

YEARBOOK 1983

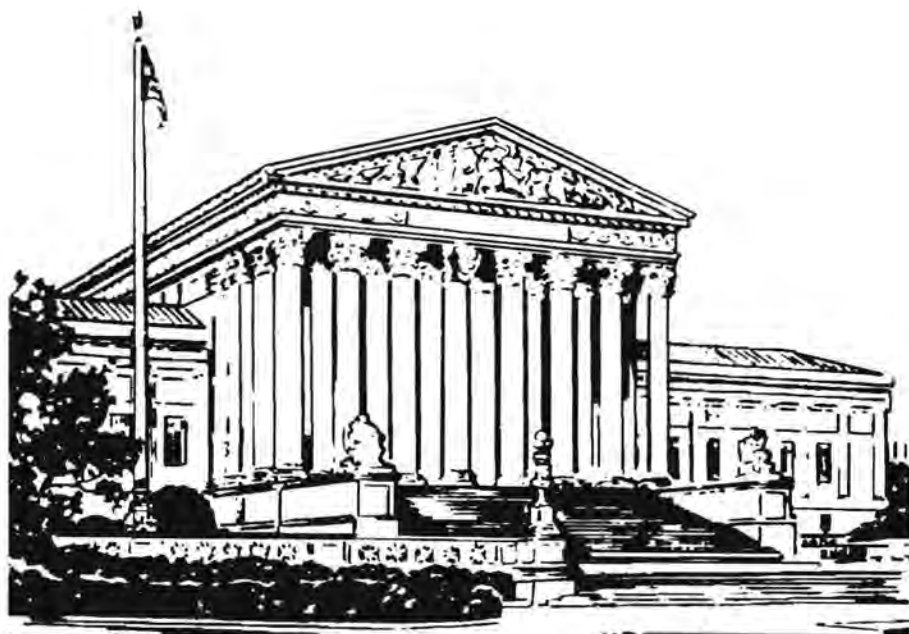
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WILLIAM HOWARD TAFT
TENTH CHIEF JUSTICE, 1921-1930

YEARBOOK 1983

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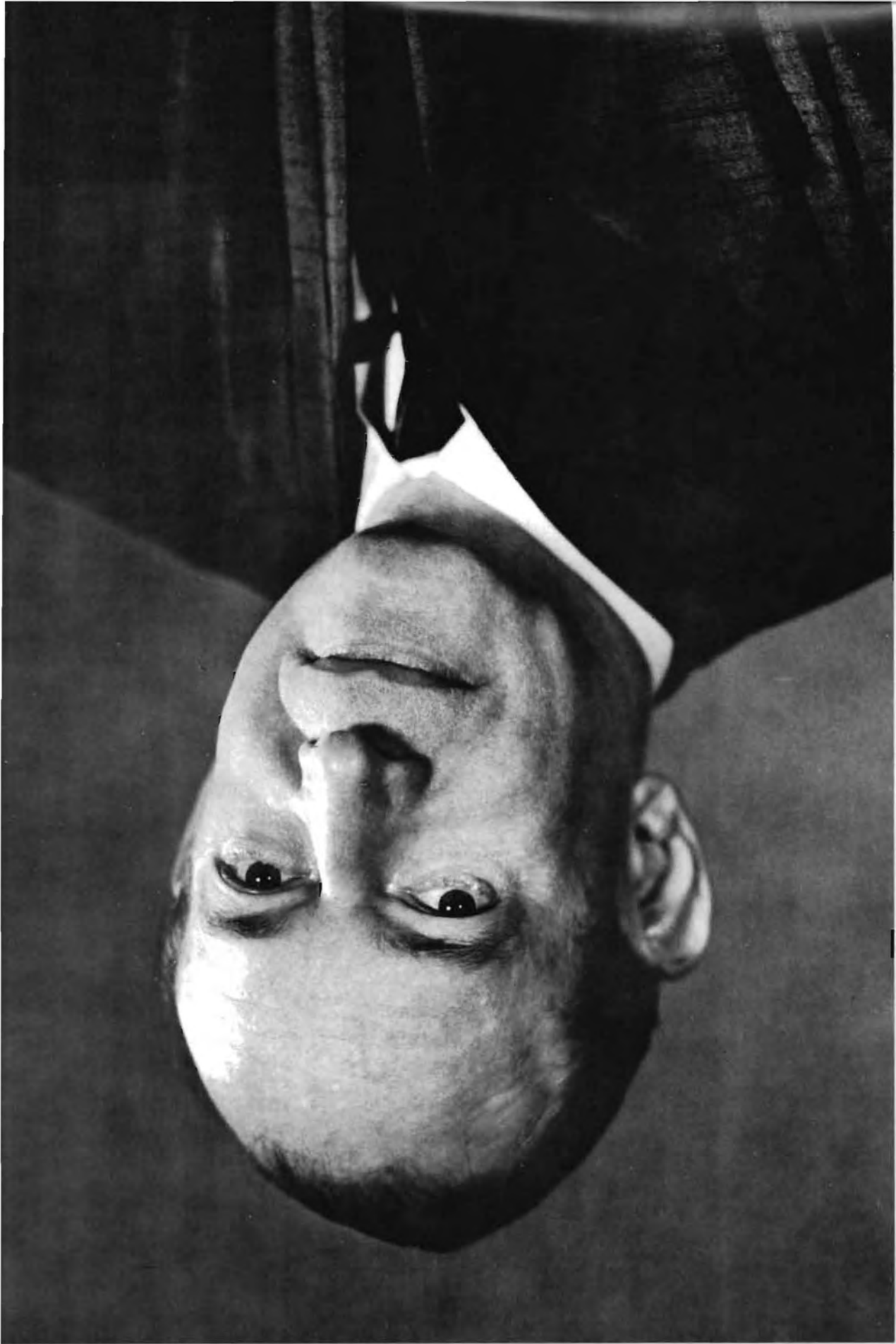
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In Memoriam

ABE FORTAS
1910-1982



In Memoriam: Abe Fortas

Rex Lee*

Abe Fortas, Associate Justice of the Supreme Court of the United States from 1965 to 1969, died at his home in Washington, D.C. on April 5, 1982. He was 71 years old, but even for a man whose career had been so rich, so varied and so fruitful, his death cannot be said to have come in the fullness of time. Only a few days before, he had argued before the Supreme Court and neither his appetite for work nor his powers showed any signs of diminishing.

To recall the details of his life is to exhibit, as the historian Burckhardt said, only the "under-side of the tapestry": the knots and stitches, not the whole work. Abe Fortas was animated by a warmth, a compassion, a profound gravity that could be felt, that cannot be captured in words, but that made him who he was and whom we remember.

Abe Fortas was born in Memphis, Tennessee on June 19, 1910. His Orthodox Jewish parents had emigrated from England. His father was a cabinetmaker who was also a sometime shopkeeper and jeweler. Abe was the youngest of five children, and his family's modest circumstances dictated that any achievement he enjoyed would be self-made. He worked his way through high school by playing the violin in a small dance band. The violin began as a source of pleasure, became a means of self-support along with part-time work in a shoe store, and remained a passion throughout his life. His academic record led to a scholarship at Southwestern College, a Presbyterian institution in Memphis. There he was president of the drama and debating clubs and leader of the school orchestra. With a near-perfect

academic record, he won a scholarship to the Yale Law School, which he entered in 1930 at the age of 20.

Propitious circumstances and the relentless application of his remarkable ability made Yale the turning point of Fortas' life. He led his class academically, was Editor-in-Chief of the Law Journal, and authored a brilliant student note at the direction of William O. Douglas, then a young Sterling Professor of Law, who would later call Fortas "my prize student" and who would become an intimate friend for life.

Fortas was appointed assistant professor of law upon his graduation in 1933, but for the next four years his world had two centers, New Haven and Washington. During summers and semesters when he was not teaching, he worked at the Agricultural Adjustment Administration at the behest of two other Yale faculty members who had been drawn by the New Deal, Thurman Arnold and Wesley Sturges. In 1934, Fortas joined Douglas at the new Securities and Exchange Commission as a consultant. He became an important collaborator with Douglas in the preparation of a study of protective committees that led to major legislative revisions in reorganization proceedings under the Bankruptcy Act. Three years after joining the Commission, Fortas left the Yale faculty. In the meantime, he had married Carolyn Agger. She, too, became a brilliant student at the Yale Law School and after her graduation in 1933, began an outstanding career as a tax lawyer that has continued to the present day.

In 1939, at the age of 29, Fortas became General Counsel to the Bituminous Coal Division of the Department of the Interior. Two years later, he became Director of the Division of Power in the Department. In that capacity, he met a young congressman named Lyndon B. Johnson, who was interested in a proposed power project in his home state of Texas. The introduction led to a

* Reprinted from the Solicitor General's remarks before the Supreme Court of the United States during the Special Session in memory of Justice Fortas on December 13, 1982.

life-long friendship which included Fortas' representation of Johnson in the contested Texas Senatorial election of 1948.

Talented young men, of whom Fortas was one of the best, were able to rise quickly in the New Deal. In 1942 at the age of 32, Fortas became Under Secretary of the Interior. His legal abilities had been firmly established. In the new post, he demonstrated the judgment and force required to become a successful second in command to Secretary Harold Ickes, the self-styled curmudgeon of the Roosevelt administration. Fortas won Ickes' trust so quickly and to such a degree that he frequently substituted for the secretary at Cabinet meetings.

With the declaration of war after Pearl Harbor, the business of the Interior Department acquired new gravity. The Department was charged with administering the removal of Japanese Americans from the West Coast and with overseeing the administration of martial law in the Hawaiian Territory. Fortas fought a determined, though unsuccessful battle to prevent the relocation and internment of the Japanese-Americans. In later years he would tell associates that he was prouder of his efforts in that cause than in any other he undertook in more than a decade of government service. And with Ickes, he also fought to ameliorate the harshest aspects of martial law in Hawaii during the war.

Fortas' tenure in the Interior Department was briefly interrupted when he resigned to enlist as an apprentice seaman in the Navy. Rejecting any high-level desk assignment in the service, he was in boot camp when a persistent and serious eye ailment compelled his release; he was reappointed to his still-vacant post as Under Secretary.

When the war ended, so did the New Deal. In January 1946, the law firm of Arnold and Fortas was organized in Washington, D. C. Its purpose, as Fortas later recalled in a tribute to Thurman Arnold, "was to provide a means for its two partners to make a living." For almost 20 years, Fortas managed the firm and built it into one of the leading institutions in the city and in the country. Two of Fortas' most important victories were for clients whom he represented by court appointment. His representation of Monte Durham in 1954 by appointment of the United States Court of Appeals for the District of Columbia Circuit, led to a decision that for its time

was a landmark in the modern attempt to bring into closer proximity legal rules and scientific knowledge concerning insanity. Less than a decade later, again by appointment of the court, he convinced the Supreme Court that Clarence Earl Gideon was entitled under the Constitution to a lawyer to defend him in state court for a petty offense. Both cases were constitutional watersheds.

Abe Fortas was an advocate not only of the powerful and the penniless, but also of the arts. If his professional passion was craftsmanship, his private passion was music and art. The two merged symbolically in the form of his desk at the firm which was made from a Victorian grand piano. He was an effective supporter of the National Endowments for the Arts and for the Humanities. He arranged for Pablo Casals to play at the White House, and in later years he helped direct the John F. Kennedy Center for the Performing Arts.

He once said that the only thing he could not live without was his music. Though he played for pleasure, his musical sense and skill were of a high order, and he played the violin and viola regularly with the talented professionals who were his friends in the Sunday evening sessions at his home that he called "the 3025 N Street Strictly No Refund Quartet." A month after Fortas' death violinist Isaac Stern led a memorial concert at the Kennedy Center in memory of the man who worked to make the Kennedy Center a vital force in the arts, who with Stern, successfully fought the destruction of Carnegie Hall and who helped make the Hirschhorn Museum a reality.

Abe Fortas was a man of rare completeness—patron and practitioner of the arts, successful corporate lawyer and superb advocate, defender of the poor and the persecuted. His legal renown came as "Washington lawyer" but not of the breed sometimes thought to provide clients with income more than advice. Fortas knew Washington from the inside, but his success rested on an intuitive knowledge built from the ground up of how bureaucracies worked and thus, how they needed to be addressed. When an elevator car carrying lawyers, judges and administrators was trapped between floors in the Export-Import Bank on the way to a meeting, Fortas opened the operator's panel, pulled a lever, flicked a switch or two and the car was once again on its way.

When his fellow passengers expressed their astonishment, Fortas replied with the mock innocence he occasionally affected, "It's really quite simple, for an insider."

Abe Fortas was not eager to accept appointment to the Court, but President Johnson styled the nomination as a call to "vital duty" and Fortas accepted. The President, noting Fortas' well-known reluctance to assume public office again after 20 years in private life, declared that "the job has sought the man—a scholar, a profound thinker, a lawyer of superior ability and a man of deeply compassionate feelings toward his fellow man."

Justice Fortas took the constitutional and judicial oaths on October 4, 1965 to become the 95th justice to sit on the Supreme Court of the United States. In the four terms that he sat as an Associate Justice he wrote 106 opinions—40 opinions for the Court, 21 concurrences and 45 dissents. His importance to the Court and to the nation during the perilous times in which he sat cannot be measured by output. Part of his value lay, as Holmes said of John Marshall, in the fact that he, and not someone else, was there during "a strategic point in the campaign of history."

On June 27, 1968, President Johnson nominated Abe Fortas to be Chief Justice of the United States to replace Earl Warren, who had announced the day before that he would retire as soon as his successor was confirmed. The nomination never went to a vote in the Senate because Fortas asked on October 3 that his name be withdrawn from consideration after stormy confirmation hearings where questions were raised about decisions made by the Court both before and during his tenure, and about Fortas' extrajudicial activities. To Fortas, the political implications of the controversy transcended personal vindication. He knew, as he said, that, "If I stayed on the Court, there would be a constitutional confrontation that would go on for months. I felt there wasn't any choice for a man of conscience." Against the urgings of friends and those who recognized the importance of his contribution to the work of the Court, he resigned from the Court on May 14, 1969.

After the resignation, Abe Fortas resumed an active practice as an eminent and valuable member of the bar. The practice was remarkably varied, challenging and consuming. Of particu-

lar interest to him was the future of the Commonwealth of Puerto Rico, with which he had a long association and which he represented in his only argument before the Court after leaving it. He continued his manifold activities on behalf of the arts, and he occasionally lectured. Although his work and his avocation seemed to fill a 25-hour day, he always had time for his friends.

The life of Abe Fortas was so full, so rich and lived at such intensity that it is possible we do not fully know the man we have lost. He recognized his own complexity. "The Supreme Court," he said, "brings you face to face with the problems of what you really believe, and that accounts for some of the transformations of men on the Court. Maybe if I'd stayed on the Court long enough I'd have discovered a Fortas under the Fortas under the Fortas. But it didn't happen."

Abe Fortas was not so much a man of contradictions as a man of great tensions. An instinctive, emotional passion for justice and fair play underlay his quiet and controlled public reserve; the man who moved so easily in the corridors of power was acutely uncomfortable with the trappings of that power, so much so that he could not bear to ride in the back seat of a limousine alone because he detested the distinction between the passenger and the driver such seating symbolized; and the active and diverse social life that he and his wife so enjoyed was at odds with his lifelong gravity and social concern.

Abe Fortas bore the burden of the same kind of conscience that he perceived in his friend and former partner, Louis Eisenstein: "He believed in man and man's capability. He believed—although life could not have been easy for him because he was a sensitive instrument responding too easily, too deeply, too quietly, too passionately to the vibrations of others—not only those whom he knew, whose sorrows impinged upon his life, but also to the unseen multitudes whose problems to him were not abstract, but a personal agony and a personal responsibility." As he said of Eisenstein in that deep, deliberate, somewhat mournful voice which none who heard it can ever forget, "The death of a remarkable man is not just an end. It is also a beginning. His death does not terminate his life. His life continues in each of those whom he has touched, and in thousands whom he never encountered, but whose lives are better and richer because he lived."

Admission to the Supreme Court Bar, 1790-1800: A Case Study of Institutional Change

James R. Perry and James M. Buchanan*

The history of admission to the Supreme Court bar during the Court's first decade is significant for what it reveals about the functioning of the Court during its formative years. The Court was a unique institution which did not spring fully formed from the Constitution and the Judiciary Act of 1789. Consequently the justices had to settle many matters concerning procedure. Their decisions in these matters were ad hoc and not immutable. In particular, the fluctuation in procedures for bar admission illustrates the Court's flexibility in establishing rules and practices. Furthermore, the history of admission to the bar suggests the major role the Chief Justice took in shaping the Court's practice.

Even before the Supreme Court first convened and admitted lawyers to its bar in February, 1790, Chief Justice John Jay turned his attention to organizational and procedural matters of pressing concern. In an exchange of letters with Associate Justice William Cushing, Jay's priorities and preferences became clear.¹ First, the Chief Justice believed that process in the Court should run in the name of the President of the United States. Furthermore, he argued that, in accordance with section 1 of "An Act to regulate Processes in the Courts of the United States" (enacted September 29, 1789),² the federal circuit courts would have to wait for the Supreme Court to provide for their seals. Turning to the Court's need for a clerk, Jay acknowledged that Cushing's candidate, John Tucker, came highly recommended;³ but he noted that "I have made it a Rule to keep myself free from Engagements, and at Liberty to vote as after mutual Consultation among the Judges shall appear most adviseable." Jay did think that the clerk "should reside at the seat of Governmt." Finally, he concluded:

*The authors gratefully acknowledge Nancy Matthews, Sandra Van Burkleo, and Sarah Blank for contributing to the biographical research used in this article.



Chief Justice John Jay

"There are several matters which will demand early attention; and it would doubtless be useful to have some informal Meetings before Court, in order to consider and mature such Measures as will then become indispensable — among these will be the Stile of writs — admission of Attorneys and Counsellors — some rules of Practice &c—&c."

Jay's concerns became the agenda followed by the Court during its first term. On February 3, 1790, the Court appointed John Tucker as clerk and agreed with Jay that Tucker "reside, and keep his Office at the Seat of the National Government." That same day, the Court provided for its own seal as well as seals for the circuit courts. On February 5, the Court ordered that all process should run in the name of the President of the

United States. It also passed rules for the admission of attorneys and counsellors:

"Ordered, that (untill further Orders) it shall be requisite to the admission of Attorneys or Counsellors to practice in this Court; that they shall have been such for three Years past in the Supreme Courts of the State to which they respectively belong, and that their private and professional Character shall appear to be fair. Ordered, that Counsellors shall not practice as Attornies; nor Attornies as Counsellors in this Court."⁴

The Court also specified an oath for admission to the bar.

It is evident that the Chief Justice had shaped not only the agenda of the Court, but also the decisions related to these procedural matters. His influence even extended to the wording of some of the Court's actions. Drafts of the Court's rules for admission to the bar and issuance of process survive in the records of the Supreme Court; they are in the handwriting of John Jay.⁵

The history of admission to the Court's bar during the 1790s suggests the continuing importance of the Chief Justice in shaping procedure, but the bar is important in its own right. The bar's importance can be gauged by the attention given it in newspaper coverage during the 1790s. It was not uncommon for newspapers to print lists of the attorneys and counsellors admitted. Illustrative of the respect given to the bar is this passage published in New York City's *Gazette of the United States* on March 6, 1790, a month after the Court's first term:

"Every friend to America must be highly gratified, when he peruses the long list of eminent and worthy characters, who have come forward as Practitioners at the Federal Bar—where the most important rights of Man must, in time, be discussed, and determined upon, as well those of nations, as of individuals.

During the Court's first term, twenty-seven lawyers were admitted to the bar. These admissions took place between February 5, 1790—the date when the Court established rules governing the bar—to February 10—when the Court adjourned.⁶ According to the just-announced rules of the Court, applicants for the bar had to have practiced for three years or more in the supreme courts of their respective states of residence and had to have maintained a "fair . . . private and professional Character." For three of the twenty-seven admitted in February, 1790,

character references or certificates survive, the latter to vouch for their having practiced as lawyers in the highest courts of their states of residence.⁷ How did the other twenty-four establish their professional credentials to satisfy the Court's requirements? The answer may lie in the personal and professional reputations of these "eminent and worthy characters."

Seeking admission were nine representatives and one senator, all in New York to attend the second session of the First Congress. Among the congressmen was Egbert Benson (1746-1833) from New York.⁸ Benson had graduated from King's College (later Columbia) in 1765,⁹ after which he read law in the office of John Morin Scott for a number of years. In 1769 he gained admission to the bar of the New York Supreme Court of Judicature. Thereupon, he established a respected legal practice in his native Dutchess County. He was active in the revolutionary cause, serving in New York's Provincial Congress (1776) and on its Council of Safety (1777-1778). In 1777 he became the first attorney general of New York, a position he held for over a decade. Concurrently he was a member of the state assembly (1777-1781, 1788) and a member of the Confederation Congress (1781-1784). He attended the Annapolis Convention in 1786 and, two years later, enthusiastically worked for adoption of the Constitution as a member of New York's ratifying convention. According to one biographer, Benson's "reputation for legal learning was second only to that of Hamilton." Four



Elias Boudinot of New Jersey, a leading colonial lawyer and active patriot during the Revolutionary period, became the first member of the Supreme Court bar in February, 1790.

years after Benson was admitted to the Supreme Court bar, he became a justice of the New York Supreme Court of Judicature.¹⁰

Eminence such as that displayed in the career of Egbert Benson typified those lawyers admitted to the bar who were serving in Congress; others who were admitted, while not members of Congress, also had attained eminence and held (or had held) positions requiring legal expertise. Of the latter group, some had worked as clerks of county or state tribunals, others as judges of county, state, and federal courts. One had been the attorney general of his state, one was a federal district attorney, and two had been involved in the codification of statutes. Representative of this group is Richard Varick (1753-1831). Born in Hackensack, New Jersey, he had moved to New York City, where he was admitted to the bar on October 22, 1774. After the revolution, he served as recorder of New York City from 1784 to 1788. He was speaker of the New York Assembly in 1787 and 1788. In the latter year he became attorney general for the state, a post he held for only one year before becoming mayor of New York City. In the three years prior to his admission to the bar of the Supreme Court, he also had collaborated with Samuel Jones on a project to produce an official codification of the statutes of New York.¹¹

The admission of Arthur Lee (1740-1792) presents a special case of eminence recognized by the Court. Perhaps no man who became a member of the Court's bar during its first term enjoyed as large a reputation as that of this Virginian. In his fiftieth year at the time of his admission, Arthur Lee had a long list of achievements. He had been educated at Eton and the University of Edinburgh, where he received his M.D. in 1764. He returned to his native Virginia and began to practice medicine in Williamsburg. Lee did not stay with medicine for very long, however; within a few years, political events precipitated by the Stamp Act crisis steered him away from his first chosen profession. Returning to London once again, he began to study law at Lincoln's Inn and the Middle Temple. While in London Lee acted as an agent for Massachusetts and, in 1775, began to serve in the same capacity for the Continental Congress. That same year, he was admitted to the Court of King's Bench. In 1776, Lee joined Silas Deane and Benjamin Franklin at Paris in an effort to negotiate a

Franco-American alliance. He then journeyed to Madrid and Berlin as special envoy for the American Congress before his recall by that body in 1779. Returning to America, Lee won election to the Virginia House of Delegates in 1781 and then to the Confederation Congress, where he served until 1784. A year later, Congress chose him to serve on the treasury board.¹² As the *Gazette of the United States* noted on March 6, 1790, shortly after Lee's admission to the Supreme Court bar:

This gentleman, (whose talents and law knowledge so eminently distinguished him in the Courts of Westminster, prior to the commencement of the late glorious revolution, in the whole course of which his abilities and patriotism were so successfully exerted for the benefit of his country,) will, we doubt not, be another shining ornament to the Federal Bar—and will, we hope meet with those returns from his fellow citizens, in the line of his profession, which his long-tried integrity, and high character justly entitle him to: Those considerations, we hear, have induced the Hon. Judges of the Supreme Court to dispense with a special rule of the Court in his favor, which precluded the admission of any person as a counsellor, who had not practiced as such in some of the Superior Courts of the States for three years antecedent to the adoption of the New Constitution.

The *Gazette* inaccurately stated the rule of the Court, which in fact required three years of practice in a state supreme court preceding admission to the United States Supreme Court bar, rather than "antecedent to the adoption of the New Constitution." But this news report does illustrate how widespread was Lee's reputation, to the extent that the Court was willing to bend its rules, so recently laid down.

After the admission of the most eminent practitioners as counsellors, the Court admitted several lawyers as attorneys. In the rules passed February 5, 1790, the Court had distinguished between counsellors and attorneys. The former could plead cases before the Court, whereas the latter could only prepare documents. All of those lawyers admitted as attorneys during the February term, 1790, practiced in New York City. If the nation's capital, and therefore the Court was to remain in that city,¹³ some lawyers would be needed to act in the capacity of attorneys. Foreseeing this need, the Court may have admitted these individuals, although they were less prominent than those admitted as counsellors.

Given the eminence of those admitted as coun-

Library of Congress



Associate Justice James Wilson

sellors and the intended role of those admitted as attorneys, it becomes clearer how applicants established their credentials in February, 1790. As noted earlier, only three applicants are known to have presented written documentation evidencing qualification for the bar. Inasmuch as the Court had just passed its rules on admission, the justices bowed to expediency and decided to accept unwritten proof of credentials. Articles published in the New York City *Daily Advertiser* two years later (in conjunction with John Jay's candidacy to be governor of New York) indicate that the Court allowed oral testimony to establish the credentials of applicants to the bar. The March 1, 1792, issue of this newspaper carried an article by "Aristogiton," who noted that the lawyers of New York were indebted to John Jay "for the *decency* and *delicacy* with which they were treated when they applied to be admitted at the federal bar, and for the pains he took to establish their reputation by oaths and *certificates*." (Emphasis in original.) Four days after this article appeared in the *Daily Advertiser*, an article signed "A Free Elector" in the same paper noted that it had been understood that, in order to establish the length of practice before the state supreme courts and the character of the applicant, "it was requested that the gentlemen of the bar



SCHS

Associate Justice William Cushing

should produce certificates as to both these facts." Although these two articles were written with political motives (one for, and one against Jay), they reveal nonetheless the process of admission followed during the February 1790 term; that is, although the Court *requested* written certificates, it did not *require* them.

Evidence as to qualification for the bar either was given orally in Court or was a matter of common knowledge, mitigating any need for written certificates and character references. Given the relatively small number of lawyers in a country of only four million (including 700,000 slaves) and given the even smaller number who would have practiced before the highest courts of their respective states, there was probably no applicant to the Court's bar not personally or professionally acquainted with at least one of the justices—themselves leaders of their state bars. The justices who met in February, 1790, hailed from Massachusetts (William Cushing), New York (John Jay), Pennsylvania (James Wilson), and Virginia (John Blair).¹⁴ The lawyers admitted came from Massachusetts (3), New York (15), New Jersey (5), Pennsylvania (1), Virginia (1), South Carolina (1), and Georgia (1). The lawyers from New Jersey probably would have been known either by Jay or Wilson; William



Library of Congress

A handwritten signature in cursive script, which appears to read "Edmund Randolph".

Attorney General Edmund Randolph

Smith of South Carolina was one of three who supplied the Court with a certificate; and James Jackson of Georgia was a congressman who had been appointed to the conference committee on the Process Act of 1789.¹⁵

Although verbal testimony or common knowledge seems to have been allowed to establish qualification for the Court's bar during the first term, such was not the case at the next meeting of the Court—all three applicants for the bar in August, 1790, brought to the Court certificates or character references or both. The justices may have decided after their experience during the first term in New York that they preferred not to be personally responsible for establishing the qualifications of applicants to the Court's bar.

This supposition gains support in view of what happened during the Court's first term in Philadelphia in February, 1791, when a large number of lawyers appeared for admission to the bar without any supporting documentation. Edward Burd, prothonotary of the Supreme Court of Pennsylvania, immediately supplied a certificate for twenty-two applicants that stated that they had practiced in Pennsylvania's highest court. But the justices still needed evidence that the applicants "had good Moral Characters, and possessed good legal Abilities."¹⁶ Only six of

the twenty-two individuals were admitted that first day: four on the basis of offices that they held or had held involving legal expertise; one after being vouched for by Associate Justice James Wilson ("with apparent Reluctance as against his wishes to do it for any one"); and one, Jared Ingersoll, on the basis of his recognized eminence as a Philadelphia lawyer.¹⁷ The remaining sixteen were admitted the next day. Wilson's hesitation to vouch for any of his former colleagues from Pennsylvania may be indicative of the determination of the justices not to be responsible for the reputations of those admitted to practice before the Court.

Furthermore, the episode described by Burd was particularly important because, during the discussion of how the applicants could establish their characters, it was suggested that an already-admitted member of the Court's bar "should vouch for ye rest of ye Bar, but ye Chief Justice said that they had determined that one lawyer should not vouch for another."¹⁸ The justices' unwillingness to verify the credentials of applicants for the bar after the Court's first term in New York and their refusal to allow the lawyers to do it for one another had led to a very embarrassing incident. In reference to James Wilson's waffling, Edward Burd wrote: "The Bar thought they might have been treated with a little more delicacy by a Gentleman who knew them all intimately."¹⁹

To resolve the dilemma of how to establish the credentials of bar applicants, the Court turned to the Attorney General of the United States. In February, 1791, the Court's minutes begin to record lawyers being admitted to the bar on motion of the Attorney General of the United States. This was a new development. The minutes of the Court for the time when it met in New York do not record that anyone moved the admission of counsellors and attorneys. The Attorney General, Edmund Randolph, held a special position in the ranks of the practitioners before the Court. On the first day that the Court had convened in February, 1790, the letters patent of Randolph as Attorney General had been read right after those of the justices. Some contemporaries even thought that the Attorney General was an officer of the court.²⁰ Randolph never was formally admitted to the Court's bar. By virtue of his special position, he may have been viewed as especially qualified to present applicants for the bar to the

Court. Given that the Attorney General's involvement in the admission procedure begins during the same term when there was a dispute concerning evidence of qualification for the bar, it seems that in February, 1791, the Attorney General assumed responsibility for determining the credentials of applicants, a responsibility the justices did not want.

That someone was needed to perform this role is apparent. After February 1791 term, evidence of certificates and/or character references survives for just over one-third of those admitted to the Court's bar for the rest of the time that the Court met in Philadelphia. This is quite a contrast with the three lawyers admitted to the bar in August, 1790, all of whom had had some form of written documentation. Without this written evidence and with the justices unwilling to verify qualification for the bar, the Court involved the Attorney General in the admission process. After the admission of William Lewis, the first counsellor admitted on February 7, 1791, counsellors and attorneys were almost always admitted on motion of the Attorney General of the United States, a practice followed during the period when Jay was Chief Justice. Of forty-eight lawyers whose admission is recorded in the Court's minutes, only nine were not admitted on motion of the Attorney General.

An examination of these nine exceptions reveals the influence of the presiding justice over admission procedure. With John Jay presiding as Chief Justice, the minutes record the admission of thirty-seven lawyers after February, 1791. Six of these lawyers (16%) were admitted without the Attorney General so moving. Samuel Roberts of Pennsylvania typifies certain factors common to these six admissions. First, it cannot be determined if the Attorney General was in Court on February 20, 1793, the day when Roberts was admitted as a counsellor. Secondly, William Rawle, who had been admitted to the bar on February 8, 1791, and who was United States attorney for Pennsylvania, moved the admission. Thirdly, Roberts presented both certificates and a character reference as supporting documentation. And lastly, the Court's minutes note in unusual detail the specifics of his application. Roberts is representative of the six exceptional admissions in the following ways. First, for five of the lawyers, it cannot be determined if the Attorney General was present in Court to

move the admissions. Secondly, in four instances, bar members of recognized legal ability and reputation moved the admissions. Thirdly, in five out of the six cases, full documentation supporting the application survives; this is particularly striking given the incompleteness of the extant record of this documentation mentioned above. Finally, for four of the lawyers, the Court's minutes reflect the special nature of the admission process. Thus, during the time that John Jay presided as Chief Justice, the Attorney General moved all admissions unless there was a powerful confluence of factors suggesting a different procedure. And for only 16% of lawyers admitted did this confluence occur.

When Associate Justice William Cushing presided, the pattern was quite different. During the time that John Jay was Chief Justice, Cushing was the presiding Associate Justice in Jay's absence when eight lawyers were admitted to the bar. Of those eight, three (38%) were admitted on the motion of a member of the Supreme Court bar, rather than on motion of the Attorney General. William Few typifies the three. Few was admitted as a counsellor on February 11, 1792, on motion of Thomas Hartley, a Pennsylvania congressman who had gained admission to the Supreme Court's bar on February 5, 1790. No certificate or character reference has survived to document his application. Most notably, the Attorney General seems to have been in Court that day but did not move the admission himself.

The above patterns indicate that Chief Justice Jay insisted that the Attorney General be an integral part of the admission process while Associate Justice Cushing did not;²¹ the latter practice would soon become the Court's norm. After Jay left the bench, the Court's minutes record admission to the bar of thirty lawyers in the five years preceding removal to the new capital in Washington. Only three of the thirty (10%) were admitted on motion of the Attorney General. Whether Chief Justice Oliver Ellsworth or Associate Justices William Cushing, James Wilson, or William Paterson presided, the Attorney General no longer played the same part in moving for the admission of new applicants to the bar. This was not all that had changed; so too had the relationship of the Attorney General to his fellow practitioners before the Court. The letters patent of Attorney General Charles Lee were read before the Court and, unlike Edmund Randolph before

him. Lee was admitted formally to the bar on motion of Edward Tilghman, a member of the Court's bar since February 7, 1791.²²

The admission procedures followed during the 1790s seem to have been very much at the discretion of the presiding justice. As Chief Justice, John Jay asserted his procedural preference by involving the Attorney General who held a special position before the Court on the basis of his letters patent. Chief Justice Ellsworth and Associate Justices Cushing, Wilson, and Paterson favored a different procedure, which did not ele-

vate the Attorney General above the rest of the practitioners before the bar. This variation in practice is representative of a general flux as the Court gradually established procedures during the first decade. It is also suggestive of the power of the presiding justice to assert his preferences. Combined with evidence presented earlier about the influence of John Jay on the actions taken by the Court in its first term, it is not too much to suggest that the assertion of strong leadership during the Court's first decade set the stage for the role that John Marshall would assume next.

Footnotes

¹ William Cushing to John Jay, November 18, 1789, Photostat in the Photostat Collection, Massachusetts Historical Society; John Jay to William Cushing, December 7, 1789, Robert Treat Paine Papers, Massachusetts Historical Society.

Only two changes have been made in transcribing quotations from eighteenth-century documents; superior letters have been brought down to the baseline, and baseline dashes have been reproduced as modern dashes.

² U.S., *Statutes at Large*, 1:93.

³ John Tucker was, at that time, one of two clerks of the Supreme Judicial Court of Massachusetts. William Cushing had been chief justice of that court from 1777 until his retirement to accept appointment to the Supreme Court of the United States, and, therefore, he was well acquainted with Tucker's capabilities. *Catalogue of Records and Files in the Office of the Clerk of the Supreme Judicial Court for the County of Suffolk* (Boston, 1897), p. 118; *Dictionary of American Biography* (hereafter, *DAB*).

⁴ Minutes of the Supreme Court of the United States, General Records, RG 267, National Archives.

⁵ Records of the Office of the Clerk, RG 267, National Archives.

⁶ Information on membership in the Supreme Court bar comes from several sources: the Court's minutes (the most complete listing), the Court's docket (both the minutes and the docket are in General Records, RG 267, National Archives), the parchment counsellor and attorney rolls, and the bound attorney roll (Records of the Office of the Clerk, RG 267, National Archives).

⁷ Records of the Office of the Clerk, RG 267, National Archives.

⁸ *DAB*.

⁹ John Jay was a year ahead of Egbert Benson at King's College. After graduation, Benson took an active part in Jay's moot and presided at the Debating Society of which Jay was also a member. Paul M. Hamlin, *Legal Education in Colonial New York* (New York, 1939), pp. 134 n. 4, 202, 204 n. 1.

¹⁰ *DAB*; *Biographical Directory of the American*

Congress, 1774-1961 (Washington, D.C., 1961).

¹¹ Charles Elliott Fitch, *Memorial Encyclopedia of the State of New York* (New York, 1916), 1: 229-30; *DAB*; *Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature Since the Revolution*, 2 vols. (1789).

¹² *DAB*; Tyler's *Quarterly Historical and Genealogical Magazine*, 14 (1932-1933), p. 69.

¹³ It was not until July 16, 1790, that Congress decided finally to move first to Philadelphia and then to the new federal district on the Potomac. "An Act for establishing the temporary and permanent seat of the Government of the United States," U.S., *Statutes at Large*, 1: 130.

¹⁴ John Rutledge was absent for the entire term. Robert H. Harrison had resigned on January 21, 1790 (Library of Congress Special Collection, RG 233, National Archives).

¹⁵ U.S., House of Representatives Journal, September 26, 1789; "An Act to regulate Processes in the Courts of the United States," U.S., *Statutes at Large*, 1: 93-94.

¹⁶ Edward Burd to Jasper Yeates, February 8, 1791; Lewis Burd Walker, ed., *The Burd Papers: Selections from Letters Written by Edward Burd, 1763-1828* (n.p., 1899), p. 168; certificate in Records of the Office of the Clerk, RG 267, National Archives.

¹⁷ Edward Burd to Jasper Yeates, February 8, 1791; Walker, ed., *The Burd Papers*, pp. 168-69.

¹⁸ *Ibid.*, p. 169.

¹⁹ *Ibid.*

²⁰ William Grayson to George Washington, September 22, 1789, George Washington Papers, Library of Congress.

²¹ James Wilson was presiding Associate Justice for three admissions during the years when Jay was Chief Justice. All three lawyers were admitted with no record of a motion being made.

²² William Bradford, Jr., Attorney General from January 27, 1794, to August 23, 1795, already was a member of the Supreme Court bar at the time of his appointment.

Here Lies the Supreme Court: Gravesites of the Justices

George A. Christensen*

William Gladstone, the famous British Prime Minister, once said: "Show me the manner in which a Nation or community cares for its dead and I will measure with mathematical exactness the tender sympathies of its people, their respect for the laws of the land and their loyalty to high ideals." As our country prepares to celebrate the constitutional bicentennial, it is appropriate to honor the memory of the ninety-one deceased members of the Supreme Court of the United States.

The table which appears as an appendix to this article lists the final resting place of each justice and is the product of more than a year of active research. It represents the first attempt to provide a central source for this information. Some unanswered questions remain, and perhaps always will.

During the course of this study, several interesting stories surfaced which seemed worthy of preservation. They are presented here for the benefit of those who share a particular interest in historical anecdotes concerning the Supreme Court.

Associate Justice James Wilson of Pennsylvania was the first member of the new republic's high bench to leave this world. The last years of Wilson's life were both tragic and pathetic. Hounded by creditors and imprisoned briefly for debt while riding circuit in New Jersey, he sought refuge from his problems in Edenton, North Carolina, the home of fellow Supreme Court Justice James Iredell. Suffering from malaria, Wilson died following a stroke in 1798 in a dingy room at the Hornblow Tavern near the Edenton

court house. He was buried without great ceremony in a private plot belonging to the family of Iredell's wife, Hannah Johnston.

Ironically, the second member of the Court to die was James Iredell and these two members of the original Court — Wilson and Iredell — lay together in the same burial ground for more than 100 years. The City of Brotherly Love eventually reclaimed Wilson, a brilliant legal scholar and Constitutional Convention delegate; Wilson's body was removed in 1906 to the Second Street churchyard of Philadelphia's Christ Church.

A more difficult interment to trace than Wilson's to Philadelphia concerned "Abbey Mausoleum" in Arlington, Virginia where, according to 1942 newspaper accounts, Associate Justice George Sutherland had been buried following funeral services at the Washington Cathedral. The initial problem was simply locating the Mausoleum.

Largely abandoned, Abbey Mausoleum still exists, located immediately beside the Arlington National Cemetery. According to local tradition, certain relatives of military personnel who were

*The author is particularly grateful for the assistance and enthusiasm provided by Betsy Strawderman and Betty J. Clowers at the Supreme Court of the U.S.; George Kackley of Oak Hill Cemetery, Georgetown, D.C.; Augustus T. Graydon of Columbia, South Carolina; Shirley Baltz of Bowie, Maryland; Edna Whitley of Paris, Kentucky; Evelyn Converse of Bloomington, Illinois; Michael Cardozo of Washington, D.C.; Wilbert F. Hesse of Brooklyn, New York; and, Richard Heckhaus of Rockville, Maryland, who inadvertently triggered this project.



The Supreme Court bench, draped in black, to commemorate the death of Associate Justice Benjamin Cardozo in 1938.

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buried in the National Cemetery but who were not eligible themselves for burial there, purchased adjacent property in the 1920's and by private subscription erected the mausoleum. A monolithic, bunker-like structure, the building has space for more than 200 crypts and was originally graced with stained glass windows and skylight. Today, the windows are broken and boarded up and the doors are locked.

