cotton was just down the corridor and around the corner. The President's door was open to him at any hour."<sup>13</sup>

It was Cotton who had told the story of the Hughes appointment to his old and close friend Felix Frankfurter.<sup>14</sup> And that was the story Professor Frankfurter told us at supper:

News of the impending Taft retirement reached the President while Mr. Cotton was with him. The latter immediately said, in substance—and the conversations that follow are, necessarily, given in substance—"That provides you with a great opportunity, Mr. President. Now you can promote Justice Stone to be Chief Justice." Justice Stone was not only a member of Hoover's medicine ball cabinet that met daily on the White House lawn at 7:30 A.M.,<sup>15</sup> but Justice and Mrs. Stone had long been close friends of the Hoovers,<sup>16</sup> an intimacy reflected in their Sunday evening suppers together over many years.<sup>17</sup>

"And then," continued Cotton, "you can appoint Judge Learned Hand to fill Stone's place, and thus put on the Supreme Court the most distinguished federal judge on the bench today."

The President had doubts.

"That would be fine, very fine. But I feel I must offer the Chief Justiceship to Governor Hughes. As a former Justice there can be no question of his qualifications, and I feel so greatly obliged to him for that splendid speech he made for me on the Saturday before election<sup>18</sup> that it would be unforgivable ingratitude on my part not to offer him this position."

"But, Mr. President," said Cotton, "Hughes can't take it. His son Charles, Jr., is your Solicitor General, and in that job he handles all government litigation before the Supreme Court. That comes to about 40 percent of all the cases there. Consequently, if the father is Chief Justice, the son can't be Solicitor General. That means that Governor Hughes won't accept."

"Well," said the President "if he won't, that solves our problem. Then I can promote Stone and appoint your friend Hand. But, since the public knows Hughes and not Hand, it would be fine to announce that I had offered the post to Hughes before appointing Stone and Hand.<sup>19</sup> So I really must make the offer to Hughes."

Which he proceeded to do, over the telephone.

(President Hoover had a reputation for constant use of the long distance telephone, and this was given as an explanation of his immediate inquiry concerning Hughes' availability.<sup>20</sup>)

And then—here I quote Cotton as related by Frankfurter, this time verbatim—"The son-of-a-bitch never even thought of his son!" For Hughes accepted then and there.<sup>21</sup>

That is the way F. F. told us the story, now 50 years ago. Memories of course play tricks, but Judge Judd in September, 1972 remembered the incident distinctly, and wrote that the foregoing account "agrees in the main with what I recall."<sup>22</sup> As indicated, it has been revised to conform to his recollection as well; where his memory differed from mine, I have deferred to his. And he then permitted me to quote his own diary entry for February 5, 1931, as follows:

"Fritz speech on Roger Wms in eve, then dinner with Henry, FF & heard Hand, Hughes story."<sup>23</sup>

## II

The story above related apparently did not appear in print until 1935, in a serialized magazine article about Chief Justice Hughes, written by Henry F. Pringle, who later became the biographer of Chief Justice Taft.<sup>24</sup> By that time Cotton was dead,<sup>25</sup> and Chief Justice Hughes' *Autobiographical Notes* had not been written, much less published.<sup>26</sup> Here is what Pringle then wrote in *The New Yorker*:

"On February 3rd, 1930, Chief Justice Taft, shattered in body and apprehensive that he could no longer carry on the duties of the Court, submitted his resignation. It had to be accepted. Mr. Hoover, according to the best information, desired to promote Associate Justice Stone, his close friend. He confided this to the late Under Secretary of State Cotton, who said that it was out of the question to pass over Mr. Hughes. But Hughes, he added, would not accept. He was earning enormous fees in private practice. Besides, Charles E. Hughes, Jr., would have to resign as Solicitor-General if his father became Chief Justice. 'Offer it to Mr. Hughes,' suggested Cotton. 'He'll decline and then you can pick Justice Stone.'

"It was offered to Hughes and he promptly accepted."<sup>27</sup>

About a year and a half afterwards, two well known if essentially vituperative journalists, who today would be dignified as "investigative reporters"—the reference is to Drew Pearson and Robert S. Allen—undertook in advance of publication the serialization of their rancorous caricature of the Supreme Court, entitled *The Nine Old Men*. Here is how their version of the incident appeared in the book:

"Shortly after Chief Justice Taft died, the late Joseph P. Cotton, Undersecretary of State, was called to the White House for advice as to whom he should appoint as Taft's successor. Hoover, who leaned heavily on Cotton in all important matters, told him that he wanted to elevate his old friend Justice Stone to that office, but considered himself under obligation to Charles Evans Hughes, who had campaigned most effectively in his behalf, and who, he felt, carried great prestige throughout the nation.

"Cotton agreed emphatically that Stone was the man for the chief justiceship, and mentioned the idea of elevating Judge Learned Hand of the United States Circuit Court in New York, as a successor to Stone as associate justice.

"What I would like to do," said Hoover, 'is to offer Hughes the appointment but make sure that he will turn it down.'

"That's very simple," suggested Cotton. 'Hughes's son, Charles Evans, Junior, is Solicitor General and argues the government's cases before the Supreme Court. If his father became chief justice he would have to resign, and I'm sure Hughes wouldn't have him do that. Hughes is almost seventy years old. He has lived his life. He has received almost every honor there is to receive. He doesn't need the job, while being Solicitor General means a great deal to his son who is just at the start of his public career. So you can offer Hughes the appointment and be sure that he will turn it down.'

"Hoover thought this was sound reasoning and got Mr. Hughes on the long-distance telephone immediately.

"Mr. Hughes," he said, 'I would like to offer you the chief justiceship of the Supreme Court.'

"Without a moment's hesitation, Hughes replied:

"Mr. President, this is a very great honor indeed. I accept."

"Hoover and Cotton looked at each other in astonishment. Then the latter exploded:

"Well, I'll be damned! Can you beat that? The old codger never even thought of his son."<sup>28</sup>

It is doubtless unnecessary to dwell on the many details in which the Pringle and Pearson-Allen versions differ from the original Frankfurter account as set forth here and as still remembered by Judge Judd in 1972.

## III

When the foregoing excerpt was called to





Shown on a campaign train in 1928, Herbert Hoover, was reported to have offered the Chief Justiceship to Hughes two years later, allegedly feeling confident that Hughes would turn it down.

ex-President Hoover's attention, early in 1937, he sent the following letter to Chief Justice Hughes:

"My attention has been called to the serializing of a scurrilous book on the Supreme Court in one of the newspapers here, in which a purported conversation of mine with Joe Cotton at the time of your appointment is related.

"I scarcely need to say that no such conversation ever took place, and your own recollections will confirm mine that I never had any telephone conversations with you at all on the subject. I only write this so that you might file it away in your memoirs, although I think it is hardly necessary.

"I am not capable of expressing my indignation at this book and its authors. One of those men was discharged from the *Baltimore Sun* and the other from the *Christian Science Monitor* for deliberate lying. The discharge, however, did not seem to effect any moral regeneration."<sup>29</sup>

The Chief Justice replied on the very next day:

"\*\*\* The story of a conversation between you and Cotton, at the time of my appointment, first appears, I think, in July, 1935, in an article by Henry F. Pringle in *The New Yorker*. Pringle is a serious writer and was friendly. What he said about your conversation with Cotton greatly disturbed me, as it was utterly inconsistent with your offer to me and with all I knew of the circumstances of my appointment. I thought of writing you about the matter, but let it pass. Your letter disposing of this story is most welcome and I shall treasure it as a valuable item for those who in the future wish to write with accuracy.

"I wonder if you would let me quote to Mr. Pringle the first two paragraphs of your letter. I understand that he is writing Mr. Taft's biography and he has important articles from time to time in magazines and reviews. He may be tempted to repeat the story and I should like to see it suppressed."<sup>30</sup>

The ex-President referred to the matter a few days later, saying that he was unaware when he first wrote "that this telephone story had other antecedents than those two particular imaginative minds." He continued:

"The whole story falls to the ground from the fact that no telephone conversation as to your appointment as Chief Justice ever took place. That you and I can both confirm. If our joint word is no good, one would think it improbable that Presidents use the telephone in such vital matters, especially in the extraordinarily confidential circumstances that surrounded the incident.

"You may be interested in that background. I have had it looked up in the Presidential files and I have checked my memory from the White House Secretary concerned.

"Chief Justice Taft became indisposed early in January, 1930, and went to North Carolina for a rest. Late in the month I received word from a member of the family that unless the Chief Justice soon showed improvement, he would be compelled to resign in order to have complete rest and that this contingency was almost certain. I at once discussed the question of his possible successor with the Attorney General. To my great satisfaction, Mr. Mitchell urged your appointment. The question required no consultation with others. It was the obvious appointment.

"I discussed it with but one other gentleman and that was not Mr. Cotton. Mr. Cotton was Under Secretary of State and had nothing to do with judicial appointments.

"I sent word to you asking you to come to the White House. You did so on January 31."<sup>31</sup>

The letter then continues with Mr. Hoover's recollection of that meeting with Mr. Hughes.<sup>32</sup> The Chief Justice replied, outlining his own "vivid memory" of the interview in question, which differed in two respects from that of the ex-President; and then concluded:

"I am glad to have your emphatic repudiation of the absurd story which it seems has gained considerable currency. I suppose a good deal of such unfounded gossip passes into history!"<sup>33</sup>

Chief Justice Hughes' definitive recollection of his White House interview with President Hoover on January 31, 1930, will be considered below; first it is appropriate to deal with the Hoover denials, and particularly with his flat-footed assertion that "Mr. Cotton was Under Secretary of State and had nothing to do with judicial appointments."

That sentence, which first appeared in print in 1967,<sup>34</sup> simply fails to carry conviction.

First of all, Mr. Hoover was writing, not to an uninformed outsider, but to one who, to his own certain knowledge, had actually been a Secretary of State. After all, both had been members of the Harding-Coolidge Cabinet from March, 1921 to March, 1925, Hoover as Secretary of Commerce, Hughes as Secretary of State.

Next, the obvious obliquity of the quoted sentence raises instant doubts as to its trustworthiness. That is because, on its face, it verges on deadpan nonsense, on a par with the congressional committee reports that supported repeal of the old statutory provision that "Here-after women shall not be allowed to accompany troops as laundresses" on the stated ground that the Quartermaster Corps' operation of laundries had rendered it obsolete.<sup>35</sup>

The position is even more striking once one proceeds *dehors* the assertion itself. That is because by making that statement ex-President Hoover in effect disowned one who had been very close to him for years as a trusted adviser. As has been noted, Cotton and Hoover had been together in the U.S. Food Administration in what in 1931 was still *the* World War.<sup>36</sup> That circumstance of course forged an indissoluble bond between them, as common service in crisis virtually always does. At the time in question, the President and the then Acting Secretary of State were constantly in each other's presence, each in temporary quarters in the same building that were in close proximity. All this would explain why the President could indeed have discussed the filling of the Supreme Court vacancy with a close lawyer friend who was not in the Department of Justice at all.

And then there is the vital testimony of Under Secretary Cotton's lawyer chief, Secretary of

State Henry L. Stimson. Here is what Justice Frankfurter said later:

"Cotton was a tower of strength. He died within two years. I don't know the details. It was too awful. I went up to his funeral in Bedford Village, New York. Mr. Stimson was there, and he asked me to ride back with him to the station. I remember that that strong man, Mr. Stimson, was really in tears about Joe Cotton's death. I remember sitting there, and he clasped my thigh, and he said, 'Felix, you know a great deal about the goings on of this administration, but even you don't know what Joe's loss means to the country.' And then he made this statement, 'He's the only man who can do anything with the President.'"<sup>37</sup>

Mr. Hoover's 1937 denials also make no mention of Justice Stone, who had been his close and indeed intimate friend since their association in the Coolidge cabinet, Stone as Attorney General, Hoover as Secretary of Commerce. More than that, Stone remained his friend throughout. It is surely significant that, as the far from glorious Hoover presidency came to its dismal end on March 4, 1933, that dark day when the doors of every bank in the country had clanged shut, among the very few persons who came to see the ex-President off at the Union Station after the inauguration of his successor were Justice and Mrs. Stone.<sup>38</sup>

Mr. Hoover's latest biographer, who treats his subject sympathetically, has pointed out that, in the ex-President's *Memoirs*, "the errors are legion."<sup>39</sup> That is a reason, additional to Mr. Hoover's unconvincing repudiation of Joseph P. Cotton and to his failure even to mention Harlan F. Stone, why his denials are suspect on their face.

#### IV

Let us refer to Chief Justice Hughes' definitive account of his January 31, 1930, interview with President Hoover; here is what appears in the text of his *Autobiographical Notes*:

"At President Hoover's request, I came to Washington the night of Thursday, January 30th, and saw the President at the White House early the next morning. It appeared that Chief Justice Taft was failing rapidly; there was no hope of recovery, and the fear was entertained that unless he resigned at once he might lapse into a mental condition which would make it impossible for him to resign and in which he might continue for an indefinite period. The President wished to be ready for the contingency of the Chief Justice's resignation and proposed my appointment. I demurred, referring to my age (I should be 68 in the following April), and my desire not to assume

further and heavy responsibilities. After some discussion in which the President strongly urged me to accept, I finally told him that I would, making the qualification that I did not wish my nomination to evoke any contest over confirmation. I made this qualification because I had taken an important part in the Republican campaign of 1928 and had also been very active in my law practice. The President did not seem to think there would be opposition and urged that my acceptance would be very satisfactory to the country.

"Chief Justice Taft resigned the next day (February 1st) and on the following Monday (February 3rd) the President sent my nomination to the Senate. The Senate confirmed it on February 13th."<sup>40</sup>

The Chief Justice's *Autobiographical Notes* then go on to quote Pringle in *The New Yorker*, as well as the several letters that passed between him and ex-President Hoover about that and the Pearson-Allen version, excerpts from all of which have already been set forth.

Three points about the extract just quoted call for comment.

First, the Chief Justice is demonstrably wrong in dating the Taft resignation on February 1st. On this point he is contradicted by the official record,<sup>41</sup> by a reliable contemporary account reporting that announcement of the Hughes nomination followed that of the Taft resignation by only four hours,<sup>42</sup> and by Mr. Hoover's 1937 recollection in accord with those two.<sup>43</sup>

Second, the Chief Justice's text never mentions his son; that individual is mentioned by name only in Mr. Hoover's second letter, the one written on February 25, 1937:

"My recollection of that interview [of January 31, 1930] you can also confirm. We discussed the subject at great length. I urged many reasons for your taking it. You felt you should be allowed to finish your life in peace. You felt it might interfere with the career of Charles, Jr. I stated that we were anxious to keep him in the Government in some other equally important post. I urged the confidence your acceptance would bring to the whole country and that it would meet great response in the people. You promised to let me know in a day or so.

"I was convinced your sense of public service would compel you to accept, and I reported to the Attorney General that he could consider it settled if Mr. Taft felt he must retire. A day or so later you sent word to me, either through Charles, Jr. or the Attorney General that you would accept."<sup>44</sup>

To the foregoing letter, Chief Justice Hughes replied on March 8, 1937, saying,

"My recollection agrees with yours in every respect, except that I think I gave my acceptance at the time of our interview subject only to the qualification that I did not wish my nomination to evoke a contest over confirmation. However, that is an unimportant detail.\*\*\*I do not recall sending you a confirmatory message."<sup>45</sup>

What may however appear important is that, according to the Chief Justice's later recollection, he accepted the offer at the time it was made to him. And as for Charles, Jr., who duly resigned as Solicitor General on the day following his father's confirmation as Chief Justice,<sup>46</sup> it is the fact that he never thereafter held any federal office at all, and apart from membership on a temporary commission of New York State, was never afterwards appointed to any public office whatsoever.<sup>47</sup>

Third, neither the Chief Justice nor the ex-President ever explain, in their 1937 correspondence, how the former was on January 30, 1930, invited to come to the White House the next day. One cannot learn from those letters by what means that invitation was extended, or whether it came directly from the President or was conveyed by an aide.

Finally, and this item comes from another source, the Chief Justice's 1937 wish to have the Cotton story "suppressed"<sup>48</sup> was simultaneously conveyed to Mr. Pringle, then working on his biography of Taft, by the Chief Justice's son and daughter.<sup>49</sup>

Accordingly, the sequence of events as remembered by the principals concerned raises these queries:

Was the January 30 invitation to come to Washington the next day in fact extended to Mr. Hughes on the telephone by the President himself?

If so, was this the telephone conversation of the Joe Cotton story?

And if it was, would not even a tentative acceptance of the tendered Chief Justiceship be consistent with an invitation to come to Washington to discuss the matter in more detail and at greater depth?

At any rate, some time in 1937, probably after President Roosevelt had unveiled his Court Plan, I saw in a newspaper or magazine that I cannot now identify a journalist's interview with Chief Justice Hughes, in which the latter was quoted as flatly denying that the office he then held had been offered to him over the telephone.



Some time thereafter, probably rather sooner than later, I called that denial to Mr. Frankfurter's attention. As nearly as I can now recollect, I did so face to face, because I remember vividly his spoken response: "I can show you the iron manhole cover in Times Square on which Joe Cotton and I stepped when he told me the story."

## V

At the outset of Chief Justice Hughes' tenure, Mr. Frankfurter more than once expressed himself in print as unhappy over the former's votes.<sup>50</sup> I can recall receiving from F. F. at about this time, 1932 or 1933, a letter in which he wrote, in substance, "I am more and more disturbed over the alignment of your Brown Chief Justice." (Chief Justice Hughes had graduated from Brown University in 1881, I received my bachelor's degree there in 1927.)

So it is therefore not wholly surprising that relations between the two men were hardly close immediately after Frankfurter was appointed to the Supreme Court.<sup>51</sup> But before very long mutual wariness was replaced by mutual respect. The Chief Justice presented F. F. with an inscribed portrait that bespoke his "esteem,"<sup>52</sup> while, after Hughes' retirement and then more frequently after his death, the younger Justice paid repeated tribute to his former Chief.

## VI

Speaking personally now, and as one whose participation in Supreme Court advocacy extended over a span of more than 35 years,<sup>53</sup> I never felt, at any time, the slightest inner doubts as to the qualities or competence of Charles Evans Hughes. He was a far better presiding officer than any of his successors and an infinitely better lawyer than any of them except Stone, whom he probably also excelled, though not to nearly the same degree.

But history also has its claims, and the incident herein discussed at length has a bearing on history, particularly on the history of the nation's highest court; and that it involves, not prying into private lives, but rather a study of the acts of two very public persons at a significant national crossroads in time.

## VII

*A number of conclusions can fairly be extrac-*

ted from the contradictions apparent between the account set forth in Part I hereof and the subsequent denials discussed in Parts III and IV, as well as from the omissions contained in those denials and from their contradictions *inter sese*.

1. Hoover and Hughes both agree that they met and discussed the offer of the Chief Justiceship on January 31, 1930, and that the invitation to Mr. Hughes to come to the White House was extended on the day before.<sup>54</sup> Mr. Hoover checked both dates against the White House records.<sup>55</sup>

Even in those days of infinitely better postal service than we enjoy today, that invitation could not have been extended by letter in time to bring Mr. Hughes from New York to Washington for an early morning meeting on the following day. A telegram, which would necessarily pass through several hands at both ends, could not guarantee prompt delivery to the actual addressee, and would moreover not be private. And President Hoover was, long before direct dialing, much given to consistent use of the long distance telephone. Undoubtedly, therefore, the President asked Mr. Hughes by telephone to come to Washington the next day, January 31.

2. As has been seen, Cotton in January, 1930 was Acting Secretary of State, occupying the Secretary's office, which was in the same building as, and in close proximity to, the temporary office then being used by the President, to which Cotton had access at all hours.<sup>56</sup>

Mr. Cotton was also personally close to the President, a relationship originally grounded on their war-time service together in the U. S. Food Administration.<sup>57</sup> And, as Secretary of State Stimson lamented, some 14 months later when his Under Secretary died, "He's the only man who can do anything with the President."<sup>58</sup>

3. There is a good deal of evidence, much of it actually in the interstices of the denials, that actually corroborates the Cotton story.

(a) Thus, Justice Stone was not only a close but indeed an intimate friend of President Hoover.<sup>59</sup>

(b) According to Cotton, Mr. Hughes never gave any thought to what acceptance of the Chief Justiceship would mean to his son's career. In his dictated *Autobiographical Notes*, Chief Justice Hughes in telling of his January 31 talk with the President never mentions Charles, Jr.;<sup>60</sup> the latter appears only in Mr. Hoover's 1937 letter



reciting his own recollection of that same conversation.<sup>61</sup>

(c) According to Cotton, Hughes accepted immediately. Here also, in his dictated *Autobiographical Notes*, the Chief Justice says that he accepted the offer on January 31, subject only to the qualification that he did not want a fight over confirmation,<sup>62</sup> a reservation with which the President was of course powerless to comply. And, here also, it is only in Mr. Hoover's 1937 letter about the January 31 talk that there is any mention of acceptance being postponed for a few days.<sup>63</sup>

4. President Hoover's denials of the Cotton story are, for a number of reasons, simply not credible.

(a) There is of course nothing inherently improbable about a President offering a Supreme Court appointment over the long distance telephone; that was precisely the way that Franklin Roosevelt, only a few years later, tendered one to Professor Frankfurter of the Harvard Law School.<sup>64</sup>

But, far more significantly, it has since been incontrovertibly established that, just two years after the Hughes appointment, on the occasion of Justice Holmes' retirement, President Hoover offered the resultant vacancy to Chief Judge Benjamin N. Cardozo of the New York Court of Appeals *over the telephone!* Here the proof rests on the White House phone logs plus the recollection of Chief Judge Cardozo's law clerk.<sup>65</sup>

(b) The White House phone logs are unavailable for the Hughes appointment, as they only start in July, 1930.<sup>66</sup> But President Hoover's latest biographer has established that his subject's *Memoirs* are not only replete with factual errors, but are full of self-deception as well.<sup>67</sup> After all, here we have President Hoover asserting in 1937 that he could not possibly have done an act that the newly found proof shows he had actually done in 1932.

(c) President Hoover, likewise, is silent concerning the means by which he extended his invitation to Mr. Hughes to be at the White House on January 31.

(d) His brushing aside of Joe Cotton, long-time intimate, is surely less than commendable, while his bland abstract assertion that an Under Secretary of State has no concern with judicial appointments<sup>68</sup> is, in the circumstances, disingenuous at best.

(e) Mr. Hoover's complete silence about his intimate friend Justice Stone similarly raises doubts about his denial.

(f) As for Mr. Hoover's denial that he had ever discussed the matter with Cotton at all, Chief Justice Hughes would of course have no independent knowledge as to who if anyone was with the President at the time of the telephone call that was undoubtedly made on January 30, and which in fact brought him to the White House the next day.

(g) The Cotton story was far from creditable to the ex-President, in two respects. It showed him extending the offer of a supremely important office in the expectation, and probable hope, that it would not be accepted. And it showed him ignoring the claims of his very close friend, Mr. Justice Stone, whom he may well have preferred as the appointee, regardless of how many other prominent persons may have specifically recommended, and indeed strongly urged, that he appoint Hughes.

Mr. Hoover accordingly had every motive to deny the Cotton story when it first came to his attention, in somewhat garbled form, nearly six years after Joe Cotton had been laid in his grave. Doubtless the ex-President felt that he could then do so with impunity.

5. Chief Justice Hughes' apparent denials of the telephonic offer also break down under close analysis.

(a) He, like President Hoover, fails to say by what means, on January 30, he was requested to come to Washington the next day.<sup>69</sup>

(b) His dictated account of an immediate acceptance at the January 31 meeting, together with his failure to mention Charles, Jr., in that account,<sup>70</sup> are, while contradicted by Mr. Hoover,<sup>71</sup> entirely consistent with the two core elements of the Cotton story. Indeed, this double concordance constitutes the weightiest kind of corroboration, by the Chief Justice himself, of the very heart of Joe Cotton's recital.

(c) Immediate acceptance of an offer of the Chief Justiceship, made over the telephone and this without opportunity for reflection, has as a psychological matter the ring of truth.

(i) After all, in 1910 Hughes had missed the Chief Justiceship by a hair. President Taft had all but determined on him as the successor to Chief Justice Fuller, and it was only a last-minute switch, or whim, call it what one will, that in-

dured Taft to select Justice E. D. White instead. As Mr. Justice Frankfurter later said —

"We shall never know the full story of what happened, but within twenty-four hours after the justices called on him there was a change in the mind of Taft, and it was then that White became chief justice. There is the most absurdly contradictory testimony of people who think they do know what happened. Within a half-hour after Taft had summoned Hughes, probably to tell him he was going to be chief justice, he canceled the request that Hughes come. During that time something happened.

"Anyhow, White was made chief justice. At the Saturday conference following the sending of White's name to the Senate, Hughes, the junior member of the Court, made what I am told was one of the most gracious speeches of welcome to the new chief justice."<sup>72</sup>

Yet Hughes would have been less than human if he had not felt at least residual disappointment at the ultimate outcome.

(ii) Then too, as Mr. Justice Frankfurter twice observed, Hughes came to regret his resigning from the Supreme Court in 1916 to run for President.<sup>73</sup> In the aftermath of his hairbreadth defeat in that year,<sup>74</sup> successful and resourceful as he later proved to be as Secretary of State, preeminent though he inevitably was as

a universally acknowledged leader of the American bar,<sup>75</sup> and that solely by virtue of unparalleled professional competence, it is inconceivable that he would not on occasion prior to 1930 have wondered whether, on balance, he should not have declined the presidential nomination tendered him in 1916.

Once more to quote Justice Frankfurter,<sup>76</sup> "\*\*\*\*the question will not down, futile as such doubts of retrospective wisdom are, whether at the end of his life he would not have preferred the rule of conduct he formulated in 1912, when he declined to be drafted,<sup>77</sup> to the exception he made in 1916."<sup>78</sup>

(d) The conjunction of the foregoing events — the two near misses, first the chief justiceship and then the presidency — would explain why, if the obviously unexpected offer was made early in 1930 in the way recounted by Cotton, in a manner that precluded the formulation of a reasoned response after deliberation, Hughes accepted, instinctively, somewhat impulsively, and immediately. Had the same offer been transmitted by mail in the first instance, he would undoubtedly have reflected on how his acceptance would, as in fact it did, blight the public career of Charles, Jr. But on the telephone —



*Hughes appears here in the traditional center position of the Chief Justice, flanked in the front row by Associate Justices James C. McReynolds, Oliver Wendell Holmes, Willis Van Devanter, and Louis D. Brandeis. Standing, second row, are Harlan F. Stone, George Sutherland, Pierce Butler and Owen J. Roberts.*

(e) If indeed the offer was made over the telephone, as it was according to Cotton, and as a similar offer was made to Chief Judge Cardozo by President Hoover just two years later, that of course was different, and reflections would only come afterwards. They could not all have been pleasant — and it has long been a settled tenet of psychology that unpleasant matters are invariably forgotten.<sup>79</sup> That pervasive fact of human life doubtless underlay all later reluctance to admit the circumstances of the offer as related by Cotton.

6. Even though that relation necessarily became hearsay once Cotton was dead, it can confidently be asserted that there were no flaws in its transmission.

The Cotton story as set forth above was repeated by Mr. Frankfurter early in February, 1931, almost exactly one year after the event with which it dealt, and doubtless substantially less than a year from the time that Frankfurter heard it from Cotton. And the present version of Frankfurter on Cotton was confirmed by Judge Orrin Judd in 1972 in every essential detail.

Accordingly, the reader may safely accept Part I above as correctly reproducing what Mr. Frankfurter told Hart, Judd, and myself in 1931.

The next inquiry accordingly is, Did Professor Frankfurter accurately recount what he had heard from the lips of Joseph P. Cotton?

We can be sure that he did. For all of Felix Frankfurter's utterances and remarks, oral as well as written, were characterized by a lifelong devotion to meticulous accuracy. He was, in everything he said and did, a most fastidiously truthful individual. There were many persons who failed to admire him, to be sure; and, like every human being, he was not immune to some of the frailties of mankind, minor though his own lapses were when viewed in context. But, when it came to accuracy, to exactitude, to preciseness, to veracity, he was absolutely uncompromising. His whole life reflected a dedicated and unceasing quest for truth. As Professor Freund said in the moving and hauntingly eloquent tribute that he delivered at Justice Frankfurter's funeral service, F. F. was indeed a "Mr. Valiant-for-truth."<sup>80</sup>

That much was admitted even by his most tenacious adversaries. Actually, perhaps the most significant tribute in that regard, fantastically grudging though it was in expression, came from President A. Lawrence Lowell of Harvard,

on the occasion of the bitter Frankfurter-Wigmore dispute over the Sacco-Vanzetti case, the controversy that roused all of proper Boston and sorely split the university itself. Said Lawrence Lowell to a friend, "Wigmore is a fool! Wigmore is a fool! He should have known that Frankfurter would be shrewd enough to be accurate."<sup>81</sup>

It is therefore impossible, literally and utterly impossible, that the Cotton story as related by Professor Frankfurter in February, 1931, so soon after he had heard it from Joe Cotton himself, could have been in any vital respect an inaccurate version.



A Harvard Law School professor in 1931, Frankfurter was appointed to the Supreme Court himself eight years later by President Roosevelt.

7. Let us turn to the source of the story, Joseph P. Cotton. He was as Justice Frankfurter later told in his *Reminiscences*, "As capacious-minded, as effective a man of law as anyone I know of in my time."<sup>82</sup> He also had scholarly interests and had a hankering for public affairs.<sup>82</sup> When Secretary of State Stimson commissioned his law partner George Roberts and his friend and former assistant Professor Frankfurter to combine in finding him an Under Secretary on whom they could jointly agree, they picked Cotton — with the result that "Stimson

was simply in seventh heaven. Here was Joe Cotton. I'm sure Stimson thought that Cotton was as well qualified as he was to be Secretary of State."<sup>83</sup>

Against that background, having been selected and then accepted by three men, each one of the highest ethical outlook and standards, it is simply out of the question to suppose for a moment that Joseph P. Cotton would concoct out of whole cloth and thin air a story about Herbert Hoover and Charles Evans Hughes that was completely devoid of factual foundation.

Indeed, even if it be argumentatively supposed that Cotton had been capable of fabricating such a calumny, what possible motive could he have had for doing so?

Seven years later, after Cotton was dead, both the ex-President and the Chief Justice may well have wished that the matter had not happened as it did. Each of them then had a motive to deny, Cotton had none in telling the story. And there, quite apart from all else, is the real reason why it is impossible to believe Mr. Hoover, in whom accuracy was all too often deflected by wishfulness; and why one can read between the lines of Chief Justice Hughes' recollections and letters much that confirms the story even as it reflects some degree of residual regret at having been tendered a post that the President really wished to confer on another, and at having impulsively preferred self to son when the tender was made.

8. Finally, on an *n*th rereading of the 1937 Hoover-Hughes correspondence,<sup>84</sup> and of Chief Justice Hughes' recollections<sup>85</sup> that were "leisurely dictated" between November, 1941 and the end of 1945,<sup>86</sup> one cannot find therein any specific Hughes denial that he had in fact been offered the Chief Justiceship over the telephone on the day before his White House interview with the President. The Chief Justice talks around that assertion, but never directly declares that the actual event did not in fact happen.