The grounds of Abbey Mausoleum are now completely surrounded by federal property, and the only means of access is through the U.S. Marine Corps establishment known as Henderson Hall. A few volunteer Marines now keep a watchful eye over the building, which is in its current depressing state as a result of prolonged and extensive vandalism.

Once having located the correct building, it was still necessary to verify that Justice Sutherland was in fact buried inside. Unfortunately, Sutherland's presence could not be determined with certainty due to the damage and disarray of the interior. It was depressing to think that the proper, starchy, and conservative Justice Sutherland could have come to such a sad and undignified end. On a hunch, three possible locations in the area where a transfer of his remains might have been made came to mind. Further investigation verified that Justice Sutherland had indeed been removed across the Potomac River in June 1958 to the Sanctuary Mausoleum at Cedar Hill Cemetery in Suitland, Maryland. Architecturally, this mausoleum resembles from the outside an Angkor Wat afterthought. But inside, the atmosphere is calm and bright—very dignified and very proper.

Researching gravesite information for Associate Justices Moody, Barbour, Chase, and Duvall, has caused some researchers to go prematurely gray. William Moody proved hard to locate, not because he had been moved, but because his churchyard has been moved, in the sense that township boundaries had shifted since 1917 as a result of urban growth. Philip Barbour's grave in Congressional Cemetery in Washington, D.C. was difficult to find because the inscription on the monument has weathered poorly since 1841. In good light, the inscription can be made out, but only if the reader is less than two feet from the face of the memorial.

Samuel Chase has been buried in the same spot since 1811, but in today's Baltimore the name

"St. Paul's Cemetery" designates a large, semi-rural cemetery southeast of the Inner Harbor. In Chase's lifetime, "St. Paul's Cemetery" referred to a downtown churchyard on West Lombard Street. Even more frustrating, "Old" St. Paul's presents only a blank, tall brick wall to public view on Lombard Street. The cemetery entrance, open only on Saturday mornings, is around the block on Redwood Street. The final resting place of Gabriel Duvall proved impossible to locate with certainty, for the simple reason that no one knows exactly where he was buried.

Judge Duvall owned a large farm in Prince George's County, Maryland roughly half-way between Annapolis and the new federal city on the Potomac. The Duvall estate, "Marietta," had its own family burial ground sited about one mile from the main house. The house, seemingly in excellent repair but not open to the public, still stands on a slight rise with a handsome view of the Maryland countryside from the front porch. Most of the original estate has been sold and sub-divided and resold many times, so that the old Duvall family burial ground has become separated from the relatively small part of the estate which remains surrounding the main house.

In order to find the burial ground today, a first time visitor should find a local guide, lest the visitor become forever lost in the wilds of Prince George's County. If the Duvall family burial ground ever had a fence or discernible boundary, no evidence remains. Three gravesites, lying close together are marked with clearly legible inscriptions; *nothing* else is visible. A horizontal stone tomb cover, tilted and broken in half because a tree has grown through the brick enclosure of the grave, memorializes Mrs. Mary Gibbon, the mother of Judge Duvall's second wife. A simple gravestone in the center marks the burial of two very young Duvall grandchildren who died within days of each other. The children's father rests beside them beneath a very handsome monument inscribed to the memory of "Col. Edmund B. Duval." Interestingly, the surname on the children's headstone is twice spelled "Duvall."

The old judge outlived his only son by several years, and local tradition has it that Gabriel Duvall was buried somewhere in the vicinity of his son's grave; however, no grave marker or document remains to verify this contention. Justice Duvall's journal reveals that his second wife,



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The funeral of Chief Justice Harlan Fiske Stone at Washington National Cathedral in April, 1946.

Jane Gibbon, was buried beside her mother some ten years before his own death. It is also known that Edmund Duvall's wife wished to be buried beside her husband. Neither of the wives, however, were remembered with a lasting marker or inscription in the family graveyard.

"Marietta" was devised to Gabriel Duvall's two grandsons, both of whom were very fond of their doting grandfather. Therefore, it is not the case that no one was left in the family at the time of the judge's death who cared to—or could afford to—erect a stone memorial. Perhaps the judge desired no grave marker or monument for himself—a gesture of modesty or self-effacement that was not uncommon in the humble and trusting expectations of popular religion in his time. Perhaps a simple wooden marker was once placed upon his grave. If so, it has long since disappeared.

In contrast, Justice Bushrod Washington is memorialized by an impressive obelisk set in front of the family vault at Mount Vernon. Justice Washington died in Philadelphia in November, 1829, while riding circuit. His wife, Julia Ann Blackburn, was present when her husband died. It seems that "Anna" was always present and virtually never left the judge's side. Two days after Bushrod died, during the carriage ride home from Philadelphia for his funeral and interment, she died of grief. Still side by side,

they are buried together in the vault area behind the tombs of George and Martha Washington.

Richmond, Virginia is uniquely blessed in terms of the historic dead who are buried there. Although Shockoe Hill Cemetery is in a now run-down section of Richmond, the cemetery itself and the well-marked family plot of Chief Justice John Marshall are very well cared for. In Hollywood Cemetery, overlooking the rapids of the James River, lie Associate Justice Peter V. Daniel, and Presidents James Monroe and John Tyler. The Confederacy's only president, Jefferson Davis, is also buried there. The life-sized bronze statue of Davis standing above his grave gazes across the quiet cemetery roadway to a large monument marked only with the surname of a prominent Richmond family—Grant.

Some members of the Court have been buried close to home, notably, William Cushing, the first born of all Court members, who was buried in Scituate, Massachusetts. Others lie fairly far from home. The three Supreme Court appointees from California are all buried in the Washington, D.C. area. Both appointees from Alabama are buried elsewhere. One of these, John A. Campbell, is buried in a remote part of Green Mount Cemetery in Baltimore. Green Mount is beautifully maintained, but Campbell's grave seems rarely, if ever, visited. Most of the tourist traffic to Green Mount heads for the opposite



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Justice and Mrs. Brandeis on the occasion of the Justice's 83rd birthday in 1939—"forever together."

corner of the cemetery where John Wilkes Booth lies in an unmarked grave in the Booth family plot.

William Paterson of New Jersey was on his way to Ballston Springs, New York to "take the waters" when he died at the Albany home of his daughter and Van Rensselaer son-in-law. Paterson was laid to rest in the Van Rensselaer family vault in 1806, and remained there until the city acquired the property and relocated the cemetery. For that reason, Albany Rural Cemetery in nearby Menands, New York now claims two Justices — Paterson and local-boy-made-good, Rufus W. Peckham—as well as President Chester A. Arthur.

Hundreds of people pass the unusual burial place of Justice Brandeis every day but only a few pause to nod respectfully in the direction of a memorial stone as they make their way to classes in torts or criminal procedure. Justice Brandeis—the "people's attorney"—and his wife were cremated, and their ashes are interred together beneath the portico of the Law School of the University of Louisville, in Louisville, Kentucky.

The State of Kentucky can boast of a total of seven Court members' graves. Finding Justice Thomas Todd originally presented some problems, as it was not clear that "State Cemetery" in Frankfort was synonymous with "Frankfort Cemetery." Robert Trimble is buried in the cemetery in Paris, Kentucky. Although his grave is handsomely marked by a twenty-five foot tall granite memorial, it took some time to verify its location because cemetery records had been destroyed in an office fire.

Citizens in Elkton, Kentucky fondly re-

member Justice McReynolds and they point out his home and local office with great pride and respect. McReynolds may not have been as well regarded by his colleagues on the Supreme Court bench. As one of his law clerks has written "... in 1946 he (McReynolds) died a very lonely death in a hospital—without a single friend or relative at his bedside. He was buried in Kentucky, but no member of the Court attended his funeral though one employee of the Court traveled to Kentucky for the services." In an interesting aside, this clerk noted that in 1953, McReynolds' aged negro messenger—Harry Parker—died and the Chief Justice and four or five Justices attended his funeral.

It has become customary for a departed Justice to be accompanied to the grave by surviving members of the Court. The observance of this custom in March 1930 created a considerable logistical problem when Associate Justice Edward T. Sanford and former Chief Justice Taft both died on the same day. Taft's demise was not unexpected and some preliminary planning had been done for suitable obsequies in the nation's capital following his passing. The death of Edward Terry Sanford, however, was not expected;



Library of Congress

Among the five justices buried at Arlington National Cemetery is Chief Justice William Howard Taft.

with some fast changes of plans, Chief Justice Hughes and Justices McReynolds, Butler and Stone travelled to Knoxville, Tennessee for Sanford's funeral. According to a contemporary account in the *New York Times*, "they hurried to the station immediately following the services, and left on their special car for Washington to attend the funeral of former Chief Justice Taft tomorrow."

The death of Chief Justice Waite in 1888 created a sensation in the capital. When the Chief Justice became ill with a slight cold, no information was released to the public. No one thought that the illness was serious, and it was considered desirable to avoid alarming Mrs. Waite, whose own health was very delicate and who was in California at that time. When Morrison Waite developed pneumonia and died, the shock was all the greater for being unexpected. The *entire* front page of the *Washington Post* on the morning following his death was devoted to stories concerning the Chief Justice. Large crowds attended services held in the chamber of the House of Representatives, and all the Justices except Bradley and Matthews accompanied the body of their fal-

len leader on a special train to Toledo, Ohio. Mrs. Waite was rushed by train from Los Angeles to Kansas City, where she was met by the family's doctor who escorted her on to Toledo, arriving just in time for final services and burial. The press reported that Chief Justice Waite would be buried in a family plot that he had purchased in Forest Hill Cemetery, but for some unknown reason, he rests instead with a handsome monument over his grave in Toledo's Woodlawn Cemetery.

Justice David Brewer is easily located in Mount Muncie Cemetery in Lansing, Kansas. Justice Samuel Nelson's gravesite, however, was a different matter as all records for Lakewood Cemetery near Cooperstown, New York are now kept in the garage of the current superintendent. In Newark, Ohio, local citizens know that Justice William B. Woods and his brother, both Union Army Civil War generals, were buried at Greenlawn Cemetery. The fact that William had served on the U.S. Supreme Court, however, was "news" in Newark. In Bloomington, Illinois, apparently all the citizens know and take pride in their heritage as represented in Ever-



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Members of the Court stand in tribute as the casket of Associate Justice Pierce Butler descends the steps of Washington's St. Matthew's Cathedral in November, 1939.

green Cemetery. Justice David Davis rests there in honored peace, near Vice President Adlai Stevenson and his grandson and namesake. In contrast, not even the office at Calvary Cemetery in St. Paul, Minnesota could verify the burial there of Justice Pierce Butler; ultimately, the pertinent information was obtained from the diocesan central office for Catholic cemeteries. Although many people believe that Chief Justice Oliver Ellsworth is buried on the grounds of the Ellsworth Homestead in Windsor Connecticut, he lies in fact in the cemetery behind the First Congregational Church overlooking the Farmington River.

Many of the Justices' memorial monuments reveal a great deal about the character of the deceased Justices, or about the style and attitudes of their times. Prolixity was in vogue in tombstone inscriptions in 1800. It takes several minutes to read everything carved in John Blair's inscription in the Bruton Parish churchyard in Williamsburg, Virginia. On the other hand, only a stark "VAN DEVANTER" — nothing else — marks the family plot of the Justice in Rock Creek Cemetery, in Washington, D.C. The fairly ornate gravestone in Mt. Olivet Cemetery in Washington, D.C. shared by Justice Joseph McKenna and his wife is inscribed "In Sacred and Loving Memory of Amanda Borneman McKenna as Wife and Mother" and, somewhat brusquely, "In Memory of Our Father."

The concept of rural, "garden cemeteries" as places of peaceful and dignified repose "in the arms of nature," far from crowded and noisy towns and cramped churchyards, originated in Europe. The first and foremost example was Pere-Lachaise Cemetery established in Paris by Napoleonic decree in 1804. The first American garden cemetery was established at Mount Auburn in 1831 in Cambridge, Massachusetts, followed by Philadelphia's Laurel Hill (1836), Brooklyn's Green-Wood (1838), and, arguably, Pittsburgh's Allegheny Cemetery (1844).

Mount Auburn Cemetery was dedicated with great civic pride and celebration, and one of the principal speakers on that occasion was Associate Justice Joseph Story. Joseph Story is buried in Mount Auburn, as are scores of America's celebrated political, literary, religious, and military leaders. His grave is marked by a piece of sepulchral statuary executed by his son, William Wetmore Story.

Oak Hill Cemetery is in Georgetown, an intriguing section of the District of Columbia, and overlooks Rock Creek. Among the distinguished residents of Oak Hill Cemetery today, one may find Chief Justice Edward Douglass White, Associate Justice Noah Swayne, and "almost-Justice" Edwin M. Stanton. Stanton's nomination by President Grant was confirmed by the Senate, but Stanton died suddenly on Christmas Eve, 1869, before he could be sworn in. Chief Justice Salmon P. Chase was also buried here, but after 14 years his body was transferred to Spring Grove Cemetery in Cincinnati.

Without a doubt, the most intriguing Oak Hill related story concerns Justice Henry Baldwin. Baldwin's sister, Ruth, married Joel Barlow, a friend of Thomas Jefferson and a some-time author, diplomat and politician. At the suggestion of Jefferson, Joel Barlow purchased the Kalorama estate. The estate, though located in the District of Columbia, was once considered to be far out in the country, away from the mud and confusion of the raw, new federal city on the Potomac. Abraham Baldwin, U. S. Senator from Georgia and brother of Henry Baldwin and Ruth Baldwin Barlow, died in Washington, D.C. in March, 1807. The Barlows subsequently constructed a family burial vault on the grounds of their new estate, and had the body of Abraham Baldwin transferred from Rock Creek Cemetery to the new vault.

Several years later, Joel Barlow died in Europe while on a mission from President Madison to Napoleon; he was buried in Zarniowica, Poland. His widow returned to live at Kalorama, and in due course, she joined her brother in the family vault. The estate passed through bequest and purchase to Colonel George Bomford, who had married Clara Baldwin, the Justice's younger sister. At this time in his career, Henry Baldwin was a prominent and prosperous lawyer from western Pennsylvania. He served in the U. S. House of Representatives, and was executor of Ruth's will. In addition, he became young Henry Baldwin Bomford's well regarded uncle.

Kalorama, in the days of Barlow-Bomford ownership, and especially during the Republican administrations of Madison and Monroe, was the glittering hub of the social scene in the capital. Robert Fulton sailed model steam boats up and down Rock Creek with Joel Barlow and the Marquis de Lafayette came to call. Commodore

and Mrs. Stephen Decatur were also close friends of the Bomfords. When Decatur was killed in an 1820 duel, he was buried in Kalorama vault in accordance with his widow's request. The naval hero remained there until 1846 when his remains were removed to St. Peter's churchyard in Philadelphia.

Henry Baldwin became a trusted advisor to Andrew Jackson in the 1820's and he was rewarded by "Old Hickory" with an appointment as an associate justice of the Supreme Court in 1830. Justice Baldwin subsequently suffered severe financial reverses; developing a reputation for political unreliability and mental instability, the Justice was frequently referred to as "Crazy Henry." He died in Philadelphia in 1844 and was interred with his brother and sister in the Kalorama vault.

Kalorama passed from family hands in 1846, but the 91-acre estate survived essentially intact until about 1887. The family vault, very close to the intersection of Massachusetts and Florida Avenues, N.W. and no longer "in the countryside," was emptied in February, 1892 and torn down. Abraham Baldwin was returned to Rock Creek Cemetery, where he had originally been buried in 1807, and many of the other occupants of the Kalorama vault went with him. Henry Baldwin, however, was removed to a plot owned by his grandson in Washington's Oak Hill Cemetery where other family members were already buried. The Oak Hill Cemetery "Baldwin" plot diagram clearly shows a small rectangle apparently indicating where the Justice was buried, and cemetery lot records reflect his transfer from the Kalorama vault in 1892. There is however, no headstone or grave marker for Justice Henry Baldwin in the family plot. On the other hand, a large stone marker inscribed with his name and dates and those of his wife rests solidly and serenely in Greendale Cemetery in Meadville, Pennsylvania!

In 1866, the judge's widow, Sarah Ellicott Baldwin of Baltimore, died in Batavia, New York and was buried in Meadville, where she and Henry Baldwin had been married in 1805. There is no interment record in the cemetery book for Henry Baldwin at Greendale, but only for "Baldwin, Mrs. Judge." Therefore, it could be presumed that the stone in Meadville serves only as a memorial for the Justice and is an actual grave marker for only his wife. However, there is



Enhancing the beauty of Rock Creek Cemetery, this serene figure keeps silent vigil.

a local tradition in Meadville that Justice Henry Baldwin is buried there, and an undated, unannotated note in records of the Supreme Court Curator suggests the same. In Meadville, the Crawford County Historical Society Librarian advised that "there is no documentary evidence that proves that Judge Baldwin is buried in Meadville." A transfer to Meadville with interment beside his wife remains a possibility, but absent further documentation, it is most likely that he is still buried in Washington, D.C. at Oak Hill.

If the question of Justice Baldwin's location proved difficult, the questions concerning Justice William Johnson present even greater problems. Authoritative writers about the Court have assumed that Justice Johnson was buried in Saint Philip's churchyard — near the grave of John C. Calhoun — in his home town of Charleston, South Carolina. There is a large monument to William Johnson in that cemetery erected by his children; church records, however, do not show that he was ever interred at Saint Philip's.

The unsolved mystery of the missing judge begins in summer 1834 when William Johnson arrived in Brooklyn, New York. The following was printed in the *New York Evening Star* on August 5th:



Associate Justice William Samuel Johnson—lost in 1834?

The Hon. Judge Johnson, of South Carolina breathed his last, at Brooklyn, at one o'clock yesterday. He had arrived here some weeks ago, for the purpose of placing himself under the charge of an eminent medical practitioner of this city, having for some time suffered with an affliction of the jaw, to eradicate which it required he should undergo the most painful surgical operation. Dr. Mott, of this city, was selected for the purpose, who expressed his opinion of the inability of the Judge to survive the operation. With a knowledge of the expression of the surgeon, he still determined upon placing himself under his hands; and without the aid of friends, or being bound, he submitted, with the utmost fortitude and calmness, to the most excruciating tortures; but in the course of half an hour after completion of the doctor's labors, he died of exhaustion, produced by the sudden reaction of the nerves, which had been excited to their utmost power in buoying up his mind throughout the whole of the operation.

The funeral of the Hon. Judge Johnson will take place from the house of Mr. Lewis, Corner of Columbia and Orange streets, Brooklyn Heights, at half past 4 to-morrow afternoon. The municipal and other authorities of the cities of New York and Brooklyn, and members of the bar, officers of the Army, Navy, and militia, and citizens and strangers, generally, are respectfully invited to attend.

On August 7, 1834, the *New-York American* reported the following:

The procession moved from the residence of Zachariah Lewis, Esq., Brooklyn, down Nassau to Washington street, and down Washington street to St. Ann's church. . . . The body was left in the church. It will be deposited in one of the

vaults of the marble cemetery until winter, when it will be removed to South Carolina.

Apparently, William Johnson's body was never seen again; in a genuine "miscarriage of justice," his remains were *not* returned to South Carolina!

Piecing together various bits of information, it appears that the old parish of St. Ann moved to a new location at Clinton and Livingston streets in 1867. The parish was relocated and merged in 1966 with the neighboring parish of Holy Trinity. Prior to 1800, a cemetery was laid out in "Wallabout," and a portion of the cemetery was allotted to "The Episcopal Church." Sometime in the 1830's, the city took over the land occupied by Wallabout Cemetery in condemnation proceedings to permit the establishment of Wallabout Market on the property. A new burial plot, now known as The Evergreens Cemetery, was provided by the city and a portion of the new cemetery was allotted to "The Episcopal Church" which at that time seems to have consisted only of St. Ann's Church and St. John's Church. In the 1890's the two churches brought a partition action in King's County, dividing the Episcopal plot in The Evergreens Cemetery into two separate parcels. The "marble cemetery" mentioned by the *New-York American* may in fact have been the same "Wallabout Cemetery," but if Johnson was eventually reburied at "The Evergreens," no records exist to document which parish received the gravesite in the partition action of 1890. The truth is, no one really knows where William Johnson is buried today.

Twenty-four states and the District of Columbia are represented in the Table accompanying this article. In almanac terms, the grave farthest to the east is in Portland, Maine; south—Savannah, Georgia; north—St. Paul, Minnesota; and, west—Boulder, Colorado. The final resting places of nineteen former Court members are within a one hour drive of the present Supreme Court building. New York has the greatest number of Supreme Court gravesites—twelve, including the missing William Johnson. Virginia has nine; Washington, D.C. also has nine, unless Henry Baldwin was moved to Pennsylvania, after all; Ohio—eight; Kentucky—seven; Maryland and Massachusetts—six each.

Currently, the cemeteries honored by the graves of more than one Supreme Court Justice are:



Office of the Curator, Supreme Court

On a bleak March day in 1935, President Franklin Roosevelt and members of the Court said farewell to Associate Justice Oliver Wendell Holmes, a thrice wounded Civil War veteran, as taps sounded.

Arlington National Cemetery, Arlington, Virginia	5
Mount Auburn Cemetery, Cambridge, Mass.	4
Rock Creek Cemetery, Washington, D.C.	4
Oak Hill Cemetery, Washington, D.C.	3
Spring Grove Cemetery, Cincinnati, Ohio	3
Mount Olivet Cemetery, Nashville, Tennessee	2
Albany Rural Cemetery, Menands, New York	2

Several former members of the Court have remained quite neighborly with other Justices even after death. The four justices buried in Rock Creek Cemetery are essentially paired off. The Van Devanter family plot is within 40 yards of

that of the senior John Marshall Harlan. The handsome memorials for the Chief Justice and Mrs. Harlan Fiske Stone are within 25 yards of the imposing black obelisk resting above the grave of Stephen Johnson Field.

In Arlington National Cemetery, Justice William O. Douglas's grave lies near that of Oliver Wendell Holmes, Jr. Chief Justice William Howard Taft is buried in Arlington in a quiet, lovely section to the right of the main cemetery entrance. Up the hill, 200 yards or so behind the Taft monument, is a simple headstone, identical in size and shape to the tens of thousands of military headstones in Arlington. This particular simple grave marker is inscribed "Hugo Lafayette Black, Captain, U. S. Army." Between the graves of Justice Black and his first wife, a simple marble bench is conveniently placed for the contemplative visitor. On the front of the bench is inscribed a simple but eloquent tribute: "Here Lies a Good Man."

Ninety-one such "good men" who served as justices of the Supreme Court of the United States are listed in the following table. Printed for the first time in one place, this table provides complete burial site information as a matter of historical interest in a neglected area.

TABLE OF DECEASED U. S. SUPREME COURT MEMBERS

Name Appointed From (By/Sequence Court Service (See Note 1))	Date/Place of Birth Date/Place of Death	Interment Location
Henry BALDWIN Pennsylvania/Jackson/#22 (1830-1844)	14 January 1780/New Haven, Connecticut 21 April 1844/Philadelphia, Pennsylvania	Oak Hill Cemetery (See Note 2) 30th & R Streets, N.W. Washington, D.C.
Philip Pendleton BARBOUR Virginia/Jackson/#25 (1836-1841)	25 May 1783/Orange County, Virginia 25 February 1841/Washington, D.C.	Congressional Cemetery 1801 E. Street, S.E. Washington, D.C.
Hugo Lafayette BLACK Alabama/Franklin Roosevelt/#76 (1937-1971)	27 February 1886/Harlan, Alabama 25 September 1971/Washington, D.C.	Arlington National Cemetery Arlington, Virginia
John BLAIR Virginia/Washington/#6 (1789-1796)	? 1732/Williamsburg, Virginia 31 August 1800/Williamsburg, Virginia	Bruce Parish Churchyard Williamsburg, Virginia
Samuel BLATCHFORD New York/Arthur/#48 (1882-1893)	9 March 1820/New York, New York 7 July 1893/Newport, Rhode Island	Green-Wood Cemetery Fifth Avenue at 25th Street Brooklyn, New York
Joseph P. BRADLEY New Jersey/Grant/#41 (1870-1892)	14 March 1813/Berne, New York 22 January 1892/Washington, D.C.	Mount Pleasant Cemetery 375 Broadway (Bellevue Avenue) Newark, New Jersey
Louis Dembitz BRANDEIS Massachusetts/Wilson/#67 (1916-1939)	13 November 1856/Louisville, Kentucky 5 October 1941/Washington, D.C.	U. Louisville Law School Portico 3rd Street at Eastern Parkway Louisville, Kentucky
David Josiah BREWER Kansas/B. Harrison/#51 (1890-1910)	20 January 1837/Smyrna, Asia Minor Ottoman Empire (Izmir, Turkey) 28 March 1910/Washington, D.C.	Mount Muncie Cemetery (See Note 3) RFD #2, Box 1 Leavenworth, Kansas
Henry Billings BROWN Michigan/B. Harrison/#52 (1891-1906)	2 March 1836/South Lee, Massachusetts 4 September 1913/Bronxville, New York	Elmwood Cemetery 1200 Elmwood Avenue Detroit, Michigan

TABLE OF DECEASED U. S. SUPREME COURT MEMBERS

<i>Name Appointed From/By/Sequence Court Service (See Note 1)</i>	<i>Date/Place of Birth Date/Place of Death</i>	<i>Interment Location</i>
Harold Hitz BURTON Ohio/Truman/#84 (1945-1958)	22 June 1888/Jamaica Plain, Massachusetts 28 October 1964/Washington, D.C.	Highland Park Cemetery 21400 Chagrin Boulevard Cleveland, Ohio
Pierce BUTLER Minnesota/Harding/#71 (1923-1939)	17 March 1866/Northfield, Minnesota 16 November 1939/Washington D.C.	Calvary Cemetery (See Note 4) 753 Front Avenue St. Paul, Minnesota
James Francis BYRNES South Carolina/F.D.R./#81 (1941-1942)	2 May 1879/Charleston, South Carolina 9 April 1972/Columbia, South Carolina	Trinity Cathedral graveyard Sumter & Gervais Streets Columbia, South Carolina
John Archibald CAMPBELL Alabama/Pierce/#33 (1853-1861)	24 June 1811/Washington, Georgia 12 March 1889/Baltimore, Maryland	Green Mount Cemetery Greenmount Avenue at Oliver Street Baltimore, Maryland
Benjamin Nathan CARDOZO New York/Hoover/#75 (1932-1938)	24 May 1870/New York, New York 9 July 1938/Port Chester, New York	Cypress Hills Cemetery (Shearith Israel Congregation) Jamaica, Avenue at Crescent Brooklyn, New York
John CATRON Tennessee/Jackson—Van Buren/#26 (1837-1865)	ca. 1786/Pennsylvania (poss. Virginia) 30 May 1865/Nashville, Tennessee	Mount Olivet Cemetery 1101 Lebanon Road Nashville, Tennessee
Salmon Portland CHASE Ohio/Lincoln/#39 (1864-1873)	13 January 1808/Cornish, New Hampshire 7 May 1873/New York, New York	Spring Grove Cemetery (See Note 5) 4521 Spring Grove Avenue Cincinnati, Ohio
Samuel CHASE Maryland/Washington/#9 (1796-1811)	17 April 1741/Somerset County, Maryland 19 June 1811/Baltimore, Maryland	St. Paul's Cemetery 700 West Lombard Street Baltimore, Maryland
Tom Campbell CLARK Texas/Thuman/#86 (1949-1967)	23 September 1899/Dallas, Texas 13 June 1977/New York, New York	Restland Memorial Park Greenville Avenue at Restland Road Dallas, Texas
John Hessin CLARKE Ohio/Wilson/#68 (1916-1922)	18 September 1857/Lisbon, Ohio 22 March 1945/San Diego, California	Lisbon Cemetery 1 Elm Street Lisbon, Ohio
Nathan CLIFFORD Maine/Buchanan/#34 (1858-1881)	18 August 1803/Rumney, New Hampshire 25 July 1881/Cornish, Maine	Evergreen Cemetery 672 Stevens Avenue Portland, Maine
Benjamin Robbins CURTIS Massachusetts/Fillmore/#32 (1851-1857)	4 November 1809/Watertown, Massachusetts 15 September 1874/Newport, Rhode Island	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts
William CUSHING Massachusetts/Washington/#3 (1789-1810)	1 March 1732/Scituate, Massachusetts 13 September 1810/Scituate, Massachusetts	Family Graveyard (now a state park) Neal Gate Street, Greenbush Scituate, Massachusetts
Peter Vivian DANIEL Virginia/Van Buren/#28 (1842-1860)	24 April 1784/Stafford County, Virginia 31 May 1860/Richmond, Virginia	Hollywood Cemetery 412 South Cherry Street Richmond, Virginia
David DAVIS Illinois/Lincoln/#37 (1862-1877)	9 March 1815/Cecil County, Maryland 26 June 1886/Bloomington, Illinois	Evergreen Memorial Cemetery 302 East Miller Street Bloomington, Illinois
William Rufus DAY Ohio/T. Roosevelt/#59 (1903-1922)	17 April 1849/Ravenna, Ohio 9 July 1923/Mackinac Island, Michigan	West Lawn Cemetery 1919 7th Street, N.W. Canton, Ohio
William Orville DOUGLAS Connecticut/F. Roosevelt/#79 (1939-1975)	16 October 1898/Maine, Minnesota 19 January 1980/Washington, D.C.	Arlington National Cemetery Arlington, Virginia
Gabriel DUVALL Maryland/Madison/#17 (1811-1835)	6 December 1752/Prince George's Co., Maryland 6 March 1844/Prince George's Co., Maryland	(See Note 6) Prince George's Co., Maryland
Oliver ELLSWORTH Connecticut/Washington/#10 (1796-1800)	29 April 1745/Windsor, Connecticut 26 November 1807/Windsor, Connecticut	Palisado Cemetery (See Note 7) Across from Fyler House 96 Palisado Avenue Windsor, Connecticut
Stephen Johnson FIELD California/Lincoln/#38 (1863-1897)	4 November 1816/Haddam, Connecticut 9 April 1899/Washington, D.C.	Rock Creek Cemetery Rock Creek Church Rd. at Webster, N.W. Washington, D.C.
Abe FORTAS Tennessee/L. Johnson/#95 (1965-1969)	19 June 1910/Memphis, Tennessee 5 April 1982/Washington, D.C.	Cremated. No interment.

TABLE OF DECEASED U. S. SUPREME COURT MEMBERS

<i>Name Appointed From/By/Sequence Court Service (See Note 1)</i>	<i>Date/Place of Birth Date/Place of Death</i>	<i>Interment Location</i>
Felix FRANKFURTER Massachusetts/F.D.R./#78 (1939-1962)	15 November 1882/Vienna, Austria 22 February 1965/Washington, D. C.	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts
Melville Weston FULLER Illinois/Cleveland/#50 (1888-1910)	11 February 1833/Augusta, Maine 4 July 1910/Sorrento, Maine	GraceLand Cemetery 4001 North Clark Street Chicago, Illinois
Horace GRAY Massachusetts/Arthur/#47 (1882-1902)	24 March 1828/Boston, Massachusetts 15 September 1902/Nahant, Massachusetts	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts
Robert Cooper GRIGER Pennsylvania/Polk/#31 (1846-1870)	5 March 1794/Cumberland County, Pennsylvania 26 September 1870/Philadelphia, Pennsylvania	West Laurel Hill Cemetery 215 Belmont Avenue Bala-Cynwyd, Pennsylvania
John Marshall HARLAN (I) Kentucky/Hayes/#44 (1877-1911)	1 June 1833/Boyle County, Kentucky 14 October 1911/Washington, D. C.	Rock Creek Cemetery Rock Creek Church Rd., at Websters, N.W. Washington, D. C.
John Marshall HARLAN (II) New York/Eisenhower/#89 (1955-1971)	20 May 1899/Chicago, Illinois 29 December 1971/Washington, D. C.	Emmanuel Church parish cemetery 285 Lyons Plain Road Weston, Connecticut
Oliver Wendell HOLMES, Jr. Massachusetts/T. Roosevelt/#58 (1902-1932)	8 March 1841/Boston, Massachusetts 6 March 1935/Washington, D. C.	Arlington National Cemetery Arlington, Virginia
Charles Evans HUGHES New York/Taft—Hoover/#62 (1910-1916) as Associate Justice (1930-1941) as Chief Justice	11 April 1862/Glens Falls, New York 28 August 1948/Osterville, Massachusetts	The Woodlawn Cemetery 233rd Street and Webster Avenue Bronx, New York
Ward HUNT New York/Grant/#42 (1873-1882)	14 June 1810/Utica, New York 24 March 1886/Washington, D. C.	Forest Hill Cemetery 2201 Onedia Street Utica, New York
James IREDELL North Carolina/Washington/#6 (1790-1799)	5 October 1751/Lewes, England 20 October 1799/Edenton, North Carolina	Private Cemetery (See Note 8) Hayes Plantation Edenton, North Carolina
Howell Edmunds JACKSON Tennessee/B. Harrison/#54 (1893-1895)	8 April 1832/Paris, Tennessee 8 August 1895/"West Meade," Tennessee	Mount Olivet Cemetery (See Note 9) 1101 Lebanon Road Nashville, Tennessee
Robert Houghwout JACKSON New York/F. Roosevelt/#82 (1941-1954)	13 February 1892/Spring Creek, Pennsylvania 9 October 1954/Washington, D. C.	Maple Grove Cemetery Frew Run Street Frewsburg, New York
John JAY New York/Washington/#1 (1789-1795)	12 December 1745/New York, New York 17 May 1829/Bedford, New York	Private Cemetery (See Note 10) Boston Post Road Rye, New York
Thomas JOHNSON Maryland/Washington/#7 (1792-1793)	4 November 1732/Calvert County, Maryland 26 October 1819/Frederick, Maryland	Mount Olivet Cemetery (See Note 11) 315 South Market Street Frederick, Maryland
William JOHNSON South Carolina/Jefferson/#14 (1804-1834)	27 December 1771/Charleston, South Carolina 4 August 1834/Brooklyn, New York	Unknown (See Note 12) Presumably buried in Brooklyn, New York
Joseph Rucker LAMAR Georgia/Taft/#64 (1911-1916)	14 October 1857/Elbert County, Georgia 2 January 1916/Washington, D. C.	Summerville Cemetery John's Road at Cumming Road Augusta, Georgia
Lucius Quintus Cincinnatus LAMAR Mississippi/Cleveland/#49 (1888-1893)	17 September 1825/Eatonton, Georgia 23 January 1893/Vineville, Georgia	Riverside Cemetery 1301 Riverside Drive Macon, Georgia
Henry Brockholst LIVINGSTON New York/Jefferson/#15 (1807-1823)	25 November 1757/New York, New York 18 March 1823/Washington, D. C.	Trinity Church churchyard Wall Street vault area New York, New York
Horace Harmon LURTON Tennessee/Taft/#61 (1910-1914)	26 February 1844/Newport, Kentucky 12 July 1914/Atlantic City, New Jersey	Greenwood Cemetery 984 Greenwood Avenue Clarksville, Tennessee
John MARSHALL Virginia/J. Adams/#13 (1801-1835)	24 September 1755/Germantown, Virginia 6 July 1835/Philadelphia, Pennsylvania	Shockoe Hill Cemetery Hospital and Third Streets Richmond, Virginia
Stanley MATTHEWS Ohio/Garfield/#46 (1881-1889)	21 July 1824/Cincinnati, Ohio 22 March 1889/Washington, D. C.	Spring Grove Cemetery 4521 Spring Grove Avenue Cincinnati, Ohio

TABLE OF DECEASED U. S. SUPREME COURT MEMBERS

<i>Name Appointed From/By/Sequence Court Service (See Note 1)</i>	<i>Date/Place of Birth Date/Place of Death</i>	<i>Interment Location</i>
Joseph McKENNA California/McKinley/#57 (1898-1925)	10 August 1843/Philadelphia, Pennsylvania 21 November 1926/Washington, D. C.	Mount Olivet Cemetery 1300 Bladensburg Road, N. E. Washington, D. C.
John McKINLEY Alabama/Van Buren/#27 (1838-1852)	1 May 1780/Culpepper County, Virginia 19 July 1852/Louisville, Kentucky	Cave Hill Cemetery 701 Baxter Avenue Louisville, Kentucky
John McLEAN Ohio/Jackson/#21 (1830-1861)	11 March 1785/Morris County, New Jersey 4 April 1861/Cincinnati, Ohio	Spring Grove Cemetery 4521 Spring Grove Avenue Cincinnati, Ohio
James Clark McREYNOLDS Tennessee/Wilson/#66 (1914-1941)	3 February 1862/Elkton, Kentucky 24 August 1946/Washington, D. C.	Glenwood Cemetery U. S. 181 at Pond River Road Elkton, Kentucky
Samuel Freeman MILLER Iowa/Lincoln/#36 (1862-1890)	5 April 1816/Richmond, Kentucky 13 October 1890/Washington, D. C.	Oakland Cemetery 18th and Carroll Streets Keokuk, Iowa
Sherman MINTON Indiana/Truman/#87 (1949-1956)	20 October 1890/Georgetown, Indiana 9 April 1965/New Albany, Indiana	Holy Trinity Catholic Cemetery 2507 Green Valley Road New Albany, Indiana
William Henry MOODY Massachusetts/T. Roosevelt/#60 (1906-1910)	23 December 1853/Newbury, Massachusetts 2 July 1917/Haverhill, Massachusetts	Byfield Parish Churchyard (See Note 13) Georgetown, Massachusetts
Alfred MOORE North Carolina/J. Adams/#12 (1800-1804)	21 May 1755/New Hanover Co., North Carolina 15 October 1810/Bladen Co., North Carolina	St. Philip's Churchyard (See Note 14) Brunswick Town Historic Site Southport, North Carolina
Francis William MURPHY Michigan/F. Roosevelt/#80 (1940-1949)	13 April 1890/Harbor Beach, Michigan 19 July 1949/Detroit, Michigan	Our Lady of Lake Huron Cemetery State Highway 25 at Jinks Road Sand Beach, Michigan
Samuel NELSON New York/Tyler/#29 (1845-1872)	10 November 1792/Hebron, New York 13 December 1873/Cooperstown, New York	Lakewood Cemetery East Lake Road Cooperstown, New York
William PATERSON New Jersey/Washington/#8 (1793-1806)	24 December 1745/County Antrim, Ireland 7 September 1806/Albany, New York	Albany Rural Cemetery (See Note 15) Albany-Troy Road at Cemetery Avenue Menands, New York
Rufus Wheeler PECKHAM New York/Cleveland/#56 (1896-1909)	8 November 1838/Albany, New York 24 October 1909/Altamont, New York	Albany Rural Cemetery Albany-Troy Road at Cemetery Avenue Menands, New York
Mahlon PITNEY New Jersey/Taft/#65 (1912-1922)	5 February 1858/Morristown, New Jersey 9 December 1924/Washington, D. C.	Evergreen Cemetery 65 Martin Luther King Avenue Morristown, New Jersey
Stanley Forman REED Kentucky/F. Roosevelt/#77 (1938-1957)	31 December 1884/Minerva, Kentucky 2 April 1980/Huntington, New York	Maysville Cemetery Mason-Lewis Road at Dietrich's Lane Maysville, Kentucky
Owen Josephus ROBERTS Pennsylvania/Hoover/#74 (1930-1945)	2 May 1875/Germantown, Pennsylvania 17 May 1955/West Vincent Township, Pennsylvania	St. Andrew's Cemetery St. Andrews Lane (just west of intersection State Highways 401 & 100) West Vincent Township, Pennsylvania
John RUTLEDGE South Carolina/Washington/#2 (1789-1791) as Associate Justice (1795) as Chief Justice	? September 1739/Charleston, South Carolina 21 June 1800/Charleston, South Carolina	St. Michael's churchyard Meeting and Broad Streets Charleston, South Carolina
Wiley Blount RUTLEDGE Iowa/F. Roosevelt/#83 (1943-1949)	20 July 1894/Covington, Kentucky 10 September 1949/York, Maine	Green Mountain Cemetery 290 20th Street Boulder, Colorado
Edward Terry SANFORD Tennessee/Harding/#72 (1923-1930)	23 July 1865/Knoxville, Tennessee 8 March 1930/Washington, D. C.	Greenwood Cemetery 3500 Tazewell Pike Knoxville, Tennessee
George SHIRAS, Jr. Pennsylvania/B. Harrison/#53 (1892-1903)	26 January 1832/Pittsburgh, Pennsylvania 2 August 1924/Pittsburgh, Pennsylvania	Allegheny Cemetery 4734 Bulter Street Pittsburgh, Pennsylvania
Harlan Fiske STONE New York/Coolidge—F. Roosevelt/#73 (1925-1941) as Associate Justice (1941-1946) as Chief Justice	11 October 1872/Chesterfield, New Hampshire 22 April 1946/Washington, D. C.	Rock Creek Cemetery Rock Creek Church Road at Webster, N. W. Washington, D. C.
Joseph STORY Massachusetts/Madison/#18 (1812-1845)	18 September 1779/Marblehead, Massachusetts 10 September 1845/Cambridge, Massachusetts	Mount Auburn Cemetery 580 Mount Auburn Street Cambridge, Massachusetts

TABLE OF DECEASED U. S. SUPREME COURT MEMBERS

<i>Name Appointed From/By/Sequence Court Service (See Note 1)</i>	<i>Date/Place of Birth Date/Place of Death</i>	<i>Interment Location</i>
William STRONG Pennsylvania/Grant/#40 (1870-1880)	6 May 1808/Somers, Connecticut 19 August 1895/Lake Minnewassa, New York	Charles Evans Cemetery 119 Center Avenue Reading, Pennsylvania
George SUTHERLAND Utah/Harding/#70 (1922-1938)	25 March 1862/Stony Stratford, England 18 July 1942/Stockbridge, Massachusetts	Cedar Hill Cemetery (See Note 16) 4111 Pennsylvania Avenue Suitland, Maryland
Noah Haynes SWAYNE Ohio/Lincoln/#35 (1862-1881)	27 December 1804/Frederick County, Virginia 8 June 1884/New York, New York	Oak Hill Cemetery 30th and R Streets, N.W. Washington, D.C.
William Howard TAFT Connecticut/Harding/#69 (1921-1930)	15 September 1857/Cincinnati, Ohio 8 March 1930/Washington, D.C.	Arlington National Cemetery Arlington, Virginia
Roger Brooke TANEY Maryland/Jackson/#24 (1836-1864)	17 March 1777/Calvert County, Maryland 12 October 1864/Washington, D.C.	St. John the Evangelist Cemetery 200 Block, East Third Street Frederick, Maryland
Smith THOMPSON New York/Monroe/#19 (1823-1843)	17 January 1768/Dutchess County, New York 18 December 1843/Poughkeepsie, New York	Poughkeepsie Rural Cemetery (See Note 17) South Avenue (Albany Post Road) Poughkeepsie, New York
Thomas TODD Kentucky/Jefferson/#16 (1807-1826)	23 January 1765/King and Queen Co., Virginia 7 February 1826/Frankfort, Kentucky	Frankfort Cemetery (See Note 18) 215 East Main Street Frankfort, Kentucky
Robert TRIMBLE Kentucky/J. Q. Adams/#20 (1826-1828)	17 November 1776/Augusta County, Virginia 25 August 1828/Paris, Kentucky	Paris Cemetery (See Note 19) South Main Street Paris, Kentucky
Willis VAN DEVANTER Wyoming/Taft/#63 (1911-1937)	17 April 1859/Marion, Indiana 8 February 1941/Washington, D.C.	Rock Creek Cemetery Rock Creek Church Road at Webster, N.W. Washington, D.C.
Frederick Moore VINSON Kentucky/Truman/#85 (1946-1953)	22 January 1890/Louisa, Kentucky 8 September 1953/Washington, D.C.	Pinehill Cemetery Off U.S. 23, top of hill Louisa, Kentucky
Morrison Remick WAITE Ohio/Grant/#43 (1874-1888)	29 November 1816/Lyme, Connecticut 23 March 1888/Washington, D.C.	Woodlawn Cemetery 1502 West Central Avenue Toledo, Ohio
Earl WARREN California/Eisenhower/#88 (1953-1969)	19 March 1891/Los Angeles, California 9 July 1974/Washington, D.C.	Arlington National Cemetery Arlington, Virginia
Bushrod WASHINGTON Virginia/J. Adams/#11 (1799-1829)	5 June 1762/Westmoreland County, Virginia 26 November 1829/Philadelphia, Pennsylvania	Family Vault Mount Vernon Fairfax County, Virginia
James Moore WAYNE Georgia/Jackson/#23 (1835-1867)	ca. 1790/Savannah, Georgia 5 July 1867/Washington, D.C.	Laurel Grove North Cemetery 802 West Anderson Street Savannah, Georgia
Edward Douglass WHITE Louisiana/Cleveland — Taft/#55 (1894-1910) as Associate Justice (1910-1921) as Chief Justice	3 November 1845/Lafourche Parish, Louisiana 19 May 1921/Washington, D.C.	Oak Hill Cemetery (See Note 20) 30th and R Streets, N.W. Washington, D.C.
Charles Evans WHITTAKER Missouri/Eisenhower/#91 (1957-1962)	22 February 1901/Troy, Kansas 26 November 1973/Kansas City, Missouri	Calvary Cemetery 6901 Troost Street Kansas City, Missouri
James WILSON Pennsylvania/Washington/#4 (1789-1798)	14 September 1742/Caskardy, Scotland 21 August 1798/Edenton, North Carolina	Christ Church (See Note 21) Second Street churchyard Philadelphia, Pennsylvania
Levi WOODBURY New Hampshire/Polk/#30 (1846-1851)	22 December 1789/Francestown, New Hampshire 4 September 1851/Portsmouth, New Hampshire	Harmony Grove (South Cemetery) Sagamore Street Portsmouth, New Hampshire
William Barnham WOODS Georgia/Hayes/#45 (1881-1887)	3 August 1824/Newark, Ohio 14 May 1887/Washington, D.C.	Cedar Hill Cemetery 275 North Cedar Street Newark, Ohio

FOOTNOTES:

1. Terms of Court service are considered to begin only after the oath of judicial office is taken and the Justice is fully vested with and exercises the powers of a member of the U. S. Supreme Court.