Significantly, Chief Justice Hughes in 1937 wrote of the Pringle version of the Cotton story, "I should like to see it suppressed."<sup>87</sup> But the objective observer may fairly inquire, Are not falsehoods properly "exposed" rather than "suppressed"?

## VIII

After extended cogitation over the years, "after many night watches,"<sup>88</sup> and this against the background, and with the advantage of a lifetime of professional experience in the weighing and evaluation of conflicting evidence, there emerges the following conclusion:

The strong probabilities are, indeed the virtual certainty is, that what passed between President Hoover and Mr. Hughes took place over the telephone on January 30, 1930, just as Under Secretary Cotton shortly afterwards told Professor Frankfurter, and just as the latter related it to us at the Providence-Biltmore Hotel on the evening of February 5, 1931.

The only item missing from both accounts was the last part of the Hoover-Hughes telephone conversation, namely, the President's invitation to come to the White House for further discussion on the morning following. Mr. Hoover's denial that there was any such telephone conversation, in any manner, evokes incontestable disbelief in view of the proof now available of his offer of another Supreme Court vacancy, also over the telephone, just two years afterwards. But the missing portion just noted—the invitation to come to Washington for further discussion the next morning—really reconciles Chief Justice Hughes' letters and later recollections with the Cotton story.

## IX

When I first heard the Cotton story fifty years ago, I had no reason whatever to doubt it; I knew my erstwhile teacher Felix Frankfurter to be a man of veracity and probity whose every statement of fact could be unreservedly accepted as true.

Today, in the light of all the available evidence—the setting, the relationships, the motivations on both sides, the psychological probabilities, the revealing slips, all of which have been set forth above in full detail—I not only still believe the Cotton story, I submit that the dispassionate observer can safely and confidently accept that story as historical fact.



## Footnotes

<sup>1</sup> P. A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 6 (1967). This article will in time become a chapter in Professor Freund's Volume for the Holmes Devise History of the Supreme Court, to be entitled *DEPRESSION, NEW DEAL AND THE COURT IN CRISIS, 1930-1941*; but up to now that book has not appeared.

<sup>2</sup> 3 AM. JUR. PROOF OF FACTS (1959) 380; I. GOLDSTEIN, TRIAL TECHNIQUE (1935) §332; I. GOLDSTEIN TRIAL TECHNIQUE (F. Lane's 2d ed. 1969) §11.34. See *Angus v. Smith*, Moo. & M. 473, 474 (Nisi Prius 1829; Tindal, C.J.C.P.), where those requirements were first made applicable in instances of selfcontradiction. But the invariable American practice today enforces these identical preliminaries as a prerequisite to evidence of all conversations.

<sup>3</sup> F. B. Wiener, *Roger Williams' Contribution to Modern Thought*, 28 R. I. HIST. SOC. COLL. 1 (1935), cited by the Supreme Court, *per* Frankfurter, J., in *Minersville District v. Gobitis*, 310 U. S. 586, 594 n.3 (1940).

<sup>4</sup> 43 HARV. L. REV. 99 (1929); *id.* at 1282 (1930).

<sup>5</sup> FELIX FRANKFURTER REMINISCES (H. B. Phillips ed. 1960) 38-50. Hereafter cited as F. F. REMINISCES.

<sup>6</sup> New York Times, Jan. 8, 1930.

<sup>7</sup> New York Times, Jan. 15 & 16, 1930.

<sup>8</sup> TIME, Feb. 17, 1930, p. 17.

<sup>9</sup> New York Times, Feb. 4, 1930, p. 1.

<sup>10</sup> 280 U. S. iii.

<sup>11</sup> TIME, Feb. 17, 1930, p. 17. Of course this report does not establish that Chief Justice Taft was in fact able to communicate with the President during this visit.

<sup>12</sup> WHO WAS WHO IN AMERICA 1897-1942, p. 264, s. v. Joseph P. Cotton ("with U. S. Food Admin. Dec. 1917, European Representative, U. S. Food Admin. 1918"); 1 H. HOOVER, THE MEMOIRS OF HERBERT HOOVER: YEARS OF ADVENTURE, 1874-1920 (1951) 253 ("On the legal staff we secured Joseph P. Cotton [and seven other named individuals]"; *id.* 352 ("I at once sent Joseph Cotton over to London to see these [Allied Wheat] Executives."); 2 H. HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933 (1952) 336 ("Secretary Stimson\*\*\* was well supported by such men as Joseph Cotton, William Castle, and Harvey Bundy, who had worked with me before.")

<sup>13</sup> TIME, Feb. 3, 1930, p. 11; see also *id.*, Jan. 27, 1930, p. 12.

<sup>14</sup> F. F. REMINISCES 218-228 (ch. 21, "Joseph P. Cotton").

<sup>15</sup> 2 H. HOOVER, THE MEMOIRS OF HERBERT HOOVER 327; A. T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956) 270-271. Hereafter cited as MASON'S STONE.

<sup>16</sup> *Id.* 262-289 (ch. 17, "Friend of President Hoover").

<sup>17</sup> THE MEMOIRS OF HERBERT HOOVER 187.

<sup>18</sup> New York, Nov. 6, 1928, p. 17, indicating that it may have been a talk over the radio rather than to a live audience. In my original draft, composed in 1971-1972, the text read, "that splendid Madison Square Garden speech." Judge Judd, commenting on that draft, wrote on Sept. 14, 1972, "I do not remember the part about Hughes' Madison Square Garden speech."

<sup>19</sup> This sentence was not in my original draft; it is taken from Judge Judd's letter of Sept. 14, 1972, that sets forth his recollection of the story as told us by Professor Frankfurter.

<sup>20</sup> Same comment as to this sentence; it also is taken from that same letter from Judge Judd.

<sup>21</sup> "\*\*\*\*young Hughes may well have had an understanding with his father when he became Solicitor General that he would not stand in the way of any opportunity that his father might have for reappointment to the Supreme Court.\*\*\*Justice Hughes had enough political savvy so that he and his family must have been aware of the possibility of a reappointment. Consequently I would not agree with Joe Cotton's characterizations of Hughes, Sr., even though I do recall that it was part of the language that was quoted at the time. One reason the remark impressed me was that I was then Law Clerk to Judge Learned Hand. He was away in early February, either at A.[merican] L.[aw] I.[nstitute] or on a winter vacation, which accounted for my being able to come to Providence." Letter from Judge Judd, Sept. 14, 1972.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; also letter from Judge Judd, Sept. 21, 1972.

<sup>24</sup> H. F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT (1939). Hereafter cited as PRINGLE'S TAFT.

<sup>25</sup> He died on March 10, 1931. WHO WAS WHO IN AMERICA, 1897-1942, p. 264.

<sup>26</sup> THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES (D. J. Danelski & J. S. Tulchin, eds., 1973) xi: They were composed between the end of 1941 and the end of 1945, and were originally titled "Biographical Notes"; hereafter cited as AUTOBIOGRAPHICAL NOTES. The earlier title was used by Mr. Merlo J. Pusey in his life of the Chief Justice (CHARLES EVANS HUGHES [1951], hereafter cited as PUSEY'S HUGHES), and the Professor Freund in the article already cited *supra* note 1.

<sup>27</sup> H. F. Pringle, *Chief Justice - III*, THE NEW YORKER, July 13, 1935, pp. 18, 19.

<sup>28</sup> D. PEARSON & R. S. ALLEN, THE NINE OLD MEN (1936) 74-75.

<sup>29</sup> Letter, Hoover to Hughes, Feb. 19, 1937, AUTOBIOGRAPHICAL NOTES 292; also 3 MEMOIRS OF HERBERT HOOVER: THE GREAT DEPRESSION, 1929-1941 (1952) 375-376, where however the last two sentences of the letter were eliminated.

<sup>30</sup> AUTOBIOGRAPHICAL NOTES 292-293.

<sup>31</sup> *Id.* 293-294.

<sup>32</sup> *Id.* 294.

<sup>33</sup> *Ibid.*

<sup>34</sup> Freund, *supra* note 1, 81, HARV. L. REV. at 6, note 8.

<sup>35</sup> By Sec. 5 of the Act of March 16, 1802, c. 9, 2 Stat. 132, 134, Congress allowed one ration "to the women who may be allowed to any particular corps not exceeding the proportion of four to a company"; this became R. S. §§ 1240 and 1295. By 1878, there were 980 such women, each entitled to a daily ration at 22¢ each (7 Cong. Rec. 3729); as a matter of arithmetic this came to \$79,134 per year.

Partly "that thereby they will get rid of a class injurious to the service" (7 Cong. Rec. 3795), partly for reasons of economy (7 *id.* 3554, 3729, 3795,

4187-4189), Congress in Sec. 5 of the Act of June 18, 1878, c. 263, 20 Stat. 145, 150, declared "That hereafter women shall not be allowed to accompany troops as laundresses: *Provided*, That any such laundress, being the wife of a soldier as is now allowed to accompany troops, may, in the discretion of the regimental commander, be retained until the expiration of such soldiers present term of enlistment." This section, less the proviso, became 10 U.S.C. (1926 through 1952 eds.) § 664.

In the 1956 revision of Title 10 of the U.S. Code, that provision was dropped because "*Obsolete*." Laundry service is now furnished troops by Quartermaster Corps personnel organized as fixed or mobile laundry units, or through commercial facilities." H. R. REP. 970, 84th Cong., 1st sess., p. 1011; SEN. REP. 2484, 84th Cong., 2d sess., p. 1020.

<sup>36</sup> *Supra* note 12.

<sup>37</sup> F.F. REMINISCES 227-228.

<sup>38</sup> MASON'S STONE 289.

<sup>39</sup> D. BURNER, HERBERT HOOVER: A PUBLIC LIFE (1979) 58\*, 203, 251, 288, 300, 339\*.

<sup>40</sup> AUTOBIOGRAPHICAL NOTES 291.

<sup>41</sup> 280 U.S. 111, note 1.

<sup>42</sup> TIME, Feb. 10, 1930, p. 12.

<sup>43</sup> Letter Hoover to Hughes, Feb. 25, 1937, AUTOBIOGRAPHICAL NOTES at 294.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> 281 U.S. iii, note 1.

<sup>47</sup> 2 WHO WAS WHO IN AMERICA, 1943-1950, p. 269.

<sup>48</sup> AUTOBIOGRAPHICAL NOTES 293.

<sup>49</sup> MASON'S STONE 280\*.

<sup>50</sup> (1) *The Supreme Court and the Interstate Commerce Commission* (1932), in P.B. KURLAND, ed., FELIX FRANKFURTER ON THE SUPREME COURT (1970) 228, discussing *United States v. Baltimore & O.R.R.*, 284 U.S. 195 (1931), and *Chicago, R.I. & P.R.R. v. United States*, 284 U.S. 80 (1931). (Also criticized therein at length was the decision in the St. Paul reorganization case, *United States v. Chicago, M., St. P. & P.R.R.*, 282 U.S. 311 (1931), as to which see M. LOWENTHAL, *THE INVESTOR PAYS* (1933); but Hughes, C.J., did not participate in that decision.) (2) *Social Issues Before the Supreme Court* (1933), P.B. KURLAND, ed., *supra*, at 286, discussing *Klein v. United States*, 283 U.S. 231 (1931), *Heiner v. Donnan*, 285 U.S. 312 (1932), and *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933).

<sup>51</sup> Here is a characteristic incident three times publicly mentioned by the younger man: "Early in my experience at these Saturday conferences, when I made some remarks that were not wholly in accord with what he thought should be the decision of the Court, Chief Justice Hughes would say, as though it casually fell from his lips, 'Well, Professor Frankfurter—I beg your pardon, Justice Frankfurter...' I thought he said it once too often, and I said, I hope with smiling deference: 'With all due respect, Chief Justice, I regard no title as more honorable, and none that I like more to be called by than 'professor'.' F. Frankfurter, *The Health of the Society*, 1 J. Soc. PUBLIC TEACHERS OF LAW [n.s.] 363, 364 (1950) (spelling Americanized). For two later versions only slightly different, see *Dean James Barr Ames and the Harvard Law School* [1956], in F. FRANKFURTER, *OF LAW AND LIFE & OTHER THINGS THAT MATTER* (P.B. Kurland ed., 1965) 26, 28; and *Presentation of*

*the American Bar Association Medal* [1963], in FELIX FRANKFURTER: A TRIBUTE (W. Mendelson ed. 1964) 6, 8.

<sup>52</sup> Personal observation.

<sup>53</sup> My name first appears in the United States Reports in *Ickes v. Fox*, 300 U.S. 82, 83 (1937); I had argued and lost the case below by a 4-1 vote (*Ickes v. Fox*, 85 F.2d 294 [App. D.C. 1936]), following which Solicitor General Stanley Reed very generously attached my name to the Secretary's brief on the merits that was ultimately filed.

Then, after my first two Supreme Court arguments, see the note following, there ensued a lengthy professional hiatus during Army service that lasted from March, 1941 to December, 1945; *inter arma silent leges*.

The war over, I next appeared in the reports as one of counsel in *In re Yamashita*, 327 U.S. 1 (1946). I am last mentioned by name in the U.S. Reports as counsel for the winning appellant in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). My last Supreme Court case was *B.P.O.E. Lodge v. Ingraham*, 411 U.S. 924 (1973), dismissing appeal from 297 A.2d 607 (Me. 1972). But by then the names of counsel were no longer noted in connection with dismissals of appeals or denials of certiorari. Even those who, like myself, deplore the current legitimization of lawyers' advertising (*Bates v. State Bar of Arizona*, 433 U.S. 350 [1977]), welcomed the anonymity that by then surrounded failures to obtain Supreme Court hearings of cases lost below.

<sup>54</sup> AUTOBIOGRAPHICAL NOTES 291, 294.

<sup>55</sup> *Id.* 293.

<sup>56</sup> *Supra* note 13.

<sup>57</sup> *Supra* note 12.

<sup>58</sup> F.F. REMINISCES 228.

<sup>59</sup> *Supra* notes 15, 16, and 17.

<sup>60</sup> AUTOBIOGRAPHICAL NOTES 291.

<sup>61</sup> *Id.* 294.

<sup>62</sup> *Id.* 291.

<sup>63</sup> *Id.* 294.

<sup>64</sup> F.F. REMINISCES 282-284, 287-288.

<sup>65</sup> A.L. Kaufman, *Cardozo's Appointment to the Supreme Court*, 1 CARDOZO L. REV. 23 at 23 and note 1 (1979).

<sup>66</sup> Letter from Dale C. Mayer, Archivist, Herbert Hoover Presidential Library, West Branch, Iowa, June 2, 1980.

<sup>67</sup> *Supra* note 39.

<sup>68</sup> AUTOBIOGRAPHICAL NOTES 293.

<sup>69</sup> *Id.* 291.

<sup>70</sup> *Ibid.*; and see also *id.* at 294.

<sup>71</sup> *Id.* 294.

<sup>72</sup> OF LAW AND MEN 122; see also I PUSEY'S HUGHES 271-194 (ch. 27, "Ascending the Supreme Bench"), and I PRINGLE'S TAFT 532-535.

<sup>73</sup> OF LAW AND MEN 133, 146-147.

<sup>74</sup> I PUSEY'S HUGHES 360-366 (ch. 34, "Defeat Without Bitterness").

<sup>75</sup> See particularly 2 *id.* 582-591, covering Hughes' visit to London in 1924, when, as President of the American Bar Association, he led a large group of American lawyers; and quoting from his addresses at Westminster Hall and elsewhere in connection with that pilgrimage to "the old homestead."

<sup>76</sup> OF LAW AND MEN 147.

<sup>77</sup> I PUSEY'S HUGHES 295-304 (ch. 20, "A Flat 'No' in 1912").

<sup>78</sup> *Id.* 315-334 (ch. 31, "The 1916 Nonimation").

<sup>79</sup> "The forgetting in all cases is proved to be founded on a motive of displeasure." *Psychopathology of Everyday Life*, in *THE BASIC WRITINGS OF SIGMUND FREUD* (A. A. Brill, ed. & tr., Modern Library ed. 1938) 96. See chapters I-VII of the *Psychopathology*, all dealing with forgetting and concealed memories. The text itself was first published as a book in 1904, although it had appeared in a periodical three years earlier. 2 E. JONES, *THE LIFE AND WORK OF SIGMUND FREUD* (1955) p. 11.

<sup>80</sup> *Felix Frankfurter*. Remarks of Paul A. Freund at

the funeral service, February 24, 1965, p. 3.

<sup>81</sup> F. F. REMINISCES 217.

<sup>82</sup> *Id.* 218.

<sup>83</sup> *Id.* 224.

<sup>84</sup> AUTOBIOGRAPHICAL NOTES 292-294.

<sup>85</sup> *Id.* 291.

<sup>86</sup> *Id.* xi.

<sup>87</sup> *Id.* 293.

<sup>883</sup> BRACTON, *DE LEGIBUS ET CONSEUTUDINIBUS ANGLIAE* (S. E. Thome, ed. & tr. 1977) 95 (f. 164b).

## A Note on the "Joe Cotton Story"

James M. Buchanan

Of all the stories that surround the Hughes appointment in February, 1930, perhaps none is so intriguing and undying as the "Joseph Cotton Story."

The story first appeared 1935 in a *New Yorker* article by Henry Pringle, Chief Justice Taft's authorized biographer. Pringle wrote:

On February 3rd, 1930, Chief Justice Taft shattered in body and apprehensive that he could no longer carry on the duties of the Court, submitted his resignation. It had to be accepted. Mr. Hoover, according to the best information, desired to promote Associate Justice (Harlan Fiske) Stone, his close friend. He confided this to the late Under Secretary of State Cotton, who said that it was out of the question to pass over Mr. Hughes. But Hughes, he added, would not accept. He was earning enormous fees in private practice. Besides, Charles E. Hughes, Jr., would have to resign as Solicitor-General if his father became Chief Justice. 'Offer it to Mr. Hughes,' suggested Cotton. 'He'll decline and then you can pick Justice Stone.' It was offered to Hughes and he promptly accepted."<sup>1</sup>

While this story "greatly disturbed" Hughes and caused him to consider writing to ex-President Hoover about the matter, he nevertheless, "let it pass."<sup>2</sup>

Two years later, the story again resurfaced, this time in Drew Pearson and Robert S. Allen's *The Nine Old Men*.<sup>3</sup> The publication of *The Nine Old Men* not only caught Hughes' attention but Hoover's as well, prompting the ex-President to write Hughes a denial.<sup>4</sup> In the intervening two years the story had been embellished. Instead of Pringle's sparse account, the Pearson story contained dialogue between Cotton and Hoover. It also contained errors.

First, according to the Pearson account, Cotton was called to the White House "shortly after Chief Justice Taft died," which would have been after March 8th, 1930. The Pringle story has Cotton arriving after Taft's resignation on the 3rd of February. Secondly, in the Pringle story, Cot-

ton reminded the President of his obligation to Hughes, whereas in the subsequent Pearson account, Hoover reminded Cotton. The addition of dialogue may or may not be a device by Pearson, but one wonders where he received such descriptive information.<sup>5</sup>

The story continued to make the rounds long after Stone and Hughes had died (Cotton, the source of all this, died in early 1931). The story seems to have been retold to Alpheus T. Mason as well as to Mrs. Harlan Fiske Stone in 1950.<sup>6</sup>

In 1949 the controversy again erupted upon the occasion of Merlo Pusey's research into the incident. In an exchange of letters with Pusey, William D. Mitchell, Hoover's Attorney General at the time of the Hughes appointment, denied the veracity of the Pringle and Pearson accounts.<sup>7</sup>

The debate continued in 1956 with the publication of Dexter Perkins' *Charles Evans Hughes and American Democratic Statesmanship*.<sup>8</sup> Hoover sent Perkins a denial of the story sometime after the review of the book appeared in the *Saturday Review* of July 28, 1956.<sup>9</sup> The Perkins book also generated a twenty-page exchange between Supreme Court Justice Felix Frankfurter and Merlo Pusey. Frankfurter claimed that Cotton told him of the incident within a day or two of its occurrence. Frankfurter found Mitchell's denial of the story and the account given to him to be not mutually exclusive. The question, Frankfurter held, revolved around the telephone call. Frankfurter insisted that the call took place on January 30th and "the result of it [was] Hughes came down from New York and had . . . breakfast" on the 31st.<sup>10</sup>

That Hughes did have breakfast with Hoover is not denied by any of the parties involved. "My guess," Frankfurter continued, "is that Hughes did not accept unequivocally over the phone but, that the shrewd Cotton rightly inferred that when



he came down to see the President . . . he would allow himself to be persuaded by the President to accept.<sup>11</sup>

What Cotton did not know was that Associate Justices Willis Van Devanter and Pierce Butler, anxious to carry out the dying Taft's wish for a particularly qualified replacement, had arranged to meet with Hughes on the 28th of January. Meeting at Hughes' New York City apartment, Van Devanter and Butler approached Hughes with the nomination proposal.<sup>12</sup> Ascertaining that he would accept if offered, they immediately informed the President, through Attorney General Mitchell, of Hughes' interest.<sup>13</sup>

Frankfurter does shed new light on the subject. He claims that the Hoover-Hughes conversation on the 30th did not amount to an offer "and correspondingly there was nothing said by Hughes at the other end that could be called an acceptance."<sup>14</sup> Frankfurter believed that the conversation indicated to Cotton that Hughes would accept the nomination if Hoover offered it to him. Frankfurter pointedly avoids the story of the offer being made over the phone on which

Pringle and Pearson base their stories.

According, therefore, to Frankfurter's account, Hoover did not "make an offer" over the phone to Hughes on the 30th, but merely invited him down to Washington to discuss the nomination matter further. Thus, Hoover would have been acting consistently with information he received from those at the Van Devanter-Butler-Hughes meeting of the 28th that, if offered, Hughes would accept. Cotton, unaware that Hughes had already been approached and had been given time to consider the appointment offer and to consult with his son, was probably surprised at Hughes' willingness — and seeming callousness — to meet with the President to discuss the nomination. The story repeated in the Pearson book which had the President looking at Cotton "in astonishment" and saying "Well, I'll be damned! Can you beat that? The old codger never even thought of his son" is apocryphal.<sup>15</sup> Frankfurter never defended it. "The central issue," Frankfurter wrote, "[was] whether Cotton had such a talk with President Hoover" — not over an offer.<sup>16</sup>

#### Footnotes

<sup>1</sup> H. F. Pringle, "Profiles," *The New Yorker*, July 13, 1935, p. 19.

<sup>2</sup> Charles Evans Hughes to Herbert Hoover, 2-20-37, Post-Presidential-Individual, Box 370, Herbert Hoover Presidential Library, West Branch, Iowa.

<sup>3</sup> Pearson and Allen, *The Nine Old Men*, (New York, 1936).

<sup>4</sup> Hoover to Charles Evans Hughes, 1-19-37, Post-Presidential-Individual, Box 370, Herbert Hoover Presidential Library, West Branch, Iowa.

<sup>5</sup> Pearson and Allen, *The Nine Old Men* p. 74.

<sup>6</sup> Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (New York, 1956), pp. 835-836, f.n. 46.

<sup>7</sup> Merlo Pusey to William D. Mitchell, 10-20-49; Mitchell to Hoover, 10-21-49; Hoover to Mitchell, 10-25-49; Mitchell to Pusey, 11-7-49; and Pusey to Mitchell, 11-12-49, William DeWitt Mitchell Papers, Box 7 .M682a and Box: Hoover, Spencer, and Sullivan Correspondence, Minnesota Historical Society, Minneapolis, Minnesota.

<sup>8</sup> Dexter Perkins, *Charles Evans Hughes and American Democratic Statesmanship* (New York, 1956).

<sup>9</sup> Hoover to Dexter Perkins (ca. August, 1956) Post-Presidential-Secretary, Box 188, Herbert Hoover Presidential Library, West Branch, Iowa.

<sup>10</sup> Felix Frankfurter to Merlo Pusey, 11-14-56, Felix Frankfurter Papers, Box 147, Library of Congress.

<sup>11</sup> Felix Frankfurter to Merlo Pusey, 11-27-56, *Ibid.* In Hoover's personal engagement calendar he noted that he saw Cotton on January 11th and 14th and on February 3rd. For the famous telephone conversation to have taken place, Cotton had to be at the President's office on January 30th. It must be noted, however, that the President's engagement calendar has numerous gaps between appointments, so it can not be held as conclusive evidence that Cotton *did not* visit with the President on that day. President's Personal File, Box 167, Herbert Hoover Presidential Library West Branch, Iowa.

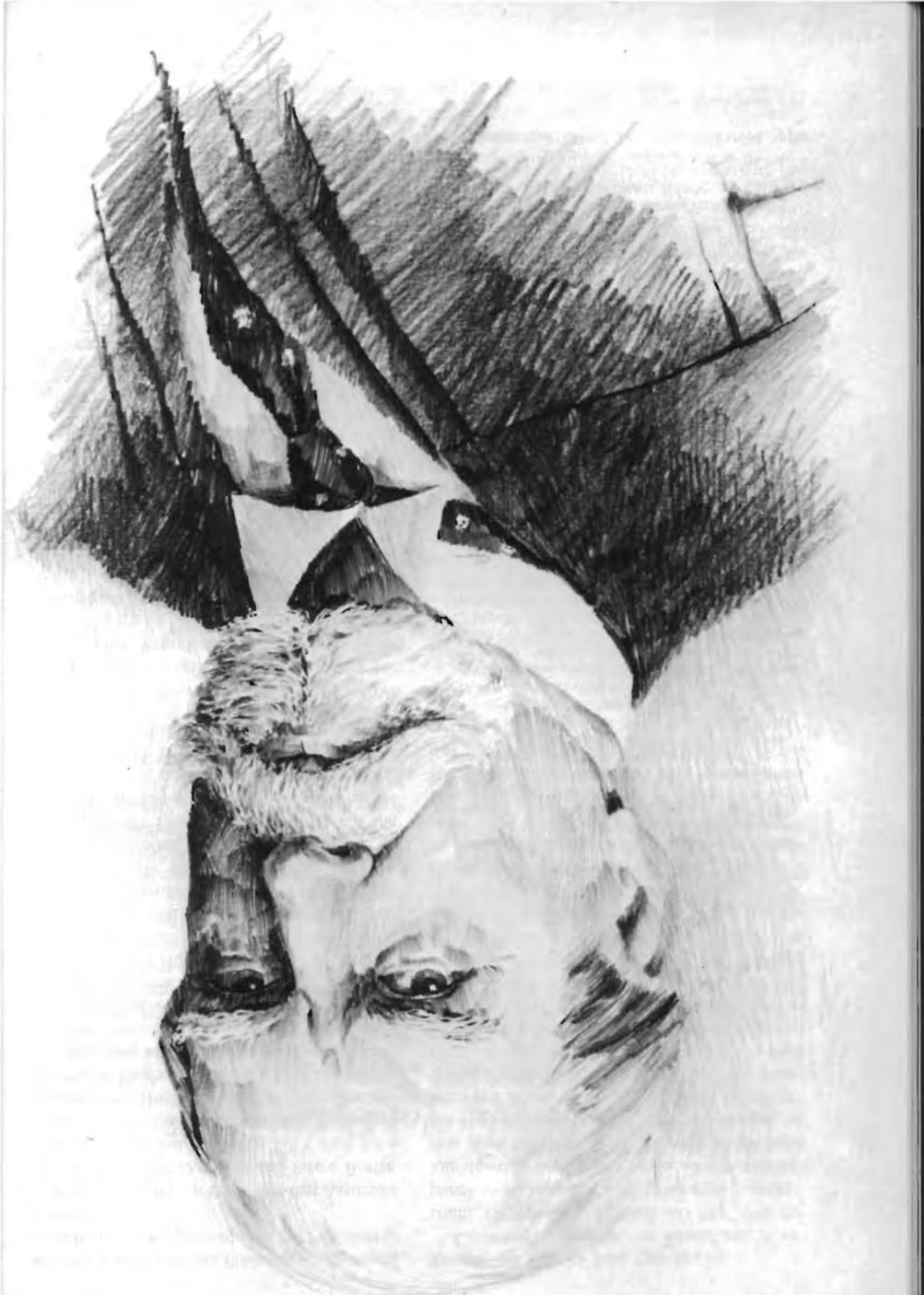
<sup>12</sup> Merlo Pusey, *Charles Evans Hughes*, (New York, 1951), Vol. II, p. 651. See also: Beerits Memorandum, 1-28-30, Charles Evans Hughes Papers, Box 80, Library of Congress.

<sup>13</sup> William D. Mitchell to Merlo Pusey, 11-7-49. Quoted in Pusey, *Charles Evans Hughes*, p. 651.

<sup>14</sup> Frankfurter to Pusey, 12-10-56, Frankfurter Papers, Box 147, Library of Congress.

<sup>15</sup> Pearson and Allen, *The Nine Old Men*, pp. 74-75.

<sup>16</sup> Frankfurter to Pusey, 12-10-56, Frankfurter Papers, Box 147, Library of Congress.



CHARLES E. GARDNER

# Hughes Exhibit Catalogue

## *Charles Evans Hughes: The Eleventh Chief Justice*

### INTRODUCTION

Our exhibit celebrates the anniversary of two notable dates in the life of Charles Evans Hughes.

It has been 70 years since President William Howard Taft appointed Charles Evans Hughes to be the sixty-second Associate Justice of the Supreme Court of the United States.

Fifty years have elapsed since President Herbert Hoover chose, and the Senate confirmed, Charles Evans Hughes as the eleventh Chief Justice. Hughes succeeded Chief Justice William Howard Taft, the man, who as President, had placed Hughes on the Court as Associate Justice.

During his eleven years as Chief Justice, the Court moved into its first real home. Hughes presided over the opening session in the new Supreme Court building on October 7, 1935 — 45 years ago.

Although there is no time limitation on the exhibit, the opening has been set to recognize these anniversaries.

To Elizabeth Hughes Gossett I extend my personal thanks for sharing with us her time and support, an insight into her father, Charles Evans Hughes, and most of the memorabilia included in this exhibit. Without her, the exhibit could not have been possible. My thanks to Susanne Owens, Assistant Curator, for preparing this catalogue detailing the memorabilia of Charles Evans Hughes.

We join many others in honoring Charles Evans Hughes on the 50th anniversary of his appointment as Chief Justice. In doing so, we pay tribute to him in the words of Chief Justice Taft, "a man who does things and does them right, a great Governor, a great judge and a great Secretary of State." May we add, a great Chief Justice.

Gail Galloway  
Curator

### LENDERS TO THE EXHIBIT

Brown University Archives  
Providence, Rhode Island

The Chief Justice and Mrs. Burger

Helen Hughes Campbell  
Stonington, Connecticut

The Chapman Historical Museum  
Glens Falls, New York

School of Law  
Columbia University  
New York City

Cornell University  
Manuscripts and Archives Division  
Ithaca, New York

Diplomatic Reception Rooms  
Department of State  
Washington, D. C.

Mr. and Mrs. William T. Gossett  
Birmingham, Michigan

Library of Congress  
Washington, D. C.

The National Archives and Records Service  
Washington, D. C.

National Museum of History and Technology  
Smithsonian Institution  
Washington, D. C.

Mr. Ferdinand R. Petrie  
Rutherford, New Jersey

The Supreme Court Historical Society  
Washington, D. C.