2. Henry Baldwin was originally interred in the Kalorama vault on the estate

owned by his brother-in-law. Baldwin's interment at Oak Hill Cemetery in Georgetown, D.C. in 1892 is supported by cemetery records, however, there is a possibility that he was subsequently transferred and reburied in Greendale Cemetery, Meadville, Pennsylvania.

3. Mount Muncie Cemetery is actually in Lansing, Kansas south of Leavenworth on State Highway #5, about 1/2 mile east of U. S. Highway 73.

4. Calvary Cemetery could not provide exact plot location for the gravesite of Pierce Butler. He is buried in Lot 1, Block 4, Section 33 according to the central diocesan office for Catholic cemeteries.

5. Chief Justice Chase was buried until 1886 at Oak Hill Cemetery, Georgetown, D.C.

6. Duvall was born at "Darnell's Grove," his father's property in central Maryland. By purchase and land trades, Gabriel Duvall established his large "farm," which he named "Marietta," in Prince George's County. After Duvall's death, his two grandsons divided the property. The main house was in one parcel which was still called "Marietta"; the family graveyard was included in the other parcel, known as "The Wigwam." The main house is still standing and is located about 2 1/2 miles west of Bowie, Maryland on Bell Station Road, 0.3 miles north of State Highway #450. The Duvall family graveyard is 0.6 miles further north on Bell Station Road, then 0.3 miles east on an unmarked dirt road. Hire a guide! The Maryland Highway Department plans a multi-lane road which soon will whisk traffic past the western edge of the cemetery property. There is no grave-stone or marker in the graveyard for Justice Duvall.

7. Palisado Cemetery is sometimes called "First Congregational Church" graveyard. The cemetery is actually owned by the First School Society of Windsor, Connecticut, and is directly across the street from Fyler House, 96 Palisado Avenue, Windsor, now occupied by the Windsor Historical Society.

8. Hayes Plantation remains private property. For permission to visit the burial ground, it is best to stop at the Edenton Visitors' Center in the Penelope Barker House at the foot of Broad Street.

9. "West Meade" homesite was formed from a portion of the Belle Meade plantation and stock farm, about six miles west of Nashville. Howell Jackson was first buried in the private cemetery at Belle Meade, but was transferred to Mount Olivet.

10. The Jay family private cemetery is located behind the building serving as Headquarters of the American Methodist Church on Boston Post Road, southwest of the Rye, New York railroad station. The family burial grounds are currently under the care of Dr. John Jay DuBois of Rye.

11. Thomas Johnson was originally buried in All Saints churchyard in Frederick before his removal to Mount Olivet.

12. The mystery of the missing Justice William Johnson is examined in detail in the article accompanying this Table.

13. According to the Town Clerk's office in Georgetown, Massachusetts the easiest access to Byfield Parish Church is "from Rte. 1 in Newbury, take the exit for Gov. Dummer Academy, stay right on that road and it will lead you to the small, quaint, and charming Byfield Parish Church. It is perhaps two miles from Rte. 1. Lots of luck."

14. Alfred Moore was buried at Belfont plantation in Bladen County, North Carolina, home of his son-in-law, until his body was moved in 1910 to "Old Brunswick." Now part of Brunswick Town Historical Site, St. Philip's is on the west bank of the Fear River, approximately 20 miles south of Wilmington, then two miles east off River Road.

15. William Paterson was first buried in the Van Rensselaer family vault. When the vault was torn down, all burials there were transferred to Albany Rural Cemetery. The Paterson plot in Albany Rural contains the presumed remains of William Paterson, some confusion in identification arising due to a lack of complete, accurate records concerning interment locations within the Van Rensselaer vault.

16. George Sutherland was moved to the Sanctuary of Truth Mausoleum at Cedar Hill Cemetery in June 1958 from Abbey Mausoleum, adjacent to Arlington National Cemetery across the Potomac River.

17. Smith Thompson was buried, and still is buried, in "Livingston's Private Cemetery." Poughkeepsie Rural Cemetery was established in 1852 and grew; over time. In May 1914 the cemetery company purchased additional property which brought "Livingston's Private Cemetery" within their care.

18. After the "State Cemetery" was established in Frankfort, Thomas Todd was moved from the family graveyard established on the property of his father-in-law, Henry Innes, on Elk Horn Creek near Frankfort.

19. As an aid to finding the Thimble monument, Mrs. Edna Whately of Paris, Kentucky advised that "it is of dark red granite and very tall so that when the light is at a certain angle it is hard to read the inscription. He is next to the circular drive way and close to the burial place of U. S. Senator Garrett Davis (1837-1847), born 1801, died 1872."

20. There is a persistent controversy concerning the spelling of the middle name of Chief Justice White. Most evidence supports the spelling "Douglass." His full name is shown two times on markers in the family plot at Oak Hill Cemetery, and both times the middle name is here spelled "Douglas."

21. For 106 years James Wilson was buried near Edenton, North Carolina in the Hayes Plantation private family burial ground, beside fellow Justice James Iredell. Wilson was returned to Philadelphia in 1906.

The Trial of the Officers and Crew of the Schooner "Savannah"

John D. Gordan, III*

Introduction

On Sunday, June 2, 1861, the schooner *Savannah*, commissioned by Jefferson Davis as "a private armed vessel in the service of the Confederate States," left her anchorage near Fort Sumter in Charleston harbor, slipped past the U.S. frigate *Brooklyn*, part of the Union blockading fleet, and reached the open sea. The next day, having taken the brig *Joseph*, bound from Cuba to Philadelphia with a cargo of sugar, and sent her into Beaufort with a prize crew aboard, the *Savannah* engaged the U.S. brig *Perry*, and after an exchange of fire, surrendered. On October 23, 1861, twelve of the officers and men of the *Savannah* went on trial in the United States Circuit Court for the Southern District of New York on charges of piracy arising from the capture of the *Joseph*.¹

For the *Savannah*, Fort Sumter, whose Union garrison had surrendered to General Beauregard some seven weeks earlier, was a point both of departure and of historical reference. The voyage of the *Savannah*, and the prosecution which followed, were inextricably bound up in the attack on Fort Sumter. The outcome of the trial, it will be suggested, may have resulted from the participation of the Circuit Justice presiding, Samuel Nelson, in the events immediately preceding the Confederate assault on Fort Sumter.

The Fall of Fort Sumter and Its Aftermath

At 4:30 A.M. on April 12, 1861, the first shell rose from the Confederate batteries below Charleston and exploded over Fort Sumter, be-

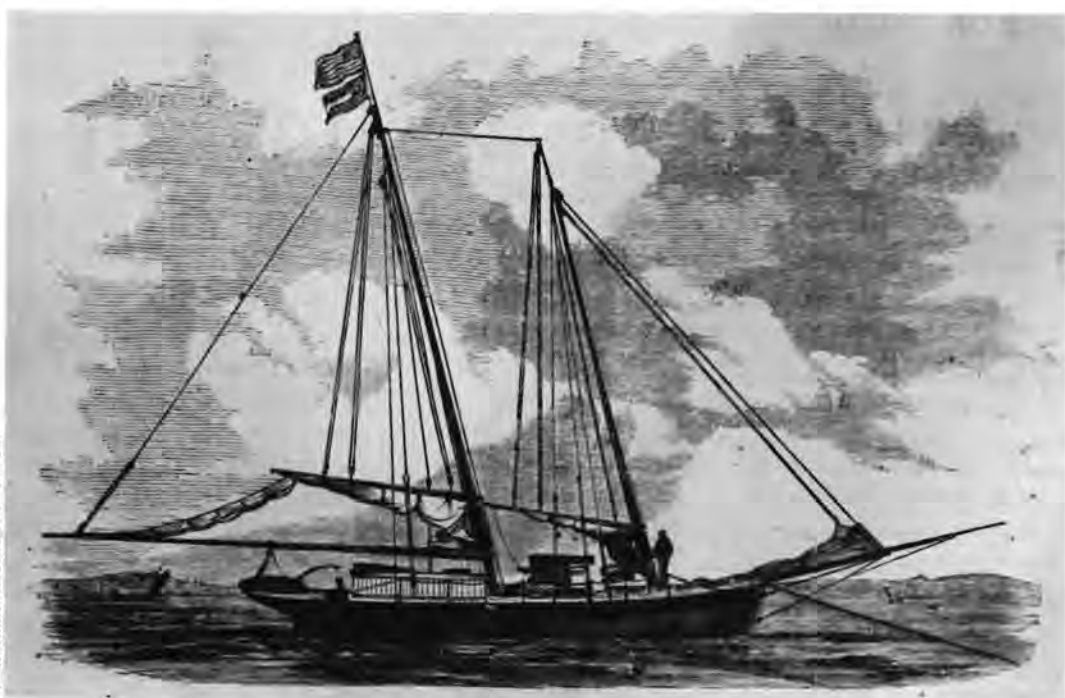
ginning the Civil War. The United States fleet sent by President Lincoln to provision the garrison arrived at the bar of the harbor as the assault began and watched for the next day and a half as the Confederate batteries pounded Fort Sumter into submission. By the evening of the 13th the Fort had surrendered, and on the 14th the fleet carried away its survivors while Beauregard's troops raised the Confederate flag over the ramparts.

The day of the assault, Jefferson Davis called a special session of the Confederate Congress at Montgomery, the provisional capitol, for April 29. On April 15 President Lincoln issued a proclamation, calling into service 75,000 state militiamen and summoning a special session of Congress on July 4. On the 17th of April, Davis invited interested parties to apply for "commissions or letters of marque and reprisal to be issued under the seal of these Confederate States." President Lincoln responded on the 19th, declaring a blockade of the ports of the seceded states and warning that

"If any person, under the pretended authority of said States, or under any other pretence, shall molest a vessel of the United States or the persons or cargo on board of her, such person will be held amenable to the laws of the United States for the prevention and punishment of piracy."

Lincoln's proclamation would touch off a storm in England, which recognized the belligerent status of the Confederacy. In the House of Lords, the Lord Chancellor expressed the view that no one ought "to be regarded as a pirate for acting under a Commission from a State admitted to be entitled to the exercise of belligerent rights" and that "[a]nybody dealing with a man under those circumstances as a pirate and putting him to death would . . . be guilty of murder." Lord Kingsdown declared that enforcement of the proclamation "would be an act of barbarity

*This article was prepared and published in pamphlet form under the joint auspices of the Second Circuit Historical Committee established by the Judicial Council of the Second Circuit and the Federal Bar Council of New York.



The Confederate privateer, Savannah.

which would produce an outcry throughout the civilized world. . . ." The Earl of Derby asserted that the "Northern States . . . must not be allowed to entertain the opinion . . . that they are at liberty so to strain the law as to convert privateering into piracy, and visit it with death."²

Undeterred by Lincoln's proclamation, on April 29 Davis asked the Confederate Congress for a statute authorizing the issuance of letters of marque and reprisal to make up for the Confederacy's lack of any naval vessels. On May 6, Davis signed the Act he had requested, which declared war on the United States and contained detailed provisions for the issuance of letters of marque under the seal of the Confederate States, for the conduct of vessels so commissioned, and for the condemnation of prizes by the district courts of the Confederate States.³ On May 18, 1861, pursuant to the Act, Davis issued the following commission:

"JEFFERSON DAVIS,
"PRESIDENT OF THE CONFEDERATE
STATES OF AMERICA.

"To all who shall see these presents, greeting:
—Know ye, that by virtue of the power vested in me by law, I have commissioned, and do hereby commission, have authorized, and do hereby authorize, the schooner or vessel called the *Savannah* (more particularly described in the schedule hereunto annexed), whereof T. Harrison Baker is

commander, to act as a private armed vessel in the service of the Confederate States, on the high seas, against the United States of America, their ships, vessels, goods, and effects and those of her citizens, during the pendency of the war now existing between the said Confederate States and the said United States.

"This commission to continue in force until revoked by the President of the Confederate States for the time being.

"Given under my hand and the seal of the Confederate States, at Montgomery, this 18th day May, A.D. 1861.

"JEFFERSON DAVIS.

"By the President — R. TOOMBS, Secretary of State."

"Schedule of description of the vessel: — Name, Schooner *Savannah*; tonnage, 53 41/95 tons; armament, one large pivot gun and small arms; number of crew, thirty."⁴

"At 5.20 went to quarters"

On June 2, 1861, with twenty men on board and armed with a single 18 pound pivot gun mounted amidships, the *Savannah* left Charleston harbor after dark. On the morning of the following day, without firing a shot, she captured the brig *Joseph* "by authority of the Confederate States." A vessel flying English colors was allowed to pass unmolested, since the *Savannah's* commission extended only to United States vessels.

Later that day, after placing a prize crew



President Abraham Lincoln



President Jefferson Davis

aboard the *Joseph* and standing off from her a little, the *Savannah* noted an unidentified vessel on the horizon, which soon proved to be the U. S. Navy brig *Perry*, part of the West India Blockading Squadron. The log of the *Perry* records what happened:

"Log of the United States Brig 'Perry'
Remarks this 3d day of June 1861

"From 4 to 6 [PM]: At 4 discovered a brig [*Joseph*] & schooner [*Savannah*] forward of lee beam, schooner a mile astern of brig. At 4.40 the movements of the schooner being suspicious, gave chase to her. At 5 saw that the schooner had a gun. At 5.20 went to quarters & cleared the vessel for action. Hoisted our colors.

"From 6 to 8: At 6.10 the schooner hoisted colors & kept them up for only a moment but we could not make them out. At 7.15 fired a shot ahead of the schooner but she showed no colors. At 7.50 it being quite dark & the brig out of sight opened fire on the schooner with Port Battery — which was returned by the schooner. Several of her shot passed over us.

"From 8 to midt.: At 8.10 the schooner ceased firing and we lost sight of her for a moment. It proved that she had lowered her sails to show her submission. . . ."⁵

Journey Northward

The *Perry* took the men of the *Savannah* aboard

as prisoners and put all but the officers in irons.

With the *Savannah* following behind with a small crew from the *Perry* aboard, the two vessels set out on a northwesterly course upon which they rendezvoused with the U.S.S. *Minnesota*, the flagship of the commander of the Atlantic Blockading Squadron, Flag-Officer Silas Stringham. The *Perry* transferred the prisoners to the *Minnesota* and sailed for her assigned blockading station in Florida.⁶

Commodore Stringham towed the *Savannah* before Charleston harbor to show her capture and then proceeded to Hampton Roads, near Norfolk. The *Savannah* was sent on to New York as a prize, arriving there on June 15.⁷ She was condemned by order of District Judge Samuel Rossiter Betts ten days afterwards and sold for twelve hundred dollars.⁸

On June 23, the prisoners were ordered transferred to the U.S.S. *Harriet Lane*, a revenue cutter which had been part of the fleet to relieve Fort Sumter and which was returning to New York for repair of her engines and battle damage.⁹

The *Savannah* privateers arrived in New York on June 25 and were led in chains, amid excited

crowds, to the Marshal's Office and then to the City Prison, even then called the Tombs. The first mate of the *Savannah*, John Harleston, a young man of an old Charleston family, described the accommodations in his prison journal:

"[We] were all thrown into cells 6 feet by 9 and treated as criminals of the worst description. The cell occupied by Capt. Baker and myself was No. 72 on the 2d tier, I never shall forget it, it was filthy beyond description, was filled with vermin. After being in there three days we discovered we were covered with lice and the bedbugs, fleas, etc. nearly drove us crazy. . . . The cells were lighted by a narrow slit just under the ceiling. . . it is dark in here by four o'clock. We could see nothing outside, only a narrow strip of sky. The fare of the prison is *very bad*, just enough to keep body and soul together; meat and soup (so called) twice a week, bread and coffee two days (coffee made out of beans and sweetened with molasses) and mush and molasses the balance of the time, and often so dirty and disgusting that your stomach refused it."

Harleston continues:

"Within two weeks after our arrival we were taken up four times before the U. S. Commissioner for examination and sent back every time without any examination. Every time we were carried up we were handcuffed together and dragged through the streets, a show for the populace, who heaped abuse on us of every description. . . . I held up my head, looked everyone in the eyes, and marched along as proudly as if it was an honor. I never felt afraid. To say that I did not feel anger when I was manacled and dragged through the streets would be untrue. I felt it, and feel it yet, and hope to live to repay it."¹⁰

Jefferson Davis' Letter

Two weeks after the prisoners' arrival in New York, Jefferson Davis intervened with a letter personally addressed to Abraham Lincoln.

Richmond, July 6, 1861.

To Abraham Lincoln, President and Commander in Chief of the Army and Navy of the United States.

Sir: Having learned that the schooner *Savannah*, a private armed vessel in the service, and sailing under a commission issued by authority of the Confederate States of America, had been cap-

on board of any mand."

It now appears a contradiction in New York that the prisoners conveyed to that city are not as prisoners of war, have been put in before the courts and treason, and have been actually convicted for no other reason than defense of the nation under the authority

A just regard to this Government explicitly that, in this Government held by it the same shall be experienced Savannah, and if of retaliation by officers or the creation will be extended secure the abandonment of the warfare of civil to disgrace the nation, auguring it.

With this view reached you, I need to the commander in exchange for the Savannah, an equal number according to rank

President and Commander and Navy of the

Evidently Davis Chesnut's "diary" mentioned out — those they mentioned heads of our men mentioned touched."¹²

Davis' letter was today of Col. Thomas to the Washington General Winfield Scott in his last days as General Colonel Taylor was a pagne reception by the letter on to the V

Indictment

able William D. Shipman, United States District Judge for the District of Connecticut, sitting by designation.¹⁴ They were there attended by a distinguished array of counsel including:

(1) Daniel Lord, Jr., founder of Lord, Day & Lord, appearing for John Harleston, the first mate, whose father had been Lord's classmate at Yale;

(2) Algernon S. Sullivan, founder of Sullivan & Cromwell, retained by the Confederate government to represent all the defendants and also counsel for other privateers who arrived in New York as prisoners;

(3) James T. Brady, the leading criminal lawyer of the time in New York and former District Attorney and Corporation Counsel, brought into the case by Sullivan to represent T. Harrison Baker, the Captain of the *Savannah*, and afterwards one of the counsel for Jefferson Davis in his abortive prosecution for treason in 1866 in the United States Circuit Court in Richmond.¹⁵

The Government was represented by E. Delafield Smith, the United States District Attorney, sometime professor of law at the City University and later Corporation Counsel.¹⁶

John Harleston's memoir of his trial describes Smith as "a good looking man, about forty [Smith was actually thirty-five], and smart." Of the others, he says, "Mr. Daniel Lord . . . was an old gentleman, of seventy years, I suppose. He was a small, thin man. He ranked as one of the heads of the New York bar, a first-class lawyer, respected by all for his sterling honesty and truthfulness. . . . James T. Brady, at that time New York's most celebrated criminal lawyer . . . was an Irishman . . . of medium height, square shoulders, a big head and plenty of brains. . . . Algernon Sullivan . . . a native of Ohio . . . was a tall, thin, distinguished looking man, a fine lawyer and an eloquent speaker."¹⁷

The proceedings on the 17th were anticlimactic. The arraignment was adjourned to July 23 after some wrangling about when the case would be tried, in light of the injury, "by being run away with by a horse," of the Circuit Justice, Samuel Nelson, whose presence at trial defense counsel strenuously demanded.

On the 23rd, after the prisoners had pleaded not guilty, Smith tried to force the case to trial on July 31, "that an example may be set to those who pursue [this] . . . species of marauding. . . ." Defense counsel insisted that the issues were too complex and that evidence required for the defense had to be obtained in the South. Judge Shipman refused the Government's application,

pointing out that:

"In capital cases, it has been a rule usually adhered to in the United States Circuit Courts (which are so constituted by the Act of Congress that two Judges are authorized to sit) to have, if applied for, a full Court, so that the defendant might have the benefit, if I may so speak, of the chance of a division of opinion. For such division of opinion constitutes the only ground upon which the case can be removed to a higher Court for revision."¹⁸

Due to the incapacity of Justice Nelson and his commitments in other Districts, the case was set for trial in late October, when the Justice was expected to be present.

Preparing the Defense

The defense to the Government's seemingly airtight case was conceived before the *Savannah* ever set sail. Under date of May 21, 1861, Daniel Lord, Jr., circulated a six-page printed opinion to his commercial clients, many of them involved in international trade, styled "The Legal Effect of the Secession Troubles on the Commercial Relations of The Country."¹⁹ While questioning the lawfulness of the blockade in the absence of a declaration of war by Congress, he had no doubt that citizens of the seceded states who actively participated in the war against the United States were guilty of treason. This opinion applied as well to privateering:

"VIII. — It is proper next to consider the subject of privateering commissions issued by the Secession States. They not being, in the judgment of the United States, independent States, nor authorized to make war, all such commissions must be held void by them. No captures under them could change the property of the original owners, nor protect it in the hands of purchasers, nor exempt either those who made the capture or who received the prizes from being held accountable, if ever caught. Whether it would be deemed piracy rests on considerations somewhat varying from those commonly supposed. The color of authority and the publicity attendant on a capture with the object of condemnation by a court, acting as such, might relieve the offense from its character of piracy, were it not that such acts are treasons; and every crime which if committed on land is punishable with death, is, when committed at sea, piracy. (Act of 30th April, 1790, § 8.) And the naval forces and merchants ships are authorized to capture such pirates, and to have the property condemned to their use, (Act of 3d March, 1819.)"

Faithful to President Lincoln's proclamation, the indictment had missed this theory. Defense counsel would successfully keep from the jury

proof that the *Savannah* had fired on the *Perry* because, although "this indictment might have been framed in a different way, under the 8th Section of the Act of 1790, with a view to proving acts of treason, if you please, which are made piracy, as a capital offense, by that act," the charges were strictly limited to the piratical seizure of the *Joseph*; counsel, it was said, were not prepared to meet such "a new and substantial charge."

Thus, with the indictment in hand and Mr. Lord's view evidently in mind, defense counsel set about finding proof of "[t]he color of authority and the publicity attendant on a capture with the object of condemnation by a court. . . ." On July 19, three days after the indictment was returned, Algernon Sullivan wrote to J. R. Tucker, the Attorney General of Virginia, for this purpose:

"As the Confederate States of America is a government not yet acknowledged we must by parole evidence, authenticate the Letter of Marque and the government seal. And also by parole prove the acts of secession, the formation of the Confederate Government, the adherence of South Carolina to the C.S.A. and the enactment of the law for the recognition of the war & authorizing letters of Marque, etc. I will have to obtain this evidence through the aid of yourself, or of some one connected with the Departments at Richmond.

"I think it will be desirable also, in order to prove compliance with the laws of war & Privateering, by the depts, to show that after capture, the 'Joseph' was sent into port as a prize & regularly libelled & condemned by the Admiralty court. It will be well to exclude any idea that the acts of the Privateers were characterized *animo furandi*.

"We will try the case before Judge Nelson, who has intimated to us that he will hold the next Circuit in person. This is favorable to us."

Sullivan also noted that, insofar as the indictment charged that the privateers were citizens of the United States, he would argue "openly . . . the broad ground that Capt. Baker & his crew, were not 'citizens' of the United States on the 3d of June, 1861. . . ." ²⁰

Although the mails between the United States and the Confederacy had been cut off, Sullivan's letter was soon in the hands of the Confederate government and more particularly those of its Attorney General, Judah P. Benjamin, an immigrant from St. Croix and former United States Senator, himself a brilliant trial lawyer who, upon the fall of Richmond in 1865, would join

and, later, lead the English bar as Queen's Counsel.²¹ Benjamin commented:

"I would cheerfully give any aid in my power to the counsel charged with the defense of the Capt. and crew of the *Savannah*, but I am totally at a loss to see what can be done here. The Counsel desires *parole* proof of the actions of this Government. We can send no witnesses to New York. We can furnish no such proof in time of war.

"The question appears to me to be much more of a *political* than of a *legal* character. If the U. S. refuse to consider this government is even *belligerent*, I do not see what effect the offer of parole proof could have. If we be recognized as belligerent, the action of the public authorities of a belligerent nation can in no manner be authenticated so conclusively as by its seal. If the signatures of our public men are to be proved, hundreds of persons in New York can prove them.

"However as this may be, I am certain that we have no means that I am aware of, by which we can furnish parole proof as desired by Mr. Sullivan in his letter, which I return." ²²

Arrest of Algernon S. Sullivan

On September 7 Secretary of State William H. Seward telegraphed the Superintendent of Police in New York City to "arrest Algernon S. Sullivan, No. 59 William Street, and deliver him to Colonel Martin Burke, Fort Lafayette." ²³ Three days later Seward dispatched a stinging reply to a letter of protest he had received from Daniel Lord, Jr.:

"I have received your letter of yesterday relating to Algernon S. Sullivan, a political prisoner now in custody at Fort Lafayette. This Department is possessed of treasonable correspondence of that person which no rights, or privileges of a lawyer or counsel can justify or excuse. The public safety will not admit of his being discharged." ²⁴

Mr. Sullivan's dossier in the secret Civil War archives of the State Department shows that his defense of the *Savannah* privateers was the cause for his arrest:

"Sullivan was counsel for Capt. Baker of the rebel Privateer 'Savannah.' An intercepted letter from him dated August 23, 1861, and addressed to 'Hon. R.M.T. Hunter, Secretary of State, C.S.A.' asks for numerous papers, to be used in said Baker's defense, and he says, 'I desire not to evade the high ground that the Confederate States are sovereign and that her citizens are not citizens of the United States.'" ²⁵

While Mr. Sullivan's intercepted letter has not been found, his surviving correspondence contains indiscrete expressions of sympathy with the Confederacy. His earlier quoted letter to the Attorney General of Virginia refers to his "painful

proof that the *Savannah* had fired on the *Perry* because, although "this indictment might have been framed in a different way, under the 8th Section of the Act of 1790, with a view to proving acts of treason, if you please, which are made piracy, as a capital offense, by that act," the charges were strictly limited to the piratical seizure of the *Joseph*; counsel, it was said, were not prepared to meet such "a new and substantial charge."

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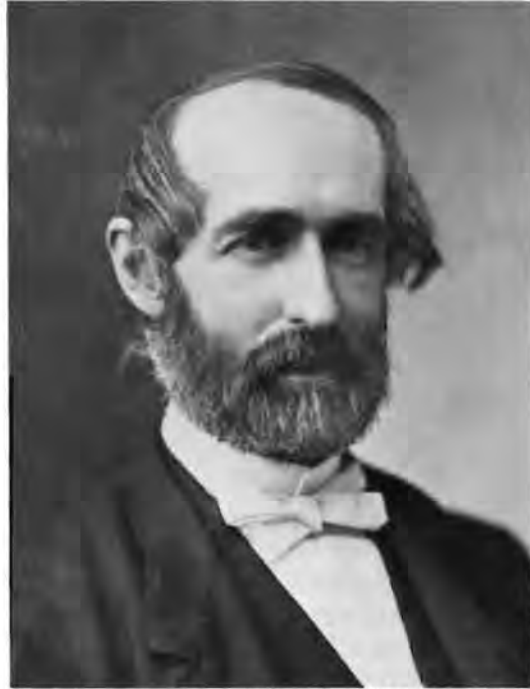
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suspense" and "hope and anxiety" over the outcome of the battle at Manassas Junction, which was to be won by the Confederacy; it is unlikely that his "hope" was for a Union victory. John Harleston's memoir explains Mr. Sullivan's motivation:

"His wife was a Virginia woman who influenced him. She was a genuine Confederate, very pretty and very smart. When we talked together about the South and about the Yankees her eyes just blazed and neither of us could talk fast enough." ²⁶

Fort Lafayette, Mr. Sullivan's new abode, was a grim fortress standing out in the Narrows in New York harbor on a rocky shoal which now supports a pontoon of the Verrazano bridge. It housed prisoners of war and Mr. Seward's political prisoners, persons arrested without warrant and held at the pleasure of the Secretary of State. Conditions there were little better than at the Tombs; the drinking water was notably foul. Not all of its inmates left for freedom; referring to one such, Col. Burke would say at the trial of the Lincoln conspirators in 1865: "I had charge of him and had him hung." ²⁷



Library of Congress

Lincoln's Secretary of State, William Seward (above), wielded enormous power during the early years of the Civil War, as demonstrated by the letter (below), which alone was sufficient to have attorney Algernon S. Sullivan arrested.

61

Encl. 2
Tel. A. H. G.

Department of State
Washington Sept. 21/65

John A. Kennedy,
Superintendent of Police,
New York.

Your letter of yesterday received, arrest Algernon S. Sullivan No. 59 William Street, and deliver him to Colonel Martin Burke, Fort Lafayette.

Yours &c.

W. H. Seward

National Archives

A Different Approach

Even while making use of his Southern connection, Mr. Sullivan (and the other counsel) pressed the Government of the United States for assistance. On September 7, evidently just prior to his arrest, Mr. Sullivan joined Messrs. Lord and Brady in a letter to U. S. District Attorney Delafield Smith, asking that he support their request that the United States government provide "the necessary facilities" for obtaining authenticated copies of the Constitution and relevant laws of the Confederate States and the acts of the Confederate States Prize Court in Charleston, as well as safe conduct for witnesses.²⁸ After a further reminder, Smith responded politely on the 20th that counsel should write directly to Washington.²⁹

In default of Mr. Smith's reply, defense counsel had on September 18th already written to Attorney General Edward Bates, enclosing their correspondence with Smith and requesting "permission, by proper safe conducts, for some person to be approved by the Government, to proceed to the South to obtain the needed documents. . . ." ³⁰ The Attorney General responded to Mr. Lord alone on October 8th, apologizing for the delay and advising that he did not yet know "the pleasure of the Government." Pointing out that the question of the national existence of the Confederacy was not "provable [by] documentary evidence" and that it was—as his counterpart, Judah P. Benjamin had also thought—a "political question," which "both the Congress & the President . . . have determined against the nationality of the C.S.A.," the Attorney General advised he would "again propound the matter to the President and see whether or no he has any directions to give. . . ." ³¹

Four days later, Attorney General Bates wrote that he had spoken to Mr. Lincoln and that "[t]he President, concurring, in the main with my views, as briefly indicated in my note to Mr. Lord, authorises me to answer at my discretion. . . ." The answer was: "[T]he Government declines to take any active part, in aid of the accused from (sic) the procurement of such testimony." ³²

The Trial

On October 23, 1861, the trial opened in the United States Circuit Court before Justice Samuel Nelson and District Judge Shipman.

Judge Shipman, who had conducted the arraignment in July, was then forty-three, for seven years United States District Attorney for Connecticut until his elevation to the bench in 1860. He would later write of his experience:

"It was my misfortune to become a Federal Judge just before the war broke out and to be transferred to the Court in New York where I was confronted with a series of new questions for which there was no precedent." ³³

His senior colleague, Samuel Nelson, three weeks short of his sixty-ninth birthday, was in the fortieth year of a judicial career which spanned half a century. After twenty-two years of service in the New York courts, the last eight as Chief Justice of the New York Supreme Court, Justice Nelson had been appointed to the Supreme Court of the United States in 1845, remaining until just before his eightieth birthday in 1872.³⁴ John Harleston speaks briefly of them:

"Judge Nelson was a large, fine-looking old man with a profusion of grey hair and whiskers. He had a good face, and though against us, was, I think, fair. Judge Shipman was a young man of rather small stature. He was second to Judge Nelson and was only consulted when points in dispute arose." ³⁵

Algernon S. Sullivan had rejoined Daniel Lord and the others. On October 18, Secretary Seward had ordered Col. Burke to release him "on taking the oath of allegiance, and engaging on oath that he will not do any act hostile or injurious to the United States nor enter any of the States in insurrection . . . nor be engaged in any treasonable correspondence with any person, whomsoever, during the present hostilities. . . ." ³⁶ Sullivan was released, after taking the oath, on October 21, two days before trial.

There was a new face in the courtroom, that of William M. Evarts. U. S. District Attorney Smith already had the assistance of Assistant U. S. District Attorney Ethan Allen, a descendant of the hero of the Revolution, and Samuel Blatchford, compiler of Blatchford's Reports in the days before West Publishing Co.'s National Reporter, in 1867 appointed United States District Judge for the Southern District of New York, in 1878 United States Circuit Judge, and in 1882, raised to an Associate Justice of the Supreme Court of the United States.³⁷ But Smith was uneasy that the prosecution was over-matched. On October 10, 1861, he wrote to At-



New York Historical Society, New York City

Fort Lafayette in New York harbor's Narrows served during the Civil War as a federal prison in which Sullivan and his clients were held in 1861-62.

torney Bates that:

"In view of the magnitude of the cases of the pirates of the 'Savannah' and of other vessels; in consideration, also, of the extraordinary array of counsel retained for the defence, and the novelty of some of the questions which will be raised therein; I respectfully ask authority to associate Mr. William M. Evarts with me in the trial and argument of those cases." ³⁸

Permission was granted but Evarts was not in New York to accept the retainer until October 22, the day before trial. The foremost trial lawyer of his day, later counsel for President Johnson in the impeachment proceedings, Attorney General of the United States, Secretary of State, and, at the end of his life, United States Senator from New York, even Evarts would write Attorney General Bates that he had been opposed by "the most numerous array of able counsel that I have ever known combined in any cause. . . ." ³⁹

John Harleston leaves this account of the opening of the trial:

"On our first appearance in the court room we were seated together — all handcuffed. When court had opened Judge Nelson said that if any of our counsel desired their clients to be seated near them they could do so. Mr. Daniel Lord got up and said: 'May it please the court, I did desire and did expect to have my client, John Harleston, sit alongside of me, but I observe he is heavily ironed and must be a desperate, dangerous character, and my life might be endangered by having him near me; or even your Honor might be in danger of your life.' Judge Nelson, who had not noticed that we were in irons, turned quickly

and looked at us. His face became red and he said: 'Mr. Marshal, what is the meaning of this? Take the irons off these men at once and never keep them in that condition again in this court. Outside you do as you see fit but not in here.' He then turned and looking at Mr. Lord, said: 'Brother Lord, I think we can risk it.' The irons came off." ⁴⁰

The trial required eight days, but the evidence offered on each side took little time to put in. The Government nolleed the indictment as to one of the *Savannah's* crew and put him on the stand to testify to her fitting out, her capture of the *Joseph* and her capture by the *Perry*. There also appeared the builder of the *Joseph* and a part owner of her — to prove her a United States vessel, her Captain and mate at the time of capture, Commodore Stringham, two officers from the *Harriet Lane*, the United States Commissioner in New York who had issued the warrants of arrest, and Assistant U. S. District Attorney Allen — to prove admissions of identity and citizenship. The defense recalled one of the *Harriet Lane's* officers briefly as its only live witness; the main evidence was the long-sought documents proving the establishment of the Confederate government, now published in *Putnam's Rebellion Record*, the letter of marque found on the *Savannah*, the Act of May 6, 1861 of the Confederate Congress which authorized its issuance, and an advertisement from the *Charleston Daily Courier* of the libeling and sale of the *Joseph* by the Admiralty Court in Charleston.

The entire balance of the trial, in a packed courtroom, was taken up by lengthy arguments to the Court or to the jury, although to John Harleston, "[o]ne day was like another — lawyers wrangling and making speeches." The major summations were by Mr. Brady for the defendants — certainly the most powerful address of the trial — and Mr. Evarts for the Government; both traveled well outside the record and also instructed the jury on the law. In brief, counsel for the defense contended variously that the seceding states had good reason for their conduct — Northern nullification of the Fugitive Slave Law — and had done nothing more than the American colonies had in declaring independence from England; that the Confederacy was a government *de facto* and perhaps, under the Constitution, *de jure*; that various bits of evidence — flags of truce, surrenders, exchanges of prisoners, and communications — sufficiently proved that the United States had recognized the Confederacy, and its letter of marque thus constituted a complete defense to a charge of piracy; that the piracy statutes were not intended to, and could not by their terms, apply here, and that, apart from this, piracy required *animo furandi* — intent to steal — which the defendants' commission and conduct showed they lacked. Evarts ably met each of these points, decrying privateering as barbaric, asserting the right of the United States to protect its citizens and commerce and to enforce its laws in its courts against those in unjustified rebellion against its sovereignty.