### ACKNOWLEDGEMENTS

A name that appears and reappears throughout the credits for gifts and loans to the exhibit is that

of Mrs. William T. Gossett. Mrs. Gossett, nee Elizabeth Evans Hughes, is the youngest child of Charles Evans Hughes, born when her father served as governor of New York. From 1975 to 1980 Mrs. Gossett served as the president of the Supreme Court Historical Society and over these years she has made an extensive donation of material related to the life of her father. For the purpose of this exhibit, she has loaned still more. Not only the source of material bounty, she also provides a unique source of reflection upon Hughes, the public figure, and Hughes as she knew him — the private person. But for her, an exhibit of this scope on Charles Evans Hughes would not have been possible. For her vitality as well as her boundless generosity, we would like to express the depth of our gratitude. To Mr. William Gossett we also extend our deep appreciation.

The efforts of many others have contributed to the preparation of this exhibit. While it is impossible to name all of those who took part, in particular we would like to acknowledge the assistance of the following individuals and institutions:

Mr. and Mrs. George L. Campbell; Merlo J. Pusey; Martha Mitchell, University Archivist, John McIntyre, Assistant to the President, and Robert E. Hill, Associate Vice President for Administration, Brown University; M. Joan Gibson, Curator, Chapman Historical Museum in Glens Falls, N. Y.; H. Thomas Hickerson, Chairman, University Archives of Cornell University; Jon D. Freshour, Registrar, the Library of Congress Exhibit Office; James E. O'Neil,

Acting Archivist and Christine Rudy Smith, Education Information Specialist, National Archives; Herbert F. Collins, Curator, and Martha Morris, Registrar, the National Museum of History and Technology; Clement E. Conger, Curator, and Gail Serfaty, Curatorial Assistant, the State Department; and Keith Allen of Todd/Allan Printing Company.

For their invaluable part in producing the exhibit, we are indebted to the staff of the Office of Exhibits Central, Smithsonian Institution. In particular we would like to mention James Mahoney, Chief; John C. Widener, Chief Production Administrator; Kenneth V. Young, Senior Designer; Michael P. Fruitman, Editor; Kenneth R. Clevinger, Supervisor of Fabrication Production; and the exhibit production staff.

For their dedicated hours and their inspired skill we would like to thank Edward F. Douglas, Carpenter, and his staff, Frank Howarth, Phil Wood, Sun-Hoe Ku, David Douglas, and Bill McDonald.

We would also like to thank Francis J. Lorson, and Edward H. Faircloth of the Clerks Office; Louis Cornio and his staff in the Print Shop of the Supreme Court; the staff of the Labor Force; and the officers of the Supreme Court Police Force.

Special mention should also be made of the following for their generous assistance to the Curators Office: Judith McCollough, Betsy Trumble, James M. Buchanan, Michael E. Gehringer, Karen Bizier, and Timothy B. Carey. To all of these persons and to many who may not be named, we express our appreciation for their contribution to this exhibit.



## CHECKLIST

*The Early Years—1862-1905*

## SILK BOOTIES

Embroidered silk, 2-7/8 x 4 inches

Blue embroidered baby booties worn by Hughes as an infant.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## FAMILY PHOTOGRAPH, 1868 (panel)

Family photograph of Hughes, age 6, with his parents, Rev. David Charles Hughes and Mary Catherine Connelly Hughes.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## SPELLING BOOK

23 pages, bound in red leather, 8-1/8 x 6 inches

*Short Words to Read and Spell* inscribed on the flyleaf in pencil "My first spelling book — C.E.H." Also inscribed in pen "To Helen from Grandma—Nov 30th 1894," when presented to Hughes' daughter Helen, age 2, by his mother.

*Loaned by Helen Hughes Campbell (grand-daughter of Hughes), Stonington, Connecticut*

## LETTER, 1879

4 pages. Handwritten letter signed from Hughes to his father, from Brown University, February 8th.

"... Instead of the exact marks they give characters in the following order — Ex for excellent, V.g. for very good, g. for good ... There is one fellow who got five ex's I hear. I guess he is the only one. Please tell me what my marks are as I am quite anxious to know. I think I ought to have two ex's at any rate. I don't know, I may not have any." [note on exhibit the college tuition bill for January 1881, where Hughes himself attained five "ex's"]

*Loaned by Brown University Archives  
Providence, Rhode Island*

## PHI BETA KAPPA KEY

Gold key with chain, 14 inches long

Scholastic honor which Hughes earned at the end of his junior year at Brown University, 1880. Inscribed: "December 5th 1776/C. E. Hughes" Verso: "ΦBK"

*Loaned by Columbia University Law School  
New York City*



*Brown University*

## POCKET WATCH

Gold, 2-inch diameter

Watch presented to Hughes by his students at the Columbia College School of Law where he taught at night. It is inscribed, "Charles E. Hughes from Classes '87 and '88./C.C.S. of L." (The Columbia College School of Law became Columbia University School of Law in 1896.)

*Loaned by the School of Law,  
Columbia University  
New York City*

## TUITION BILL, 1881

1 page

College Half Term Bill of Charles Evans Hughes for the term commencing September 15, 1880 and ending January 25, 1881 at Brown University, recording tuition due in the amount of \$25 (a fifty per cent reduction for the child of a minister).

*Loaned by Brown University Archives  
Providence, Rhode Island*

## LITHOGRAPH

Tinted lithograph of Brown University as it appeared about 1880, when Hughes was a student there.

*Loaned by Brown University Archives  
Providence, Rhode Island*

## STUDENT NOTEBOOK, 1882-1883

Bound notebook 12-1/2 x 8 inches

Handwritten notes by Hughes on Moot Court Cases 1882-1883, a course taken at Columbia College Law School.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## STUDENT NOTEBOOK

321 pages. Bound notebook, 9-1/2 x 8-1/4 inches

Handwritten notes by Hughes described on page 3 as follows: "The History of an Action. Lectures on the Code of Civil Procedure of the State of New York by Prof. Theodore W. Dwight./ C. E. Hughes, Columbia Law School, Class of 1884."

*Courtesy of the Supreme Court Historical Society.  
Gift of Mrs. William T. Gossett*

## CERTIFICATE OF MARRIAGE (panel)

Certificate of marriage of Miss Antoinette Carter and Charles E. Hughes on December 5, 1888, signed by the pastor, D. C. Hughes, father of the groom.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## CERTIFICATE OF MARRIAGE (panel)

Decorative Certificate of marriage of the wedding ceremony held at the home of Antoinette Carter's father in Brooklyn.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PHOTOGRAPH (panel)

Charles Evans Hughes and his wife, Antoinette, photographed at Mt. Vernon in Virginia, at the time of their honeymoon in Washington, D.C.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## MARRIAGE ANNOUNCEMENT (panel)

Engraved announcement of the marriage of Miss Antoinette Carter to Charles Evans Hughes, December 5, 1888, and card designating calling hours at the couple's new residence.

*Loaned by the Library of Congress  
Washington, D. C.*

## PHOTOGRAPH, 1888

Mr. and Mrs. Charles Evans Hughes during the first month of their marriage, December, 1888.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

## LETTER, 1891

2 pages. Handwritten copy of correspondence from Hughes to Charles Kendall Adams, President, Cornell University.

Hughes' draft of a letter dated June 9th accepting the offer of a teaching post at Cornell University.

*Loaned by the Department of Manuscripts and  
University Archives,  
Cornell University  
Ithaca, New York*

## CERTIFICATE, 1900

Certificate of admittance of Charles Evans Hughes to the U. S. Supreme Court Bar, signed by James H. McKenney, Clerk of the Court, dated January 8th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## Investigator/Governor-1905-1910

## LETTER, 1906

2 pages. Handwritten draft from Special Assistant to the Attorney General Hughes to Pres. Theodore Roosevelt at the White House.

A letter to the President concerning Hughes' resignation as Special Assistant to the Attorney General in anticipation of the upcoming gubernatorial election in which Hughes was a candidate.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## LETTER, 1906

1 page. Typewritten letter signed to Hughes from M. D. Prudy, Acting Attorney General, November 5th.

An acknowledgement and acceptance of Hughes' request to resign as Special Assistant to the Attorney General.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## CAMPAIGN BUTTONS AND RIBBONS, 1906 (panel)

Seven buttons and two ribbons from Hughes' gubernatorial campaign.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PHOTOGRAPHS, 1906

Three photographs of Hughes campaigning for the office of governor of New York.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## LETTER, 1907

1 page. Typewritten letter signed to Gov. Hughes from Pres. Theodore Roosevelt, the White House, January 6th.

"I can not deny myself the pleasure of writing to



*Hughes campaigning for governor in 1906.*

congratulate you as well as our party and our State upon your admirable message and upon the admirable way in which you have begun your term."

*Loaned by the Library of Congress  
Washington, D.C.*

#### PHOTOGRAPH

Portrait of Pres. Theodore Roosevelt

*Reproduced from the collection of the Library of Congress, Washington D.C.*

#### PHOTOGRAPH, 1908

Antoinette Hughes and daughter, Elizabeth, born August 19, 1907, the first baby ever born at the Executive Mansion in Albany.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

#### PHOTOGRAPH, 1907

Autographed photograph of Hughes dated February 3, 1908.

*Loaned by the Smithsonian Institution  
Washington, D.C.*

#### PHOTOGRAPH, 1908

Hand colored photograph of Hughes with Gen. Frederick S. Grant, at Pine Camp, New York.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### MEDALS, 1908-1909

Stuyvesant Medal, 1908, gold, 2-½ inch diameter

Hudson-Fulton Celebration Medal, 1909, sterling silver, 4 inch diameter

Hudson-Fulton Celebration Medal, 1909, gold, 2-¾ inch diameter

Three medals made as presentations to Hughes while he served as governor of New York.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH, 1909 (panel)

Formal portrait photograph of Hughes.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH AND POSTCARD, 1909

Gov. Hughes on horseback leading the New York delegation at the inaugural parade for Pres. Taft, March 4th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPHS

Two photographs taken upon the occasion of a visit by Pres. Taft to Governor and Mrs. Hughes.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH (panel)

Pres. Taft upon a visit to Gov. Hughes and family. After departing, the President remarked to an aide, "I don't know the man I admire more than Hughes," and subsequently appointed him to the Supreme Court as an Associate Justice.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### LETTER, 1910

1 page. Typewritten letter signed to Mrs. Charles E. Hughes from William Howard Taft, the White House, March 29th.

"I shall always look back with the most delightful memories upon my visit to the Executive Mansion [in Albany, NY], and shall always treasure the friendship that was made closer in the stay. . . ."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### LETTER, 1910 (panel)

1 page. Typewritten letter signed from Gov. Hughes to Major J. M. Wright, the Marshal of the Supreme Court, August 6th.

Hughes explains that his judicial robe will be ordered from the firm where Justices Peckham, Holmes, and Lurton procured theirs.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### Associate Justice—1910-1916

#### APPOINTMENT, 1910 (panel)

The certificate of appointment of Charles E. Hughes as Associate Justice of the United States

Supreme Court, May 2nd, signed by Pres. William Howard Taft.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*



*Seated among religious, military and fraternal organization leaders, President William Howard Taft and Governor Charles Evans Hughes*

#### PHOTOGRAPH, 1910 (panel)

Charles E. Hughes shown in his judicial robe.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### LETTER, 1910

3 pages. Typewritten letter signed from Gov. Hughes at the Executive Chamber in Albany, to the Marshal of the Court, Major J. M. Wright, August 16th.

"I have leased for next year the house No. 2401 Massachusetts avenue. . . . Various alterations are to be made in the house. The present dining room, in the basement, is to be converted into my office, and an alcove at the north end is to be partitioned off for my secretary."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### LETTER, 1910

2 pages. Typewritten letter from M. C. T., a Court employee, to J. M. W. [John Montgomery Wright, Marshal of the Supreme Court], August 18th.

Correspondence between the two refers to a letter from Gov. Hughes about furnishing his Judicial Chamber before his arrival in Washington. The chamber was being planned in his private residence, as was the tradition before the Supreme Court had a building of its own.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### JUDICIAL AND CONSTITUTIONAL OATHS, 1910

As a new Associate Justice, Hughes took two oaths of office, each on the tenth day of October.

*Loaned by the National Archives and Records Service  
Washington D.C.*

#### PHOTOGRAPH, circa 1910

A formal portrait of Hughes in a suit, with his Phi Beta Kappa key and chain showing inside his jacket.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH, circa 1910

Charles E. Hughes in his judicial robe.

*Collection of the U.S. Supreme Court*

#### APPOINTMENTS, 1910, 1914

Appointments for two stenographic clerks—the predecessor of today's secretary and law clerk. Both clerks were appointed to serve Associate Justice Hughes.

*Collection of the U.S. Supreme Court*

#### OPINION, 1914

Cover page of *Houston, East & West Texas Railway Company v. United States*, 234 U.S. 342 (often called the Shreveport Case).

The Shreveport Case is generally regarded as one of Hughes' most significant judicial opinions. By establishing the power of the federal government to regulate intrastate railway rates, the opinion had repercussions on industrial expansion for the nation as a whole.

*Collection of the U.S. Supreme Court*

#### JUDICIAL CAP

Black silk cap traditionally worn by the robed Justices at outdoor functions.

*Collection of the U.S. Supreme Court*

#### Presidential Campaign—1916

##### CAMPAIGN SPEECH, 1916

29 pages.

Printed copy of Hughes' address on July 31st accepting the Republican Nomination for President: "America First, America Efficient."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

##### PAMPHLET OF SPEECHES, 1916

35 pages.



"Speeches of Hon. Charles Evans Hughes and Hon. Nathan L. Miller and Platform Adopted at Republican State Convention, Saratoga Springs, New York, September 28, 1916."

*Loaned by the Smithsonian Institution  
Washington, D.C.*

#### CAMPAIGN BUTTONS, 1916

Four Campaign buttons, three depicting heads of Hughes and one depicting that of his opponent Woodrow Wilson.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett  
and collection of the U.S. Supreme Court*

#### CIGAR, 1916

9 inches long

Large cigar with wrapper promoting Hughes for President.

*Loaned by the Smithsonian Institution  
Washington, D.C.*

#### ITINERARIES, 1916

Two printed itineraries for cross country campaign trips made by Hughes in his presidential bid.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### POSTCARDS

Four postcard scenes of Republican presidential candidate, Hughes, riding the railway campaign trail.

*Courtesy of the Supreme Court Historical Society*

#### PHOTOGRAPH, 1916

Hughes and his wife, Antoinette, garbed in rain slickers before descending into a mine in Helena, Montana during the presidential campaign.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### POSTCARD, 1916

Postcard portrait of Mrs. Hughes, wife of the Republican candidate for President upon arrival in Spokane.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH, 1916

Described on the rear of the photograph by Elizabeth (Mrs. William T. Gossett): "CEH, Republican presidential candidate, summer 1916, with daughter, Elizabeth, 9 years old. Bridgehampton, N. Y."



*As candidate for President, Hughes posed for this typical family photograph published in the old New York Sun in July, 1916. Mrs. Hughes and their daughters, Elizabeth, Helen and Catherine are shown.*

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

#### NEWSPAPER PAGE, 1916 (panel)

The New York Sun, Sunday, July 23rd.

Presidential candidate Hughes with his wife and daughters, Elizabeth, Helen, and Catherine, 'photographed on the lawn of their summer home at Bridgehampton, L. I.'

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPHS, 1916

Photographs of Hughes campaigning while traveling to the Pacific North Coast on the Chicago, Milwaukee and St. Paul railway.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### POSTER, 1916 (panel)

Campaign poster issued by the Ohio Republican State Executive Committee.

*Loaned by the Smithsonian Institution  
Washington, D.C.*

#### CAMPAIGN RIBBONS AND BADGES, 1916

Four ribbons and medallions from Hughes' 1916 Presidential campaign.

*Loaned by the Smithsonian Institution  
Washington, D.C.*

### POSTER, 1916

"Preparedness-Protection-Prosperity," a poster showing Republican candidate Hughes for President, Charles W. Fairbanks for Vice-President, and other party candidates.

*Loaned by the Smithsonian Institution  
Washington, D. C.*

### BALLOT, 1916

Sample ballot for the November 7th election.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### PHOTOGRAPH

Woodrow Wilson, the victor in the 1916 presidential race against Hughes.

*Reproduced from the collections of the Library of Congress, Washington, D. C.*

### BENCH and PHOTOGRAPH

Mahogany.

Restored portion of the facade of the Bench at which the Supreme Court justices sat between the years 1860 and 1935. The photograph shows the balustrade in its original setting in the Old Senate Chamber (on the first floor of the U. S. Capitol) where the Court held its sessions before moving to the current site.

*Collection of the U. S. Supreme Court*

### *Secretary of State/World Statesman - 1921-1929*

### ITALIAN MEDAL, 1920

Royal Decree of the Order of Cavalier of the Grand Cross, decorated with the Grand Cordon of the Crown of Italy.

This award was conferred on Hughes in honor of his service as president of the Executive Committee for the society, Italy-America, promoting cordial relations between the two countries.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### APPOINTMENT, 1921 (panel)

Official appointment of Hughes as Secretary of State by Pres. Warren G. Harding, March 7th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### PHOTOGRAPH, 1921

Sec. of State Hughes and his wife, Antoinette, as they posed at "Greystone," their home which

overlooked Rock Creek Park in Washington, D. C. The photographs were taken just prior to the forthcoming conference on the limitation of arms.

*Collection of the U. S. Supreme Court*

### PHOTOGRAPH, 1921 (panel)

First official photograph of the Conference on the Limitation of Armament, in D. A. R. Hall, Washington, D. C. showing a view of the delegates, advisers, secretaries, interpreters, stenographers and spectators at the opening session.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### SPEECH, 1921

27 pages.

Autographed cover and final page of the speech Hughes presented on the opening day of the Conference on the Limitation of Armament, Washington, D. C., November 12th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### PHOTOGRAPH, 1921

"The Big Four—U. S. Delegates to Arms Conference—Washington, D. C.—1921." Shown left to right are former Sec. of State Elihu Root, Sen. Oscar Underwood, Hughes, Sen. Henry Cabot Lodge, and American diplomat, Basil Miles.

*Collection of the U. S. Supreme Court*

### REPORT, 1922

132 pages.

*Report of the American Delegation of the Proceedings of the Conference on the Limitation of Armament, Submitted to the President/February 9, 1922.*

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### MEDALLION, 1922

Copper hexagon, 5-1/2 inches across

Bas relief medallion with an eagle surmounting a shield engraved, "U.S.S. Maryland," over crossed anchors. Also engraved, "Rio de Janiero to New York/9-12-22 9-23-22/Charles E. Hughes/Secretary of State/U. S. A."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### MEDALS, 1922

Centennial of Brazilian Independence Medal, gold, 2-3/8 inch diameter



*Memorabilia from Hughes' years as Chief Justice of the United States, 1930-1941, are shown in this display featuring, in the case at left, the Chief's judicial robe. In 1936, as indicated by the trowel and sketches, the Court finally moved into a building of its own.*

Brazil-Mexico Centennial Award, silver, 2 inch diameter

Two medals awarded to Hughes for his work as Secretary of State in the area of U.S.-Latin American relations.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH, 1923

Calvin Coolidge, Hughes, and Republican Whip of the Senate, Charles Curtis, at the Willard Hotel when Coolidge assumed the presidency after the sudden death of President Harding.

*Collection of the U.S. Supreme Court*

#### MEMORIAL, 1924

18 pages. (Washington: Government Printing Office, 1924)

"Memorial Address in Honor of the Late President Warren G. Harding" delivered by Sec. of State Hughes, February 27th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### CERTIFICATE OF AUTHORIZATION, 1924

Typed document with official seal and signature of Pres. Calvin Coolidge empowering Hughes to conduct negotiations to prevent liquor smuggling.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH, 1924 (panel)

An autographed photograph of the Coolidge Cabinet with Treasury Secretary Andrew Mellon, Attorney General Harlan Fiske Stone, Navy Secretary Curtis Wilbur, Secretary of State Hughes, Agriculture Secretary Howard Gore, War Secretary John Weeks, Labor Secretary James Davis, Postmaster General Harry New, Interior Secretary Hubert Work, and Commerce Secretary Herbert Hoover.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## CARICATURE, 1925

A caricature drawing by Massaguer of Hughes as ex-Secretary of State and internationalist of world fame.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PHOTOGRAPH, 1925

A photograph of Chief Justice Taft inscribed: "For Charles E. Hughes, a man who does things and does them right, a great Governor, a great judge and a great Secretary of State. With affectionate admiration. [signed] W. H. Taft/Washington, March 9, 1925."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PASSPORT, 1926

United States diplomatic passport issued to former Sec. of State Hughes, his wife, and daughter, May 16th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PHOTOGRAPH, 1927

Former Associate Justice Hughes presenting the Cross of Honor of the United States to Charles A. Lindbergh for the American Flag Association, June 12th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PHOTOGRAPH, 1928

Inscribed in the hand of Hughes, "Special Committee of Pan American Conference at Washington, December, 1928, on Bolivia-Paraguay incident. . . ."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## BILL OF SALE, 1929

A record of sale in the amount of 29 pounds (then equivalent to approximately \$140) from Kerslake & Dixon Tailors in London, for a judicial robe. The robe was ordered by Hughes to be worn while serving the International Court of Justice. The robe referred to can be seen on display.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PHOTOGRAPH, 1929

Hughes robed as a judge for the International Court of Justice, The Hague, Netherlands.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

## PHOTOGRAPH, 1929

The World Court in session, hearing argument.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## LETTER OF COMMENDATION, 1929

1 page. Typewritten letter signed to Hughes from Pres. Coolidge, the White House, January 5th.

"This is to express my appreciation again for your generous and successful public service and to tell you how grateful I am for all of it. Your representation of our interest at Havana and again at Washington has been all that our country could desire. . . ."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### *Supreme Court Nomination and Controversy—1930*

## PHOTOGRAPH

Autographed formal photograph of Hughes.

*Collection of the U. S. Supreme Court*

### *Chief Justice—1930-1941*

## JUDICIAL ROBE

Black silk.

Judicial robe worn by Hughes as Chief Justice.

*Loaned by the Smithsonian Institution  
Washington, D. C.*

## APPOINTMENT, 1930 (panel)

The certificate appointing Charles Evans Hughes as Chief Justice of the U. S. Supreme Court, February 13th, signed by Pres. Herbert Hoover.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

### JUDICIAL AND CONSTITUTIONAL OATHS, 1930

The two oaths of office taken by Hughes on Feb. 24th as the new Chief Justice. Each oath is also signed by the Senior Associate Justice, Oliver Wendell Holmes.

*Collection of the U. S. Supreme Court*

## APPOINTMENT, 1930

Typewritten letter signed by Hughes designating Wendall W. Mischler to serve as secretary to the



Chief Justice at an annual salary of \$4400.

*Collection of the U.S. Supreme Court*

#### PHOTOGRAPH, 1931 (panel)

A courtesy visit by the nine Supreme Court justices which was traditionally made at the opening of each fall term. The visit of Pres. Hoover was paid on October 12th.

*Collection of the U.S. Supreme Court*

#### PHOTOGRAPH (panel)

Photograph of Herbert Hoover inscribed, "To my good friend, Charles E. Hughes, Chief Justice of the United States from Herbert Hoover."

*Courtesy of the Supreme Court Historical Society*

#### DRAFT OPINIONS (panel)

Printed drafts of two opinions as they are circulated to each justice for review. Hughes has signed his agreement on these two authored by Justice Butler.

*Collection of the U.S. Supreme Court*

#### LETTER

1 page. Handwritten letter signed to Hughes from Oliver Wendell Holmes, simply dated, Dec. 26/9<sup>30</sup>(p.m.).

"My Dear Chief/ Will you please convey my thanks to Mrs. Hughes for the pheasants one of which gave me good supper this evening?"

I am not very available to write a pretty letter to a lady and so ask a man of the world to do which I cannot."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH, 1931

Hughes photographed with Oliver Wendell Holmes on the 8th of March, Holmes' 90th birthday.

*Collection of the U.S. Supreme Court*

#### PHOTOGRAPH, 1933 (panel)

Chief Justice Hughes swearing in of Pres. Franklin D. Roosevelt at the beginning of FDR's first term, March 4, 1933. (Beginning in 1937, inaugurations were held on Jan. 20th.)

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### MEMORANDUM AND LETTER, 1937

Memo to the Chief Justice from his secretary, Mischler, in reference to a letter from a woman that requests a stay of execution of her daughter's

marriage. Mischler asks for guidance in responding to the letter, to which Hughes replies: "Write saying that I have no authority in the matter, C.E.H."

Mischler's letter in reply dated June 5th is also displayed.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### MAGAZINE, 1937

Pages 30-35, LIFE magazine, March 8th.

Photographic feature layout covering the major events in the life of Hughes as a 75th birthday tribute to him: "The Chief Justice of the United States has lived seventy five years. . . and no man has ever doubted either his brains or his character."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### MAGAZINE, 1937

Volume XXXIX, No. 9, March 1st

Cover shot of Hughes on TIME magazine.

*Courtesy of the Supreme Court Historical Society  
Gift Mrs. William T. Gossett*

#### PHOTOGRAPH, 1938

Chief Justice and Mrs. Hughes at the time of their 50th wedding anniversary, December 5th.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

#### PHOTOGRAPHS, 1939

Two photographs of Chief Justice Hughes on March 4th, as he addresses Congress on the occasion of its 150th anniversary. The photographs seem to attest to the fact that he was seriously ill although he gave his speech as planned.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### ADDRESS, 1939

1 page.

Address made by Hughes to Congress at the 150th anniversary meeting of First Congress of the United States, March 4th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PROGRAMS, 1940

Two programs for the Sesquicentennial Celebration of the Supreme Court on February 1st. One copy is autographed by the nine justices then serving.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### MEMORANDUM, 1941

1 page. Typewritten memo to Chief Justice Hughes from his secretary, W.W.M. (Wendell W. Mischler).

The memo refers to the presentation of two tickets for seating at the 1941 inauguration of Pres. Franklin D. Roosevelt.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### INAUGURATION TICKETS, 1941

Two tickets for seating at the inauguration of Pres. Franklin D. Roosevelt and Vice Pres. Henry A. Wallace. The tickets were offered to Chief Justice and Mrs. Hughes even though they would not be required since the Chief Justice would be a participant in the ceremony, administering the Presidential oath of office.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### PHOTOGRAPH, 1941

Charles Evans Hughes as he steps from a car, arriving for a luncheon with the President on June 5th.

*Collection of the U. S. Supreme Court*

#### *The New Deal Controversy*

##### ORDER OF THE COURT, 1935

1 page.

Typewritten order initialed by Hughes to close the October term of 1934: "All cases submitted and all business before the Court at this term having been disposed of . . ." Dated June 3rd, 1935

*Collection of the U. S. Supreme Court*

##### LETTER, 1936

1 page. Handwritten letter signed to Chief Justice Hughes from Mrs. W. F. Arnold, Mentor, Ohio, Dec. 4th.

A letter of support by an American citizen in response to the challenges of the New Deal: "... It is our belief that during the next few years our beloved country will need you more than ever before.

May God grant you health and many years to come, is the prayer of one of your millions of admirers."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### ETCHING

Autographed portrait of Hughes.

*Collection of the U. S. Supreme Court*

##### "WHEELER" LETTER, 1937

9 pages. Typewritten letter signed from Chief Justice Hughes to Sen. Burton K. Wheeler (D.-Mont.) March 21st.

This widely publicized letter calmly rebutted an accusation by Pres. Roosevelt that the Court was behind in its work, calling for a plan of reform. Hughes replied: "There is no congestion of cases upon our calendar. This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard."

*Collection of the U. S. Supreme Court*

##### PHOTOGRAPH, 1944 (panel)

An autographed photograph of Hughes inscribed, "To Wendell W. Mischler, my faithful Secretary and esteemed friend. . . . October 10, 1944/Charles E. Hughes"

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### *Laying of the Supreme Court Cornerstone*

##### PHOTOGRAPH

Photograph of William Howard Taft, who succeeded in acquiring the necessary appropriation and plans to build a home for the U. S. Supreme Court.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

##### PLAQUE

Bronze mounted on oak, 8- $\frac{3}{8}$  x 7 inches.

Bas-relief medallion of Cass Gilbert, the architect of the U. S. Supreme Court Building

*Collection of the U. S. Supreme Court  
Gift of Farnham Gilbert*

##### PEN

Rosewood pattern and color penholder with pen point, 8- $\frac{1}{2}$  inches

Pen used by Cass Gilbert, the architect of the building, and Hughes, to sign a contract for the U. S. Supreme Court building.

*Loaned by the Smithsonian Institution  
Washington, D. C.*

## One or Fifteen? The Nation's Eyes Turn to the Supreme Court



*P. flamm.* 84 years old, was captured 1905 by Frederick Cuddeback and W. Chesterfield, N. H., or 1872. — *Ann. & Bur.*



James Clark McIlroy, 74 years old, was appointed in 1914 by President Wilson. He was born in Ellettsville, Ky., on Feb. 2, 1862.



Charles Evans Hughes, 74 years old, was appointed as Associate Justice in 1910 by President Taft, resigned on becoming the Republican Presidential nominee in 1916 and was appointed Chief Justice in 1930 by President Hoover. He was born in Glens Falls, N. Y., on April 11, 1862.



Owen J. Roberts, 61 years old, was appointed in 1930 by President Hoover. He was born in Philadelphia, Pa., on May 2, 1870.



Lucius Demetrius Haysfield, 59 years old, was appointed in 1910 by President Wilson. He was born in Louisville, Ky., on Nov. 15, 1856.



The main entrance of the Supreme Court's new home faces the Capitol, where the reorganization of the Court took its final shape. The building's design, by architect John Russell Pope, was a response to the Supreme Court's request for a new building that would be a fitting home for the nation's highest court. The new structure, first occupied in 1935, was a landmark in the history of the Court's architecture.

In May of 1933, as 283 by 304 feet in exterior dimensions and was designed, on the theory, that it must be imposing enough to typify the importance and dignity of the judicial branch of the government. It is four stories in height to the center, with three-story wings, and its surface is white marble.



Before he went off, was up  
a 1911 by President Harding  
was in Washington, Minn., on  
Jan. 10.



Reinhold, 74 years old, was  
in 1925 in Germany. He  
was in Germany in 1925.  
He was in Germany in 1925.  
He was in Germany in 1925.



Walter Van Doren, 77, former oil man, appointed in 1910 by President Taft. He was born in Marion, Ind., on April 17, 1842.



Benjamin N. Verdine, 90 years old, was appointed in 1930 by President Hoover. He was born in New York City on May 28, 1870.



In that event, the Supreme Court asks to have rooms and to appoint 10 members. The room is 34 feet high and 62 by 91 feet long with 14 walls. Though the population is increased to 100,000, the seating of the additional judges would present a serious problem. The construction of the rooms would be difficult. The main ob-

The assembly justices are depicted by university, with their names in letters placed around the Chief Justice. From left to right, the meeting is: Associate Justice Roberts, Butler, Brandeis, Van Devanter, Chief Justice Hughes, Associate Justice McReynolds, Sutherland, Stone and Cardozo.

**TROWEL, 1932**

Silver with mahogany handle, 11 inches long, 4 inches wide

Inscribed: "Trowel used by the President in laying the cornerstone of the building for the Supreme Court of the United States at Washington, D.C., October 13, 1932."

The trowel is of silver and mahogany, furnished by the Architect of the Capitol, made from articles long used in the Supreme Court Chamber."