After the briefest of instructions from Justice Nelson,⁴¹ the jury retired. The Marshal had already ordered death cells for the prisoners set aside at the Tombs, but, after deliberations over two days and a return for supplemental instructions, the jury could not agree and were discharged.⁴² The Government's application for an immediate retrial was refused by Justice Nelson. John Harleston reports the trial's conclusion:

"[T]he crowd rushed for the doors. The judges retired and I saw United States Marshal Murray standing in a doorway twenty or thirty feet away. His face was red and his sharp eyes snapping. He had a silk hat in his hand. He shouted to his deputies to take us back, and then throwing his hat on the floor stamped on it in a paroxysm of rage."⁴³

Why the Jury Hung

In the midst of a civil war, having caught the defendants red-handed and represented by the

ablest advocate of his day, the Government was unable to obtain convictions of the privateers from jurymen who must have been drawn from the mercantile classes privateering threatened. To be sure, the privateers were also represented by great counsel who made able and appealing arguments to the jury (with the exception of Mr. Mayer, who assured the jury that his arguments for his German crew member client were made "on my own responsibility" and that his client's view was "*mitgegangen, mitgefangen, mitgehangen* [gone along, caught along, hanged along]"). But a fair reading of the transcript brings the apparent causes down to one — the jury instructions of Justice Nelson.

While seemingly a pro-Government charge, its emphasis and ambiguity must have favored the defense. First, Justice Nelson instructed the jury that the evidence established that the privateers were *not* guilty of piracy as the offense is defined by the "common law of nations," precisely what the defense had argued. While the Justice went on to say that the charge was laid under the Act of 1820, and not the law of nations, the jury must have realized that the Government was asking them for the deaths of men who the Court said in substance were innocent in the eyes of the world. The unpleasantness of the jury's position can only have been enhanced by Justice Nelson's further expression that "if you are satisfied, upon the evidence, that the prisoners have been guilty of this statute offense of robbery on the high seas, it is your duty to convict them, though it may fall short of the offense as known to the law of nations."

Second, the defense had heavily relied on decisions that made it an element of piracy that the accused have "*animo furandi*," literally, intent to steal, and had followed Daniel Lord's theory that no such intent could be brought home to men, sailing under a letter of marque issued in wartime by a *de facto* government, who seize an enemy vessel for condemnation in a prize court. On this point Justice Nelson's charge was again favorable to the defense, for he defined *animo furandi* as "an intent of gaining by another's loss, or to despoil another of his goods, *lucris causa*, for the sake of gain." While the defendants had intended to, and did, deprive the owners of the *Joseph* and its cargo of their property permanently, the instructions left open for favorable consideration by the jury the contention that the



Associate Justice Samuel Nelson

defendants had acted as combatants, rather than for personal gain.

Finally, on the Confederacy's letter of marque as a complete defense to the charge of piracy, Justice Nelson charged that:

"[A]s the Confederate States must first be recognized by the political departments of the mother Government, namely, the legislative and executive departments, in order to be recognized by the courts of the country, we must look to the acts of those departments as evidence of the fact."

Professor Swisher criticizes Justice Nelson because he did not go on to say that "such recognition had not taken place" or negate the claim of the defense that "in its method of conducting the war as a war, by taking prisoners of war . . . by its land operations, by the blockade of Southern ports, and by other acts, the government had . . . in effect given the necessary recognition."⁴⁴

That Justice Nelson acted deliberately must be concluded from the fact that he had before him the charge of Justice Grier given at the trial of a captured member of a prize crew from the privateer *Jeff. Davis*. That trial had opened in the Circuit Court in Philadelphia the day before that of the *Savannah* privateers did in New York and had resulted in a guilty verdict on October 25, the third day of the *Savannah* trial.⁴⁵ On the 26th, E. Delafield Smith had Justice Grier's instructions in hand by telegraph and read them out in the courtroom.

Justice Grier, Justice Nelson's junior on the Supreme Court by only a year, treated the statutory offense of piracy not as something less than the offense under the law of nations but rather as its "municipal" equivalent. He defined *animo furandi* merely as the purpose of "appropriating the thing taken." Most significantly, Justice Grier dealt with the status of the Confederacy as Professor Swisher thought Justice Nelson should have — by following the instruction that the courts were bound by the position of the legislative and executive departments with the statement that: "The fact that a civil war exists for the purpose of suppressing a rebellion, is *conclusive evidence* that the Government of the United States refuses to acknowledge their [the Confederacy's] right to be considered . . . [a State]." (emphasis supplied).⁴⁶

No contemporary document nor historical study has been found to explain why Justice Nelson charged the jury as he did. Perhaps he silently agreed with James Brady's comment when Justice Grier's charge was read:

"I do not see that there was anything left for the Jury. Judge Grier decided that case, which undoubtedly he could do, for he is a very able man."

Perhaps he was influenced by political beliefs, for Justice Nelson had been part of the majority in the *Dred Scott* decision, had been mentioned as a possible candidate of the Democratic party to oppose Abraham Lincoln in the 1860 election,⁴⁷ and would lead a minority which included Chief Justice Taney in dissent from Justice Grier's majority opinion, sustaining the legality of the blockade before Congress declared war on July 13, 1861, in *The Prize Cases*, 2 Black 635 (1863). Against this may be weighed the fact that the prosecution of the privateers was Seward's brain-child, and that Gideon Welles, Lincoln's Secretary of the Navy and no friend of Seward's, would record in his diary at a later date Seward's repeated claim that he "controlled" Justice Nelson.⁴⁸

While it is by no means certain, undisputed historical facts do suggest another reason why Justice Nelson would not foreclose the issue whether acts of the executive department "or of the president" constituted effective recognition of the Confederacy. The reason was that Justice Nelson knew better.

The Negotiations with the Confederate Commissioners

In 1865 John A. Campbell was in jail in Fort Pulaski, Georgia. Arrested under a warrant issued by General Grant on May 7, 1865, for him and for R.M.T. Hunter, Algernon Sullivan's erstwhile correspondent,⁴⁹ Campbell was held as a participant in the conspiracy to assassinate Abraham Lincoln, with whom he had met to negotiate terms of peace in Richmond after its fall in early April, 1865, days before the President was killed.⁵⁰

In March, 1861, however, Campbell was, and since 1853 had been, an Associate Justice of the Supreme Court of the United States. Although Alabama, his native state, had left the Union two months earlier, Campbell had remained on the Court.

Abraham Lincoln had been inaugurated on March 4, 1861, and for forty days thereafter the future of the country hung in the balance. Some, but not all, the states which would make up the Confederacy had seceded. Even in those states, a few military outposts still held on, notably Fort Sumter. What would President Lincoln do, and particularly about Fort Sumter?

Into this uncertainty Jefferson Davis thrust three Commissioners, whose stated purpose in coming to Washington was to negotiate a peaceful resolution of the differences between the United States and the Confederacy, including the evacuation of Fort Sumter by Union forces.

The Commissioners' first overture to meet with Seward, presented on March 11 through the then United States Senator from Virginia, R.M.T. Hunter, was rebuffed the next day. The Commissioners delivered a formal note to the State Department on March 13, but no answer had been received when, according to his later account, Justice Campbell ran into one of his colleagues on Pennsylvania Avenue on March 15.

The colleague was Justice Samuel Nelson, who had just come from a meeting with Seward, whom he had endeavored to persuade against a course of violent resistance to the Confederate States. After talking themselves, the two Justices returned to Seward's office and after some conversation became intermediaries between the State Department and the Confederate Commissioners. Justice Campbell apparently would meet alone with the Commissioners, one of whom he knew, but Justice Nelson joined his early meet-

ings with Seward. According to the Commissioners' report to their Secretary of State in late March, Campbell's meetings with Seward were:

"held in the presence of Judge Nelson also of the Supreme Court Bench, who it seems attends in person with Judge Campbell for the latter's protection against the treachery of Secretary Seward & such other members of the Cabinet as he sees."⁵¹

At their initial meeting on March 15th, Seward told the Justices that if the Commissioners did not immediately press their demand for formal negotiation with the new administration, the evacuation of Fort Sumter could be expected within five days. Campbell immediately reported this to the Commissioners, who agreed to wait. But the Fort was not evacuated, and two further meetings were held by the Justices with Seward, who put the delay off on Lincoln's eccentricities.

By March 30, Fort Sumter had still not been evacuated and Campbell returned to Seward, this time alone, since Justice Nelson had left Washington. Seward promised to answer on April 1 and at another meeting on that date delivered a message which, according to Campbell's later account, Seward said came from President Lincoln. Seward told Campbell that Lincoln might wish to resupply Sumter, a possibility Seward pooh-poohed, but that this would not be undertaken without notice to the Governor of South Carolina. The Commissioners continued to hold back.



Associate Justice John Archibald Campbell

By April 5th, however, President Lincoln had secretly ordered a fleet to Charleston to supply Fort Sumter, with instructions to arrive by the morning of the 11th. Rumors of troop and vessel movements reached the Commissioners, and Campbell wrote to Seward on April 7, expressing his concern. Seward responded, "Faith kept as to Sumter, wait and see." This time, however, the Commissioners decided to press the demands of their March 12 note, and on April 8 were handed Seward's reply, dated *March 15*, refusing to see them. "Faith kept as to Sumter" proved to mean not that it would be surrendered, but that, as Seward had said on April 1, the Governor of South Carolina would be given prior notice of an attempt to resupply it; that notice was given on April 8 as well.

Three and a half days later, the fighting began. On April 17 Virginia seceded. Having written a lengthy account of his activities to Justice Nelson on April 15,⁵² Campbell resigned as an Associate Justice of the Supreme Court on April 25 and headed South. Three weeks later, the *Savannah* received her commission.

Suppression of Evidence?

The evidence of Seward's negotiation with the Confederate Commissioners through Justices Campbell and Nelson, despite its deliberately unofficial character, was far more powerful proof of effective recognition of the Confederacy by the United States than the scattered recognitions of flags of truce and the form of surrender documents relied on by the defense at trial. Moreover, President Lincoln's involvement in these negotiations, and specifically the statement by Campbell that Seward spoke in President Lincoln's name on April 1, is confirmed in the biography of Lincoln by his long-time private secretary, John G. Nicolay, who quotes the President as saying that he "'told Mr. Seward he might say to Justice Campbell that I should not attempt to provision the fort without giving them notice.'" ⁵³

It seems at least arguable that Justice Nelson should have tendered himself as a defense witness if defense counsel were unaware of his personal knowledge of the negotiations. But the evidence is strong that defense counsel were aware. First, the whole of the Confederate government certainly knew, since on May 8, 1861 Jefferson Davis had given a full report of the

negotiations to the Confederate Congress, including copies of Campbell's correspondence with Seward, which specifically described Justice Nelson's involvement.⁵⁴ Given Sullivan's lines of communication with the leaders of the Confederate government, he had every means of knowing what it knew. Secondly, and still more compelling, extracts of Campbell's correspondence with Seward, including portions naming Justice Nelson and describing his activities, were published in the *New York Evening Post* on May 17, 1861, along with an editorial characterizing Campbell as a "tool of rebels," traitor and spy.

Why did the defense not call Justice Nelson? No record of the reason remains. But it may be suggested that the intention of defense counsel to preserve the possibility of review in the Supreme Court, strongly maintained on July 17 and relied on by Judge Shipman on July 23, precluded their summoning Justice Nelson from the bench to the witness stand and leaving the trial to Judge Shipman alone.

Epilogue

The *Savannah* privateers were never retried, although their continued imprisonment in the Tombs cost some of their number either sanity or life itself. Jefferson Davis' threats of retaliation has made the conviction of the *Jeff. Davis* privateers in Philadelphia an embarrassment to the United States government. Attorney General Bates' diary records indignantly that on February 5, 1862, he received a letter from the Assistant U. S. District Attorney in Philadelphia from which he learned for the first time "that the *Marshal* had recd. a letter from the *Secy. of State* directing *him* to transfer all the prisoners held for piracy—several of whom are indicted and one, at least, convicted—to Fort Lafayette!" (emphasis in original).⁵⁵ John Harleston's prison journal for February 2, 1862 records:

"Tomorrow we go to Fort Lafayette, and as *prisoners of War*. Hurrah Pirates no more." (emphasis in original).⁵⁶

Later, they were exchanged and returned home.

Judge Shipman would resign and go into practice with one of the defense lawyers. John Harleston enlisted in the Confederate Army, fought bravely and was thrice wounded. T. Harrison Baker got himself commissioned Captain of

another privateering vessel, this time bigger and with more than one gun.

In 1891 William M. Evarts, then a Senator from New York, old and nearly blind, secured the passage of the so-called "Evarts Act," under which the United States Circuit Courts of Ap-

peals were established. Later that year, his co-counsel from the *Savannah* trial, Samuel Blatchford, now also an old man and Circuit Justice for the Second Circuit, declared the new Court open, inaugurating the federal court system as we know it today.⁵⁷

Footnotes

¹ The indictment and the proceedings at arraignment and trial are reported in Warburton, *Trial of the Officers and Crew of the Privateer Savannah, On the Charge of Piracy* (1862); much of the discussion *infra* relies upon this volume without further reference to it. With the exception of one page of docket entries, neither the original court file nor the trial exhibits can be found.

² House of Lords, May 10 and 16, 1861.

³ J. D. Richardson, *Messages and Papers of Jefferson Davis and the Confederacy* 104 (A. Nevins ed. 1966) (hereafter "*Messages and Papers of the Confederacy*").

⁴ *Id.* at 102.

⁵ National Archives, Washington, D.C.

⁶ *Official Records of the Union and Confederate Navies in the War of Rebellion*, Series 1—Volume 5, 692 (1897) (hereafter "*Official Records*").

⁷ *New York Times*, June 16, 1861, p. 1.

⁸ *United States v. Schooner Savannah*, No. 16-350 (S.D.N.Y. 1861).

⁹ *Official Records* at 736.

¹⁰ Unpublished; courtesy of the family of John Harleston, Charleston, S.C. Some punctuation has been supplied for clarity.

¹¹ Lincoln Papers, Library of Congress, Washington, D.C.; reprinted in 1 *Messages and Papers of the Confederacy* 115.

¹² C. V. Woodward, *Mary Chesnut's Civil War* 236 (1981). The text of the order appears in J. T. Sharf, *History of the Confederate States Navy* 76 n. 1 (1887).

¹³ W. M. Robinson, Jr., *The Confederate Privateers* 134 n. 2 (1928).

¹⁴ The United States Circuit Courts were established by the Judiciary Act of 1789 and originally required the presence of two Justices of the Supreme Court and the District Judge for the District in and for which the Circuit Court was held. The required number of Supreme Court Justices was reduced to one in 1802, and by 1861 the District Judge could hold the Circuit Court alone.

The Circuit Court combined the jurisdiction today divided between the United States Court of Appeals and the United States District Court. Although the District Courts were also created in 1789, their jurisdiction was limited to admiralty, bankruptcy and minor crimes. Apart from hearing appeals from the District Court, the Circuit Court served principally as the United States court of general original jurisdiction. There was no United States Court of Appeals.

Nor were there, in 1861, Circuit Judges. The Circuit Court was presided over by one of the Justices of the Supreme Court allotted for that purpose, escorted by the District Judge who was, except when a dispute arose, a supernumerary. But for the brief existence of the federalist "midnight" Circuit Judges in 1801, and an early experiment in California which ended in the

appointment of Justice Stephen J. Field as the first (and only) tenth Justice of the Supreme Court, there were no Circuit Judges until the office was created in 1869 and the circuit duties of the Justices of the Supreme Court reduced, though not eliminated.

It was not until 1891 that Congress created the Circuit Court of Appeals, taking away the Circuit Court's appellate jurisdiction and the first loyalty of its judges. Presided over by District Judges, the United States Circuit Courts lingered on until, finally, on January 1, 1912, they adjourned forever, their remaining jurisdiction transferred to the District Courts.

A careful explanation of the evolution of the United States Circuit and District Courts may be found in the unsurpassed monograph of the late United States Circuit Judge Charles Merrill Hough, *The United States District Court for the Southern District of New York* (1934).

¹⁵ 1 *History of the Bench and Bar of New York* 266 (D. McAdam ed. 1897).

¹⁶ *Id.* at 476.

¹⁷ Published in *The Sunday News* (Charleston, S.C.), February 9, 1919.

¹⁸ A judgment of conviction in the Circuit Court could be reviewed in the Supreme Court only upon a certificate of division of the two judges below. If either judge sat alone, there could be no such division and, thus, no appellate review.

¹⁹ Lord, Day & Lord Opinion Book, March, 1861—March, 1865.

²⁰ Pickett Papers, Library of Congress, Washington, D.C. (hereafter "Pickett Papers").

²¹ See generally R. D. Meade, *Judah P. Benjamin* (1943). For an excellent vignette of Benjamin as a trial lawyer, see E. M. Kahn, "Judah P. Benjamin in California," *California Hist. Soc. Quarterly* (June, 1968), which recounts his appearance as trial counsel in the famous New Almaden mine case in 1860. Benjamin had been commissioned United States District Judge for the Northern District of California in 1850 but had declined to serve.

²² J. P. Benjamin to W. M. Browne, 3 August 1861 (Pickett Papers).

²³ National Archives, Washington, D.C.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See footnote 17.

²⁷ B. Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators* 53 (1865; reprinted by the Greenwood Press 1976).

²⁸ National Archives, Washington, D.C.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Proceedings December 9, 1929, being on the occasion of the presentation to the United States District

Court for the District of Connecticut of a portrait of William Davis Shipman, A Judge of said Court 1860 to 1873. (Library of the Association of the Bar of the City of New York).

³⁴ *History of the Bench and Bar of New York* 428 (D. McAdam ed. 1897).

³⁵ See footnote 17.

³⁶ National Archives, Washington, D.C.

³⁷ See the Supreme Court Historical Society *Quarterly*, Vol. IV, No. 4 (Summer, 1982).

³⁸ National Archives, Washington, D.C.

³⁹ *Id.*

⁴⁰ See footnote 17.

⁴¹ *United States v. Baker*, 24 Fed. Cas. 963 (C.C.S.D.N.Y. 1861) (No. 14, 501).

⁴² Robinson, *supra*, at 147, reports that the jury stood eight to four for conviction, but no source is shown or has been found for this statement.

⁴³ See footnote 17.

⁴⁴ C. B. Swisher, *The Taney Period 1836-64*, in *History of the Supreme Court* 871 (1974).

⁴⁵ *The Jeff. Davis Piracy Cases - Trial of William Smith for Piracy, as one of the Crew of the Confederate Privateer, The Jeff. Davis* (1861).

⁴⁶ *United States v. Smith*, 27 Fed. Cas. 1134 (C.C.E.D.Pa. 1861) (No. 16, 318).

⁴⁷ *3 Diary of George Templeton Strong* 33 (1952). In a late entry concerning the 1864 elections, Strong refers to Justice Nelson as "a full-blooded Copperhead." *Id.* at 475.

⁴⁸ *3 Diary of Gideon Welles* 320 (1911).

⁴⁹ W. M. Robinson, Jr., *Justice In Grey-A History of the Judicial System of the Confederate States of America* 593 n. 14 (1941). A copy of Gen. Grant's order of May 7 may be found in the Campbell-Colston Papers, Southern Historical Collection, University of North Carolina Library, Chapel Hill, N.C.

⁵⁰ Justice Campbell's moving account of his meetings with President Lincoln on April 4 and 5, 1865, may be found in the Campbell-Colston Papers.

⁵¹ Report of "Commissioners Crawford, Roman & Forsyth to Secretary of State [Robert Toombs], enclos-

ing notes of Judge Campbell," March 22, 1861 (Pickett Papers).

⁵² Justice Campbell left several accounts of the negotiations he and Justice Nelson had with Secretary of State Seward. The principal record of the negotiations is Campbell's letter to Seward of April 13, 1861, a copy of which he sent to Justice Nelson with an explanatory cover letter dated April 15, 1861 (New York State Historical Association, Cooperstown, N.Y.). On May 7, 1861, Campbell, by then in Montgomery, transmitted a copy of his April 13 letter to Seward, together with a cover letter containing further information, to Jefferson Davis, who passed them on to the Confederate Congress the next day. *1 Messages and Papers of the Confederacy* 82, 93, 97. Prior to leaving Washington, Campbell had also sent a brief and elliptical account of his activities to Justice Clifford under date of April 18, 1861. (Clifford Papers, Maine Historical Society).

After the war Campbell prepared (at least) two additional accounts of the negotiations. One, written in July, 1865 while in captivity at Fort Pulaski, is quoted in H. G. Connor, *John Archibald Campbell* 122-132 (1920). The second, prepared in 1874, is discussed in I Jefferson Davis, *The Rise and Fall of the Confederate Government* 267-268 (1881). Each of Campbell's post-war statements is remarkably true to his April 13, 1861 letter to Seward. That quoted in Davis's book is notable as containing the first suggestion, ascribed to Justice Nelson by Campbell, that Justice Nelson's opposition to violent resistance to secession was the result of consultations with Chief Justice Taney.

⁵³ J. G. Nicolay and J. Hay, *Abraham Lincoln* 33 (1890).

⁵⁴ See footnote 52.

⁵⁵ *The Diary of Edward Bates* 230 (1933).

⁵⁶ See footnote 10.

⁵⁷ The inspiration for this article, references to some of the original materials cited and a number of insights came from Volume V of *History of The Supreme Court of the United States: The Taney Period 1836-64*, by the late Carl B. Swisher (1974).

Roscoe Conkling and the Fourteenth Amendment

William F. Swindler

Had Senator Leland Stanford, Sr. of California not retained his colleague, Senator Roscoe Conkling of New York, to argue two cases for the Southern Pacific Railroad in the Supreme Court in 1882, the constitutional history of the United States for the ensuing half-century might have been substantially different. What made this case—and Conkling's argument—even more paradoxical was the fact that the key argument was never addressed by the Court, since the case was dismissed as moot, and in subsequent cases was accepted as "settled principle" without further discussion. Yet Conkling's contention, that the word "person" in the Fourteenth Amendment was intended by the draftsmen to include "legal persons" (i.e., corporations), helped to move the Court away from the original purpose of the Amendment—to guarantee the rights of the new freedmen—in favor of a new interstate economic

structure, upon which judicial construction focused until the middle of the 1930s and beyond. Indeed, the "original meaning" of the Amendment did not resume its primary position in constitutional law until after the desegregation cases in the 1960s.

There had been a growing interest within the Court, since the *Slaughterhouse Cases* in 1873 (just five years after the Amendment had been adopted), in developing the due process clause in the Amendment into something of broad substantive usefulness in the nationwide corporate enterprises that had burgeoned after the Civil War. In that case, a 5-4 majority upheld a Louisiana grant of monopoly licenses for slaughterhouses by narrowly defining the rights of individuals to be protected by the Amendment; the dissenters, led by Justice Stephen F. Field, contended that the Amendment's due process clause should pre-



Curator of the Senate

Senator Leland Stanford of California



Curator of the Senate

Senator Roscoe Conkling of New York

vent the states from depriving any person of his property rights without strict compliance with tested legal procedures. Ten years later, in the Civil Rights Cases, the Court greatly restricted the subject to which the "original meaning" of the Amendment was intended to apply, by holding that only "state action" denying a freedman his rights would be subject to judicial review.

The Court was thus ideologically prepared to accept the argument which Conkling advanced; the first "Southern Pacific" case, in fact, had been argued before the decision in the *Civil Rights Cases*, although it was not disposed of by the Court until three years later. Conkling, who by then had been in Congress for almost a quarter of a century (he served in the House of Representatives from 1859 to 1867, and in the Senate from 1867 to 1881), might have been on the bench himself, rather than appearing before it. In the course of a bitter party struggle in the Senate, his nomination as a justice had been confirmed (39-21) in March 1882, but he had declined the position.

The force of Conkling's argument on the broad meaning of the Fourteenth Amendment came from his membership on the Joint Committee of Fifteen which had drafted the Amendment in Congress in 1867-68. Citing the then unpublished report of the committee in his appellate brief, the ex-Senator from New York categorically declared that the legislative purpose of selecting the language which appeared in the Amendment was to accomplish this very object. Subsequent publication of the committee records suggested upon a careful reading that Conkling may have overstated the facts; but the controlling fact was that he said what the Court, at this time in national history, wanted to hear. The Court's opinion dismissing the case of *San Mateo County v. Southern Pacific Railroad* was handed down on December 21, 1885. The following spring, on May 10, 1886, in a companion case (*Santa Clara County v. Southern Pacific Railroad*), Chief Justice Waite laconically stated: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does."

Thus Conkling's argument in the earlier case was accepted *sub silentio*, and one of the pivotal constitutional concepts in modern American his-



Chief Justice Morrison Waite

tory made its appearance with virtually no fanfare. For half a century thereafter, critics of the Court insisted upon a "conspiracy theory" of construction of the opening clause of the Fourteenth Amendment, to convert it to the best interests of the new interstate economy which was to develop virtually without legal guidelines between the 1870s and the 1920s. It was not the "Southern Pacific" cases alone, of course, that developed this "substantive due process" doctrine of the Fourteenth Amendment into a convenient tool of rampant free enterprise; but the temper of the age, the personalities involved both in the Senate and in California politics, and the legislative history of the Amendment itself, combined to establish the new constitutional regime.

Roscoe Conkling has all but dropped from familiar American history, but in his day he was the embodiment of the nineteenth century individualist. Beginning law practice in Utica, N.Y. in 1850, his mastery of the popular "spread eagle" stump oratory of the time won him election to the House of Representatives in less than a decade. Although critics like James G. Blaine referred to his "turkey gobble strut" through the halls of Congress, he was a force to be reckoned with in the cataclysmic years of the Civil War and Reconstruction. He became Republican boss of New York State in 1867 when he was elected to

the Senate and thus dominated the control of Federal patronage in his state. The following year his political ideal, Ulysses S. Grant, was elected President. It was a sign of Conkling's own standing with Grant that the President should offer him, five years later, the Chief Justiceship as successor to Salmon P. Chase, who died in May 1873.

Grant showed himself to be something of a student of political history when he wrote to Conkling on November 8 that his "own preference went to you at once," but that he had wanted to wait until Congress was in session because "a Chief Justice should never be subjected to the mortification of a rejection" — a remote possibility, considering the administration dominance of the Senate. But there had been the record of rejection of the second Chief Justice, John Rutledge, in 1795, and the more recent frustration of John Tyler's efforts at Supreme Court appointments twenty years before (see "Robin Hood, Congress and the Court," YEARBOOK 1977), while his own nominations had not had smooth sailing. In 1870 the Senate had disregarded its tradition of collegial courtesy by rejecting the nomination of Senator Ebenezer Hoar of Massachusetts, an advocate of reconciliation with the South, while virtually compelling the nomination of the former Cabinet nemesis of

President Andrew Johnson, Edwin M. Stanton. (Only Stanton's fortuitous death, four days after his nomination, prevented this unequivocal Reconstructionist from ascending to the bench.)

Conkling declined Grant's offer of nomination on November 20. He knew his *forte* lay in the political rather than the judicial arena; but he also understood that the President, like other occupants of the White House before and since, was interested in finding sympathetic persons for the Court. In declining, Conkling urged that "your choice fall on another who, however else qualified, believes as man and lawyer, as I believe, in the measures you have upheld in war and in peace." Conkling obviously approved of Grant's "packing" of the Court, the previous year, to secure a majority for the reargued "legal tender" cases. This was "made possible by Congress" cooperation in raising the Court membership back to nine, after it had been cut from ten to seven to deny Johnson the chance to fill any vacancies.

(Grant still had trouble with the vacant Chief Justiceship. Following Conkling's refusal of the offer of nomination, the President submitted the name of George Henry Williams, his attorney general and one-time chief justice of the Oregon Territory. The nomination provoked such a coast-to-coast protest against Williams' inept handling of government cases and his political spoilsmanship that the Senate Judiciary Committee, which had first compliantly reported favorably on the name, called back its report for reconsideration. Conkling himself was sufficiently disturbed by the choice to suggest a bill making the appointment of a Chief Justice the prerogative of the Senate—something that might have raised some very sticky constitutional issues in itself. But, in any event, the President got the message and withdrew Williams' name on January 8, 1874. He then nominated Caleb Cushing of Massachusetts, an able enough jurist; but the publication of an indiscrete wartime letter from Cushing to the President of the Confederacy, Jefferson Davis, compelled Grant to withdraw this nomination. He finally nominated, and won confirmation for, Morrison R. Waite — seven months after Chase's death.)

Political spoilsmanship in itself was not objectionable to Conkling — indeed, his control of the New York Republican machine rested upon it. But, he believed in choosing competent people



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President Ulysses S. Grant

for the available positions, and on that basis resisted the growing movement to establish and extend a national civil service law. When Rutherford B. Hayes became the front-runner for the next Presidential nomination, Conkling furiously opposed him because of his strong advocacy of civil service; and when Hayes encouraged his Secretary of the Treasury, John P. Sherman (later sponsor of the first federal anti-trust law) to investigate federal patronage in New York State, and eventually suspended Conkling's strong henchman, Chester A. Arthur, as collector of customs for New York City, the fight broke into the open. Although the White House rode out the storm, Conkling consolidated his position in New York by getting another of his henchmen, Alonzo B. Cornell, elected governor and yet another, Thomas C. Platt, elected to the other Senate seat. As for Arthur, that would be an even more dramatic story.

It was this political milieu in which Conkling, as a member of the special committee for the drafting of the Fourteenth Amendment, joined with other Reconstruction politicians to accomplish several purposes. The Amendment itself was to have an anomalous legislative and ratification record, presaging its complex and often furiously argued judicial construction in the ensuing century. In June 1866, it passed both Houses of Congress and was formally submitted to the states on June 16. There were then thirty-seven states actually or nominally in the Union—depending on the status of several former members of the Confederacy, so that twenty-eight states were necessary for ratification. Since the Reconstruction Congress made it a condition of readmission that the seceded states ratify the Amendment, there was strong legal question whether ratification could actually be coincident with readmission.

Strikingly enough, however, it was the resistance of two Northern states and one Western state which precipitated the final anomaly. New Jersey had approved the Amendment on September 11, 1866, but the legislative session of February 20, 1868 "withdrew" the ratification; the governor vetoed the rescission, and the legislature thereupon overrode his veto. Ohio, which had ratified on January 14, 1867, rescinded this action the following year. Oregon, approving September 19, 1866, withdrew its approval on October 15, 1868, but by then Congress had al-

ready declared the Amendment validly ratified by the necessary majority. On July 9, 1868, Secretary of State William H. Seward had certified the majority on condition that the actions of New Jersey and Ohio in rescinding ratification be declared invalid. The following day both houses of Congress so declared, by joint resolution, and on July 26 Seward certified the Amendment as a part of the Constitution.

This did not end the matter by any means. Conscious of the considerable cloud that rested on the ratification process, the Secretary of State continued to accept ratification from readmitted Southern states and add them to the totals, during and after July 1868. North Carolina's ratification had been received on July 2, Louisiana's on July 9 and Alabama's on July 13, while Georgia's came in the same week as Seward's formal certification, on July 21. The State Department subsequently added the ratifications of Virginia (October 8, 1869), Mississippi (January 17, 1870) and Texas (February 18, 1870). Thus, an aura of questionable legitimacy—which gave further credence to the "conspiracy theory"—settled upon this key Amendment and has added to its colorful history. (In the high tide of the Progressive Movement, in the second decade of the twentieth century, five different proposals were introduced into Congress to repeal the Amendment.)

Although the Amendment as originally drafted was obviously intended to complement the Thirteenth, which had abolished slavery, and would be further oriented in its fundamental purpose by the Fifteenth, which purported to insure manhood suffrage without regard to race, it was clear from the beginning that this was not the first concern of the committee which drafted it, or the Court which construed it in the ensuing years of the nineteenth century. In terms of fundamental constitutional theory, as well as in economic effect, the generalized language of the opening section of the Amendment was what concerned such states as New Jersey, Ohio and Oregon:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any *person* [italics supplied] of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence established in unequivocal terms what had theretofore been tacitly assumed—that all Americans were in fact citizens of both their own state and of the Union. This dual nature of American citizenship, which was to baffle so many foreign commentators thereafter, was not only legally confirmed by this sentence, but the confirmation itself legally suggested that each status of citizenship in the same person was definable in terms of distinct rights and duties. The second sentence emphasized this in its three distinct references to “privileges and immunities of citizens of the United States,” the protection of due process from state impairment, and the introduction of the new (and long undefined) concept of equal protection of the individual under the laws.

As for the economic ramifications of the clause, the *Slaughterhouse Cases* of 1873 cast the shadow of the future. The carpetbag legislature of Louisiana had granted a monopoly to a politically favored corporation to operate slaughterhouses in New Orleans, and in effect denying a similar right of operation to a large number of other parties. On the contention that this amounted to depriving the outsiders of a property right without due process of law, the petitioners obtained federal jurisdiction under the new Amendment. A 5-4 majority of the Supreme Court denied the argument, declaring that the intent of the Amendment had not been to federalize “the entire domain of civil rights heretofore belonging exclusively to the states.” The minority contention was that the Amendment’s clause was indeed intended to insure that states could not frustrate these rights by denying due process. The significance of the case, aside from the decision on the general question, lay in the fact that both majority and minority factions recognized that the question itself was indeed cognizable under the Amendment.

With the matter thus in an anomalous state judicially, the scene now shifts to California, and a battle of titans which was in full fury there. Senators Leland Stanford, Sr. and George Hearst were the politically dominant figures of that state in the same degree that Conkling controlled New York. Stanford, the Republican, represented the Southern Pacific and other railroad interests, while Hearst, the Democrat, was the legal and political spokesman for the mining magnates. Stanford had been governor of California during

the Civil War, where his twin objectives had been to keep the state in the Union and to get legislation enacted which would commit state and local government financial support to a transcontinental railroad.

Stanford—who was later to devote a large part of the vast fortune he made from railroading to endowing a great university as a memorial to his son—was the prototype of the *laissez-faire* capitalist who was to dominate the half-century of American life following the Civil War. He adamantly opposed the tentative regulatory processes which were being legislated in various Midwestern states—known to history as the “Granger laws”—castigating them as “pure communism.” Then, in due course, the state of California and several counties undertook to levy taxes on the transcontinental railroad that Stanford had helped bring into being. The former governor now took to the new Fourteenth Amendment for relief, relying on the courts’ jurisdictional position in the *Slaughterhouse Cases*. The Circuit Court for the Ninth (California) Circuit found for the railroad in September 1882, and a writ of error was brought to the Supreme Court, where a battery of corporation lawyers, led by the now retired Senator from New York, undertook argument beginning December 19.

Conkling had overreached himself the year before, when he had resigned from the Senate in protest against President James A. Garfield’s energetic advancement of a stronger civil service with particular effect upon New York patronage. It was an occasional stratagem of nineteenth-century Senators, when they were elected by state legislatures, to make a gesture of resignation as a matter of principle if they were confident of being reelected. But by 1881 Conkling had lost control of the assembly at Albany, and his reelection ploy failed. However, fortune was not altogether hostile. That summer Garfield himself was fatally wounded by an anarchist, and upon his death in September Conkling’s old political ally, Chester A. Arthur, succeeded to the Presidency. Meantime, back in California Stanford’s old antagonist, Hearst, had acquired the San Francisco *Examiner*—which his son, William Randolph, would later make the cornerstone of a spectacular journalistic career—and was seeking the gubernatorial nomination on a party platform endorsing railroad taxes.

Among other converging events, President Arthur began flexing his political muscles, and in February 1882 advised Conkling that he was sending the ex-Senator's name to the Senate to fill a Supreme Court vacancy left by the death of the long-ailing and inactive Justice Ward Hunt. The nomination, Arthur wrote, was made on the recommendations of Senator John P. Long of Nevada, a mining millionaire, and Justice Stephen J. Field, of the California Ninth Circuit and author of the minority opinion in the *Slaughterhouse Cases*. Obviously, the President had solicited approval from persons interested in getting another *laissez-faire* vote onto the bench; he was also interested in establishing his own administration's control over appointments. Although public reaction was critical—Conkling's Senate career had been marked by doctrinaire opposition to civil service and other reforms—the Senate proceeded to confirm him by a vote of 39-12, with various abstentions. The next day from New York however, Conkling wrote the President declining the appointment "for reasons which you would not fail to appreciate."

What these reasons were may only be conjectured. Conkling had been suffering from ill-health since his failure to regain his Senate seat; he had just revived his law practice and was in the way of securing some lucrative retainers which

would soon be further enhanced by the appellate briefs from the Southern Pacific's tax litigation. Moreover, there is strong indication that Arthur had intended the whole thing as a gesture and a token repayment of past political support, and was not surprised or upset by Conkling's declining of the appointment.

Several Southern Pacific cases were now on their way to the Court. San Mateo County had brought the first tax suit against the railroad the previous April, in a California state court. In June the case had been removed into the Ninth Circuit and "elaborately argued." It was obvious to all concerned that this was a test case, and in it Conkling was to address the question of whether a corporation (i.e., the Southern Pacific) was a "person" entitled to the due process clause protection of the Fourteenth Amendment, as against arbitrary state action. Conkling's inside knowledge of the deliberations of the committee which had drafted the Amendment in 1867-68 made him the best lawyer Stanford could obtain, to argue to the Court that the word "person" in the second sentence of the Amendment's first clause could mean both a natural person and a "legal person" (i.e., a corporation).

(To make such an argument, counsel and the Court had to be in tacit agreement that the word "person" in the second sentence differed from the same word in the first sentence, where the Court had already declared that the word referred to natural persons. This was at variance from the usual rule of construction, that a specific word had the same definition throughout the same instrument. But such were the times.)

Conkling's argument, among other things, made the following statements:

The idea prevails that the fourteenth amendment was conceived and brought forth in the form in which it was at last ratified by the Legislatures of the States, as one single expression and entirety, beginning and ending, at least as to the first section, with the protection of the freedmen of the South.

It may shed some light on this supposition to trace from their beginnings some of the elements which were finally grouped and formulated together, for convenient submission to the States, into a single proposal of amendment. . . .

These extracts show that different parts of what now stands as a whole, were separately and independently conceived, and separately acted on, perfected, and reported, not in the order in which they are now collected, and not with only one single inspiration and purpose. They will show a design to select and employ not the narrowest, but the broadest, words in denoting the subjects



CHESTER A. ARTHUR

President Chester A. Arthur



The Court's opinion in the Southern Railroad Cases in 1885, written by Associate Justice John Harlan (right) relied substantially upon the dissent of Associate Justice Stephen Field (left) in the Slaughterhouse Cases of 1873.

on which the several amendments were to act, and in prescribing their scope.

They will show that neither Mr. Stephens or the committee understood that the word *citizen* and *person* are "synonymous terms, and that by the term *person* was meant a natural person, a citizen of the United States, and of the State in which he may reside."

* * *

The word "persons," as used in the Constitution and in other solemn and exact instruments was, as it is now, familiar as a term embracing artificial as well as natural beings.

Corporations of the strictest sort — corporations specially created even by royal grant — have been constantly, and in like cases, it may be said uniformly, held within the designation "persons."

"Persons," "occupiers," "inhabitants," "individuals," have in countless instances been held to include corporations, or artificial persons.

No action was taken in the San Mateo case for several terms, because of the several related cases which were making their way eastward — from the counties of Santa Clara and San Bernardino, and the state of California itself. Meantime, an agreement in lieu of taxes had been made between the Southern Pacific and San Mateo, and the Court in December 1885 dismissed that case as moot. Conkling did not appear as attorney of record in the later cases in 1886, but his argument in 1882 had accomplished his clients' purposes. Upon the opening of argument in the later cases, Chief Justice Waite ruled that the status of a corporation as a legal person was now "settled doctrine." If so, it had been obliquely settled. On the merits, Justice John

Marshall Harlan then spoke for a unanimous Court in affirming the circuit judgements in favor of the railroad.

The interstate corporation was now essentially insulated from regulation by states, while the concept of regulation by the national government was an idea still struggling to be born. However, the struggle was in progress, and three years later the Interstate Commerce Commission was created by Congress, followed the next year by the first anti-trust (Sherman) act. While a narrow-constructionist Court would, for most of the next half-century, limit the effectiveness of federal administrative regulation of a predatory free enterprise system which reached its maximum power at the turn of the century, the constitutional power over modern American economic life would be judicially sanctioned after the first New Deal. The fact was, that a point of no return had been passed in 1882, with Roscoe Conkling's arguments in the Southern Pacific case.

SOURCES

In lieu of footnotes, the primary source materials for the foregoing paper are to be found in 16 Wall. and 116 and 118 U.S. The Conkling-Grant and Conkling-Arthur correspondence is in Alfred R. Conkling's *Life and Letters of Roscoe Conkling* (New York, 1889), and the transcript of Conkling's argument before the Supreme Court is among the case papers (Docket No. 106, 1882 term) in the Supreme Court Library.

Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era

Melvin I. Urofsky

On January 3rd, 1916, Louis D. Brandeis, then one of the leading Progressive reformers in the country, addressed the Chicago Bar Association on the challenges confronting the legal profession, especially the waning respect among the populace for the law. He traced the problem to the failure of law to keep pace with rapidly changing social and economic conditions in the country. "Political as well as economic and social science noted these revolutionary changes," he declared,

But legal science... was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently 18th century conceptions of the liberty of the individual and of the sacredness of private property. Early 19th century scientific half-truths like 'The survival of the fittest,' which translated into practice meant 'The devil take the hindmost,' were erected by judicial sanction into a moral law.¹

Brandeis, who within a few weeks would be nominated to the Supreme Court of the United States, expressed a complaint common among reformers in the early twentieth century. The industrial revolution had wrought radical changes in the economic, political, and social relations of the nation; the United States now had a large urban workforce, men and women jammed into unhealthy tenements and hovels, working in unsanitary and dangerous factories and mines for subsistence wages or less. The great increase in American productive wealth had come at an enormous cost in human misery. Reformers correlated a number of problems to the growth of industry, and devised various remedies to protect workers, especially women and children, from the malignant effects of factory life. Protective legislation, including the establishment of maximum hours and minimum wages, the abolition of child labor, and the creation of workmen's

compensation programs all aimed at redressing the perceived imbalance between the lords of industry and their ill-used workers.

These campaigns, begun in the closing years of the nineteenth century, had proven fairly successful in the state legislatures, but then, reformers claimed, a reactionary judiciary, led by the Supreme Court of the United States, struck down one law after another, relying on hide-bound in-



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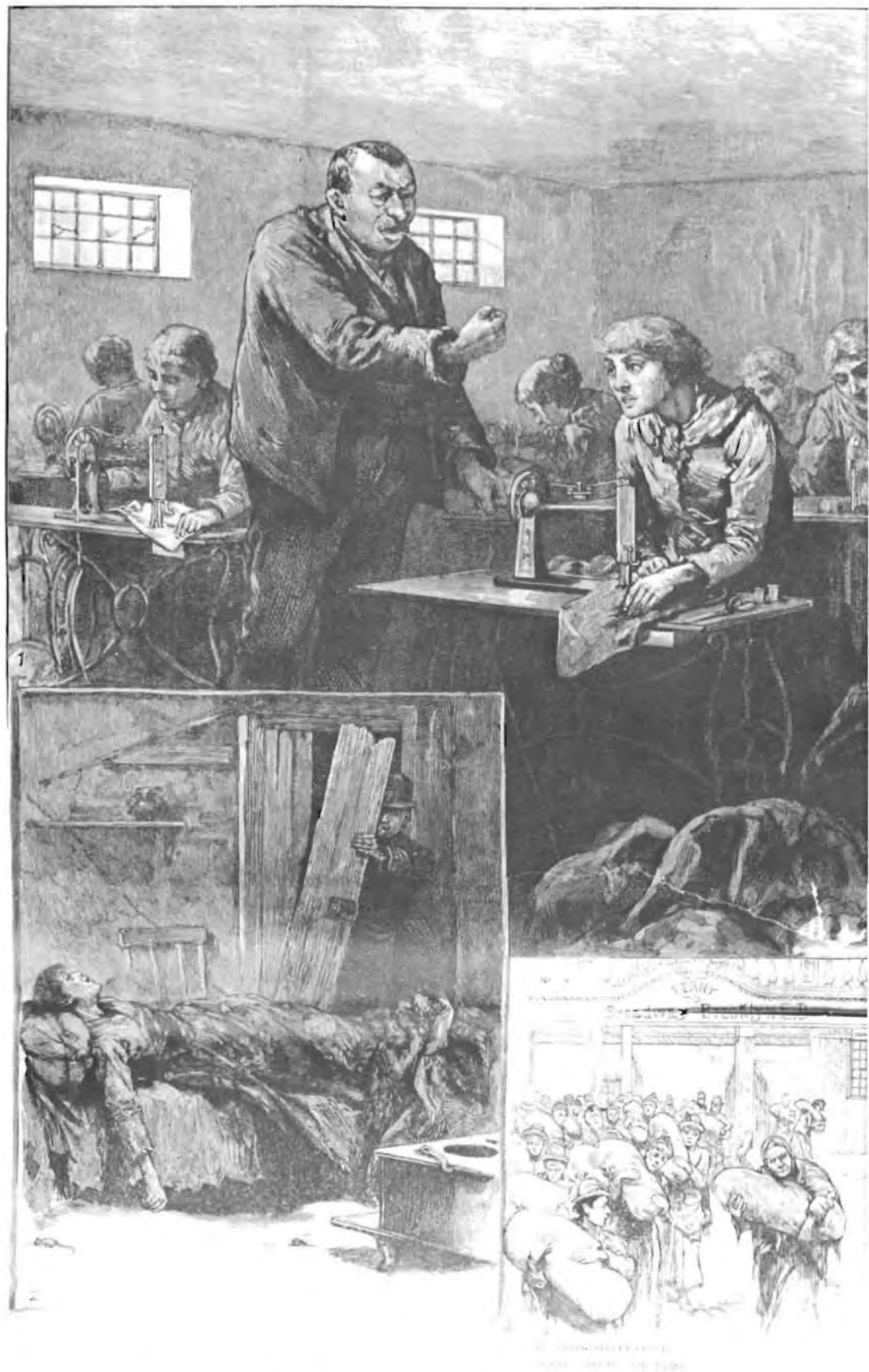
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The "female slaves of New York" from Leslie's Illustrated Newspaper, November 3, 1888.



Library of Congress

A period engraving depicting America's industrial growth.

terpretations of so-called freedom of contract and due process of law. Progressives as disparate in political ideology as Brandeis, Theodore Roosevelt and Gilbert Roe all attacked a legal system which, in their opinion, steadfastly refused to face up to the facts of modern life, and instead erected the judges' conservative economic prejudices as barriers to social reform. William F. Willoughby, in his presidential address to the American Association for Labor Legislation, noted how so many people were "still dominated by the dogmas of laissez-faire and individualism as preached by the Manchesterian and utilitarian schools of the middle nineteenth century. They are still influenced . . . by the doctrine that all resort to the state is to be deprecated."²

The attack on courts as enemies of reform, as blind to social change, and as bastions of an outmoded economic orthodoxy received wide play during the Progressive years, and since then has worked its way into countless historical studies and monographs. There is no doubt that in some areas courts were conservative, and even reactionary. Decisions such as *Lochner v. New York*,

and its widely quoted dissent by Justice Holmes — "This case is decided upon an economic theory which a large part of the country does not entertain" — did little to establish a reputation for courts as friends of reform.³

Recently, however, a number of scholars have begun to re-examine this traditional view. Following the teachings of the "new legal history," they have begun to read more widely in the actual case literature, to see not just how the courts decided the "great" cases, but how they acted upon all the reform issues which came before the bench.⁴ The results of these new investigations require a wholesale rethinking of the problems of judicial response to social reform, and the role of courts in changing environments. Certainly, insofar as the Supreme Court decided issues of protective legislation in the Progressive Era, one would have to conclude that far from being an enemy of reform, the Court was as progressive as most reformers could desire.

I

The litany of Progressive complaints derived from a basic assumption that industrialization

had so altered traditional economic and social relationships as to endanger not only the health and welfare of laborers, but to undermine the moral and political bases of democracy. To take but one example, reform investigators "discovered" that the huge increase in the number of women workers in factories correlated with a rise in prostitution, a decline in church-going, and a growing population dependant upon charity. To the investigators, the reasons were clear. An 1884 Boston study, covering over a thousand working women, found that most factory owners required them to work more than sixty hours a week, and that commercial businesses often demanded eighty-hour weeks, including Sundays, with no extra pay. A New York Labor Bureau study described in horrified terms the inadequate ventilation, filthy sanitary facilities, and dangerous conditions of New York sweatshops. As one immigrant woman sadly told Lincoln Steffens, her young daughters wanted to become prostitutes when they grew up, because the working conditions and pay were better than in the factories.⁵

A similar concern marked the crusade against child labor, and in fact tied in closely with the fight to improve working women's conditions. Women and children constituted the heart of the family, and the quality of America's next generation would be adversely affected by the deprivations visited upon those now employed for long hours, in dangerous working conditions, and lacking any opportunity for moral or intellectual growth. In explaining why it backed Progressive reforms, the National Conference of Charities declared that "all we have attempted is to keep the sub-basement floor which we regard as positively the lowest stratum that should be tolerated by a community interested in self-preservation."⁶ While reformers certainly cared deeply about the underprivileged, they also feared the future effects of long hours, low wages, and stunted growth. The preamble to the Oregon minimum wage law explicitly declared: "The welfare of the State of Oregon requires that women and minors should be protected from conditions of labor which have a pernicious effect on their health and morals, and inadequate wages . . . have such a pernicious effect."⁷

The general legislative outline of the protective program emerged fairly early: minimum standards to reduce the incidence of child labor; maximum hours for women, children, and men

employed in dangerous occupations; payment of labor in cash, to eliminate the abuse of the scrip system and company stores; the establishment of a minimum wage, first for women and children, and then for men; elimination of employers' common law defenses against liability for injury to their workers; and the creation of workmen's compensation plans to insure against the hazards of death and disability in the factory. As Richard Hofstadter concluded, "it was expected that the [neutral] state, dealing out evenhanded justice, would meet the gravest complaints. Industrial society was to be humanized through the law."⁸

The reformers, operating primarily in the state legislatures, succeeded in securing much of this program, and in the first two decades of the twentieth century significantly transformed the environment of industrial workers.⁹ How Progressives secured their victories, however, concerns us less than the opposition they faced within the legal community, and the question of how the courts responded to protective legislation. Common wisdom for many years set up the judiciary as a barrier to reform and, at least on the surface, evidence exists to support this view.

Following the Civil War, the American economy underwent not only a quantitative transformation but a qualitative one as well. What had been essentially a small-unit, agrarian economy changed with breath-taking speed into one dominated by large industries organized in investor-owned corporations. The new order generated a myriad of demands for additional resources, labor, legislative favors, and for a law system sensitive to its needs and protective of its interests.

Here again the standard wisdom has limned a familiar portrait. Skilled corporate attorneys (a genre which had not even existed before the Civil War) steered a compliant Supreme Court into erecting the Fourteenth Amendment's due process clause as a substantive barrier against public efforts to regulate industry. Thomas M. Cooley and Christopher G. Tiedeman provided the intellectual scaffolding for the enterprise, upon which Justice Stephen J. Field applied the bricks and mortar of inviolate property rights, with the pinnacle reached in the *Lochner* decision.¹⁰ The Court's power, declared Field, is "the safeguard which keeps the mighty fabric of government from rushing to destruction. This negative power is the only safety of a popular government."¹¹



Thomas M. Cooley

Cooley, whose *Constitutional Limitations* (1868) may have been the most cited legal treatise in American law, left no doubt that he relied on courts to protect the nation against the kind-hearted but ill-advised attempts by legislatures to meddle with the social and economic order. "It is a duty," he lectured, "which the courts, in a proper case, are not at liberty to decline." Tiedeman was even more explicit in his two-volume treatise on limitations of the police power, referring to "the power of constitutional limitation to protect private rights against the radical experimentation of social reformers." No law, he urged, should go beyond the ancient and revered maxim, *sic utere tuo ut alienum non laedas*.¹²

For a while it seemed as if bench and bar had but one goal, the protection of private property through court vetoes of adverse legislation. As one judge noted disprovingly: "There has in modern times arisen a sentiment favorable to paternalism in matters of legislation."¹³ In one of the most celebrated cases of the day, *In re Jacobs*, Judge Robert Earl, speaking for a unanimous New York Court of Appeals, struck down a state statute attempting to prohibit cigar-

making in tenements. This law, declared Earl,

interferes with the profitable and free use of his property by the owner or lessee of a tenement-house who is a cigar-maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and some portion of his personal liberty.¹⁴

Within the legal profession, a number of voices applauded this stand against the alleged depredations of King Mob. "There is an inner Republic formed by the Bench and Bar," happily proclaimed one lawyer, which, "as one of the moral and intellectual forces of the nation, has a clear and important duty to perform in matters of such great public concern [the defense of capitalism]." John F. Dillon lectured the New York State Bar Association on "Property — Its Rights and Duties in Our Legal and Social System," while his colleague William Guthrie warned against "the despotism of the majority." We lawyers, he intoned, "are delegated . . . to teach the people in season and out to value and respect individual liberty and the rights of property."¹⁵ In Wisconsin, Judge James G. Jenkins went so far as to prohibit workers not only from striking but even from quitting their jobs, since that would infringe upon the property rights of their employer!¹⁶ Nor was this all rhetoric; the courts handed down enough decisions like *Jacobs* and *Lochner* to give credence to charges that the bench had gone over com-



"The little laborers of New York City," an 1873 engraving of the use of child labor in the tenement cigar industry.

pletely to the service of big business in opposing humane reform legislation.

In the early years of this century, one could scarcely pick up a popular periodical without seeing an attack on the courts. What could one expect, Justice Samuel Miller had earlier asked, of judges "who have been at the bar the advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest?"¹⁷ William Trickett, the dean of Dickinson Law School, was but one of many voices arguing that courts had usurped the power of judicial review, and that the Founding Fathers had never intended judges to have a veto over legislation. Horace Davis, Gilbert Roe, Robert LaFollette and even Theodore Roosevelt soon joined in this chorus.¹⁸

Within academia more objective yet no less fervent voices also attacked the courts' apparent antipathy to social reform. Professor William F. Dodd of Princeton argued that the due process clause, as then interpreted, meant that judges could and did declare unconstitutional any law they didn't like, while remaining politically unaccountable. Ernst Freund, a highly respected law teacher at the University of Chicago, charged that judges were legislating, and the American governmental system suffered as a result. Due process, declared E. S. Corwin, "comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency."¹⁹

One of the best reasoned critiques came from a leader of the new school of sociological jurisprudence, Roscoe Pound. The Harvard law professor wrote in the wake of the highly controversial decisions of the Supreme Court in *Lochner* and *Adair v. United States*, which voided a federal law prohibiting "yellow dog" labor contracts.²⁰ Pound attacked the concept of liberty of contract in which courts ignored the realities of modern life and clung to the fiction that all men were equal in fact as in law:

Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as



Associate Justice Oliver Wendell Holmes, Jr.

if they were farmers haggling over the sale of a horse? Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?²¹

And, of course, one should not forget the most effective critic of formal jurisprudence, Oliver Wendell Holmes, Jr., whose dissents raised the spirits of the faithful and kept them hoping for a better day and a Court more attuned to contemporary realities.

The portrait of a judiciary out of touch with reality became enlarged in the writings of Progressive reformers and advocates of a sociological jurisprudence, and then embedded in the writings of later political and legal historians sympathetic to the Progressive cause. Yet, to repeat the question, how reactionary *in fact* were the courts? Were they bastions of reaction, or were they sympathetic, even supportive of reform legislation? Had judges usurped the legislative function, or did they do little more than prevent Congress and state governments from overstepping clearly defined bounds? Were the *Adair* and *Lochner* decisions the norms, or merely exceptions to the general trend?

II

It is well to remember that the nineteenth century marked the great period of common law

development in the United States. Judges refined and in many instances created the laws of contracts, torts, domestic relations, suretyship, commercial instruments, and crimes against persons and property. They did so in response to the needs of an expanding country, and to use Willard Hurst's famous phrase, released the energy necessary for Americans to tame a wilderness and harness its resources in an orderly manner. But, as Hurst reminds us, law typically operates after the fact. It responds to, rather than anticipates, new situations and new institutions. Throughout the nineteenth century judges had made the common law over in response to events which had already taken place; the courts legitimized that which had happened and gave their imprimatur to agencies which had proven their value, agencies of a new, industrialized America.²²

Now society was shifting again, expressing its dissatisfaction with the dominant industrial model, and through state legislation, experimenting with means to rein in corporate strength in order to protect industrial workers. Even if all judges had been prescient, it is unlikely they would have rushed to approve a wide spectrum of innovative laws, many of which ran counter to

long established common law principles, until the courts could develop measures by which to evaluate them. Fortunately for the reformers, the law did provide a rationale for this legislation under the police power.

All commentators recognized that as part of its sovereign powers, a state could override both individual and property rights to preserve public order and to maintain minimal standards for the health, safety, and welfare of the populace. Conservatives, of course even while conceding the existence of this authority, argued that the state could only interfere minimally with individual and property rights. Cooley, for example, saw the power as necessary for any well-ordered society, but it remained very limited. The regulations, he declared, "must have reference to the comfort, safety, or welfare of society. . . and they must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers."²³ Progressives, on the other hand, saw the power as far more extensive, by which the authority of the state could be exercised on behalf of the oppressed. "The police power," said Holmes in a non-labor case, "may be put forth in aid of what is sanctioned by usage, or held by the prevailing



The 1903 Fuller Court: (seated, left to right) Associate Justices Henry Billings Brown and John Marshall Harlan; Chief Justice Melville Fuller; and Associate Justices David Brewer and Edward Douglass White; (standing, left to right) Associate Justices Oliver Wendell Holmes, Jr., William Rufus Peckham, Joseph McKenna, and William Day.

morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." ²⁴

In the police power lay the key to constitutional approval or denial of protective legislation. In those state and federal courts which adopted a narrow view of the power, protective legislation had tough sledding; conversely, where judges took a more expansive view of how the state could further public welfare, reformers found a more sympathetic hearing. The Supreme Court, in the years following the Civil War, had numerous occasions to pass upon the limits of the police power, and in so doing, created the precedents by which to judge Progressive legislation. Moreover, as Taft's Attorney-General, George W. Wickersham, noted, the whole doctrine of police power had been created by the courts themselves in an effort to harmonize the needs of a dynamic society with the strictures of written constitutions and statutes. ²⁵ Because this power was rarely, if ever, formally spelled out by legislatures or constitutional conventions, the police power at any time was essentially what the courts declared it to be.

Even so property conscious a jurist as Stephen Field recognized the great range of the power "to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to the wealth and prosperity." ²⁶ Police power, said Mr. Justice McKenna, "is but another name for the power of government." Such sweeping definitions appeared regularly in the Court's decisions supporting a variety of prohibitions and regulations. "The State may interfere," Justice Brown declared, "wherever the public interests demand it." In one of the earliest and most notable police power cases, the Court made it clear that even the sanctity of contract and property rights, under proper circumstances, might be restricted for the public good, an idea which sent paroxysms of terror through conservative ranks. ²⁷

There were, to be sure, limits on the police power, although Tiedeman's comment, that the "unwritten law of this country is in the main against the exercise of police power," appears to be more wishful than reflective of reality. ²⁸ The first Justice Harlan, in upholding a Kansas prohibition statute, noted that the courts had the ob-

ligation to ensure that measures enacted under the guise of a police regulation had a "real or substantial relation" to the goals of public health, morals or safety, and were not invidious invasions of fundamental rights. ²⁹ Harlan did not, however, deny the generally broad scope of the power, and in a later case, while still maintaining a demonstrable link between statute and goal, expanded these goals to include "public convenience" and "general prosperity" as well as health, safety and morals. Moreover, the Court recognized that as society changed due to developments in industry, transportation and communications, the methods of achieving the police power goals would also have to change. ³⁰

Certainly Ernst Freund, the most noted authority on the police power during this time, found states constantly expanding their definitions of what constituted legitimate goals of government. Specific limitations upon police regulation existed primarily in the Bill of Rights, he concluded, so that "a vast field of legislative power is not within these restraints." While noting that practically every state regulation had been attacked as violating the due process clause of the Fourteenth Amendment, he pointed out that the Supreme Court had "taken on the whole the position that the judgment of the state legislatures as to the requirements of the public welfare will be taken as conclusive against the claim of liberty, property or equality." ³¹ Little wonder that one commentator believed a veritable revolution had been wrought, in which property rights and the so-called liberty of contract had been submerged to the "superior rights of the whole community." ³²

It was, in fact, as a police regulation that the Supreme Court heard its first state labor cases. In 1885 the Court approved a San Francisco ordinance prohibiting washing and ironing in public laundries between 10 P.M. and 6 A.M. The ordinance came under attack as interfering with liberty of contract, but the Court ignored this argument. It took the common sense approach that the danger of fire at night in a city with so many wooden buildings justified the rule as a matter of public safety. The Court, speaking through Mr. Justice Field, did not even pause to judge the measure as a labor regulation. ³³

Prior to 1896, the Supreme Court passed on very few laws designed to protect labor because of limits on its jurisdiction. ³⁴ Until the Judiciary

Act revision of December 1914, no case could be appealed to the high court if the state court of last resort had held the act in question unconstitutional. One index of the increasing receptivity of state judges to protective legislation can be found in the growing number of appeals for review in Washington, reflecting the many statutes upheld at the state level. A Utah law, limiting working hours in mines and smelters, marked the beginning of the Supreme Court's review of protective legislation.

III

The struggle to reduce the number of working hours constituted one of the major reform efforts in the Progressive era, and was part of a longer campaign for shorter hours dating back to the early nineteenth century. New York had enacted an hours law in 1853, establishing eight hours as a standard day for laborers on public works absent any contract calling for other terms. In 1874 Massachusetts moved to protect women and minors by limiting their work week to no more than 60 hours, and the state's highest court upheld the statute as a proper exercise of the police power. "This principle has been so frequently recognized," said the court, "that reference to the decisions is unnecessary."³⁵ The call for an eight hour day for all workers became a standard demand by organized labor, while reformers in particular worried about the effect long hours would have on children and women who were, as John B. Andrews noted, "the mothers of the coming generations." Despite growing sentiment favoring a shorter day, American workers in 1899 averaged over 57 hours a week on the job, and a decade later the figure had declined only 2.5 hours.³⁶ The problem, as most reformers saw it, can be gleaned in the testimony of one shop girl:

It is a sham the Way the store keepers make us Poor Girls work 14 and 13½ hours a Day, and then If a Person asks to get of an evening Why they scold and Wont let us off. I am a poor hard Working girl and I must Work for our Family Because I have no father and I am sick to On account of Working so Many hours a day. . . . I Wish you People have Pity On us Poor girls and try to have the stores Closed. . . . I would like to sign my name But I am afraid that If my Boss would get to fine this Out He would fire me and I must Work.³⁷

In the face of such conditions, it is little wonder that by 1918 forty-three states, Puerto Rico and

the District of Columbia had statutes regulating hours.

Legally, reformers relied on the police power to justify these laws, but recognized that it would be impossible to secure their ultimate goal of an eight-hour day for all workers in one swoop. Ernst Freund urged them to build slowly; the idea of one day's rest in seven could be justified, and from there inroads could be made through applications of the police power to specific occupations.³⁸ Against them stood the implacable hostility of businessmen who opposed any efforts by the government to "interfere" in their business, and who relied on the sanctity of contract to thwart hours limitations. As one paper charged, the eight-hour movement was nothing but "humbuggery":

A wise laboring man will work just as long as he agrees to work for certain wages, specified between himself and his employer whether for one hour, or for twenty-four hours. No legislative body on earth can properly have anything to do with the subject. It is purely and exclusively a matter of contract between the individual wage-payer and the individual wage-worker.³⁹

Thus the stage was set for first case testing a state regulation of hours.⁴⁰ The Utah law, which limited work in mines and smelters to eight hours a day, found its justification not only in the general police power, but in a unique clause in the state constitution requiring the legislature to "pass laws to provide for the health and safety of the employees in factories, smelters, and mines." Jeremiah Wilson, counsel for the mine owner Holden, argued that the statute was not a valid exercise of the police power, since it benefited only a portion of the community; that it abridged the privileges and immunities of Holden as a citizen of the United States; and that it violated the Fourteenth Amendment by depriving him of property without due process of law.

In a 7-2 decision, the Supreme Court emphatically rejected these arguments, and put forward a strong, liberal interpretation of how states might use the police power. Speaking through Justice Brown, the Court recognized that work in mines and smelters differed from ordinary employment, and an employee beneath the surface of the earth was "deprived of fresh air and sunlight and is subject to the foul atmosphere and a very high temperature, or to the influence of noxious gases." The fact that certain occupations could

be reasonably deemed dangerous by the legislature, and that an appropriate remedy lay in restricting the hours men spent inside such conditions, justified the state's exercise of its power to protect workmen. But the Court went even further. In dismissing the argument that the state had restricted the right to contract, Brown noted that the employer and employee, while both of age and competent to contract, did not stand in a position of equality. When such disparity existed, the state could intervene if necessary to protect the welfare of the party with a significantly lesser bargaining power. This discretion resided in the legislature, and while the police power was not unlimited, within its rather broad constraints the courts would not second-guess the wisdom of elected representatives.⁴¹

Holden became the paradigmatic case for protective legislation, with its holding that special and/or dangerous conditions justified the intervention of the state.⁴² The Court then seemed to expand the scope of state control in *Atkin v. Kansas*, confirming a state law establishing eight hours as a day's work on all public projects and for all private employers contracting to do state business. In response to counsel's argument that no dangerous work was involved and that the state had interfered with liberty of contract in an unwise policy, Justice Harlan said:

We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours a day. . . . It cannot be deemed a part of liberty of any contract that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. . . . Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.⁴³

In both cases, Justices Rufus Peckham and David Brewer dissented without opinion, and were joined in *Atkin* by Chief Justice Melville Fuller. The dissenters had a majority, however, when the Court heard a challenge to a New York statute prescribing maximum hours for bakery workers. *Lochner v. New York* became the classic statement of substantive due process, and apparently spun the Court completely around from its previous views on the police power.

Peckham, undoubtedly the most conservative member of the Court and a disciple of Stephen Field, posed the issue in terms of due process: "Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the rights of the individual?" The very phrasing of the question left no doubt that Peckham was looking not only at the limits of the police power, but at the policy decisions as well. Where in *Holden* and *Atkin* the Court had deferred to legislative judgment, it now appeared it would limit the power to those laws which judges and not legislators deemed wise and prudent. Lest anyone misunderstand him, Peckham explicitly declared that "the Court looks beyond the mere letter of the law in such cases" to determine the *purpose* of the statute. Here, said Peckham, "the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantive degree, to the health of the employees."⁴⁴

Conservatives cheered *Lochner* while reformers were predictably aghast, and both sides leaped into print with defenses of and attacks upon the Court.⁴⁵ There has been an odium about the case ever since, representing, as it does, an abuse of judicial power at its worst, and it took the Court more than three decades before it finally buried the concept of substantive due process in economic legislation. But in terms of the Court's response to protective legislation in the Progressive era, *Lochner* should be seen as the exception rather than the rule. Peckham mustered a bare 5-4 majority, and elicited powerful dissents from Harlan and Holmes. Moreover, only a few months later the Court reaffirmed its ruling in *Holden* with a *per curiam* decision upholding a similar Missouri statute, and then extended *Atkin* by validating a federal eight-hour law for government laborers. Holmes, in the latter case, specifically abjured any power of the Court to speculate as to legislative motive.⁴⁶

If *Lochner* has been overrated as a triumph of judicial conservatism, one must concede that *Muller v. Oregon* has been similarly blown out of proportion.⁴⁷ The brief Louis Brandeis prepared on behalf of the Oregon ten-hour law for women was unquestionably unique, and became the model of how lawyers could properly and effec-



Associate Justice David Brewer

tively introduce sociological and economic evidence into a case. And no doubt Brewer's discovery of women's unique physical structure and maternal functions struck many, then as now, as incredibly disingenuous. One should note, however, that *Muller*, which pointedly ignored *Lochner*, merely picked up the same thread spun earlier in *Holden* and *Atkin*. There are legitimate reasons for classifying female workers so as to require the protection of the state; therefore the exercise of the police power was legitimate and did not violate either due process or contract strictures.⁴⁸ Despite arguments by Felix Frankfurter and Josephine Goldmark,⁴⁹ among others, of the revolutionary reversal of the Court in *Muller*, it is only revolutionary if one looks at Peckham's *Lochner* opinion. If fits in perfectly with *Holden* and *Atkin*, and with the hours cases decided afterwards.

In 1911 the Court upheld a 1907 Act of Congress regulating hours of railroad employees on trains moving in interstate commerce, and reaffirmed the legitimacy of an 1892 eight-hour public works law.⁵⁰ When Massachusetts passed a comprehensive regulation of working hours for

women in all types of employment, the Court unanimously sustained it, only a few weeks after it entered a *per curiam* judgment in favor of another Oregon women's hours law.⁵¹ In 1915 Brandeis appeared as counsel in defense of two California statutes, one regulating hours for female hotel workers and the other a more general eight-hour law applying to nearly all female workers. In both cases, Justice Hughes delivered the unanimous opinion of the Court, dismissing the due process and freedom of contract arguments, and upholding the power of the state.⁵² Although the Court split in approving the Adamson Act, in which Congress prescribed an eight-hour day for railroad employees, it nonetheless endorsed the congressional power, and drew upon a long list of precedents to justify its decision.⁵³ The trend had become well-nigh irreversible, and in the few hours cases which came before the Court during the war years, the judges sustained the exercise of the police power in every one.⁵⁴

IV

In fact, by the later cases the Courts had begun to move beyond the question of maximum hours regulation to the closely related issue of minimum wages. Reformers had long recognized that a reduction in hours without some adjustment of pay scale would work immense hardships on working men and women. Many of the eight-hour laws directly affected wages, for until the 1880s, most laborers were paid not by the hour but by the day. Thus a worker earning one dollar for a day would earn more per hour if the workday was reduced from ten or twelve hours to eight. Justice McKenna, in his opinion in *Bunting v. Oregon*, recognized that the state's hours regulations affected the wages women would earn, but upheld the law since its primary purpose related to hours.⁵⁵

While the modern minimum wage movement originated in Australia and New Zealand in the 1890s, both medieval England and colonial America had regulated wages, although in order to set maximum rather than minimum scales. While some nineteenth century visionaries such as Mathew Carey, Edward Bellamy, and Frank Parsons argued for a floor under wages, as late as 1900 few reformers included the concept in their programs.⁵⁶ As Progressives began to explore more deeply the interrelationship of wages,

hours and quality of life, they developed the theory of a living wage, the amount necessary for a person to live decently according to minimal middle class standards. In 1905, one estimate placed this figure at eight dollars a week, yet the Census of Manufactures of that year reported that of one million factory women sixteen years of age or over, 77.6 percent earned less than the minimum even during the busiest week of the year.⁵⁷

Even more than in the dispute over hours, the question of state regulation of wages hinged on freedom of contract. Where the rationale of *Holden* and *Muller* reflected a common sense understanding that certain occupations were inherently dangerous or that a disadvantaged class needed some protection, a minimum wage meant that all workers had to be paid according to arbitrary fixed standards which bore no relation to the work involved and which, according to many critics, could not even be determined by objective criteria.⁵⁸ For conservatives, such interference in the natural workings of the economy would only lead to total disruption of society. Rome G. Brown, for example, fulminated against the minimum wage as "confusing," "economically unsound," "unenforceable,"

"paternalistic," and "infringing upon liberty of contract."⁵⁹ When reformers claimed that the prevailing "iron law of wages" ground "the marrow out of the bones, the virtue out of the souls, and the souls out of the body," conservatives responded that people earned what they deserved. "Any wages are fair," declared W. A. Croffert, "which are as high as that sort of work commands in the open market." One might as well say that a farmer "ought" to get more than the market price for his wool or potatoes! "Charity and business are and ought to be perpetually divorced."⁶⁰

The first wage laws to come before the courts dealt not with minimal levels but with manner of payment. Many mines and factories paid their workers in scrip, redeemable only in company-owned stores which charged premium prices. When Pennsylvania attempted to outlaw scrip payment, the state's highest court struck down the statute, declaring it to be an infringement upon the right of both employer and employee:

More than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best,



Office of the Curator, Supreme Court

The 1911 White Court which upheld various wage regulations reflected an important change on the Court itself: joining the five senior justices (seated) were (standing, left to right) Associate Justices Van Devanter, Lurton, Hughes and Lamar.

whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privilege and consequently vicious and void.⁶¹

Although *Godcharles* was frequently cited by conservatives as epitomizing what freedom of contract meant, most people recognized an inherent unfairness in a system where parties to a contract did not bargain from equal positions. Christopher Tiedeman, certainly no liberal, believed scrip and similar laws constitutional because they protected and enhanced the liberty of workers to bargain meaningfully.⁶² The Supreme Court agreed. In 1899 it upheld an Arkansas statute requiring railroads to pay wages due an employee upon discharge. The right to contract is not absolute, the Court held, and private contracts had to conform to state law.⁶³ Two years later the Court confirmed the constitutionality of a Tennessee law requiring wages to be paid in cash or in orders directly redeemable in cash. The Court relied on *Holden* not in terms of impairment to health, but rather on the state's power to protect the wage earner from conditions imposed because of economic inequality. Justice Shiras noted that "the legislature evidently deemed the laborer at some disadvantage. . . and by this act undertook to ameliorate his conditions. . . . The passage of this act was a legitimate exercise of police power."⁶⁴

In the next dozen years the Court sustained a variety of wage measures preventing employers from taking undue advantage of their workers in pay methods. It upheld an Arkansas "screening" law requiring mine owners to pay workers for the weight of coal before passing it over a screen. In 1914 it approved a regulation requiring semi-monthly payments of railroad employees, as well as additional scrip and screening acts. It also sustained a federal law to protect seamen's wages.⁶⁵ In all these cases the Court found reasonable exercises of the police power as against the claims of freedom to contract.

But in all these cases, the state regulations merely attempted to preserve for the worker what he had already earned. They did not try to set wage rates, but only ensure that the worker received in cash what he and his employer had bargained for. In 1912 reformers began to go further, when Massachusetts enacted legislation requiring women to be paid wages sufficient for the "necessary cost of living and to maintain the

workers in health." By 1915 nine additional states had enacted similar statutes, all requiring minimum wages for women and in some cases for minors as well.⁶⁶ Obviously Brewer's opinion in *Muller* led Progressives to believe that because women constituted a protected class, such laws would withstand judicial scrutiny, and they all did on the state level.

The first one to come before the Supreme Court was the Oregon statute of 1913, which set the scale according to the "necessary cost of living and to maintain the worker in health." Brandeis, who originally had been retained to argue the case by the National Consumers League, withdrew when Wilson named him to the Court. Felix Frankfurter took over as counsel, and prepared an elaborate Brandeis-style brief to prove the necessity of the legislation. No doubt Brandeis approved of the argument, but because of his previous connection with the case, recused himself. The Court then split 4-4, leaving the Oregon court decision in place. This did not, however, affirm the ruling, but left the entire issue of minimum wage regulation open until another case came along.⁶⁷ That opportunity did not arise until 1923, and by then the Court's composition had changed dramatically. Before examining that case, and others which have led to a view of the Court as reactionary, let us turn to a different area in which protective legislation received judicial blessing.

V

The common law had developed various doctrines on the relation of master and servant which, while sensible and appropriate in a preindustrial society, reformers now claimed placed intolerable burdens on workingmen. Especially troublesome were three defenses which apparently immunized employers from any liability for job-related injuries to their employees, namely, the fellow-servant doctrine, contributory negligence, and assumption of risk. Short of gross negligence in limited areas, employers had practically no responsibility for what happened to those working for them.⁶⁸

Under the fellow-servant doctrine, each worker stood responsible for the negligence of other employees resulting in his injury, on the theory that he should acquaint himself with the bad habits of his co-workers, and even encourage them to more prudent behavior. Perhaps this had made sense in small workshops, but it seemed far

divorced from the realities of large mills or factories, where hundreds or even thousands of men labored on different shifts. A second prong of employer defence, contributory negligence, served to shift liability if any fault could be found in the conduct of the worker. In Arizona, for example, a railroad engineer had been forced to work thirty hours straight, in violation of a state law, and as a result had fallen asleep on the job, thus causing an accident in which he had been injured. The engineer had continued work only because of the threat of dismissal, but the court held him contributorily negligent. He had a free choice, the judges said, of cooperating or terminating his employment, and by choosing to cooperate became responsible for the results.⁶⁹

Dangerous or even illegal conditions did not vitiate the defence. If a worker knew of these dangers and still accepted employment, the law held he had assumed any attendant risks. *Volenti no fit injuria* ran the ancient maxim, that to which a person assents is not an injury. Chief Justice Lemuel Shaw of Massachusetts, in a case cited frequently both in England and America, explained:

He who engaged in the employment of another for the performance of specified duties and service for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly.⁷⁰

In modern parlance, the two parties had, through the labor contract, bargained out the various risks, and the worker, in return for higher wages, had agreed to accept the risk for any injuries except those caused by the gross negligence of his employer. As Jeremy Bentham put it: "All these conditions are a matter of contract. It belongs to the parties to arrange them according to their own convenience."⁷¹

All three defences, it should be noted had been created by judges as part of the common law, and were therefore subject to statutory revision by legislation. As early as 1855, Georgia modified the fellow-servant rule, and by 1906 a sporadic but definite trend could be discerned. Seven states abolished the rule completely, and eighteen others had modified it significantly, especially as it applied to railroads. Nearly twenty states limited assumption of risk, while others restricted contributory negligence, often allowing

recovery under a theory of "proportional negligence."⁷²

Reformers thus sought to shift liability from employees to employers, and to change the basis for compensation from causal negligence to strict liability. Because the worker in a modern industrial factory or mine had little or no control over the environment or the actions of fellow employees, the risk should be placed on the employer, who could more easily absorb the costs either through insurance or passing them on to consumers in the form of marginally higher prices. Some enlightened businessmen, especially those in the National Civic Federation, recognized the force of this argument, and also supported it as a means of rationalizing business costs. It would be far cheaper to set up an objective and predictable insurance scheme than to pay litigation fees for hundreds of personal injury suits. Other reformers spoke in terms of social costs. If breadwinners were injured or disabled, they and their families would be thrown upon the public expense. Since business profited by ignoring worker safety, ran the argument, industry and not the public should bear the costs.⁷³

This shift from a liability based upon fault to strict liability upset many conservatives. According to Bernard Schwartz, the idea of liability as a corollary of fault had been converted from a judge-made common law rule into a tenet of natural law, so that "immunity from liability when not in fault is a right inherent in free government." In fact, the development of a tort law based on moral appraisal of conduct had been hailed as a relatively recent triumph of civilization and reason over the earlier doctrine of acting at one's peril.⁷⁴ The leading English case of *Rylands v. Fletcher*,⁷⁵ with its espousal of strict liability, had made severe inroads in fault standards, much to the chagrin of many American commentators.

As states moved to shift liability to the employer, personal injury suits flooded state courts, and a number reached the Supreme Court on appeal. There is neither time nor space to explore the many decisions handed down by the Court, but the trend was unmistakable. As early as 1880 the Court held constitutional two statutes abolishing the fellow-servant rule as applied to railroads.⁷⁶ Justice Field found the 1874 Kansas statute did not violate the Fourteenth Amendment, since legislatures always had the discre-

Office of the Curator, Supreme Court



Office of the Curator, Supreme Court

The death of Chief Justice Melville Fuller (left) in the Summer of 1910 provided President Taft with the opportunity to appoint a new Chief Justice. His choice for the center chair was Associate Justice Edward Douglass White (right).

tion to change common law liability. The fact that it appeared to be special legislation, affecting only certain groups, did not make it obnoxious; it was simply a case of legislative judgment.⁷⁷ Over the next two decades the Court sustained in principle nearly all such state laws, although plaintiff employees did not necessarily win all their suits. In many cases, technicalities or the failure to prove a claim led to dismissal, or to sending the matter back to lower courts for a rehearing. One student of the Court in these years noted that of twenty-eight negligence cases, twenty-one were decided in favor of labor, and of twenty-three state liability act cases, nineteen went for labor.⁷⁸ In some cases, the Court upheld the common law policies because the state had failed to take the necessary action to annul them. The fellow-servant rule, Holmes said, may be a "bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient."⁷⁹

Because some states acted more quickly than others to shift liability, and some moved not at all, reformers in Congress attempted to set a national example in an employers' liability law in 1906, only to have it struck down by the Court

two years later.⁸⁰ Here again one must look past the anguished cry of Progressives to see just what the Court in fact did. Justice Edward Douglass White delivered the opinion of the Court, which held that Congress certainly had the power to modify or even abolish the common law in the regulation of interstate commerce, but that in this instance the law reached too far, affecting employees demonstrably not engaged in interstate activities. Justice William R. Day concurred separately, but without filing an opinion. Justice Rufus Peckham, the author of *Lochner*, concurred in the result, but along with David Brewer and Chief Justice Fuller (his fellow dissenters in *Atkin*), argued that Congress lacked any power to alter relations between master and servant. William Moody agreed with White about the power of Congress to act, but differed in the result, believing the law valid. John Marshall Harlan, with whom Joseph McKenna joined, opposed the result as well as part of the reasoning, while Holmes believed that the act could have been read in such a way as to preserve its constitutionality. Thus only three of the justices, the hard-core conservative bloc of Peckham, Brewer and Fuller, argued against any congressional power, while a clear majority of six indicated that

if Congress cured the act of its overreach, it would meet Court approval.

This is essentially what Congress did in the Federal Employers' Liability Act of April 1908. The railroads, the direct object of the law, challenged it repeatedly in the federal courts in nearly six hundred cases over the next seven years,⁸¹ but the Supreme Court upheld it unanimously. Willis Van Devanter, a new appointee to the Court, delivered the opinion. Of the five who had voted against the earlier act, Peckham, Brewer, and Fuller had departed, while Day was ill and took no part. White, now Chief Justice, had no trouble supporting the law now that it had been more carefully drafted. Moreover, the Court took a fairly expansive view of the congressional power, noting that the act governed even in those cases where the causal negligence lay with an employee engaged in intrastate commerce, since that negligence affected employees in interstate operations.⁸²

Shifting liability constituted but one prong of the Progressive program; the other would provide an orderly and rational scheme to compensate employees for injuries and death resulting from job-related accidents. Private employer liability insurance had been introduced in the United States in the 1880s, and premiums rose from about \$200,000 in 1887 to more than \$35,000,000 by 1912.⁸³ No one objected to private workmen's compensation programs, and many businesses voluntarily adopted plans in order to rationalize their expenses. Both International Harvester and the United States Steel Corporation established compensation programs in 1910. A year later the National Civil Federation proposed a model bill, and even the National Association of Manufacturers, which rarely agreed with the reformers, endorsed the principle of workmen's compensation at its 1911 convention.⁸⁴ But what if private companies did not secure insurance, in the belief that they could better bear litigation costs than individual workers? The benefits of shifting liability from employee to employer would be lost if the legal remedies proved too costly for workers, injured and out of a job and with few resources to pursue a lengthy court battle. The answer proposed by reformers appealed to many businessmen, but horrified conservatives.

Progressives called upon the states and the federal government to establish government-

operated workmen's compensation insurance pools, and then require all employers either to subscribe to the public plan or secure comparable private coverage. In return, employers would be immune from liability for those accidents covered under the plan, although they would still, as under the common law, be subject to suit in cases of gross negligence on their part. By the end of 1910, six states had enacted some form of compulsory workmen's compensation, and the response of the state courts, in Ernst Freund's words, "could hardly be characterized otherwise than as one of confusion."⁸⁵

In perhaps the most famous of these cases, the New York Court of Appeals struck down the 1909 state Workmen's Compensation Act.⁸⁶ The court, terming the law "plainly revolutionary," held that the liability involved a taking of property without due process of law. "When our Constitution was adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." To alter that rule by imposing upon an employer "who has omitted no legal duty and has committed no wrong, a liability based solely on legislative fiat . . . is taking the property of A and giving it to B, and that cannot be done under our Constitution."⁸⁷

Despite *Ives* and other decisions, an additional dozen states enacted legislation. In 1908 Congress provided that certain of its employees could receive compensation for injuries sustained on the job. Prior to that, a special act of Congress had been the only way a federal employee could recover.⁸⁸ In 1910, Congress authorized a commission to make a thorough study of employers' liability and workmen's compensation. After the commission recommended a federal plan in 1912, Senator George Sutherland, later to be villified as an enemy of labor, led the floor fight, finally winning approval in 1916.⁸⁹

In 1917 several cases involving workmen's compensation reached the Supreme Court, and on March 6, three opinions came down upholding the three prevailing types of compensation laws. In a 5-4 decision, the Court sustained a Washington state plan requiring employer participation in an exclusive state fund.⁹⁰ It then unanimously upheld the Iowa elective statute. "The Fourteenth Amendment," declared Mahlon Pitney, "does not prevent a state from establishing a system of workmen's compensa-

tion without the consent of the employer, incidentally abolishing his [common law] defenses."⁹¹ In the most extensive case, dealing with New York's compulsory law, Pitney literally dismissed plaintiff's traditional arguments against the program — property taken without due process, interference with liberty of contract, and restriction of employer and employee rights — as largely outdated. Brandeis, then a member of the Court, could have found no quarrel with Pitney's frequent allusions to the complexities of modern industrial life and the needs to mold law to fit reality. Granted common law customs had been eliminated; that was a legislative prerogative, and the policy decision — also within legislative discretion — had been made for a legitimate use of the police power.⁹² The reasoning of *Holden v. Hardy*, expanded and elaborated upon in dozens of succeeding cases, appeared to have swept aside all the old bugaboos, and Progressivism seemed to be as triumphant in the law as in politics.

VI

Why, then, the continuing myth of a reactionary Court, for if the above review of protective legislation is correct, then myth it must be. In areas of maximum hours and minimum wages, employer liability and workmen's compensation, and state child labor regulation,⁹³ the Court during the Progressive era nearly always supported reform efforts. The answer is part historical, part perceptual, and also reflects dramatic changes in Court personnel at the end of the Progressive era.

There is no doubt that during the latter nineteenth century bench and bar had proved extremely receptive to the needs of the business community. Despite the expansive interpretation of state powers in *Munn*, most courts soon foreclosed that opening, and turned rate-making, for example, from simple administrative judgment into an ongoing constitutional debate over the taking of private property without due process, with the courts reserving the right to review not only the fairness of the rates but the wisdom of the policy. Cases invalidating the income tax, or narrowly construing the scope of the interstate commerce power, arguably served the needs of industry far more than those of the public. Business then constituted the locus of national activity, and the law, reflective of the dominant mode

of the community, served those interests. That courts occasionally went too far, that their decisions exceeded the scope of judicial responsibility, that their opinions skewed in favor of business as opposed to labor or the general public, legitimately upset those who objected to what they perceived as the negative effects of industrialization. We should understand that swings of the pendulum of social values affect the judicial system as much as other parts of the society, although here one often finds a time lag as courts react to events.

Because much of the popular press backed Progressivism, muckraking journalists exploited the alleged biases of judges and their pro-business decisions, yet failed to give equal space to the many decisions endorsing the protective efforts of reformers. Cases such as *Lochner*, an anachronism in its own day, drew many times the press comments (mostly negative) than did *Holden* or *Atkin*, which in the long term were far more important. Looking over the major periodicals, one would have thought that courts consistently voted judges' conservative prejudices against the poor working person.

I have not argued that the Court was reformist in all spheres, but rather, in this period and so far as protective legislation went, the Court supported most Progressive measures. There were, however, enough decisions of the Court opposed to reform demands to give some credence to the critical chorus. The federal income tax was declared unconstitutional; *Lochner* seemed but a piece with several cases, including *Adair*, which went against labor unions; employer liability occasionally ran afoul of the Court. Then beginning in 1918, the Supreme Court seemingly reversed the whole trend of the preceding twenty years, and entered upon an extremely conservative period.

First it struck down the federal child labor law in *Hammer v. Dagenhart*, apparently abandoning an expansive view of the interstate commerce power reaching back to 1824.⁹⁴ When Congress attempted to deal with the problem through the taxing power, the Court then held that the regulation of labor, an activity beyond the scope of federal power, could not be achieved through the subterfuge of a tax.⁹⁵ Conservatives made an attempt to reverse the trend in employer liability, and mustered four votes in cases which barely sustained an expanded state law.⁹⁶ The conserva-

tives had their majority, and evidently wrote *finis* to a generation of protective legislation in striking down a District of Columbia minimum wage law in 1923.⁹⁷ By then, the high tide of prosperity had swept reform from the scene, and the nation's business leaders applauded the Court's return to common sense and sound constitutionalism.

The Court had indeed changed, and the decisions of the 1920s reflected in part the ascendance of a conservative bloc which would control the Court until 1937. William Howard Taft took over the center chair from Edward Douglass White in 1921, and provided leadership to a conservative majority which included Willis Van Devanter, James McReynolds, Pierce Butler, and George Sutherland; only Holmes and Brandeis held out for a liberal jurisprudence, and in 1925 were joined by Harlan Fiske Stone. Yet even here it is difficult to ascribe the shift just to personnel, although that undoubtedly played a major role. Joseph McKenna, for example, had been appointed in 1898 by McKinley; he voted against the Arizona employers' liability law and against a minimum wage in *Adkins*, yet dissented along with Holmes, Brandeis, and Clarke in the first child labor case. Chief Justice Taft, the acknowledged conservative leader, nonetheless dissented, and vigorously, in *Adkins*. Both Holmes and Brandeis joined with the majority in the second child labor case.

One can, of course, eschew general theories in favor of particularized case analyses.⁹⁸ In the two child labor cases, for example, the majority

of the Court did not object to efforts to stamp out an acknowledged evil; there had been an unanimous opinion upholding state laws. But it was there, in the states, where the Court believed regulation should take place, with state legislatures and not Congress having the responsibility. These men took federalism seriously. Similarly, while Congress had on occasion used the taxing power as a punitive or restrictive tool, the Court, with only one dissent, then regarded the tax as an impermissible instrument. In time the Court would change its mind on what federalism meant, and expand the limits of both the interstate commerce and taxing powers.

Even while analyzing specific cases, one can look for trends, and as I have tried to show, hostility to protective legislation was just not the norm in the Progressive era. Moreover, it would appear that cases in the twenty years following *Holden* derived directly from earlier decisions which expanded the police power. In some areas, such as the right of labor to organize and to bargain collectively, there was little case law to build upon, and it consequently took the Court longer to develop a positive doctrine, a process no doubt lengthened by the general anti-labor attitude of the 1920s. But however one wishes to examine the Court, one cannot escape the conclusion that the charges leveled by Brandeis and others of a court out of touch with reality and insensitive to industrial conditions do not bear up. That myth, at least, ought to be consigned to the dustbin of history.

Footnotes

¹ Louis D. Brandeis, "The Living Law," 10 *Illinois Law Review* 461, 463-64 (1916).

² William F. Willoughby, "Philosophy of Labor Legislation," 8 *American Political Science Review* 14, 16 (1914).

³ *Lochner v. New York*, 198, U.S. 45, 75 (1905).

⁴ See, for example, John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* (1978).

⁵ Jacob Liberman, "Their Sisters' Keepers: The Women's Hours and Wages Movement in the United States, 1890-1925," 16-17 (doctoral diss., Columbia, 1971); Lincoln Steffens, *Autobiography* 245 (1931).

⁶ Nat. Conference of Charities, *Proceedings* 378 (1912).

⁷ Alice Kessler-Harris, "Women, Work and Social Order," in B. A. Carroll, ed., *Liberating Women's History: Theoretical and Critical Essays* 338 (1976).

⁸ Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 240 (1955).

⁹ For a review of this legislation, see Elizabeth Brandeis, "Labor Legislation," in John R. Commons et al., 3 *History of Labor in the United States* (1935).

¹⁰ See, among others, E. S. Corwin, *Liberty Against Government* (1948); Sidney Fine, *Laissez-Faire and the General Welfare State* (1956); Robert G. McCloskey, *American Conservatism in the Age of Enterprise, 1865-1910* (1951); and Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court* (1942).

¹¹ Quoted in C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* 209 (1963).

¹² Thomas M. Cooley, *Constitutional Limitations* 160 (1868); Christopher G. Tiedeman, 1 *Treatise on State and Federal Control of Persons and Property in the United States* 5 (1900 rev. ed.). For a useful re-evaluation of Cooley, which does much to save him from being the villain of Progressive historiography, see Allen Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration," 53 *J.*

Am. Hist. 751 (1967).

¹³*Low v. Rees Printing Co.*, 41 Neb. 127, 135 (1894).

¹⁴*In re Jacobs*, 98 N.Y. 98, 105 (185).

¹⁵A. Ellis, "Rise and Probable Decline of Private Corporations in America," 7 *A.B.A. Rep.* 256 (1884); M. I. Urofsky, *A Mind of One Piece: Brandeis and American Reform* 23 (1971).

¹⁶*Farmers' Loan & Trust Co. v. N. Pac. R.R. Co.*, 60 F. 803 (E. D. Wis. 1894).

¹⁷Charles Fairman, "Justice Samuel Miller," 50 *Political Science Quarterly* 15, 43 (1935).

¹⁸William Trickett, "The Great Usurpation," 40 *American Law Review* 356 (1906); Gilbert Roe, *Our Judicial Oligarchy* (1912); Horace Davis, *The Judicial Veto* (1914). See, however, Charles A. Beard, "The Supreme Court: Usurper or Grantee?" 27 *Political Science Quarterly* 1 (1912) for an effort at a balanced view of the issue.

¹⁹Jackson H. Ralston, *Study and Report . . . Upon Judicial Control Over Legislation* 3-4 (1919).

²⁰208 U.S. 161 (1908).

²¹Roscoe Pound, "Liberty of Contract," 18 *Yale Law Journal* 454 (1909).

²²James Willard Hurst, *Law and Social Order in the United States* 38, 49 (1977).

²³*Constitutional Limitations* 577.

²⁴*Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

²⁵George W. Wickersham, "The Police Power: A Product of the Rule of Reason," 27 *Harvard Law Review* 297 (1914).

²⁶*Barbier v. Connolly*, 113 U.S. 27, 31 (1885). Field, however, saw the power lodged primarily in the states rather than in the federal government.

²⁷*Mutual Loan Co. v. Mariell*, 222 U.S. 225, 233 (1911); *Lawton v. Steele*, 152 U.S. 133, 136 (1894); *Munn v. Illinois*, 94 U.S. 113 (1876).

²⁸Tiedeman, 1 *State and Federal Control* 13.

²⁹*Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

³⁰*Chicago, Burlington & Quincy Ry. Co. v. People ex rel. Drainage Commissioners*, 200 U.S. 561, 592 (1906); see also *C. & Q. Ry. Co. v. McGuire*, 219 U.S. 549, 569 (1911), and *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1913).

³¹Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 13, 65-66 (1904).

³²A. H. Robbins, "Taking the Lid off the Police Power," 75 *Cent. L.J.* 314 (1912).

³³*Barbier v. Connolly*, 113 U.S. 27 (1885); *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

³⁴The Court twenty years earlier had sustained an 1868 federal law establishing eight hours as the standard day on government contract work, but had limited its application to little more than hortatory effect. *United States v. Martin*, 94 U.S. 400 (1876); *United States v. Driscoll*, 96 U.S. 421 (1877).

³⁵Elizabeth F. Baker, *Protective Labor Legislation With Special Reference to Women in the State of New York* 109 (1925); *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, 384 (1876).

³⁶The official position of the American Federation of Labor can be found in George Gunton, *The Economic and Social Importance of the Eight-Hour Day* (1889); John B. Andrews, *Labor Problems and Labor Legislation* 46 (1932); Marion C. Cahill, *Shorter Hours: A Study of the Movement Since the Civil War* 286 (1932).

³⁷Quoted in Joseph L. Candela, Jr., "The Struggle to Limit the Hours and Raise the Wages of Working

Women In Illinois, 1893-1917," 53 *Social Service Review* 15, 18 (1979).

³⁸Ernst Freund, "Constitutional Aspects of Hour Legislation for Men," 4 *American Labor Legis. Review* 129 (1914).

³⁹*Illinois State Reporter*, 13 March 1880, quoted in Ernest L. Bogart and Charles H. Thompson, 4 *Centennial History of Illinois* 163 (1920).

⁴⁰*Holden v. Hardy*, 169 U.S. 366 (1898).

⁴¹*Id.*, 396, 398.

⁴²Most state courts followed this ruling in upholding similar statutes. *State v. Cantwell*, 179 Mo. 245 (1904); *Ex parte Boyce*, 27 Nev. 299 (1904). Only one state court struck down a comparable law in a tortured decision which took an excessively narrow interpretation of the statute. *In re Morgan*, 26 Colo. 415 (1899).

⁴³*Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903).

⁴⁴*Lochner v. New York*, 198 U.S. 45, 56, 64 (1905).

⁴⁵One of the best reasoned analyses of the case is Ernst Freund, "Limitations of Hours of Labor and the Federal Supreme Court," 17 *Green Bag* 411 (1905), which effectively attacks any claim Peckham may have had to judicial objectivity. See also Learned Hand, "Due Process of Law and the Eight-Hour Day," 21 *Harv. L.R.* 495 (1908). For a partial listing of the attacks upon and defenses of the *Lochner* decision, see Charles Warren, 3 *The Supreme Court in United States History* 435-36 (1922).

⁴⁶*Cantwell v. Missouri*, 199 U.S. 602 (1905); *Ellis v. United States*, 206 U.S. 246, 256 (1907).

⁴⁷*Muller v. Oregon*, 208 U.S. 412 (1908). I must also plead guilty to overstating the importance of this case; see, *A Mind of One Piece* 39-42.

⁴⁸208 U.S. 421-23.

⁴⁹Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 *Harv. L.R.* 353 (1916); Josephine Goldmark, *Impatient Crusader: Florence Kelley's Life Story* ch. 13 (1953).

⁵⁰*B. & O. R.R. Co. v. I.C.C.*, 221 U.S. 612 (1911); *United States v. Garbisch*, 222 U.S. 257 (1911).

⁵¹*Riley v. Massachusetts*, 232 U.S. 671 (1914); *Hawley v. Walker*, 232 U.S. 718 (1914).

⁵²*Miller v. Wilson*, 236 U.S. 373 (1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915).

⁵³*Wilson v. New*, 243 U.S. 332 (1917).

⁵⁴*Bunting v. Oregon*, 243 U.S. 426 (1917); *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U.S. 336 (1917); *Dominion Hotel v. Arizona*, 246 U.S. 265 (1919); *United States v. Brooklyn East. Dist. Term.*, 249 U.S. 296 (1919).

⁵⁵243 U.S. 426, 436-37.

⁵⁶Richard B. Morris, *Government and Labor in Early America* 17, 59 (1946); James T. Patterson, "Mary Dewson and the American Minimum Wage Movement," 5 *Labor History* 134, 139 (1964).

⁵⁷Emilie G. Hutchinson, *Women's Wages* 15 (1919).

⁵⁸"Legislative minimum wage for women and minors," 28 *Harv. L.R.* 89, 90 (1914).

⁵⁹Rome G. Brown, "The Statutory Minimum Wage," 22 *Case and Comment* 281 (1915).

⁶⁰*Chicago Times*, 4 Aug. 1888, quoted in Candela, *supra*, n. 37, 17; W. A. Croffert and Louis F. Post, "What Rights Have Labor?" 1 *Forum* 294, 295-296 (1885).

⁶¹*Godcharles v. Wigeman*, 113 Pa. St. 431 (1886).

⁶²Tiedeman, 1 *State and Federal Control* § 100.

⁶³*St. Louis, Iron Mt. & St. Paul Ry. Co. v. Paul*, 173 U.S. 404 (1899).

⁶⁴*Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901). Justices Brewer and Peckham dissented with-

out opinion.

⁶⁵ *McLean v. Arkansas*, 211 U.S. 539 (1909); *Erie Ry. Co. v. Williams*, 233 U.S. 685 (1914); *Keokee Cons. Coke Co. v. Taylor*, 234 U.S. 224 (1914); *Rail & River Coal Co. v. Yaple*, 236 U.S. 338 (1915); *Patterson v. Bark Eudora*, 190 U.S. 169 (1903).

⁶⁶ "Minimum Wage Legislation in the United States," 8 *American Labor Legis. Review* 355, 360-64 (1918).

⁶⁷ *Stettler v. O'Hara*, 243 U.S. 629 (1917).

⁶⁸ A classic statement of these doctrines may be found in *Crispin v. Babbitt*, 81 N.Y. 516 (1880).

⁶⁹ James Weinstein, "Big Business and the Origins of Workmen's Compensation," 8 *Labor Hist.* 156, 158 (1967).

⁷⁰ *Farwell v. Boston & Worcester Rd.*, 4 Metcalf (Mass.) 49, 57 (1842).

⁷¹ Quoted in Lester P. Schoene and Frank Watson, "Workmen's Compensation on Railroads," 47 *Harv. L. R.* 389 (1934).

⁷² *Id.* 391; Roy Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," 8 *Labor Hist.* 254, 261 (1967).

⁷³ *Id.* 258-59; Robert F. Wesser, "Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890s-1913," 12 *Labor Hist.* 345, 346 (1971); Weinstein, *supra*, n. 69, 170-171.

⁷⁴ Bernard Schwartz, *The Law in America: A History* 123 (1974).

⁷⁵ L.R. 3 H.L. 330 (1868).

⁷⁶ *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888); *Minn. & St. Louis Ry. Co. v. Herrick*, 127 U.S. 210 (1888).

⁷⁷ 127 U.S. 205, 208, 209. Field, despite his reputation for conservatism, had four years earlier written a 5-4 decision limiting the fellow-servant doctrine by holding railroad conductors to be agents of the employer and not fellow-servants, thus making railroads liable for injuries to their employees through conductor negligence. *Chi., Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U.S. 377 (1884).

⁷⁸ Harding C. Noblitt, "The Supreme Court and the Progressive Era, 1902-1921," 107 (doctoral diss., Chicago, 1955).

⁷⁹ *Beuller v. Grand Trunk Junction Ry. Co.*, 224 U.S. 85, 88 (1912); see also *Butler v. Frazee*, 211 U.S. 459 (1908).

⁸⁰ *First Employers' Liability Cases*, 207 U.S. 463 (1908).

⁸¹ For an analysis of the law and a listing of the many court challenges, see William W. Thornton, "The Federal Employers' Liability Act," 22 *Case and Comment* 323 (1915).

⁸² *Second Employers' Liability Cases (Mondou v.*

N.Y., N.H. & H. R.R. Co.), 223 U.S. 1, 52 (1912).

⁸³ Lubove, *supra*, n. 72, 261.

⁸⁴ Wesser, *supra*, n. 73, 346.

⁸⁵ Ernst Freund, "Constitutional Status of Workmen's Compensation," 2 *Am. Labor Legis. R.* 43 (1912).

⁸⁶ *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 271 (1911). For a typical editorial lauding the decision, see "Socialism and the Law," 25 *Bench and Bar* 4 (1911).

⁸⁷ 201 N.Y. *Ives*, as Bernard Schwartz noted, was not only wrong in its history about legal liability for tort in eighteenth century America, but was an aberration even at the time. As a result of the huge uproar caused by the opinion, New York quickly amended its constitution to permit such legislation, and the Court of Appeals reluctantly had to approve a second act, one nearly identical in terms to the first. *Jensen v. S. Pac. Co.*, 215 N.Y. 514 (1915). Schwartz, *Law in America* 154.

⁸⁸ Commons, 4 *History of Labor* 570-76.

⁸⁹ Joel F. Paschal, *Mr. Justice Sutherland: A Man Against the State* 65-69 (1951).

⁹⁰ *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). White, McKenna, Van Devanter and McReynolds dissented without opinion, but from their consent in the other two cases, it may be inferred that they objected to the state-operated insurance fund, which invaded a field previously reserved for private enterprise.

⁹¹ *Hawkins v. Bleakley*, 243 U.S. 210, 213 (1917).

⁹² *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917).

⁹³ The only major challenge of a state regulation of child labor, the Illinois Child Labor Act of 1903, was disposed of in a short and unanimous opinion upholding the law. *Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913).

⁹⁴ *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The 5-4 vote found Holmes, Brandeis, McKenna and Clarke in the minority.

⁹⁵ *Bailey v. Drexel Furn. Co.*, 259 U.S. 20 (1922). For the expansive view of the taxing power, see *Veazie Bank v. Fenno*, 8 Wall. 533 (1869), and the oleo case, *McCray v. United States*, 195 U.S. 27 (1904). Only Clarke dissented in the *Bailey* case.

⁹⁶ *Arizona Employers Liability Cases*, 250 U.S. 400 (1919).

⁹⁷ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

⁹⁸ An excellent example of looking past the surface holding to discern the intent of the Court is Charles W. McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," 53 *Bus. Hist. R.* 304 (1979).

Justice Harlan and the Chief Justiceship, 1910

Loren P. Beth

As early as 1904 Republican politicians were looking forward to the vacancy on the Supreme Court that would occur when Chief Justice Melville W. Fuller retired. For varied reasons, both President Theodore Roosevelt and the Secretary of War, William Howard Taft, were "a little ghoulish as (they) pondered the unreasonable longevity" of the Chief Justice.¹ After all, Fuller was 71—old for the times—and his wife had died in August. Taft wrote that her death "leaves the poor Chief Justice a stricken man." He also commented hopefully that Fuller "was getting very tired of cases."² The President, for his part, embarked on an undercover campaign to persuade Fuller that it was time to leave. The campaign began two years earlier, in fact, when Taft had declined the nomination to replace Associate Justice George Shiras. While Taft justified his refusal on the very reasonable grounds that he wanted to finish his work as Governor of the Philippines, he made no secret of his ambition to be Chief Justice. It is not unlikely that Roosevelt, who felt himself politically obligated to Taft, supported Taft's ambition. In any case, a "White House story" leaking the nomination of William Rufus Day for the Shiras vacancy, went on to speculate that "the suggestion is made that Chief Justice Fuller may soon wish to retire and that Governor Taft would be a suitable man for the vacancy."³ Shortly thereafter, Wayne MacVeagh, a close political friend of the President, paid a visit to the Chief Justice at Roosevelt's request. Diplomatically referring to the newspaper story, MacVeagh inquired whether there was any basis for it. Fuller, who had been rather insulted by the whole idea, denied it.⁴

Whether or not Chief Justice Fuller had ever thought of resigning, he certainly was not persuaded by this somewhat clumsy attempt to secure his retirement. He told Justice Oliver Wen-



Associate Justice John Marshall Harlan

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dell Holmes that he was not about to be "paraphrased" out of his position.⁵ Fuller was in good health and performing his duties as capably as ever; Holmes, who would later serve under Taft, subsequently remarked that Fuller was the best Chief Justice under whom he had the pleasure to serve.

Chief Justice Fuller did not resign—then or ever. Taft's interest in the position continued, as did newspaper speculation, especially upon the resignation of Associate Justice Henry Billings Brown in 1906. The Secretary of War's continuing concern for Fuller's health was indeed touch-

ing — "if the Chief Justice would retire, how simple everything would become" he wrote to his wife.⁶ Roosevelt again offered Taft an Associate Justice position, and again Taft declined. Although holding out for the Chief's position, he eventually became the Republican nominee for President in 1908. He ran and won, entering the White House on March 4, 1909 with Fuller still holding onto the center chair.

As President, Taft continued to feel that Fuller had outstayed his proper time on the Court. One cannot tell with any certainty how serious the President was about this. His much quoted letter to Horace Lurton provided some indication of his concern:

The condition of the Supreme Court is pitiable and yet those old fools hold on with a tenacity that is most discouraging. Really, the Chief Justice (now 76) is almost senile; Harlan (also 76) does no work; Brewer (only 72) is so deaf that he cannot hear and has got beyond the point of the commonest accuracy in writing his opinions; Brewer and Harlan sleep almost through all the arguments. I don't know what can be done. It is most discouraging to the active men on the bench.⁷

One should add in fairness that "the active men on the bench" in 1909 were not necessarily much better. The youngest member of the Court, William H. Moody, was ill and resigned in 1910. Rufus W. Peckham was 71 and also ill. Holmes was a comparative stripling of 68, Edward D. White was 65, Day only 59, and Joseph P. McKenna, 66. The latter had difficulty writing clear opinions and the bulk of the Court's work fell on Holmes, White and Day.

One might also add that Harlan was a close friend of Taft's; they had vacationed together with their families in Quebec since the 1890s. Taft also knew that Harlan was a great friend of Lurton's, and would possibly have been reluctant to criticize Harlan seriously in a letter to a close mutual friend. Then too, Taft was an extremely verbal man, especially in letters, and often seemed to write them in order to get immediate concerns off his chest regardless of whether they represented settled convictions.

There was, however, an obvious element of truth in what Taft wrote. The Court was unusually old, and illness did not help. Even so, there was much exaggeration. There is little or no independent evidence that Fuller was senile or that Harlan was lazy. The younger justices — except for Holmes and perhaps White — did not



President William Howard Taft in 1908

Library of Congress

help the Court much. They were mediocre at best even if healthy. The names of Day, McKenna, Moody and Peckham do not ring down through American history. What Taft should have complained about was the weakness of the Court rather than merely its age.⁸

If President Taft felt that old age was a serious problem, he went about correcting the situation rather strangely. His first appointment was in fact Horace Lurton, 66 years old when he replaced Peckham early in 1910. While other appointees were younger than Lurton — Charles Evans Hughes was only 49 — they did not noticeably raise the prestige of the Court. Willis Van Devanter, Joseph R. Lamar and Mahlon Pitney were, like their predecessors, at best mediocre. With the exception of Hughes and Holmes it continued to be, on the whole, a weak Court.

This was, in general, the situation when Chief Justice Fuller died at his summer home in Maine in July of 1910. Ironically, Taft now had to appoint someone to the place he had so long co-

veted for himself and might now never attain. Who would he appoint? The front runner was undoubtedly Hughes; there was also speculation about Holmes, White, Harlan, Senator Elihu Root and Secretary of State Philander C. Knox. Root was 65, Knox only 57. Knox had already turned down two chances to join the bench, having been Roosevelt's second choice each time Taft had refused. Taft did not consider him seriously, despite his original preference for a man who was still relatively young. Root, on the other hand, was apparently considered by the President to be too old. In another of his chatty letters, Taft wrote that "if Mr. Root were five years younger I should not hesitate a moment about whom to make chief justice . . . but I doubt if he has in him that length of hard, routine work and constant attention to the business of the court and to the reform of its methods which a chief justice ought to have."⁹ An ironic statement, certainly, considering the eventual outcome of Taft's search.

Charles Evans Hughes, who had gained a great reputation as a Progressive Republican while governor of New York, was the junior Associate Justice and a man entitled to think he had a "right" to the position. Without making a promise Taft had in his typical expansive fashion

hinted broadly that Hughes would get the job; in fact, there is some doubt that Hughes would have accepted the post as successor to Justice Brewer had he not expected to be appointed Chief Justice when Fuller left the Court. Taft wrote:

The chief justiceship is soon likely to be vacant and I should never regard the practice of never promoting associate justices as one to be followed. Though, of course, this suggestion is only that by accepting the present position you do not bar yourself from the other, should it fall vacant in my term.¹⁰

This was about as explicit as one could be without making an actual promise—too explicit in fact. Taft went on to qualify his comments:

Don't misunderstand me as to the chief justiceship. I mean that if the office were now open, I should offer it to you and it is probable that if it were to become vacant during my term, I should promote you to it; but, of course, conditions change so that it would not be right for me to say by way of promise what I would do in the future.¹¹

It is not known the extent to which Hughes relied upon the President's letter. Nor is it known why President Taft changed his mind. Hughes was not yet seated when Chief Justice Fuller died; no bar existed, not even that of custom, to his appointment as the new Chief Justice. As one



The Fuller Court in 1907

historian has noted, perhaps Hughes was too young to suit the President: Taft's "appointment of a young man like Hughes to the top spot would probably place the chief justiceship permanently beyond his reach."¹² If the President really still harbored an ambition to become Chief Justice, however, there is no direct evidence of it. Moreover, two other factors mitigated against the appointment of Hughes. One was that Teddy Roosevelt — still the most powerful man in the Republican party and Taft's close friend and advisor — apparently did not like Hughes. Also, the President had perhaps mistakenly asked for the opinions of the Court itself, and the feeling on the Court was that an experienced sitting justice ought to receive the appointment. When Attorney General George W. Wickersham polled the justices personally, he found that Justice White rather than Hughes was their choice.¹³

Although White was 65 — the same age as Root — Taft no longer considered age a deciding factor. Age may even have become an asset: perhaps White would only serve long enough as Chief Justice so that the center chair would again become vacant and Taft — no longer President — would still be young enough to be appointed.¹⁴ Some hindsight may be involved in this; however, that is exactly what happened. Partly due to the intervention of Woodrow Wilson's two terms, it may have happened some years later than Taft had hoped. So late, in fact, that Taft accepted the position from President Warren B. Harding in violation of his own earlier feeling about the unfitness of elderly judges as he was then 65.

Justice Holmes, who had been a very successful Chief Judge of the Supreme Judicial Court of Massachusetts for a decade, was never seriously considered. He wrote to Sir Frederick Pollock that he thought White was the most logical choice aside from Hughes. Harlan was too old, he said, and "I have always assumed absolutely that I should not be regarded as possible — they don't appoint side Judges as a rule, it would be embarrassing to skip my Seniors, and I am too old. I think I would be a better administrator than White, but he would be more politic."¹⁵

As to Harlan, a well-known episode has suggested to some historians that the senior Associate Justice may have wanted the job:

Word had reached the White House (from whom, the historians never divulge) that Associate Jus-



Attorney General George Wickersham, who upon polling the justices, reported to President Taft that White was the Court's choice for Chief Justice.

ice Harlan . . . thought he should receive the elevation as a final ornament to his judicial career. His retirement would soon come.¹⁶

On hearing this, so the story goes, Taft "exploded."¹⁷ Another writer says he "stormed";¹⁸ while a third uses the more neutral term "responded."¹⁹ Considering Taft's reputation for geniality and his close friendship with Harlan, perhaps responded is a better term. "I'll do no such damned thing; I won't make the position of chief justice a blue ribbon for the final years of any member of the court. I want someone who will co-ordinate the activities of the court and who has a reasonable expectation of serving ten or twenty years on the bench."²⁰

Verbiage aside, the President was undoubtedly right. Harlan was too old, as were Holmes, Root and (arguably) White, not to mention Taft himself 12 years later. Until White's appointment as Chief Justice, only one of his predecessors in the center chair had been over 60 — Roger Brooke Taney. The Chief Justice has a wearing task, perhaps especially so during his first few years, and while experience may be essential, so is energy.

Except for the episode quoted above, there is no real evidence that Justice Harlan ever viewed himself as a competitor of White's for the job, or

that he was even interested in it. It is true that the two senior justices—Harlan and White—were not very close. White was a Catholic, a Democrat, and a former Confederate; Harlan was a devout Presbyterian, a Republican, and a Unionist in Kentucky when it was politically risky to be one. They frequently disagreed about the cases before the Court, especially on the interpretation of the Sherman Anti-Trust Act and in the *Insular Cases*. Yet this line can be carried too far. There is little doubt that Harlan was unhappy to see White become Chief Justice; but this was probably more due to disagreement on the Court than to any personal feelings between the two. Harlan was entirely capable of accepting former Confederates—Lurton, in fact, was a friend of many years' standing despite his record as a Tennessee Confederate officer. The relations between the Louisianan and the Kentucky colonel were, if not close, at least correct, as a rather charming newspaper story indicates:

Chief Justice White and Justice Harlan are widely known for pedestrianship. They enjoy the exercise, but Justice Harlan finds automobiles disquieting and has grown to dislike them with a fervor not inferior to that manifested by Senator Bailey and Champ Clark . . . The two jurists recently started up Pennsylvania Avenue on their way home. When crossing a side street an au-

tomobile came whizzing around a corner and Justice Harlan was saved from possible injury by Justice White, who dragged him out of harm's way.²¹

Even if White did not actually save Harlan's life, they were apparently close enough to enjoy a walk home together.

From whom did Taft get the idea that his old friend from Kentucky was eager to become Chief Justice? Almost certainly it did not come from Harlan himself, or with Harlan's knowledge or consent. There was a letter to Taft from a George Dorsey, of Fremont, Nebraska and an editorial in the *Salt Lake Tribune*—copies of these were sent to Harlan, but he had nothing to do with their writing.²² Perhaps Justice Lurton, who was a mutual friend of the President and of Harlan dating back to Circuit Court days, interceded in the Kentuckian's behalf. He wrote Harlan that "it looks like Hughes for Chief though I only know from press reports. Occasionally I am gratified to see your name." Continuing, he added, "this would be a most graceful compliment well-bestowed and gratifying to me as your friend."²³ It is not known what Harlan thought of this; his reply is noncommittal: "The mention of my name in connection with the place has been without my knowledge or procurement. I do not



THE SUPREME COURT OF THE UNITED STATES—1901

Former Associate Justice Edward Douglass White, seated in the center chair, shortly after his elevation to Chief Justice.

suppose that I will be thought of."²⁴

This would seem to indicate that Justice Harlan was well aware that he did not have much of a chance for the place; it stops considerably short, however, of proving that he didn't want it. His other remarks on the subject bear out these points, but go a little farther toward personal renunciation of ambition. In one letter he merely repeated the substance of his comment to Lurton: "... in view of my advanced years — if there were no other reason — the President will not think of me as Chief Justice. I do not know to what extent my name has been mentioned. Certain it is, I have not moved in the matter nor will I do so."²⁵ Even earlier, in a letter to Justice Day, Harlan commented that some friends in Louisville had supported his appointment; he continued:

I wrote to them to forbear any action in my behalf and I think they are conforming to my request. Of course, the President will never think of me in connection with this matter. My years forbid his consideration of my name, even if he had no other objections. Who will be appointed no one can guess. I do not think Hughes's chances are as good as they would have been had he not been appointed an Associate Justice. I now doubt whether the President has made up his mind finally on the subject.²⁶

Perhaps the most convincing evidence that Harlan did not expect the appointment to fall his way, however, is the fact that he himself supported another candidate. In a letter to the President, he urged Taft to appoint Justice Day.²⁷ Justice Day, upon receipt of a copy of the above letter, disclaimed any such ambition, writing to Harlan that, "I am not vain enough to think that the President will seriously think of me in connection with the office of Chief Justice, but I will not deny that your opinion of me in this connection has been pleasant reading."²⁸

Coming when it did only a week after Fuller's death, Harlan's letter perhaps accomplished several things other than its ostensible purpose. Taft

never apparently considered Day as a serious possibility. But the letter suggested the utility of appointing an Associate Justice with experience as to the Court's operations. Harlan may, in fact, have been the first person to suggest this to the President. It was a congenial suggestion: the Court was at the time composed of four relative newcomers and had only four experienced judges. This made strong leadership from the Chief's position more important than it might otherwise have been. Taft also felt that White's record was what he himself would have had.²⁹

Taft did not, of course, appoint Justice Day to the vacancy. But, he apparently agreed with Harlan that an Associate Justice would be a good idea, even though his reply to Harlan was noncommittal:³⁰

I have your letter of July 11th, with respect to the Chief Justiceship, and I shall give it the full consideration that advice coming from such a source is entitled to. Moody is going to retire, so that I shall have the appointment of a Chief Justice and an Associate Justice, in addition to those already made. I shall keep your letter in order to give it full weight when the time for final decision comes.

Harlan may have wished to become Chief Justice, and more certainly, he probably would have preferred someone other than Justice White. There is no evidence, however, that he ever expected to be appointed, or that his personal feelings about Justice White affected his performance on the Court after White's elevation. Justice Hughes observed that "Harlan concealed whatever disappointment he felt in not being made Chief Justice (or, perhaps, in White's elevation) and continued his work through the 1910 term with but little apparent abatement in his vigor."³¹ Had Justice Harlan received the appointment, his tenure would have been a short one — he died at the age of 78 on October 14, 1911, just ten months after White's confirmation as Chief Justice.

Footnotes

¹Henry F. Pringle, *The Life and Times of William Howard Taft*. New York: Farrar and Rinehart, 1939. Vol. I, p. 264.

²*Ibid.*, p. 265.

³Willard L. King, *Melville Fuller, Chief Justice of the United States, 1888-1910*. Chicago: University of Chicago Press, 1950, p. 303.

⁴*Ibid.*

⁵*Ibid.*

⁶Taft to Mrs. Taft, July 10, 1905, as quoted in Pringle, p. 311.

⁷Taft to Lurton, May 22, 1909, as quoted in Pringle, p. 311.

⁸In the 1909 session neither Peckham nor Moody

wrote any opinion for the Court. Brewer wrote only 12, Fuller and Harlan 18 each. This left McKenna with 24, White with 25, Day with 27 and Holmes with 34. Lurton, who replaced Peckham midway through the term, nevertheless wrote 19 opinions.

⁹Taft to Chauncey M. Depew, Oct. 15, 1910, as quoted in Pringle, p. 534.

¹⁰Taft to Hughes, April 22, 1910, as quoted in Pringle, p. 532.

¹¹*Ibid.*

¹²John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920*. Westport, Conn., Greenwood Press, 1978, p. 248. (Hereafter cited as Semonche.)

¹³Pringle, pp. 434-535.

¹⁴Semonche, p. 248.

¹⁵Holmes to Sir Frederick Pollock, Sept. 24, 1910, in Mark DeWolfe Howe (ed.) *Holmes-Pollock Letters*, 2 vols., Cambridge: Harvard University Press, 1941, Vol. I, p. 170.

¹⁶Pringle, p. 534.

¹⁷*Ibid.*

¹⁸Alpheus Thomas Mason, *William Howard Taft*,

Chief Justice. New York: Simon and Schuster, 1964, p. 35.

¹⁹Semonche, p. 248.

²⁰Pringle, p. 534.

²¹*Chicago Inter-Ocean*, Dec. 29, 1910.

²²Harlan papers, University of Louisville, undated.

²³Lurton to Harlan, Sept. 8, 1910. Harlan papers.