*Collection of the U.S. Supreme Court*

**PHOTOGRAPHS, 1932**

The construction of the Supreme Court building was well under way before the laying of the cornerstone was scheduled. Here, Hughes is shown speaking at the ceremony on October 13, 1932.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett  
and Collection of the U.S. Supreme Court*

**PHOTOGRAPH, 1932**

Chief Justice Hughes and Pres. Hoover at the placing of the cornerstone of the U. S. Supreme Court building.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

**PROGRAM, 1932**

Program for "The Laying of the Cornerstone for the Supreme Court of the United States under the auspices of the American Bar Association" Washington, D.C., October 13th.

*Collection of the U.S. Supreme Court*

**RULER**

Architect's ruler described as follows by the Marshal of the Court: "Col. Strickler this 26th day of February 1936 presented for our museum his ruler which had measured the entire SCUS [Supreme Court] Building."

*Collection of the U.S. Supreme Court*

**LETTER, 1932**

1 page. Typewritten letter signed to Hughes, Chairman of the Supreme Court Building Commission, from the Architect of the Capitol, David Lynn, May 2nd.

Lynn suggests inscriptions for the main frieze of the West and East Porticos of the building.

*Collection of the U.S. Supreme Court*



*A corner of the Exhibit Room featuring a childhood rocking chair, the governor's chair and a grandfather clock belonging to the Chief Justice's family.*

**MEMORANDUM, 1932**

1 page. Initialed handwritten memo from Hughes in response to the May 2nd letter from David Lynn, the Architect of the Capitol.

Responding to suggestions for the inscription for the West and East Porticos of the Supreme Court building, Hughes writes, "May 16, 1932/I rather prefer 'Justice, the Guardian of Liberty.'/C.E.H."

*Collection of the U.S. Supreme Court*

**Honors and Memorials****LETTER, 1924**

1 page. Typewritten letter signed to Hughes from Thomas A. Edison, Orange, N.Y., October 23rd.

"It gives me much pleasure to offer to you my felicitations on your having been the recipient of the honorary degree of Doctor of Laws, which was recently conferred upon you by The University of the State of New York./With esteem and good wishes, I remain/Yours sincerely,/Thomas A. Edison"

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*



## DIPLOMA, 1924

Certificate granting an Honorary Doctor of Laws degree upon Hughes from the University of the State of New York, October 17th.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## MEMORIAL CITATION

Paper under plexiglas, mounted on wood plaque, 14- $\frac{3}{4}$  x 12 inches.

"The American Judicature Society Presents its Golden Anniversary Award honoring the late Charles Evans Hughes in recognition of services in promoting The Efficient Administration of Justice. . . ."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## CITATION, 1940

Inter-Faith award conferred on Hughes, December 27th, by the National Conference of Christians and Jews in tribute to his contribution toward the improvement of human relations.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## MEMORIAL, 1948

Leather-bound five-page memorial, October 7th.

A hand-lettered tribute from the Chamber of Commerce of the State of New York, signed by the acting president, John D. Rockefeller.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## INVITATION, 1949

An invitation to a meeting of the bar of the Supreme Court, to "take appropriate Action in memory of the late Mr. Chief Justice Hughes."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## MEMORIAL, 1950

Booklet, 138 pages.

"Proceedings of the Bar and Officers of the Supreme Court of the United States, November 4, 1949; Proceedings Before the Supreme Court of the United States May 8, 1950. In Memory of Charles Evans Hughes."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## MEDAL, 1958

Sterling silver medal, 2 inch diameter, with red ribbon.

A posthumous award to Hughes for "Leadership, Innovation, Integrity, Vision." The medal was awarded in recognition of Hughes' role as Chief Counsel to the Armstrong Insurance Committee investigation of insurance operations in New York State in 1905.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## MEDAL

Gold Coin, 3- $\frac{1}{4}$  inch diameter

Theodore Roosevelt Memorial Association medal awarded to Hughes for "the administration of public office and the development of public and International law."

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PROGRAM, 1962

Program for a Charles Evans Hughes Commemorative Stamp Ceremony, April 11th. Autographed by Chief Justice Earl Warren, Deputy Postmaster General William Brawley, Mrs. Elizabeth Hughes Gossett, and Sylvester C. Smith, Jr., President-Elect, American Bar Association. Note accompanying envelope with first day issue stamp.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

## PORTRAIT, 1924

Oil canvas, 55 x 39- $\frac{3}{4}$  inches

Portrait of Hughes painted from life by Howard Chandler Christy.

*Loaned by the U.S. Department of State  
Washington, D.C.*

## SERVING TRAY

Silver plate, 17- $\frac{1}{4}$  x 23 inches.

Described in the following inscription: "1860-1885/Presented to Rev. D.C. & Mrs. M.C.C. Hughes [the parents of Charles Evans Hughes] on November 20th 1885/The twenty fifth anniversary of their wedding by members and friends of the Summit Ave. Baptist Church. Jersey City, N.J."

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

## TRI-HANDLED BOWL

Silver, 11- $\frac{1}{2}$  inches high.

Inscribed: "To the Hon. Charles Evans Hughes, Governor of the State of New York, from his military staff, upon the occasion of his retirement

from office/October, 1910." On the opposite side of the bowl, the names of the staff are listed.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### WINE EWER

Silver, 22-½ inches high.

Inscribed to: "Charles Evans Hughes from The American Foreign Service Association/March 4th, 1925"

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*



*Wine ewer and tri-handled bowl.*

#### *The Hughes Family*

##### MINIATURE

Miniature framed behind glass in gold setting, 3-⅝ x 2-⅞ inches.

Portrait miniature of Helen, eldest daughter of the Hughes family, who died from tuberculosis in 1920, age 28.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

##### PHOTOGRAPH, 1920

Presidential nominee Warren G. Harding and musical comedy entertainer Al Jolson standing with Hughes. The black arm band seen on Hughes was worn in mourning for the recent death of his daughter, Helen.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

##### PHOTOGRAPH, 1932

Chief Justice Hughes with his daughter and son-in-law, Mr. and Mrs. William Waddell, arriving for the New Year's reception at the White House.

*Collection of the U.S. Supreme Court*

##### PHOTOGRAPH

Color photograph of Chief Justice and Mrs. Hughes seated outdoors during a vacation in Colorado.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

##### PHOTOGRAPH, 1940

The Chief Justice and Mrs. Hughes at home just before a reception at the White House for the Judiciary, given by Pres. and Mrs. F.D. Roosevelt. In the vest worn by Hughes are a set of buttons which can be seen on exhibit.

*Collection of the U.S. Supreme Court*

##### STUDS AND CUFF BUTTONS

Gold backing, each with a pearl

One pair of cuff buttons, three studs and four matching vest buttons. With the accompanying photograph which shows them as they were worn with formal dress.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

##### PHOTOGRAPH, 1942

Catherine Hughes Waddell, Charles Evans Hughes, Jr., and Elizabeth Hughes Gossett, the children of Hughes, in a photograph taken at the time of his 80th birthday [April 11th].

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

##### PHOTOGRAPH, ca. 1978

Mr. and Mrs. William T. Gossett (nee Elizabeth Evans Hughes, the youngest daughter of Hughes).

*Collection of the U.S. Supreme Court*

##### PHOTOGRAPH, 1947

Described by an inscription on the rear as follows: "C.E.H. with his youngest child, Elizabeth, taken in the cottage at Wianno Club, Cape Cod, August, 1947, exactly one year before he died in the same cottage. Last picture of him./E.H.G." [Elizabeth Hughes Gossett.].

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*



*Robe and gown displayed in Exhibit Room.*

#### CLOCK

Eight-day traveling clock with leather covered case.

According to family account, this clock belonged to Hughes for at least 20 years. It was at his bedside and registered 9:15 p.m. at the time of his death, August 27th, 1948, Osterville, Massachusetts.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### Exhibit Room

#### PHOTOGRAPHS, 1881

Copies of six photographs compiled from the yearbook, the *Brunonian*, of which Hughes was an editor in the year of his graduation from Brown University. The photographs include views of the campus, and photographs of Hughes and his fellow editors.

*Loaned by Mrs. William T. Gossett  
Birmingham, Michigan*

#### JUDICIAL ROBE

Black silk trimmed with black velvet.

Judicial robe ordered in England and worn by Hughes during his service as a justice on the International Court of Justice.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### FORMAL GOWN

Gold threaded evening dress.

Formal gown worn by Antoinette Hughes for the occasion of their fiftieth wedding anniversary, December 5th, 1938.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### FLAG

Silk, 32 x 46 inches

American flag painted on silk, with 45 stars, which belonged to Hughes.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### LAP ROBE

Brown wool blanket.

Heavy wool blanket that served Hughes as a lap robe when riding in automobiles.

*Courtesy of the Supreme Court Historical Society  
Gift of Mrs. William T. Gossett*

#### CANE

37½ inches long.

Walking cane presented to Hughes by the Republican Club of Kalamazoo, Michigan. A photograph of Pres. Lincoln is adhered to the cane, which is purportedly made from a rail split by Abraham Lincoln.

*Loaned by Brown University  
Providence, Rhode Island*

#### ANDIRONS

Brass, 18 inches high

A pair of andirons which belonged to Oliver Wendel Holmes, friend and associate of Hughes.

*Collection of the U. S. Supreme Court*

#### CHILD'S ROCKING CHAIR

Painted Windsor rocking chair with cane bottom.

According to family account, the rocking chair was used in the church on Sundays to soothe young Charles while his father presented the sermon.

*Loaned by Helen Hughes Campbell  
Stonington, Connecticut*

#### TALL CASE CLOCK

Mahogany case 7 feet 10-½ inches tall, works by William Allam of London.

Tall case "grandfather" clock which belonged to Hughes.

*Loaned by Helen Hughes Campbell  
Stonington, Connecticut*

#### ORIENTAL RUG

*Loaned by the Chief Justice and Mrs. Burger.*

#### OFFICE CHAIR

Black leather upholstered high back swivel chair, 50 inches high.

Identified by a plaque inscribed, "Charles Evans Hughes/Governor New York/Jan. 1, 1907-October 6, 1910"

*Loaned by Brown University  
Providence, Rhode Island*

#### OFFICE CHAIR

Brown leather upholstered swivel chair, 46 inches high.

Identified by a plaque inscribed, "Charles Evans Hughes/Secretary of State/March 4, 1921-March 4, 1925/From the Staff of/The Department of State."

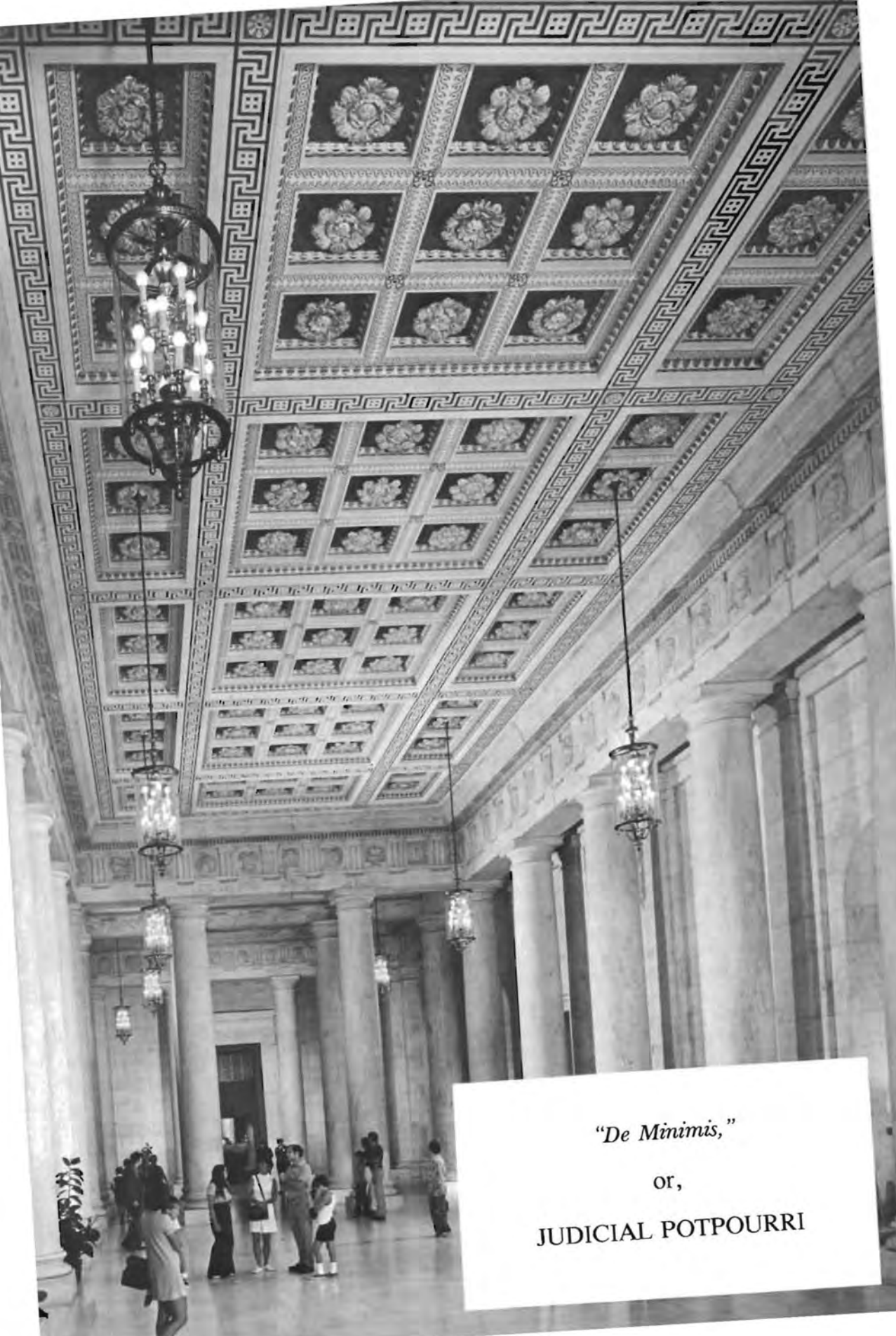
*Loaned by Brown University  
Providence, Rhode Island*

#### DRAWING

Pencil on paper, 22 x 15 inches. Sketch of Charles Evans Hughes by Ferdinand R. Petrie.

*Gift of Mr. and Mrs. Milton Turner  
Kenwood, Maryland*





*"De Minimis,"*

or,

JUDICIAL POTPOURRI

## *The Justice and the Lady: A Postscript*

Alfred J. Schweppe

This is a sequel to "The Justice and the Lady," by Judge Robert Kroninger, appearing in *Yearbook* 1977, pages 11-19.

Judge Kroninger makes no reference to the fact that different facets of the controversy went to the Supreme Court of the United States three times. The story is somewhat of a classic in West Coast journalism and is repeated in one form or another every decade or so for the new generation of readers.

In chronological order, the first case was *Ex parte Terry*, 128 U.S. 289 (submitted October 18, 1888, decided November 2, 1888), original habeas corpus.

On September 3, 1889, a three-judge circuit court for the Northern District of California, Justice Stephen J. Field presiding, sitting with Circuit Judge Lorenzo Sawyer and District Judge George M. Sabin, had sentenced Judge Terry to six months in the Alameda County Jail (Sarah Althea Hill Terry got 30 days) for violent misconduct in the courtroom in the presence of the three-judge court. In the courtroom, Terry struck the United States Marshal a blow — so violent as to knock out a tooth. Parenthetically, in the hall outside the courtroom Terry drew a bowie-knife which was taken away from him by David Neagle, a United States Deputy Marshall, who had been in court as a spectator. Neagle figures later in the story.

Terry filed in the Supreme Court an original application for a writ of habeas corpus. The cause was submitted October 18, 1888, and decided against Terry November 12, 1888, after he had served a little more than two months of his six-months' term, which he was required to complete. Mr. Justice Harlan wrote for the unanimous court denying the writ (Mr. Justice Field not participating) on the ground that contempt in the presence of the court was punishable sum-

marily even though he had left the courtroom when the contempt order was issued by the three judges on the same day.