²⁴Harlan to Lurton, Sept. 12, 1910. Harlan papers.

²⁵Harlan to H. B. F. Macfarland, Aug. 5, 1910. Harlan papers.

²⁶Harlan to Day, July 22, 1910. Harlan papers.

²⁷Harlan to Taft, July 11, 1910. Harlan papers.

²⁸Day to Harlan, July 25, 1910. Harlan papers.

²⁹Robert B. Highsaw, *Edward Douglass White, Defender of the Conservative Faith*. Baton Rouge, Louisiana: Louisiana State University Press, 1981, pp. 57-59.

³⁰Taft to Harlan, July 13, 1910. Taft papers, Library of Congress.

³¹Daniel J. Danelski and J. S. Tulchin (eds.) *The Autobiographical Notes of Charles Evans Hughes*. Cambridge, Harvard University Press, 1973, p. 169.

What Heaven Must Be Like: William Howard Taft as Chief Justice, 1921-30

by Jeffrey B. Morris*

I love judges and I love courts. They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God.

—William Howard Taft¹

No person who ever became Chief Justice yearned for that office more than William Howard Taft. No man to chair the supreme committee of nine did so with greater love. No Chief Justice came to the office having thought more about its potential than Taft. Although he served less than a decade, Taft's stamp upon the office was such that each of his successors has to an important degree had to fit into expectations which he created.

Few who have ever served or even aspired to be Chief Justice were better qualified for the position than William Howard Taft. Taft had been a judge on both the state and the federal bench. In his thirties he had served on the Superior Court of Ohio (1887-90). Later, from 1892 to 1900, Taft was a member of one of the strongest courts in American history, the Court of Appeals for the Sixth Circuit, which at one time was composed of three future Justices: Taft, William Rufus Day and Horace Lurton. Taft wrote two hundred opinions in eight years on the Sixth Circuit, dissenting only once (and filing four separate opinions). He was nationally recognized for his powerful opinions interpreting the then new Sherman Anti-trust Act, and was viewed as an anti-labor jurist.

While by no means an important legal scholar like Holmes, Thayer or Pound, Taft had taught law—as Dean and Professor at the University of Cincinnati Law School (1896-1900) and at the



Taft at home with his wife, Helen, and their son Charles.

Yale Law School (1913-21). He was the author of a number of books, among them *Our Chief Magistrate and His Powers*² and *The Antitrust Act and the Supreme Court*.³

Schooled as well in world affairs, Taft's career as an executive had been important, as first civil Governor of the Philippines (1901-04), Secretary of War (1904-09), and twenty-sixth President of the United States (1909-13). He was a great success as Secretary of War—the most influential advisor of—and heir apparent to—Theodore Roosevelt. But Taft's presidency was notably less successful. He viewed the powers of that office far more restrictively than his predecessor, "waffled" on many issues, and squandered his popu-

*I acknowledge with appreciation the research assistance of Helena Silverstein, a junior at the University of Pennsylvania.

larity.⁴ Taft's own opinion of his administration was unenthusiastic:

... a very humdrum, uninteresting administration, and it does not attract the attention or enthusiasm of anybody.⁵

Naturally, such self-deprecation ought to be viewed in light of Theodore Roosevelt's flamboyant presidency. Taft added, in words that might as well have been applicable in large measure to the administration of Dwight D. Eisenhower:

... I have strengthened the Supreme Bench, have given them a good deal of new ... legislation, have kept the peace, and on the whole have enabled people to pursue their various occupations without interruptions.⁶

The passage of time and further public service during and after World War I as co-Chairman of the National War Labor Board (1918-19) and as a strong supporter of ratification of the Versailles Peace Treaty, transformed the unpopular President of 1912 into a well-thought of "elder statesman."

Taft had aspired to a seat on the Supreme Court throughout his distinguished career. Briefly considered for the High Court as early as 1889, Taft accepted the position of Solicitor-General (1890-92), viewing it as a "stepping-stone." Twice, however, he refused Theodore Roosevelt's tender of appointment to the Supreme Court—to the seats vacated by Justices Shiras (1902) and Brown (1906). His wife's ambitions for a Taft presidency and Taft's commitment to duties in the Philippines and the War Department dictated decisions made with regret. Had Chief Justice Fuller retired or died, Taft would probably have chosen the Chief Justiceship over the Presidency. He had said, "If the Chief Justice would only retire how simple everything would become."⁷ Taft's ambition was hardly a closely guarded secret, and Roosevelt was not above manufacturing rumors of Fuller's retirement; the old Chief Justice, however, was "not to be paragraphed" out of his place by news stories.⁸ Mrs. Fuller reportedly sent word to the Philippines, "You tell Willie Taft not to be in too much of a hurry to get into my husband's shoes."⁹

As President, Taft made six appointments to the high bench with great care, blending concern for the right jurisprudential outlook with institu-



Chief Justice Melville Fuller (1888-1910)

Office of the Curator, Supreme Court

tional requirements—legal competence, experience, vigor, integrity, and the ability to work with others.¹⁰ Judging Taft's appointments by his own criteria, they failed him in only one important way—longevity. Of the six, only one—Willis Van Devanter—would serve more than ten years.*

Taft's concern about courts went far beyond his own ambitions and his belief that the courts would protect private property. From at least the time of his first article, published in 1884, Taft cared passionately about the administration of justice—the structure and management of courts, their staffing and procedures.¹¹ As senior judge of the Sixth Circuit, he had "demonstrated an abiding interest in centralized administration of that court," and had "assumed personal responsibility for those cases which had been pending before the Court for long periods of time."¹² As President, Taft was "to a unique degree" interested in the effective working of the judicial machinery and conversant with the details of ju-

* Charles Evans Hughes served five years as a Taft appointee prior to his resignation in 1916. Succeeding Taft as Chief Justice, Hughes would serve another eleven years.

dicial administration."¹³ In his first address on the State of the Union, Taft argued that:

... a change in judicial procedure with a view to reducing its expense to private litigants in civil cases and facilitating the dispatch of business and final decisions in both civil and criminal cases, constitutes the greatest need in our American institutions.¹⁴

As President, Taft bitterly fought the trend in the states and territories towards recall of judges; he "set a fire" under the Supreme Court "to modernize the federal rules of equity,"¹⁵ and vigorously supported the union of law and equity.

After Taft left the White House, he continued his crusade for judicial reform in speeches and law review articles as Kent Professor of Law at Yale (1913-21), president of the American Bar Association (1913), and president of the American Academy of Jurisprudence (1914). During this period, the best known advocate of judicial reform in the United States continued to yearn to be Chief Justice. Taft was sixty-three years old in 1920, and the fulfillment of his ambitions depended upon the victory of Warren G. Harding that year, and the departure from office of the man he had appointed, Edward Douglass White.

Personal disappointment had been evident in 1910 as Taft had set about filling the first vacancy in the Office of Chief Justice since 1888:

It seems strange that the one place in the government which I would have liked to fill myself I am forced to give to another.¹⁶

Taft bypassed the vigorous forty-eight year old Charles Evans Hughes, whom he had once indicated he might appoint, to choose White, a sixty-five year old Democrat; a Roman Catholic who had fought in the Confederate army, White was the first Associate Justice ever to be directly promoted to the Office of Chief Justice. It is difficult to measure the degree to which Taft's ambitions to be Chief Justice may have weighed in the selection of White. There were good reasons for choosing White. His jurisprudential views were congenial, and with a major transformation occurring in the membership of the Court,* it made sense to choose someone who was familiar with its work and traditions. Nor did White appear to be too old nor too unhealthy to be able to do hard,

routine work. White could handle the procedural and jurisdictional questions which were often the lot of the "Chief." White was popular with his colleagues, and it appeared that his appointment would be well-regarded by at least three constituencies important to Taft — Southerners, Roman Catholics, and Theodore Roosevelt.

On the other hand, the selection of White seems a strange choice for a President so sensitive to the need for major changes in the operations of the Supreme Court and management of federal judiciary. "A very dear man,"¹⁷ White was neither a manager nor a reformer. He proved ineffective in presiding over the conference of the Court, permitting rambling debate and generating unnecessary controversy. He was not willing to take the lead in fighting for changes in the jurisdiction of the Supreme Court that would protect it from being overwhelmed by trivial cases. Although he sanctioned Justice Willis Van Devanter's drafting what later became the Act of January 28, 1915 which slightly expanded certiorari jurisdiction,¹⁸ White "particularly requested that it be turned over to a legislator who would make it his own and in no way connect the Court or any member of the Court with it."¹⁹ The Chief Justice would not appoint a committee of Justices having anything to do with legislation; he was irked by the efforts of Justices Day, McReynolds and Van Devanter who drafted the Act of September 6, 1916, which again slightly expanded certiorari jurisdiction. The legislation was introduced and passed by the Congress when the Court was in recess; White "never became reconciled to that act."²⁰

White preferred to deal with the caseload problem facing the Court by modification of methods which had been used in the Waite and Fuller years: decisions *per curiam*, and the use of jurisdictional and procedural grounds to avoid reaching the merits of many cases. There was one innovation, the summary docket, but with the rapid growth of caseload during and after World War I, the old methods were not good enough. White would not fight for more law clerks nor for a significant improvement in the Court's working space. What Holmes had written of Fuller in 1908 remained true at the end of White's tenure:

The Chief twigs things as well as another, but you don't get him to change what has been, one jot.²¹

* Taft made six appointments in four years.

Nor would White take the lead in supporting major changes affecting the lower federal courts. He would not move in the direction which Taft and others were urging towards greater centralization with the Chief Justice given the responsibility to assign judges to overloaded districts. Indeed, White restrictively interpreted the one law granting the Chief Justice assignment power—the Act of October 13, 1913. Although he served with Lurton and Van Devanter on the committee appointed by President Taft in 1911 to revise the Federal Rules of Equity, White would not support legislation to delegate rule-making powers in civil cases to the Supreme Court. As Chief Justice, White strictly curtailed his public appearances. He addressed the American Bar Association three times during his tenure, but did not choose to use that podium to preach sermons of reform.*

Perhaps a younger and healthier White would have responded more vigorously to the demands of the caseload which occurred during the end of his tenure, but then he was ailing. Even in the

more effective early years, however, White had preferred the status quo. The last "Nineteenth Century Chief Justice," White viewed the office largely the way Taney, Waite and Fuller had.** For White, the job of the Chief Justice was to be head of the Supreme Court: to spare the Associate Justices from dealing with matters that were primarily administrative motions and other procedural problems to be handled with the Clerk; to supervise the Court's other officers; to apportion the assignment of opinions fairly; and all the while, to take responsibility for the same duties of judging as the Associate Justices. Thus, the traditional view of the job of Chief Justice to which White adhered was that the Chief Justice was primarily responsible for maintaining a good working atmosphere within the Supreme Court,

*On one occasion he introduced the Lord Chancellor; on another, he responded to a toast. White did speak once on the public duties of American lawyers.

**Chase's interests clearly transcended the running of the Supreme Court and riding circuit, but they were primarily connected with his continuing quest for the Presidency.



The White Court in 1916: joining the senior justices (seated) are (standing, left to right) Associate Justices Louis Brandeis (1916), Mahlon Pitney (1912), James C. McReynolds (1914) and, John Hessin Clarke (1916).

while turning out more than one-ninth of its opinions.

No one would deny that this was—and is—a difficult enough job to perform. But the growing centralization of American government led to increased demands upon the federal judiciary. The courts would not be able to function effectively without someone taking the lead in pressing for changes in structure, management, and staffing. William Howard Taft saw this, and knew that the only person who could be successful would be the Chief Justice. Thus, Taft became the first “modern” Chief Justice, looking outside of the Supreme Court for a substantial part of his duties. His way of looking at the office, as well as the administrative mechanisms he established, greatly influenced the manner in which his successors would view their roles.



Office of the Curator, Supreme Court

An aging Chief Justice White and an aged Associate Justice McKenna.

The Appointment of Taft as Chief Justice

Seventy-five years old and ailing, with poor eyesight and poor hearing, Chief Justice White lived through Woodrow Wilson's Presidency, keeping conscientiously at his job. Although there were rumors that he was keeping the seat warm for Taft, White gave no indication that he

would retire after Harding became President on the fourth of March, 1921. Taft had been a friend and political ally of Harding, having contributed to his unsuccessful race for Governor of Ohio in 1910, and having asked Harding to put his name in nomination in 1912. Soon after the election, Harding indicated to Taft that he wished to appoint him to the Supreme Court. When Taft told Harding that he could serve on the Court only as Chief Justice because he had appointed three of the then sitting Justices—White, Van Devanter, and Pitney, and had publicly opposed the confirmation of two others—Brandeis and Clarke, Harding remained silent. There were several potential roadblocks to the realization of Taft's ambition. White would have to leave office soon, as Taft was already sixty-three years old. Secondly, Charles Evans Hughes, Harding's Secretary of State, was a potential rival. Finally, Harding had promised the *first* available seat on the Supreme Court to his friend and former colleague, Senator George Sutherland of Utah. Taft became so impatient that soon after Harding took office, he paid personal visits to both White and White's physician, to ascertain the state of White's health.

White died on May 19, 1921. Spurred by Attorney General Harry Daugherty, who felt that he could work well with Taft on matters of federal judicial administration, Harding appointed Taft on June 30th. He was confirmed on the same day he was appointed with but four dissenting votes. Taft took the oath of office on July 11th and immediately went to work.

Chief Justice Taft

William Howard Taft brought to the Office of Chief Justice the prestige of the presidency; a lifetime of experience and special interest in courts and politics; an intricate network of friends throughout the three branches of the national government, among the bar, and in the press; a winning personality; and, a carefully considered view of what the job of the Chief Justice should be. Taft believed that within the Supreme Court the Chief Justice must “promote teamwork” to give the product of the institution “weight and solidarity.”²² To that end, he brought unusual administrative skills and an attractive personality. It was, however, in his view of the appropriate responsibilities of the Chief Justice *outside of the Supreme Court* that Taft de-



Library of Congress

Chief Justice at last, Taft leads the Court on its traditional visit to the White House in 1922.

parted audaciously from his predecessors. If Taft's view of the constitutional powers of the President had been narrow, his views of the prerogatives, duties and responsibilities of the Chief Justice were "almost majestic."²³ Accepting responsibility for acting as a visible spokesman for change, Taft brought the "executive principle" to the federal courts, fighting for a program of reform with an extraordinary array of tactics and unflagging energy.

The Taft Program

Taft became Chief Justice at one of those times during which congestion and delay in the federal court system had become especially intolerable.²⁴ The jurisdiction of the federal courts had grown rapidly within a short period of years, largely as a result of new federal laws regulating the economy, wartime measures, and a host of new federal penal offenses. Between 1918 and 1921, civil cases with the United States as a party filed in the federal courts increased from 2,877 to 9,727. Other civil cases filed increased from 13,789 to 22,453. Criminal cases increased from 35,096* to 54,487.²⁵ There was no increase in the number of federal judgeships during the period. In 1922, Albert Cummings, United States Senator from Iowa, stated that "in many

parts of the United States it is utterly impossible to secure the trial of a civil suit within one year or two years."²⁶

When Taft became Chief Justice, the federal court system had no system-wide direction. Life-tenured judges went unsupervised and unassisted. Local judges had complete power over patronage and were accountable only through impeachment. Felix Frankfurter and James M. Landis described the situation this way:

Each judge was left to himself, guided in the administration of his business by his conscience and his temperament.²⁷

The traditional remedies for increased workload had been the creation of new federal courts, more judgeships, or curtailment of jurisdiction. Taft supported the creation of new judgeships and curtailing the obligatory jurisdiction of the Supreme Court, but he also placed an emphasis upon better management, accountability of District Judges for their docket, and modernized rules of procedure. Concerned about delays, high court fees, unnecessarily complex procedures, abuses in the appointment of receivers in bankruptcy, and misconduct in the offices of clerks of court, Taft believed that someone—or some institution—had to be responsible for the overall business of the federal courts; judicial independence did not mean freedom from oversight of the management of court business.

*In 1917 there were only 19,828 criminal cases filed.

The Executive Principle

Taft first sought a new institution — a multi-judge agency — which would provide “machinery of a quasi-executive character” to mass the judicial force to attack congestion, wherever it might be. He sought to introduce into the judicial system “an executive principle to secure effective team work.”²⁸ To this end he proposed annual meetings of the Chief Justice and the Senior Circuit Judges of the then nine circuits, to join with the Attorney General in considering reports on the business in each district from the district judges and clerks. The conference would make “a yearly plan for the massing of the new and old judicial force of the United States in those districts all over the country where the arrears” were “threatening to interfere with the usefulness of courts.”²⁹

The Conference of Senior Circuit Judges, composed of the Chief Justice and nine Circuit Senior Judges, was established by the Act of September 14, 1922, to meet annually upon the summons of the Chief Justice. The Conference was to make a comprehensive survey of the condition of the business in the courts, prepare plans for the assignment of judges, and submit suggestions to the courts in the interest of uniformity and expedition of business.³⁰ Taft presided over the Conference, voted as a member, and appointed its committees, all the while serving as its staff.

Through the creation of what in time became the Judicial Conference of the United States, leadership in federal judicial administration was given to the Chief Justice and the senior circuit judges. In the early years the Conference not only collected statistics, but as a result of Taft’s prodding, discussed in *specifics* the quantity and quality of justice in the trial courts in each district, beginning to serve as a clearing house for recommendations to the Congress.

The power to act directly upon individual judges was not clearly defined by the legislation creating the Conference. The Conference was hardly a centralized executive, nor has it ever truly become one. There would not be direct control by command; rather there was coordination through persuasion.³¹ The Conference was but a “first step towards a more integrated administrative system,”³² providing not management, but important oversight and coordination.

Judgeships

Fears of centralization, of the diminution of judicial independence, and of the Chief Justice amassing too much power, led to the defeat of the second plank in Taft’s platform: the creation of eighteen new judgeships, two to a circuit, who would not be permanently assigned to any specific district, but rather, assignable by the Senior Circuit Judge to any district within his circuit, and by the Chief Justice to any district outside the home circuit. In 1921, the Chief Justice of the United States could only assign judges with light caseloads to the Second Circuit, and then only with the consent of the individual District Judge.* Taft’s proposal would have provided the federal courts, guided by the Conference, with a judicial force to grapple with the arrears and end them.³³ Taft proposed that the judgeships be “temporary,” expiring when the first appointee left the bench unless Congress provided otherwise; his proposal also left the judges-at-large without the power to make patronage appointments. Taft hoped that the at-large judgeships would head off attempts to create new judgeships for political reasons, and that the positions might be filled by more able judges than usual, for the judges would be chosen from a pool that was circuit-wide rather than district-wide.³⁴

In the end, Taft received half-a-loaf. Twenty-four new judgeships were created—more judges than he wanted, and the largest increase since the First Judiciary Act—but they were placed within specific districts, with the assignment power shared by the Chief Justice and the Senior Circuit Judges of the “giving” and “receiving” circuits. Thus, Taft had less formal assignment authority with regard to the circuits than his predecessor had enjoyed with respect to the Second Circuit.³⁵ What assignment powers Taft did have, he would be especially careful not to over-exercise.³⁶

Rule-Making Power

The third part of Chief Justice Taft’s program was the delegation by Congress to the courts of rule-making powers enabling the adoption of a single code of federal practice for civil cases. As

*However, the Chief Justice could assign the judges of the Commerce Court, which had been abolished, to any circuit.



Seated in the chair once occupied by Chief Justice John Jay, Taft was the principle speaker in May, 1922 at the rededication of the old Supreme Court building and City Hall in Philadelphia.

Library of Congress

early as 1908, Taft had been critical of the Conformity Act of 1872, which required federal courts to follow in civil cases the procedures of the state in which the federal court was meeting. As a result, federal procedures in civil cases varied from state to state, and federal courts could do nothing to modify those procedures which were archaic and complex.

For more than a century the Supreme Court had exercised the power to lay down national rules of equity, admiralty and bankruptcy for the federal courts. As President, Taft had successfully pressed for revisions of the Federal rules of Equity, a revision which permitted parties to bring controversies before the courts in intelligible, factual form, omitting ritualistic and obscure language. As Chief Justice, Taft favored the unification of law and equity in one national code of procedure:

All that is needed is to vest the same power in the Supreme Court with reference to the rules at common law and then to give that court the power to blend them into a code, which shall make the procedure the same in all and as simple as possible.³⁷

Taft envisioned a "system so simple that it needs

no special knowledge to master it," a system which would be "a model for all other courts."³⁸

Congress would not delegate rule-making powers in civil cases to the Supreme Court in Taft's lifetime. Even among his colleagues, Taft was unable to convince Holmes, Brandeis and McReynolds. But by giving visibility and sustenance to the two-decade long struggle of the American Bar Association Committee on Judicial Administration and Remedial Procedure, led by Thomas W. Shelton, Taft sowed the seeds which would be successfully reaped a few years later by Homer Cummings, William D. Mitchell, Charles E. Clark, and Chief Justice Charles Evans Hughes.³⁹ The Federal Rules of Civil Procedure were one of the great reforms in the American judicial process in the Twentieth Century.⁴⁰ The rule-making process itself and the substance of the Federal Rules were widely emulated by state courts.*

*In recent years both the process and the rules themselves have been called into question. See, e.g., Jeffrey B. Morris, "The Changing Federal Courts," in (ed.) Richard M. Pious, "The Power to Govern," 34 *Proc. Acad. Pol. Sci.* No. 2 90,97-99(1981).

Discretionary Jurisdiction for the Court

The fourth part of Taft's program was providing relief for an overburdened Supreme Court through substantial restriction of the unqualified right to appeal from courts below. The Evarts Act of March 3, 1891, which created the Courts of Appeals, substantially increased federal appellate capacity and provided discretionary jurisdiction for the Supreme Court in a limited class of cases.⁴¹ That jurisdiction, by way of the writ of certiorari, had been slightly expanded in 1915 and 1916. Further relief proved necessary as growing caseloads eradicated the benefits of the 1891 Act. In 1910, for example, the Court disposed of 509 cases; by 1916, there were 647 filed and the Court disposed of just ten fewer. Justice John Hessin Clarke complained of the "amount of grinding, uninteresting, bone labor," and added that "much more than one-half of the cases are of no considerable importance."⁴² Taft saw as a goal that:

... there must be some method adopted by which the cases brought before that Court shall be reduced in number, and yet the Court may retain full jurisdiction to pronounce the last word on every important issue under the Constitution and Statutes of the United States on all important questions of general law with respect to which there is a lack of uniformity in the intermediate appellate Federal courts of appeal.⁴³

Taft proposed to replace much of the Supreme Court's obligatory jurisdiction with an expanded use of the writ of certiorari.

Taft also hoped that at the same time the Court's discretionary jurisdiction was broadened, the laws governing the Supreme Court would be recodified "to enable any lawyer, judge, or layman, to look to one statute and be sure that it contains all there is on the appellate jurisdiction of the Supreme Court."⁴⁴

Taft was the central force behind the enactment of enlarged certiorari jurisdiction. Senator Albert B. Cumings of Iowa purportedly requested Taft to appoint a committee of Justices to draft a measure for relief of the Court. Taft appointed Van Devanter, McReynolds and Sutherland,* and sat with the committee himself. The measure drafted by the Justices was eventually

approved by the entire court, Taft having persuaded Justice Brandeis not to make his opposition public.⁴⁵ Taft arranged the testimony of Justice Van Devanter before the Congress, "set in motion the powerful machinery and organization of the American Bar Association,"⁴⁶ and drafted the language used by the President to support the bill.⁴⁷ The Judge's Bill was introduced on March 30, 1922, and became law on February 13, 1925—a very short time for enactment of such a major reform in judicial administration.

Once again, Taft had to settle for half-a-loaf—recodification of the laws governing the jurisdiction of the Supreme Court into one statute was not accomplished—but, what a half loaf it was! By 1933 Felix Frankfurter and Henry M. Hart, Jr. could report that:

... the Court is hearing and disposing of all litigation brought before it without delay and without sacrifice of any of the guarantees of ample argument and due deliberation which the effective exercise of its functions demands. In so doing, it sets a standard for state courts of last resort throughout the country.⁴⁸

Taft's medicine put the disease into remission for two generations. Stating that the Chief Justice's very active part in shepherding the Act of 1925 "entitles him to a high place among judicial statesmen," Justice William Rehnquist concludes:

Chief Justice Taft foresaw the need for this grant of discretionary jurisdiction before it became indispensable. It is due to his foresight and to his willingness to perform tasks outside of the normal business that the Supreme Court today is as currently abreast of its docket as it is.⁴⁹

Tactics

As President, William Howard Taft appeared to be a bumbling, indecisive amateur who was ill at ease in politics and cautious in the exercise of the powers of his office. As Chief Justice, Taft was deft and professional, effective in the game of politics, bold in assertion of the prerogatives of the office. Thoroughly knowledgeable about judicial administration, Taft possessed an intricate network of contacts; coming to office with a program, he filled the traditional vacuum in judicial administration, a vacuum compounded by a compliant President and an Attorney General who knew little about the needs of the courts.⁵⁰

Taft moved rapidly once he took office. Al-

* Sutherland replaced Day on the latter's retirement.



Chief Justice William Howard Taft (1921-30)

most immediately, he met with the Attorney General's five-person committee on court reform chaired by Judge John E. Slater of the Sixth Circuit. Taft urged the committee to recommend that administrative power for the court system be placed with the Chief Justice and Senior Circuit judges in collaboration with the Attorney General. Asked by Daugherty to comment on the work of the committee and to draft legislation implementing his vision of a council of judges, Taft doubled the number of District Judges recommended by the committee, and inserted language requiring annual reports by each District Judge on the business of his court.⁵¹

Throughout his tenure, Taft was willing to place the prestige of his office on the line for his program. He was not troubled by the separation of powers. If anything, he considered that the separation of powers warranted his activities, making it his duty to propose and press reforms.⁵² Taft testified formally before Congressional committees and subcommittees a number of times. He wrote to Congressmen and buttonholed them in the Capitol. He called upon his colleagues for assistance: Van Devanter, McReynolds and Sutherland testified on the Judges' Bill; Holmes and Brandeis joined Taft in testifying on behalf of the acquisition of a library for the

federal courthouse in Boston.⁵³ As Chief Justice, Taft worked well with the Congress, employing his charm and prestige; he knew when to take soundings, when to move, when to place himself on the line, and equally important, when to pull back and let others carry on.

Taft forged an extraordinary partnership with the executive branch during his tenure, especially in the first few years, wielding immense influence upon Daugherty and Harding. His relations were cordial with Coolidge and Attorney General Harlan Fiske Stone, but were less effective with Attorneys General Charles B. Warren and John G. Sargent. He was not close to President Hoover, but was successful in lobbying for the appointment of William Mitchell to head the Department of Justice.⁵⁴ Taft, however, went well beyond close collaboration with Attorneys General. The Justice Department was responsible at the time for many of the administrative details connected with the running of the federal courts; prior to making requests for appropriations, Taft met personally with members of the Department's budget section and with the Director of the Bureau of the Budget.⁵⁵

Not until Warren E. Burger would a Chief Justice forge as effective a partnership with the organized bar as Taft. In 1923 the Chief Justice wrote:

There is no reason why the bar should not exert a tremendous influence through the country. Its organization is necessary to bring about such a result. I want, so far as I can, to organize the Bench and Bar into a united group in this country dedicated to the cause of the improvement in judicial procedure and in the defense of the constitutional provisions for the maintaining, through the judiciary, of the guarantees of the Constitution.⁵⁶

Elihu Root, a leader of the bar and an old friend from his years in the Cabinet, wrote Taft in 1922, stating that he was "the first Chief Justice to fully appreciate the dynamics of the bar as an organization."⁵⁷ Taft attended meetings of the ABA, stating that:

I deem this one of the most important extracurriculum things that I have to do as Chief Justice.⁵⁸

He frequently used the podiums of local bar associations, and as the "godfather" of the American Law Institute, began in 1927 the tradition of an address to that body by the Chief Justice.⁵⁹ Solicitous and accessible to these organizations,

Taft reaped their support for his measures and insured their opposition to measures which he opposed.

In contrast, the Judicial Conference offered a pulpit for a different message. Peter Fish has written:

The Chief Justice commanded the Conference. For Taft, it was command with a purpose, for the two to five-day sessions afforded him a means of giving "unity to the federal judicial force." The social as well as the business aspects of the meetings were intended to inculcate a national perspective among the ranking federal judges. To this end, the Chief Justice arranged for Conference members to visit the White House and meet the President, and gave them a luncheon at the Metropolitan Club.⁶⁰

Ill at ease with the press and with critics as President, Taft collaborated with both as Chief Justice. As Chairman of the Conference, he became its public relations director.⁶¹ He encouraged interviews with newspapers and magazines.⁶² As for critics, Professor Felix Frankfurter provides a typical example. Frankfurter wired Taft in 1926 urging appointment of a Conference committee on statistics. Taft did what Frankfurter asked, appointing as the committee chairman Charles M. Hough, a jurist whom both men greatly respected.⁶³

Taft's political abilities and alliances not only helped him win approval for the greater part of the four-part program already discussed but also resulted in victories against the Caraway bill which would have prevented federal judges from commenting upon the testimony of witnesses, and the Norris bill which would have eliminated the diversity jurisdiction of the federal courts.

No Chief Justice before or after Taft has had such an influence upon the appointment of judges. He was influential because he was a former President and party leader, but also because he was knowledgeable, concerned, and tenacious. Even before he became Chief Justice, Taft had written Attorney General Daugherty:

If you don't mind it, my interests in the Federal Judiciary, where I know something of the situation, makes me anxious to give you benefit of what I have learned from considerable experience. I am not butting in, but I am only testifying, without any personal slant and only with a view of helping if I can.⁶⁴

Daugherty did not mind it, welcoming the overture: "I want you at all times to feel free to make

suggestions."⁶⁵ This proved to be more than a politician's tact.

Taft sought the advice of lawyers, federal judges, politicians, journalists, family and friends about possible nominees to the bench.⁶⁶ He located and advanced candidates, gathering a great deal of information with which he bombarded Attorneys General and Presidents in writing and in person. He would go to extraordinary lengths to keep from the bench judges he felt ill equipped, pleading with judges not to retire or to delay their retirements; he even pursued Coolidge onto the Harding funeral train in order to neutralize the efforts of a particular Senator.⁶⁷ Taft's standards — legal competence, sound views, "team players" and honesty — were usually high; generally, the bench was the stronger for his activities. Due in some measure to his involvement, the U. S. Court of Appeals for the Second Circuit was transformed into a great court through the appointments of Thomas Swan, and Learned and Augustus Hand.⁶⁸

Few statements show as little self-awareness as Taft's homily of July 30, 1921 that "the Chief Justice goes into a monastery and confines himself to his judicial work."⁶⁹ Taft was, to be sure, personally honest, but he hardly was "more circumspect than Caesar's wife."⁷⁰ Taft altered what had become the accepted view of how a Chief Justice should behave. Reacting to the excesses of Salmon P. Chase, Morrison Waite stayed out of activities other than judicial business. Melville Weston Fuller was the first Chief Justice to absent himself from a heavy Washington social schedule. As Chief Justice, Edward Douglass White avoided public speeches and hung back from pushing for judicial reforms. Taft, however, broke new ground. He placed the Office of Chief Justice in the front lines of the fight for reform, and became an outspoken advocate for important issues.

Certain aspects of this new expanded role for the Chief Justice did raise questions. For example should the nation's highest legal officer advise the President about pardons, or serve as emissary to convince an Attorney General besmirched by convincing allegations of corruption to resign?⁷¹ The special interest of Chief Justices from the time of Morrison Waite in the legal resolution of conflicts between nations might explain Taft's interest in the plank of the Republican party platform devoted to the World Court. If

Taft engaged in activities which might be considered inappropriate for a Chief Justice, such behavior was largely harmless. He urged Presidents to remain steadfast in pursuing policies to which they were already committed. His irrepressible fraternization with old friends, some of whom continued to argue before the High Court, may have dismayed the more austere Charles Evans Hughes, but didn't place the Court in disrepute.

Some of Taft's activities, however, should not belong to the "job description" of a Chief Justice. Taft advised Presidents on the substance of legislation unrelated to the courts. He encouraged friends to lobby to sustain presidential vetoes. He wrote to editors to persuade them to influence the legislative process. He took soundings of Republicans in Rhode Island on Coolidge's prospects for the presidential nomination of a incumbent senator. What is perhaps nation of a incumbent Senator. What is perhaps most remarkable is how little criticism Taft received for these activities.

Massing the Court

No Chief Justice can be said to have exercised true intellectual domination over the work of the

Supreme Court since Marshall, if indeed Marshall did so. Some like Taney exercised a good deal of influence upon the jurisprudence of the era. Fuller and Hughes managed the conference of the court well, assigned opinions deftly, and produced a congenial working atmosphere that maximized the productivity of their colleagues. Waite and Hughes' administrative talents spared their colleagues a good deal of time in dealing with judicial flotsam and jetsam.

Taft came to office having given considerable thought as to how he might exercise influence upon the Court's jurisprudence and working conditions. He considered it to be the duty of the Chief Justice to "mass" the Court in order to give "weight and solidarity" to its opinions. Marshaling the Court to achieve the greatest possible consensus consistent with precedent was clearly Taft's goal:

The Chief Justice is the head of the Court, and while his vote counts but one in the nine, he is, if he be a man of strong and persuasive personality, abiding convictions, recognized learning and statesman-like foresight, expected to promote teamwork by the Court, so as to give it weight and solidarity to its opinions. [A great Chief Justice is] winning in his way, strong in his responsibility for the Court, earnest in his desire to avoid divisions, and highly skilled in reconciling difficulties in the minds of his brethren.⁷²



In 1921 William Howard Taft joined the eight incumbents of the White Court—two of whom he himself had appointed; Willis Van Devanter and Mahlon Pitney.



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An "amiable" Chief Justice Taft (right) with "the mature justice," Associate Justice Oliver Wendell Holmes, Jr.

In a now classic article on the role of the Chief Justice, David J. Danelski argues that two leaders often emerge in a small group: a task leader—someone able to present views with force and clarity, and the person to whom colleagues turn when perplexing questions arise; and, a social leader—someone who provides "the warmth and friendliness which make interpersonal relations pleasant or even possible." The social leader raises the self-esteem of the members of the group, accepts suggestions readily, and is quick to relieve tensions with a laugh or friendly joke.⁷³ According to Danelski, Taft was just that kind of social-oriented leader.

Taft was an effective head of the Supreme Court. He managed its business well. He usually massed a majority for his jurisprudential views through intellectual persuasion, warmth and charm, and to some extent, through his unique influence upon the process of selection of Justices. In his early years as Chief Justice he was especially effective in discouraging dissent. Measuring Taft's impact in terms of institutional

cohesion, "job satisfaction" of his colleagues, and to a slightly lesser extent, productivity, Taft was one of the most satisfactory Chief Justices of this century.⁷⁴

It is worth pausing to examine Taft's effectiveness as chairman of the committee of nine, by looking at him through the eyes of his great colleague, Oliver Wendell Holmes, whose admiration and fondness for Taft grew over the years. Holmes was unenthusiastic at the prospect of Taft as Chief Justice. A few days after Chief Justice White's death, Holmes wrote to Harold Laski:

Now people speculate as to who will take White's place. Taft is much mentioned. I would rather have Hughes, but I think he doesn't want it. Hughes is very hard working. Taft is said to be indolent. He has been out of judicial place for 20 years or so—and though he did well as a Circuit Judge I never saw anything that struck me as more than first rate second rate. I have heard it said and denied that he is hard to get along with if you don't agree with him.⁷⁵

On the day Taft took the oath of office, Holmes wrote to Sir Frederic Pollack:

I am looking forward with curiosity to the new Chief Justice. He marked a fundamental difference in our way of thinking by saying that this office always had been his ambition. I don't understand ambition for an office.⁷⁶

But, as usual, Holmes mind was open, educable by experience. Early in Taft's first term he wrote to Laski:

Taft, I think will do well as CJ — the executive details, which, as I have said, are the matters upon which the CJ most counts as such, will be turned off with less feeling of friction and more rapidly [than with his predecessor].⁷⁷

Two months later, Holmes wrote the same correspondent:

I continue pleased with the Chief's way of conducting business — through at times a little too long winded — which I dare say he will get over.⁷⁸

Towards the end of Taft's first term, he wrote to Laski:

Taft continues to give me great satisfaction as C. J. Also he is amiable and comfortable.⁷⁹

A few weeks later, Holmes wrote to Pollock:

We are very happy with the present Chief, as I may have told you. He is good humored, laughs readily, not quite rapid enough, but keeping things moving pleasantly. His writing varies; he has done some things that I don't care for but others that I think touch a pretty high level.⁸⁰

In February 1923 Holmes wrote Pollock that "the meetings are perhaps pleasanter than I ever have know them — thanks largely to the C. J."⁸¹ In a letter to his son on May 3, 1925, Taft himself quoted Holmes as saying that "never before . . . have we gotten along with so little jangling and dissension."⁸² On November 13, 1925, Holmes stated that Taft was "the best appointment that could have been made."⁸³ Finally, Holmes wrote Laski in 1926 stating that "I think Taft is all the better Chief Justice for having been President."⁸⁴

Felix Frankfurter, a great admirer of Holmes but by no means an unabashed admirer of Taft, said many years afterwards that Taft was "instinctively genial with great warmth and a capacity to inspire feelings of camaraderie about him."⁸⁵ Taft was no saint. In private, he demonstrated sensitivity to opposition from his brethren, and in personal correspondence, questioned and deprecated the motives of his antagonists. In

public and with his brethren, however, he kept his tongue, and during the years of his Chief Justiceship — except near the end — his normally good spirits prevailed.

Taft attended sincerely to those little human details which make a man beloved. Gifts and cards of condolence or of good cheer went to bereaved or sick colleagues. After the Saturday conference of the Court, he would always drive Holmes and Brandeis home. After Taft handled the arrangements for the burial of Mrs. Holmes in Arlington National Cemetery, the eighty-eight year old skeptic wrote to Laski, no admirer of Taft, "How can one help loving a man with such a kind heart?"⁸⁶ Despite the ritualistic quality in letters to and from a retiring Justice, the words used on Taft's retirement ring with special sincerity and warmth; tough men, strong men like Holmes, Brandeis and Stone, Sutherland, Butler and McReynolds, wrote:

We cannot let you leave us without trying to tell you how dear you have made it . . . you showed us . . . your golden heart that has brought you love from every side.⁸⁷

That heart softened for the Court the adversities of the decade. Van Devanter and Sutherland appear to have broken down from overwork. McReynolds was an extremely disagreeable colleague who may have suffered from a tendency to "underword." Having arranged for special legislation to permit Mahlon Pitney's retirement without publicizing the extent of his illness, Taft had also to deal with Justice McKenna, no longer mentally sound, who after the death of his wife, clung to the Court as his one reason for life. Authorized by his brethren to handle the problem as he saw fit, Taft spoke with Justice McKenna, respected his request for the assignment of a few more opinions, and orchestrated his final day on the bench as a loving ritual.⁸⁸

It was a happier time than usual to be a justice during the Taft era; working conditions within the Supreme Court greatly improved, not only as a result of Taft's infusion of vigor after White's last years, and his ready laugh and good humor, but also because he was an excellent administrator. When Taft assigned opinions, he spread the "desirable" cases around taking more than his share of "undesirable" cases. Furthermore, Taft set the standard for hard work. In little more than eight full terms, Taft wrote 255 opinions for the Court. Averaging nearly thirty-two opinions

for the Court per term,⁸⁹ Taft achieved the fifth highest record in productivity of the Court's 102 Justices.* Taft's eight colleagues averaged a little over twenty opinions each during the same period.⁹⁰ Taft wrote twenty-five percent more opinions than either Holmes or Brandeis** during these years — not a bad pace for a man who returned to judging in his mid-sixties after two decades away, and who suffered three heart attacks in 1924. In 1928 the Chief Justice wrote, probably wryly, to his son that he was often faced with "a cabal in the court to try to influence me to reduce work."⁹¹

Much of Taft's success within the Court was due to the fact that he did not attempt to do all the work himself nor to take all of the credit. He admitted readily that he could not have gotten along without Van Devanter. He called the Justice from Wyoming "my Chancellor" and used him as legislative draftsman, opinion critic, and advisor on judgeship nominees. Van Devanter was asked to stand-in for the Chief Justice regarding activities in judicial administration while Taft was in England during the summer of 1922.⁹² When it looked as if an appearance by Taft before Congress on the Judge's Bill might hinder rather than expedite its passage, Taft stayed out of the limelight; he appointed a committee comprised of Van Devanter (the best informed on the mechanics of the legislation), Sutherland (a former Senator) and McReynolds (a Democrat) to testify in his stead. When disagreement truly existed within the Court — as over the delegation or rulemaking power — Taft did not minimize it nor run roughshod over it.⁹³ Tactics like these helped make Brandeis an ally a surprising proportion of the time, and along with his constant stress upon institutional norms, helped Taft in his goal of eliminating or at least minimizing dissent.