As a sidelight on the courtroom misconduct, please note:

It also appears that Mrs. Terry, during her part of this altercation in the courtroom, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol. *In re Neagle*, 135 U.S. 1, 46 (1890).

The second case was *Terry v. Sharon*, 131 U.S. 40 (submitted April 8, 1889 — decided May 13, 1889).



Althea Terry, the California beauty who figured in the violent courtroom dramas involving her husband and Associate Justice Stephen J. Field.

This was an appeal by Sarah Althea Hill Terry from the Circuit Court of the United States for the Northern District of California and was before the court on motion to dismiss the appeal or to affirm the decree below. The motion to dismiss was denied, but the motion to affirm granted.

The appeal was from an order made September 3, 1888, by the Circuit Court (Field, Circuit Justice; Sawyer, Circuit Judge; and Sabin, District Judge) entertaining a bill of revivor and reviving a suit in equity after a final decree in the case had been made in favor of [Senator] William Sharon, the plaintiff, who had meantime died. It was the same order and opinion during the rendition of which the courtroom fracas occurred that was considered in *Ex Parte Terry*, above. The Supreme Court's opinion recites:

The object of the original suit was to have a decree, declaring the nullity and invalidity of a certain instrument in writing purporting to be a declaration of marriage between the complainant, William Sharon and Sarah Althea Hill, the defendant. The decree which was rendered in that case declared that said instrument was false, fabricated, forged, fraudulent, and utterly null and void, and directed that it be cancelled and set aside. It further decreed, that upon twenty days' notice of the decree to the respondent, or to her solicitors, the instrument be delivered by the respondent to and deposited with the clerk of the court to be indorsed "cancelled;" and the defendant was perpetually enjoined from alleging its genuineness or validity, or making any use of the same in evidence or otherwise to support any right or claim under it. The decree itself was rendered on November 23, 1885, and was entered as of September 29 of that year; the date of submission.

On March 12, 1888, Frederick W. Sharon, as executor of William Sharon, deceased, filed his bill of revivor in the cause, setting forth the fact of the death of William Sharon, and that he left a Will, which was duly probated, and on which letters testamentary had issued to him as executor; that the so-called declaration of marriage had not been delivered for cancellation, as ordered by the decree; and that the plaintiff feared the defendant would claim and seek to enforce property rights as the wife of William Sharon, by virtue of said written declaration of marriage. The bill of revivor further stated that on January 7, 1885, the defendant, Sarah Althea Hill, had intermarried with David S. Terry, and he was accordingly made a defendant with her to the bill of revivor. It prayed, therefore, that the suit might be revived in his name as executor, and that the defendants be required to show cause why the original suit and proceedings should not stand revived against them.

To this bill of revivor the defendants interposed a demurrer which stated, among other things, that the court had no jurisdiction of the subject matter of the suit, and no jurisdiction to grant the

relief prayed for in the bill, or any part thereof, and that the bill did not contain any matter of equity whereon the court could ground any decree or give to the plaintiff any relief against the defendants, or either of them.

The Circuit Court entered an order overruling the demurrer, and reviving the suit in the name of Frederick W. Sharon, as executor of William Sharon, and against Sarah Althea Terry and David S. Terry, her husband, and ordering that the executor have the full benefit, rights and protection of the decree, and full power to enforce the same against the defendants, and each of them, in all particulars. It is from this order that the present appeal is taken. *Terry v. Sharon*, 131 U.S. 40 (1888), pp. 41-42.

Mr. Justice Miller wrote the unanimous decision of the court (Mr. Justice Field not participating). Mr. Justice Miller concluded (p.50):

It is averred in this bill of revivor that the decree has not been complied with by the defendant, Hill; that she has not delivered up the instrument to be cancelled; and that she is using it in other ways to the prejudice of Sharon's estate and that of his devisees. Somebody capable of putting the decree into effect in those particulars is essential to its utility and to its execution.

We have not been able to find any precedent exactly representing the case before us. The ingenuity of counsel has been unable to supply us with any; but we think the decree of the court below, reviving the suit in the name of Frederick W. Sharon, is so clearly right that we feel bound to affirm that decree on this motion.

The third case was *In re Neagle, Petitioner*, 135 U.S. 1 (argued March 4 and 5, 1890 — decided April 12, 1890).

This was an appeal from the Circuit Court of the United States for the Northern District of California, docketed as "Thomas Cunningham, Sheriff of the County of San Joaquin, California, appellant v. David Neagle."

Neagle was arrested by the sheriff of San Joaquin County for shooting and killing Judge David S. Terry on August 14, 1889; Neagle was acting at the time as the duly appointed United States Deputy Marshal for the Northern District of California to protect Justice Stephen J. Field against possible injury by Judge Terry and his wife, who had made many threats during and after their sojourn in the Alameda County Jail the year before. Neagle petitioned for habeas corpus.

The hearing in the Neagle habeas corpus proceeding in the Circuit Court was before Circuit Judge Sawyer and District Judge Sabin (p. 7):

The sheriff Cunningham was represented by G.A. Johnson, Attorney General of the State of

California and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court. . . .

The court:

. . . heard the testimony introduced on behalf of petitioner, none having been offered by respondent, and also the arguments for the petitioner and respondent. . . . (p. 7).

Both Judges Sawyer and Sabin signed the opinion and order discharging Neagle (pp. 7, 32).

From that order an appeal was allowed to the Supreme Court, accompanied by the voluminous record of over 500 pages (pp. 7, 53).

Among other things, it appeared in the record that, when the Terrys entered the railroad break-fast room:

Mrs. Terry, recognizing Judge Field, turned and left in great haste while Terry passed beyond where Field and Neagle were seated and took his seat at another table. It was afterward ascertained that Mrs. Terry went to the car and took from it a satchel in which there was a revolver. Before she returned to the eating room, Terry rose from his seat, and, passing around the table in such a way as brought him behind Judge Field, who did not see him or notice him, came up where he was sitting with his feet under the table, and struck him a blow on the side of the face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time arose from his seat with his revolver in his hand, and in a very loud voice shouted out: Stop! Stop! I am an officer! Upon this Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. [Let it be remembered that Neagle disarmed Terry of his bowie-knife outside the courtroom, the September before.] At this instant Neagle fired two shots from his revolver into the body of Terry who immediately sank down and died in a few minutes. [It turned out when Terry's body was searched that he was not armed.]

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. . . . The satchel which she had, being taken from her, was found to contain a revolver (pp. 52-53).

In the Supreme Court, G. A. Johnson, Attorney General of California, and Mr. Z. Montgomery appeared for appellant sheriff. Samuel Shellabarger and Jeremiah M. Wilson were on the brief for appellant sheriff.

Mr. W. H. H. Miller, Attorney General of the United States, and Joseph H. Choate (with James C. Carter on the brief) appeared for appellee Neagle.

The eminence of counsel assured highly-skilled analysis of the law and the facts and forceful presentation.

The opinion by Mr. Justice Miller was concurred in by Justices Bradley, Harlan, Gary, Blanchford and Brewer. Mr. Justice Lamar and Chief Justice Fuller dissented. Justice Field did not participate.

The Court held that Neagle was acting under law of the United States when protecting Field and hence could not be guilty of a crime under the law of the State of California. "There is no occasion for any further trial in the state court or in any court." (p. 75).

Mr. Justice Lamar, dissenting with the concurrence of Chief Justice Fuller, would have reversed and remanded the prisoner to the custody of the sheriff, expressing the hopeful conclusion, however, that "even if appellee had been indicted, and had gone to trial on this record, God and his country would have given him a good deliverance." (p. 99).

So all of the justices were in agreement that, on the facts shown, Neagle, acting in his role as Justice Field's bodyguard, was justified in shooting Terry.



# Toward 1987—Two Milestones in 1781

William F. Swindler

*(Note: Each year up to the bicentennial of the Constitutional Convention the Potpourri section will feature a review of the corresponding year of two centuries before, by way of tracing the issues which led to the 1787 gathering in Philadelphia. The seven years beginning in 1781 cover a period in which, as seen after the event, the developments making the Convention virtually inevitable may be traced in their human contemporary terms.—Ed.)*

The year 1781 was an epochal date in the five-year-old history of the "united States of America," as the term itself was devised to indicate. The adjective "united," with a small "u", indicated the general turn of mind—it was with the States that sovereignty lay; the capital "S" might have been applied synonymously to both words. The "perpetual union" which the Articles of Confederation claimed to establish was voluntary, on sufferance, if this was not a contradiction in terms. Certainly there were few to take literally the exuberant expression of the Continental Congress in 1776, when Christopher Gadsden had exclaimed that "henceforth there are no Massachusetts men, nor Pennsylvanians nor South Carolinians, but Americans all."

Most of the time since the Declaration of Independence had been taken up with prolonged debate on the Articles themselves, and their final unanimous ratification in the winter of 1781 was to be one of the two major achievements of the new nation in this year. The other would be the victory at Yorktown in October, the significance of which was recognized by Lord North's exclamation on hearing the news: "Oh, God! It's all over!"

Not quite, as it turned out. There would be two more years before the definitive treaty of peace, while the coming six years would find the shortcomings in the Articles nudging the sovereign states closer to the time when a new start had to be made. George Washington, with keen prescience, saw the first constitutional instrument as beneficial primarily for committing

the states to a union, whether "perpetual" or not. "The present temper of the states is friendly to the establishment of a lasting union," he observed, adding that "the moment should be improved; if suffered to pass away, it may never return; and after gloriously and successfully contending against the usurpations of Britain, we may fall a prey to our own follies and disputes."

Perhaps the Articles were unavoidably necessary as a first step; the erstwhile colonies had seldom worked in cooperation with each other; the Albany Congress and the First Continental Congress notwithstanding. With independence, eleven of the thirteen new states had drafted constitutions for their own forms of government (Connecticut and Rhode Island continued into the nineteenth century under the original charters). The Continental Congress, both before and after Confederation, never functioned as anything much more than an interparliamentary union; but experience with this cumbersome machinery would have to educate the people of the individual states to the need for something better.

It had taken enough of a struggle to get the Articles adopted. A major dispute had been between the states with large western landholdings and those without; and since unanimous adoption of the Articles was necessary to commit the individual states to the Confederation, the cession of these lands to the Congress had been a sticking point for a prolonged period. Virginia, with its huge claims to Kentucky and most of what later became the Northwest Territory, was bitterly challenged by Maryland, which had no lands to cede and would not ratify until Virginia did cede. Georgia, the next largest holder of lands (from the western shore of the Atlantic to the South seas," as the early English charters, with their imperfect geographic knowledge, said), would also hold out for the best bargain it could make; it did not finally cede its lands to the national government—by then the government created by the Constitution—until it had wrung a



*John Dickinson of the "three lower counties" of Pennsylvania (Delaware), one of the signers of both the Articles of Confederation and the Constitution, and a renowned polemicist of the Revolutionary era.*

good price from Congress in satisfaction of its claims, and then left the nation with the inherited problem of the Yazoo land scandals.

Connecticut was one of the New England states with western claims which had to be defeated before the Articles could become a reality. For a long time it claimed a tract of land in Pennsylvania (the Wyoming valley) on the ground that its earlier colonial charter gave it superior title. When that dispute was settled in favor of Pennsylvania by a special court set up by the Continental Congress, Connecticut then sought to keep a "western reserve" to the area beyond Pennsylvania, for resettlement of its citizens from the "firelands" — coastal areas bombarded and destroyed by British ships in the course of the Revolution.

Thus the struggle for even such a jerrybuilt structure as the Confederation was a hard one. It could not be expected that, in the circumstances, anything more workable could have persuaded the states to accept it.

This first national constitution for the "United States, in Congress assembled," was hedged with assurances that the states not only retained complete independence in their own spheres, but also retained a firm grip on the national government as well. The first three Articles of Confederation stated:

Article I. The Stile of this confederacy shall be "The United States of America."

Article II. Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Much of the language in the Articles would be repeated in the Constitution in 1787. Both the Confederation Congress and the Federal Congress were authorized to conduct interstate and foreign commerce, maintain postal services, establish uniform weights and measures, fix the content and value of coinage and currency, and provide for the maintenance and training of the armed forces (saving to the states the power of appointed general officers). Article IX, however, took away virtually everything that other language conferred upon the Confederation Congress by the proviso:

The united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and



*Daniel Carroll of Maryland, another of the four men who signed both the Articles of Confederation and the Constitution.*

expences necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, *unless nine states assent to the same*: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

Whatever vitality was left to the new government after this substantial impediment, was further limited by the opening paragraph of Article XIII, which declared:

Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

Satisfied with these safeguards in the final draft as approved by the early summer of 1778, ten of the thirteen state delegations signed the Articles between July 21 and August 8 of that year. The New Jersey delegation signed in November 1778 and the delegates from Delaware during the winter and spring of 1779 — all after having received authorization from their respective states to do so. This left Maryland as the holdout for another two years, until Virginia gave in on the "western lands" issue and the Articles were proclaimed to be unanimously adopted and in effect as of March 1, 1781.

Of these first "founding fathers" — forty-eight in all — only four (indicated by an asterisk) also

signed the Constitution of 1787. Yet, they set a new national government in motion, tentative though it was, and they deserve to be remembered for their role in the beginning of American affairs, viz.:

For New Hampshire:	Josiah Bartlett John Wentworth, Jr.
For Massachusetts:	John Hancock Samuel Adams Elbridge Gerry Francis Dana James Lovell Samuel Holton
For Rhode Island and Providence Plantations:	William Ellery Henry Marchant John Collins
For Connecticut:	Roger Sherman* Samuel Huntington Oliver Wolcott Titus Hosmer Andrew Adams
For New York:	James Duane Francis Lewis William Duer Gouverneur Morris
For New Jersey:	Jonathon Witherspoon Nathaniel Scudder
For Pennsylvania:	Robert Morris* Daniel Roberdeau Jonathon Bayard Smith William Clingar Joseph Reed
For Delaware:	Thomas McKean John Dickinson* Nicholas Van Dyke
For Maryland:	John Hanson Daniel Carroll*
For Virginia:	Richard Henry Lee John Banister Thomas Adams John Harvey Francis Lightfoot Lee
For North Carolina:	John Penn Cornelius Harnett John Williams
For South Carolina:	Henry Laurens William Henry Drayton John Matthews Richard Hutson Thomas Heyard, Jr.
For Georgia:	John Walton Edward Telfair Edward Langworthy



Robert Morris of Pennsylvania, who wrestled long and hard with financial problems of the Continental Congress, was also one of four signers of the Articles of Confederation who also signed the Constitution in 1787.

The first officers of the national government also deserve better in historical memory — particularly, Charles Thomson of Philadelphia, the "perpetual secretary," who attended every session of the Continental Congress from its opening to its closing, and whose meticulous documentation has preserved for posterity most of



*Roger Sherman of Connecticut, who signed both the Articles of Confederation which took effect in March, 1781, and the new Constitution which took effect in April, 1789.*

the records of this first government of the United States. The Presidents of the Congress were the only executives in name, but in fact they were merely presiding officers over the gathering of

the delegates from the various states. The only other formal office established under the Articles was Secretary of Foreign Affairs, a chair occupied by John Jay from 1785 to the termination of the Confederation government in the spring of 1789. (For the ad hoc judicial function and the first "federal" judges, see the article, "Of Revolution, Law and Order," in *Yearbook* 1976.)

What might have happened to the "United States in Congress assembled," had not a formal structure of government been finally agreed to in March 1781 is difficult to conjecture in terms of the other event of that year, the surrender at Yorktown in October. The record of the government under the Articles is one of steady loss of energy, but at least the instrument had been entered in the rolls of political history as the beginning of a "perpetual union" which became a "more perfect union" at the Convention of 1787.



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