There were some times, however, when Taft thought dissent appropriate: if a Justice felt *strongly* that the majority had erred in handling an *important* principle; or, if a dissent might *truly* have *practical* value. For the most part, however, Taft believed that "a Justice should be a good member of the team, silently acquiescing in the views of the majority."⁹⁴ He used the power of

example, suppressing more than two hundred of his dissenting votes while he was on the Court. Taft also employed the power of opinion assignment, relying upon his charm and the constant reiteration of the norm to achieve his goal without generating opposition. Dissent could hardly be eliminated in the modern Supreme Court, but it was considerably lessened during the Taft years — especially in the early part — as men of the calibre of Holmes and Brandeis accepted Taft's institutional values.⁹⁵

There are many reasons for the Court's productivity during this period. The happy working atmosphere, the new certiorari jurisdiction, and Taft's competence in presiding over the conference certainly contributed to greater productivity. But the Court was also strengthened by the retirements of Pitney, McKenna and Day, and by the relative youth and legal competence of the Justices who joined the court during the 1920's. Taft's influence upon the appointment of Justices during his tenure is unique among Chief Justices, and might be compared only to the influence of Felix Frankfurter upon appointments to the Supreme Court. Taft was most influential in the choice of Pierce Butler to succeed Justice Day. That appointment was engineered by Taft, who presented Butler's candidacy to Harding, advised Butler on how to secure the position, mobilized support for Butler from the Catholic hierarchy, and orchestrated the campaign for confirmation.⁹⁶ With Harding's other two appointments — Sutherland and Sanford — and Coolidge's appointment of Stone, Taft's role was less significant, but not altogether unimportant. Taft appears to have encouraged Harding to go ahead with his commitment to Sutherland. With a little less enthusiasm, Taft seems to have encouraged Coolidge to appoint Stone.

With all four vacancies, Taft suggested candidates to the Attorney General and President, and investigated the backgrounds of candidates, whether or not he was solicited to do so. Taft quenched enthusiasm for candidates less likely to be "safe" and "team players." Safety meant for Taft, of course, someone who would "enforce the guarantee that no man shall be deprived of his property without due process of law."⁹⁷ As the Taft of 1922 was considerably more conservative than the Taft of 1910, this required solid conservatives like Sutherland or John W. Davis, but not reactionaries as McReynolds then appeared to

*Behind Waite, Blatchford, Fuller and Matthews.

**and considerably more than Sutherland, Butler and Sanford, as well as more than twice as many annually as Van Devanter.

Taft. It meant that Taft opposed the elevation to the high court of Benjamin Nathan Cardozo and Learned Hand, admittedly capable, but not safe. Taft fought more bitterly, though, against the candidacy of Martin Manton, a man whom the Chief Justice believed to be unscrupulous. Taft's judgment was correct. Manton would eventually end up in prison.

Taft was willing to move ahead without listening to the voices of his colleagues in one area—a new building for the Supreme Court. Of his unenthusiastic brethren, Taft would say, not entirely unfairly on this issue, that they “did not look forward or beyond their own service on the bench or its needs.”⁹⁸ Though Taft would probably have fought for such a building while he was in the White House, it does not seem to have been part of his original program when he became Chief Justice. The Court manifestly had grown out of its twelve rooms inconveniently located in the Capitol, and Taft was increasingly frustrated in his bargaining with Congressmen for more desirable space. Taft finally convinced the House Public Buildings Committee to include moneys for the purchase of land in a fifty million dollar public building bill. He was the dominant figure in the choice of the site and the architect, Cass Gilbert. The Chief Justice lived just long enough to see Congress approve Gilbert's plans and appropriate \$9,740,000 for construction, a law signed by Herbert Hoover on December 17, 1929.⁹⁹

Taft-the-Justice

The career of Taft-the-Justice has been overshadowed by that of Taft-the-Chancellor, and Taft as head-of-the-Supreme Court. This is not unjust, for Taft did adapt the Court and the federal court system to their times and for several generations hence. In contrast, Taft-the-Justice looked backwards to a jurisprudence which strained the Constitution by unduly protecting property rights and by making the court the ultimate judge of the wisdom of state and federal legislation. Although Taft was a reformer of courts, he was not a social reformer. It has been argued with considerable justice that Taft wished to reform the federal judiciary primarily to strengthen it as a bulwark for the protection of private property rights; his goal was to enhance federal judicial power so as to better restrain the

excesses likely to occur in the states.¹⁰⁰ Whatever his motivation, Taft's impact upon the Supreme court and the lower federal courts was nevertheless to modernize their administration and enable them to cope with the needs of a strong central government.

Taft's work as a Justice should not, however, be ignored completely. Although Taft himself contributed to the view that he was a “legal light weight” through his appreciation of Van Devanter's contributions in the conference and in critiquing his own opinions,¹⁰¹ his judicial work is stronger than has been recognized. He was productive. He took on patent cases, ordinarily not an area for weak legal technicians.¹⁰² His opinions are not in the same league with those of Holmes and Brandeis, but generally read no worse than those of his other colleagues. Taft did not “dominate” his Court, nor did he dominate his “wing” of the Court, but he helped to lead the Court in the direction he wished without evoking disrespect from either Holmes or Brandeis.*

That direction was toward voiding federal—and especially—state laws regulating the economy, relying primarily upon theories of substantive due process, liberty of contract, and dual federalism.¹⁰³ If Taft during the 1920's was more conservative than he had been as President, Chief Justice Taft's court was more conservative than the court headed by Chief Justice White. Sutherland, Butler and Sanford were more conservative than the three men** they replaced: Clarke, Day and Pitney.¹⁰⁴ The pace of nullification of state actions quickened appreciably during the Taft years. From 1870 to 1921 the Supreme Court had held thirteen state and five federal laws unconstitutional in 195 cases invoking the due process clause. From 1921 to 1926 the Court struck down statutes in fifteen of fifty-three cases.¹⁰⁵ In his judicial career Taft sat on 114 cases (12.67/year) in which legislative acts of

* However loyal to the entire “team,” Taft did hold rump conferences on some Sundays in his home with the more conservative members of the Court, so that a united front might be presented to Holmes, Brandeis and Stone. See Walter F. Murphy, “Marshaling the Court: Leadership, Bargaining, and the Judicial Process,” 29 *Univ. Chi. L. Rev.* 640, 670.

** While McKenna was not a “conservative” in the way McReynolds or Van Devanter were, his replacement by Stone strengthened the “liberal” wing of the Court.

states were voided, all but a handful involving property rights.¹⁰⁶

A recent scholar has argued that due to the Taft Court, the Courts of the Fuller and White eras have appeared more conservative than they really were:

Perhaps more than anything else this tendency of the Court of the 1920s to exploit distinctions and language found in earlier opinions, which the High Bench of the preceding generation had chosen wisely to ignore, and to use as precedents decisions that were bitterly attacked at the time of their issuance gave credence to the contention that the period from the depression of the 1890s to that of the 1930s could be interpreted meaningfully as a whole.¹⁰⁷

A brief survey of some of Taft's major opinions will suggest how he fitted in with the prevailing jurisprudence of his era. In *Wolff Packing Co. v. Court of Industrial Relations*,¹⁰⁸ Taft wrote for a unanimous court, striking down on due process grounds a Kansas law which required compulsory arbitration of wage disputes. Felix Frankfurter commented:

Thus fails another social experiment not because it has been tried and found wanting, but because it has been tried and found unconstitutional.¹⁰⁹

Taft carried the entire Court—except for Justice Clarke—in *Bailey v. Drexel Furniture Co.*¹¹⁰ The case not unrealistically held that Congress was using its taxing power to penalize a company for doing business with child labor rather than to raise revenue for the federal government. In an attempt to circumvent the Court's holding in *Hammer v. Dagenhart*¹¹¹ that child labor could not be regulated under the Commerce Clause, Congress had again intruded unconstitutionally upon reserved state powers.

Taft was generally unsympathetic to the rights of labor. Writing for court divided 5-4 in *Truax v. Corrigan*¹¹² Taft held unconstitutional on due process grounds an Arizona law which had limited the use of injunctions in labor cases. Professor Frankfurter, writing anonymously in the *New Republic*, spoke of the "jejune logomachy of his judicial process," adding:

For all the regard that the Chief Justice of the United States pays to the facts of industrial life, he might as well have written this opinion as Chief Justice of the Fiji Islands.¹¹³

In *American Steel Foundries v. Tri-City Council*, Taft's opinion for the Court circumvented the



Taft's friend and successor, Chief Justice Charles Evans Hughes (right) with Associate Justice Willis Van Devanter.

Office of the Curator, Supreme Court

Clayton's Act general ban on injunctions in industrial disputes.¹¹⁴ In *United Mine Workers v. Coronado Coal Co.*,¹¹⁵ Taft's opinion for the Court held that a trade union was suable and liable for damages under the Sherman Act.

Yet, there is another side. Felix Frankfurter himself was of the viewpoint that the *Coronado* case was not so adverse to the rights of labor.¹¹⁶ And at various times, Taft departed from the conservative wing of the Court demonstrating respect for recent precedents upholding statutes regulating the economy. His opinion in *Stafford v. Wallace* is a milestone upholding Congressional power under the Commerce Clause. *Stafford* involved the Packers and Stockyards Act of 1921 which regulated the business of meat packers. Taft, not unreasonably concluded that the Chicago Stockyards were not a final destination, but "a throat through which the current flows."¹¹⁷ In words which sounded as if they came from the pen of Holmes, Taft wrote:

This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.¹¹⁸

Even if the "Supreme Court under Taft had reached the zenith of reaction,"¹¹⁹ Taft was not always on the side of the reactionaries. In *Adkins v. Children's Hospital*, Taft joined Holmes in dissent (Brandeis not participating) from a decision striking down a law of the District of Columbia setting minimum wages for women. In his *Adkins* dissent, Taft again sounded like Holmes or Brandeis:

But it is not the function of this Court to hold Congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.¹²⁰

The former President was especially interested in opinions interpreting Article II of the Constitution. The opinion upon which he lavished the most love of any in his eight terms was *Myers v. United States*,¹²¹ sanctioning virtually unlimited Presidential power to remove any executive officer. Holmes, Brandeis and McReynolds dissented. *Myers* would be considerably limited within a decade.¹²²

During Taft's tenure, the Supreme Court began the process of incorporating the First Amendment via the Fourteenth Amendment to protect individuals from actions of the states,¹²³ but the Chief Justice did not play an important

role in the process. A resounding opinion limiting arbitrary use of the contempt power came from Taft's pen for a unanimous court:

The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions.¹²⁴

In the field of civil liberties, Taft is remembered most for his opinion in *Olmstead v. United States* (with Holmes, Brandeis, Stone and Butler in dissent), holding that wiretapping did not violate the Fourth Amendment:

There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendant.¹²⁵

Olmstead would survive thirty years longer than *Myers v. United States*, but ultimately would be overruled.¹²⁶

Conclusions

Taft hoped to serve for a decade as Chief Justice, then retire, and travel with his wife. He did



The Hughes Court in 1932: (seated, left to right) Associate Justices Louis D. Brandeis and Willis Van Devanter; Chief Justice Charles Evans Hughes; Associate Justices James C. McReynolds and George Sutherland; and, (standing, left to right) Associate Justices Owen Roberts, Pierce Butler, Harlan Fiske Stone and Benjamin N. Cardozo.

not live to do so, retiring February 3, 1930, as a result of the illness which caused his death a month later. Nine other Chief Justices have served longer than Taft, yet his impress upon the Office of Chief Justice, the Supreme Court, and the federal court system accords him consideration as one of the great "Chiefs." After Taft each Chief Justice would be expected to perform extensive duties other than deciding cases and heading the Supreme Court. After Taft, the Chief Justice would be expected by the Attorney General, the Congress, the bar and the general public to take an active interest in the administration of the federal court system, and to be a force in advancing the needs of the third branch. No Chief Justice since Taft has proven as audacious in conceiving his role, for Taft had treated his job as an American Lord Chancellor—managing a system, framing legislation and putting it through, selecting judges, as well as presiding over a court and deciding cases. But all Chief Justices since Taft have been involved with the Judicial Conference of the United States, with legislation effecting the federal courts, and with the rule-making process. They have also had to spend some time managing the Supreme Court building.

The Chief Justice who most resembles Taft is the present incumbent, Warren E. Burger, who came to office ready to address needs in judicial administration—federal and state—with a program, tactics and tenacity evoking memories of Taft. By the time he became Chief Justice, the lower federal courts had emerged as a major force in American governance. This would have occurred had Taft never been Chief Justice, as a result of the centralization of American government, Congress' increased reliance upon federal jurisdiction, and the jurisprudence of the Supreme Court, especially during the 1960's. But Taft's legacy pointed the lower federal courts towards modernization, and provided tools for management and procedural reform which would be built upon by later leaders—Charles Evans Hughes, Charles E. Clark and Arthur Vanderbilt, Earl Warren and Tom Clark, Warren Burger and Griffin Bell. Such management and reform enabled the courts to survive overgenerous increases in their jurisdiction coupled with frugality in providing the tools. Were Taft alive today, he would approve the increased prestige of the lower federal courts, and probably bewail

much of their jurisprudence.

Taft-the-Chancellor deserves the "high place among judicial statesmen" which Justice Rehnquist gives him.¹²⁷ Even Taft's old adversary, Felix Frankfurter, concluded that:

[Taft] had a place in history . . . next to Oliver Ellsworth, who originally devised the judicial system. Chief Justice Taft adapted it to the needs of a country that had grown from three million to a hundred and twenty million.¹²⁸

To the functioning of the Supreme Court, Taft brought administrative talent and a gift for human relations. He could not eliminate conflict, and would not dominate its product, but he did minimize friction, establish a warm atmosphere, and mass strong majorities for most of the decisions about which he truly cared. His jurisprudence is not much with us, but the certiorari jurisdiction and the "marble palace" are.

The Court, "next to [his] wife and children" was "the nearest thing to [his] heart in life."¹²⁹ He wanted to make the Court a model for all other American courts. His friend, Charles E. Barker, related an extraordinary story. Soon after Taft was appointed Chief Justice, he said to Barker:

Old man, I guess you know this appointment as Chief Justice is the crowning joy and honor of my life. Though it is an honor, it means I shall have to work hard. The agenda of cases before the Court is now several years behind, which means that any litigant must wait a long time before his case can even be heard. This is dead wrong, and it will be my constant endeavor and ambition to bring the docket up to date.¹³⁰

Barker related that in January, 1930, during Taft's final illness, the Chief Justice took his hand and said:

Old man, do you remember what I told you in Washington? Well, I can report that my one great ambition as Chief Justice has been accomplished. The docket is up to date, so I guess I've earned a few weeks' rest.¹³¹

Whether or not the story is entirely accurate, Taft had certainly earned that rest.

For Further Reading

William Howard Taft's activities as Chief Justice have been the subject of studies by a number of distinguished political scientists, among them Alpheus T. Mason, Walter F. Murphy, Peter

is cited more thoroughly in the footnotes to this article. The best overview of Taft as Chief Justice, as well as one of the most satisfactory works ever written about a member of the Supreme Court, is Mason's *William Howard Taft: Chief Justice*. Murphy discussed Taft's work in a number of places including his *tour de force*, *Elements of Judicial Strategy* (Chicago & London: University of Chicago Press, 1964). Fish chronicled Taft's role in federal judicial administration in *The Politics of Federal Judicial Administration* (Princeton, N.J.: Princeton University Press,

1973). Taft's influence in the appointment of judges is dealt with in Danelski's *A Supreme Court Justice is Appointed*. The standard full-length biography of Taft is Henry F. Pringle's two-volume, *the Life and Times of William Howard Taft* (New York: Farrar & Rinehart, Inc. 1939). Judith Icke Anderson has written a provocative psycho-biography, *William Howard Taft* (New York: W.W. Norton & Co., 1981), which gives detailed treatment of Taft's career only through his Presidency.

Footnotes

¹ Address to the Pocatello, Idaho Chamber of Commerce, New York *Evening Post*, October 6, 1911.

² (New York: Columbia University Press, 1916).

³ (New York: Harper, 1914).

⁴ On Taft's Presidency see, e.g., Henry F. Pringle, *Life and Times of William Howard Taft* (New York: Farrar & Rinehart, 1939).

⁵ Judith Icke Anderson, *William Howard Taft*, (New York).

⁶ *Id.*

⁷ Alpheus T. Mason, *William Howard Taft: Chief Justice* (New York: Simon and Schuster, 1964), 32.

⁸ Willard L. King, *Melvin Weston Fuller* (New York: Macmillan, 1950), 303.

⁹ Quoted in Mason, *William Howard Taft*, supra n. 7, p. 28.

¹⁰ See Jeffrey B. Morris, "Edward Douglass White and President Taft's Court," *YBK SCHS* 1982, 27; Alexander M. Bickel, "Mr. Taft Rehabilitates the Court," 79 *Yale L.J.* 1 (1969); Daniel S. McHargue, "President Taft's Appointments to the Supreme Court," 12 *J. of Pol.* 478 (1950).

¹¹ Mason, *William Howard Taft*, supra n. 7, p. 14.

¹² Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton, N.J.: Princeton University Press, 1973), 24.

¹³ Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: MacMillan Co., 1928), 156.

¹⁴ Quoted in Mason, *William Howard Taft*, supra n. 7, p. 56.

¹⁵ Remarks of W. H. Taft, Proc. Judicial Section, 41 *ABA Rpts.* 741 (1916).

¹⁶ Taft to Justice William H. Moody, July 8, 1910, quoted in Mason, *William Howard Taft*, supra n. 7, p. 34. On the appointment of White, see Morris, "Edward Douglass White and President Taft's Court," supra n. 10, pp. 33-37.

¹⁷ The description is from Charles Evans Hughes and is recorded in (ed.) Joseph P. Lash, *From the Diaries of Felix Frankfurter* (New York: W. W. Norton, 1975), April 25, 1947, p. 313.

¹⁸ 38 Stat. 803.

¹⁹ Willis Van Devanter to William Howard Taft, May 11, 1927, quoted in Mason, *William Howard Taft*, supra n. 7, 108-09 at 109.

²⁰ *Id.* The Act is contained in 39 stat. 726.

²¹ Oliver Wendell Holmes to Lewis Einstein, Jan.

6, 1908, in (ed.) James Bishop Peabody, *The Holmes-Einstein Letters* (New York: St Martin's Press, 1964), p. 31 at 32.

²² Mason, *William Howard Taft*, supra n. 7, 233.

²³ *Ibid.*, 120.

²⁴ Henry P. Chandler, "Some Major Advances in the Federal Judicial System," 31 *FRD* 307 at 320 (1963).

²⁵ *Ibid.*, at p. 318.

²⁶ *Ibid.*, at p. 319.

²⁷ Frankfurter and Landis, *The Business of the Supreme Court*, supra n. 13, p. 220.

²⁸ William Howard Taft, "Adequate Machinery for Judicial Business," 7 *JABA* 453 at 454 (1921).

²⁹ *Id.*

³⁰ 42 Stat. 837.

³¹ Walter F. Murphy, "Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration," 24 *J. of Pol.* 453 (1962).

³² Fish, *The Politics of Federal Judicial Administration*, supra n. 12, p. 39. See also Peter G. Fish, "William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers," 1975 *Sup. Ct. Rev.* 123.

³³ Taft, "Adequate Machinery for Judicial Business," supra n. 28 at p. 454.

³⁴ William Howard Taft, "To Unify the Federal Judges," 5 *J. Am. Judic. Soc.* No. 2 (Aug. 1921) 37 at 39.

³⁵ 42 Stat. 837, 839. See Fish, *The Politics of Federal Judicial Administration*, supra n. 2, p. 33.

³⁶ William J. Cives, "Extra-Judicial Activities of Justices of the United States Supreme Court 1790-1960" (Ph.D., Princeton University, 1975), IV, 1321.

³⁷ William Howard Taft, "Three Needed Steps of Progress," 8 *ABAJ* 34, 35 (1922).

³⁸ *Id.*

³⁹ Rules Enabling Act of 1934, Act of June 19, 1934, 48 Stat. 1064. See also 295 U.S. 774 (); 302 U.S. 783 (); 308 U.S. 645 (1938); 28 U.S.C. 2072.

⁴⁰ Warren E. Burger, "Deferred Maintenance of Judicial Machinery," Remarks at National Conference on the Judiciary, Williamsburg, Virginia, March 12, 1971, p. 14.

⁴¹ 26 Stat. 826.

⁴² To Woodrow Wilson, September 9, 1922, quoted in Mason, *William Howard Taft*, supra n. 7, pp. 165-7.

⁴³ Taft, "Three Needed Steps of Progress," supra n. 37, p. 35.

⁴⁴ William Howard Taft's testimony before the House Committee on the Judiciary in Frankfurter and Landis, *The Business of the Supreme Court*, supra n. 13, pp. 250-1, n. 50.

⁴⁵ Mason, *William Howard Taft*, supra n. 7, p. 218.

⁴⁶ *Ibid.*, p. 112.

⁴⁷ *Id.*

⁴⁸ "The Business of the Supreme Court at October Term, 1932," *Harv. L. Rev.* 245, 249 (1933).

⁴⁹ William H. Rehnquist, "Chief Justices I Never Knew," 3 *Hast. Const. L. Q.* 637, 648 (1976).

⁵⁰ David J. Danelski, *A Supreme Court Justice is Appointed* (New York: Random House, 1963), p. 33.

⁵¹ Fish, *The Politics of Federal Judicial Administration*, supra n. 12, pp. 24ff.

⁵² *Ibid.*, pp. 61, 62, 69. Compare with Mark W. Cannon and Warren I. Cikens, "Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation," 34 *W & L L. Rev.* 1(1981) and Warren E. Burger, "Remarks Accepting the Fordham-Einstein Award," *New York City*, Oct. 25, 1978.

⁵³ Fish, *The Politics of Federal Judicial Administration*, supra n. 13, p. 80.

⁵⁴ Murphy, "Chief Justice Taft and the Lower Court Bureaucracy," supra n. 31, pp. 471-2.

⁵⁵ Fish, *The Politics of Federal Judicial Administration*, supra n. 12, p. 77.

⁵⁶ William Howard Taft to Clarence H. Kelsey, Aug. 17, 1923, quoted in Mason, *William Howard Taft*, supra n. 7, p. 276.

⁵⁷ Root to Taft, Sept. 9, 1922, quoted in *Ibid.*, p. 276.

⁵⁸ *Ibid.*, p. 129.

⁵⁹ Fish, *The Politics of Federal Judicial Administration*, supra n. 12, p. 50.

⁶⁰ *Ibid.*, p. 51.

⁶¹ *Ibid.*, p. 49.

⁶² Mason, *William Howard Taft*, supra n. 7, p. 278.

⁶³ Chandler, "Some Major Advances in the Federal Judicial System," supra n. 24, pp. 356ff.

⁶⁴ May 2, 1921, quoted in Danelski, *A Supreme Court Justice is Appointed*, supra n. 50, pp. 33-4.

⁶⁵ May 6, 1921, quoted in *Ibid.*, p. 34.

⁶⁶ Murphy, "Chief Justice Taft and the Lower Court Bureaucracy," supra n. 31, pp. 462-3. See also Walter F. Murphy, "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," 1961 *Sup. Ct. Rev.* 159.

⁶⁷ Murphy, "Chief Justice Taft and the Lower Court Bureaucracy," supra n. 31, pp. 462-3.

⁶⁸ Marvin Schick, *Learned Hand's Court* (Baltimore and London: The Johns Hopkins Press, 1970).

⁶⁹ William Howard Taft to W. J. Moore, July 30, 1921, in Mason, *William Howard Taft*, supra n. 7, p. 287.

⁷⁰ William Howard Taft to Helen H. Taft, Sept. 25, 1923, in Mason, *William Howard Taft*, supra n. 7, pp. 274-5.

⁷¹ William J. Cives, "Extracurricular Activities of Justices of the United States Supreme Court," supra n. 36, at V, 1852 n. 173.

⁷² Mason, *William Howard Taft*, supra n. 7, p. 233.

⁷³ Quoted in Walter F. Murphy, "Marshaling the Court: Leadership, Bargaining, and the Judicial Process," 26 *Univ. Chi. L. Rev.* 640 at 641 (1962). See also David J. Danelski, "The Influence of the Chief Justice in the Decisional Process" in C. Herman Pritchett and

Walter F. Murphy, *Courts, Judges and Politics* (New York: Random House, 1961), 497-508.

⁷⁴ Danelski, "The Influence of the Chief Justice in the Decisional Process," supra n. 73, pp. 502-3.

⁷⁵ May, 27, 1921, in (ed.) Mark De Wolfe Howe, *Holmes-Laski Letters* (Cambridge, Mass.: Howard University Press, 1953), 339 at 340.

⁷⁶ July 11, 1921, in (ed.) Mark De Wolfe, *Holmes-Pollock Letters* (Cambridge, Mass.: Harvard University Press, 1941), II, 72.

⁷⁷ October 9, 1921, in (ed.) Howe, *Holmes-Laski Letters*, supra n. 75, p. 373.

⁷⁸ December 22, 1921, in *Ibid.*, p. 390.

⁷⁹ May 3, 1922, in *Ibid.*, p. 423.

⁸⁰ May 21, 1922, in (ed.) Howe, *Holmes-Pollock Letters*, supra n. 76, II, 96.

⁸¹ February 27, 1923, in *Ibid.*, II, 113-4.

⁸² William Howard Taft to Robert A. Taft, May 3, 1925, quoted in Mason, *William Howard Taft*, supra n. 7, p. 199.

⁸³ Holmes to Laski, in (ed.) Howe, *Holmes-Laski Letters*, supra n. 75, p. 797.

⁸⁴ June 6, 1926, in *Ibid.*, II, 848.

⁸⁵ Felix Frankfurter, "Chief Justices I Have Known" in (ed.) Philip B. Kurland, *Felix Frankfurter on the Supreme Court* (Cambridge: Belknap Press, 1970), 471 at 488.

⁸⁶ June 15, 1929, in (ed.) Howe, *Holmes-Laski Letters*, supra n. 75, p. 1158.

⁸⁷ 280 U.S. v (1930).

⁸⁸ The story is told in David J. Danelski "A Supreme Court Justice Steps Down," 54 *Yale Review* 411 (1965).

⁸⁹ Albert P. Blaustein and Roy M. Mersky, *The First One Hundred Justices* (Hamden, Ct.: Archon Books, 1978), 148.

⁹⁰ Mason, *William Howard Taft*, supra n. 7, p. 231.

⁹¹ William Howard Taft to Robert A. Taft, March 4, 1928, quoted in Mason, *William Howard Taft*, supra n. 7, p. 195.

⁹² See Danelski, "The Influence of the Chief Justice in the Decisional Process," supra n. 73, p. 499; Frankfurter, "Chief Justices I Have Known," supra 85, 471 at 487; Danelski, *A Supreme Court Justice is Appointed*, supra n. 50 p. 36.

⁹³ Mason, *William Howard Taft*, supra n. 7, p. 117.

⁹⁴ Danelski, "The Influence of the Chief Justice on the Decisional Process," supra n. 73, p. 505.

⁹⁵ See Mason, *William Howard Taft*, supra n. 7, pp. 223, 204.

⁹⁶ See generally Danelski, *A Supreme Court Justice is Appointed*, supra n. 50.

⁹⁷ William Howard Taft, "Mr. Wilson and the Campaign," 10 *Yale Review* 1, 19-20 (1920) quoted in Mason, *William Howard Taft*, supra n. 7, p. 158.

⁹⁸ Mason, *William Howard Taft*, supra n. 7, p. 136.

⁹⁹ See Catherine Hetos, "The Supreme Court Gets a Home," *YBK SCHS* 1976, p. 25ff; See also Mason, *William Howard Taft*, supra n. 7, pp. 133-7.

¹⁰⁰ See generally Peter G. Fish, "William Howard Taft and Charles Evans Hughes," supra n. 32.

¹⁰¹ See, e.g., Walter Murphy, "Marshaling the Court," supra n. 73, p. 642.

¹⁰² See Mason, *William Howard Taft*, supra n. 7, p. 206.

¹⁰³ Alfred A. Kelly, Winfred A. Harbison and Herman Belz, *The American Constitution, Its Origin and Development* (New York: W. W. Norton & Co., 6th rev. ed. 1983), 454.

¹⁰⁴ John E. Semonche, *Charting the Future, The Supreme Court Responds to a Changing Society, 1890-1920* (Westport, Conn.: Greenwood Press, 1978), 423.

¹⁰⁵ *Ibid.*, pp. 424-5.

¹⁰⁶ Fish, "William Howard Taft and Charles Evans Hughes," supra n. 32 at 143 n. 108.

¹⁰⁷ Semonche, *Charting the Future*, supra N. 104, p. 424.

¹⁰⁸ 262 U.S. 522 (1923).

¹⁰⁹ Unsigned editorial, *New Republic*, June 7, 1923, reprinted as "Exit the Kansas Court," in (ed.) Kurland, *Felix Frankfurter on the Supreme Court*, supra n. 85, at p. 140.

¹¹⁰ 259 U.S. 20 (1922).

¹¹¹ 247 U.S. 251 (1918).

¹¹² 257 U.S. 312 (1921).

¹¹³ Unsigned editorial, *New Republic*, Jan. 18, 1922, reprinted as "Taft and the Supreme Court," in Kurland, *Felix Frankfurter on the Supreme Court*, supra n. 85, pp. 49, 52 at p. 59.

¹¹⁴ 257 U.S. 184 (1921).

¹¹⁵ 259 U.S. 344 (1922).

¹¹⁶ See, e.g., Professor Frankfurter, "The Coronado Case," *New Republic*, Aug. 16, 1922, reprinted in Kurland, *Felix Frankfurter on the Supreme*

Court, supra n. 85, p. 228.

¹¹⁷ 258 U.S. 495, 515, 516 (1922).

¹¹⁸ 258 U.S. 495, 518-519 (1922).

¹¹⁹ Felix Frankfurter, "The Supreme Court and the Interstate Commerce Commission," *New Republic*, Jan. 20, 1932, reprinted in Kurland, *Felix Frankfurter on the Supreme Court*, supra n. 85, at p. 228.

¹²⁰ 261 U.S. 525, 562 (1923).

¹²¹ 272 U.S. 52 (1926).

¹²² See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

¹²³ See *Gillow v. New York*, 268 U.S. 652 (1925).

¹²⁴ *Cooke v. United States*, 267 U.S. 255, ().

¹²⁵ *Olmstead v. United States*, 277 U.S. 438 (1928).

¹²⁶ *Katz v. United States*, 389 U.S. 347 (1967).

¹²⁷ Rehnquist, "Chief Justices I Never Knew," supra n. 49, p. 637 at p. 648.

¹²⁸ Frankfurter, "Chief Justices I've Known," in (ed.) Kurland, *Felix Frankfurter on the Supreme Court*, supra n. 91, at p. 488.

¹²⁹ William Howard Taft to H. S. Pritchett, April 25, 1923.

¹³⁰ Charles Edwin Barker, *With President Taft in the White House* (Chicago: A. Knoch, 1947), 69.

¹³¹ *Ibid.*, p. 71.

Justice Roberts' 1937 Turnaround

Merlo J. Pusey

Whenever the Supreme Court reverses its view of a vital constitutional issue, speculation is likely to go on endlessly as to the reasons for the change and the circumstances leading to it. That is especially true when the shift is associated with a momentous controversy involving the Court, as was Justice Owen J. Roberts' apparent switch on the validity of state minimum-wage legislation while the Court was under the threat of being packed in 1937. In such cases every scrap of valid information is worthy of preservation.

The frequently misconstrued "switch in time that saved nine" came in the spring of 1937 shortly after President Franklin D. Roosevelt had sent to Congress his bomb-shell asking for authorization to name six additional members of the Supreme Court if the justices then over seventy years of age did not resign. Only six months had elapsed since the Court had struck down New York's minimum-wage law for women in *Moreland v. New York ex rel. Tipaldo*.¹ By consigning that decision to the ashcan in so short a time the Court certainly appeared to be yielding to pressure. The seeming reversal of its convictions on so vital an issue as the right of the states to control social policy brought a chorus of contemptuous comments.

The *Tipaldo* case involved the jailing of an employer for failure to pay the minimum wage prescribed by New York law to one of his female employees. Since the Supreme Court had outlawed the District of Columbia minimum-wage law in 1923,² the conservatives on the Supreme Court at first tried to avoid a hearing of the New York case by denying a writ of certiorari. But Chief Justice Charles Evans Hughes insisted that the case be heard with the support of Justices Louis D. Brandeis, Harlan F. Stone and Benja-



Associate Justice Owen Roberts

Office of the Curator, Supreme Court

min N. Cardozo. Roberts was caught in the middle.

A justice of liberal instincts and of high regard for the judicial process, Roberts felt that the time had come for review of the backward-looking *Adkins* decision. But that was not what counsel for New York State was asking. Rather, New York solemnly pretended that there was a vital distinction between its law and the outlawed District of Columbia statute. Roberts felt that this was a dishonest argument and that review of the

Nine or Fifteen? The Nation's Eyes Turn to the Supreme Court



James Clark McReynolds, 71 years old, was appointed in 1924 by President Wilson. He was born in Madison, N. J., on Feb. 2, 1862.



Charles Evans Hughes, 74 years old, was appointed an 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, 1875.



Louis Brandeis, 62 years old, was appointed in 1916 by President Wilson. He was born in Louisville, Ky., on Nov. 13, 1856.

W. P. Stone, 64 years old, was appointed in 1922 by President Coolidge. He was born in Charlottesville, N. H., on 1872.



William Van Dervent, 71 years old, was appointed in 1930 by President Taft. He was born in Madison, Minn., on 1866.

The main entrance of the Supreme Court's new home from the Capitol, where the members of the Court are to be seated in the new building, where the members of the Court are to be seated in the new building, where the members of the Court are to be seated in the new building.

in May of 1935, a bill to lift him in entire dismission, and was designed on the theory that it would be enough to lift him in entire dismission, and was designed on the theory that it would be enough to lift him in entire dismission, and was designed on the theory that it would be enough to lift him in entire dismission.



In the new Court, the Supreme Court will be seated in the new building, where the members of the Court are to be seated in the new building, where the members of the Court are to be seated in the new building.

The members of the Court are seated in the new building, where the members of the Court are to be seated in the new building, where the members of the Court are to be seated in the new building.



William Van Dervent, 71 years old, was appointed in 1930 by President Taft. He was born in Madison, Minn., on 1866.



Benjamin N. Cardozo, 66 years old, was appointed in 1925 by President Hoover. He was born in New York City on May 21, 1870.



William Van Dervent, 71 years old, was appointed in 1930 by President Taft. He was born in Madison, Minn., on 1866.

constitutionality of state minimum-wage laws should await a forthright and direct challenge to the Adkins decision which had been so widely criticized. This led him to support the conservatives in the hope that a showdown could be avoided in this inappropriate case.

But that wishful thinking proved to be futile. The so-called "four horsemen" of the Court — Justice Pierce Butler, Willis Van Devanter, George Sutherland and James C. McReynolds — joined in a fierce assault upon the belief that the states have a constitutional right to prescribe minimum wages. Hughes wrote a vehement dissent supported by Stone, Brandeis and Cardozo without directly condemning the Adkins ruling. Stone, Brandeis and Cardozo then joined in a separate dissent assailing Adkins. This caused Butler to expand and stiffen the arguments in the majority opinion, leaving Roberts in a very uncomfortable predicament. At this point, however, he saw no reasonable alternative to leaving his vote on the conservative side.

The announcement of this reactionary outcome produced a furor throughout the land. The



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The Berryman cartoon (below) was typical of the press response generated by a plan to enlarge the Court announced by President Franklin D. Roosevelt (above) in 1937.



Library of Congress

country was still in the grip of depression. If the states could not deal with such basic problems as minimum wages for people utterly lacking in power to bargain with exploiting employers, they were gravely frustrated in trying to promote the general welfare. That reactionary decision was the more disconcerting because it coincided with other verdicts sharply curtailing national power. If neither the states nor the federal government could cope with economic emergencies, the result could be disastrous. So the *Tipaldo* decision led to one of the worst drubbings from public opinion that the Court has ever sustained.

Since his vote had provided the slender majority for stubborn reaction in the face of critical emergencies, Roberts undoubtedly suffered acute pangs of conscience. By instinct he was not a dyed-in-the-wool conservative. He had stood with Hughes and the liberal wing of the Court in upholding the Minnesota Mortgage Moratorium Law of 1933³ and the New York statute fixing the price of milk, and Roberts had written the opinion in the latter case, *Nebbia v. New York*.⁴ His opinions both before and after *Tipaldo* are indicative of a judicious temperament in regard to constitutional powers. So it is obvious that the months following his reluctant cooperation with the "four horsemen" involved some very acute soul-searching.

In the circumstances an early return of the issue to the Supreme Court seemed inevitable. The State of Washington was soon arguing before the high bench that its minimum-wage law was constitutional and that the tattered *Adkins* precedent was no longer valid. Justice Roberts took a fresh look at the question of an employer's so-called "freedom of contract" when it came into collision with the right of the state to protect the health, safety, morals and welfare of its people. Arriving at an independent conclusion that he had been wrong to stand with the bitter-enders against this essential use of power for legitimate public purposes, he decided to vote in favor of upholding the Washington law.⁵

It is sometimes assumed that Hughes importuned Roberts to shift his stand to save the Court from numerous threats that were being bruited. But the Chief Justice held to his general policy of not soliciting support from his colleagues and of not discussing judicial issues before the Court outside of the conference, unless one of the justices came to him with a problem.

In this instance, Roberts called on Hughes, without any previous consultation, and told him that when the *West Coast Hotel* case came before the conference he would vote with the liberals. Hughes was so delighted that he almost hugged his colleague.⁶

Shortly before Christmas, 1936, therefore the Court voted to overrule its six-months-old *Tipaldo* decision and to uphold the Washington minimum-wage law. With Justice Stone ill, however, the vote stood four to four. While that would save the Washington statute because it had been upheld by the highest court in the state, it would leave the *Adkins* precedent still dangling and the law in a state of confusion. Hughes decided to withhold the case until Stone returned,⁷ knowing that this would provide a firm majority behind the right of the states to legislate on social problems within a rationalized, modern concept of "due process of law."

Without any pressure other than that of strong legal arguments and a tidal wave of public opinion, therefore, the Court corrected one of the worst legal blunders of the twentieth century. Hughes had been so perturbed by the backward thrust of the *Tipaldo* decision that he classified it, along with the *Dred Scott* decision and the income tax cases, among the Court's worst self-inflicted wounds. There was much rejoicing within the liberal wing of the Court, therefore, when a turn-around was achieved within the judicial framework itself.

This euphoria was ironically shattered, however, when the President sent his court-packing venture to Capitol Hill before the decision in the *West Coast Hotel* case could be handed down. Roberts was so distressed by the proposal to expand the membership of the Court for the obvious purpose of influencing its views that he decided to resign if the bill became law,⁸ although its terms would not have affected his personal status on the Court. At that time he was the youngest of the nine justices. Some of the older justices had been eager to retire but failed to do so because Congress had not provided a reasonable retirement system. Hughes, then seventy-four, decided to ride out the storm in the hope of minimizing its impact on the Court. "If they want me to preside over a convention," he said, "I can do it."⁹

Trying to avoid the supposition that the Court was indulging in an immediate response to the



Associate Justice Roberts was much maligned for his apparent "switch in time that saved nine."

court-packing venture, the Chief Justice briefly held up the decision in the *West Coast Hotel* case. But this merely delayed the inevitable. The outcome was widely interpreted as belly-crawling on the part of Justice Roberts, and the silence of the Court to protect the confidentiality of its conference proceedings contributed to that assumption. The true facts behind the *West Coast Hotel* decision were not known until publication of Hughes' authorized biography in 1951.

Since the Justices had no knowledge whatever of F.D.R.'s plan to pack the Court before he sent his bill to Congress on February 5, 1937, they could not possibly have been influenced by that measure when they decided in the previous December to bury the concept of "freedom of contract" as a bar to state social legislation. What, then, did cause Roberts to shift his stance? I once had an opportunity to put that question to him directly in a confidential interview¹⁰ after he had left the bench, because I was then engaged in writing the Hughes biography. Roberts' initial, semifacetious reply was, "Who knows what causes a judge to decide as he does? Maybe the breakfast he had has something to do with it."

Roberts then went on, however, to discuss in considerable detail how unhappy he had been with the *Tipaldo* case when it came before the Court because of his feeling that it was not a

proper peg on which to hang a new pronouncement of the Court on the scope of the police powers of the states. The Justice convinced me that his chief objective at that time had been to avoid making a decision on the vital issue of state minimum-wage legislation against the background of New York's disingenuous arguments. In these circumstances he fell back upon the platform used most frequently by judges—*stare decisis*.

Of course *stare decisis* is vital to the basic concept of government by law. It means that principles of law established by judicial decisions as being authoritative will usually be followed in the decision of cases similar to those from which the principles were derived. As Justice Felix Frankfurter often explained, a judge cannot function as a *cadi* dispensing *ad hoc* justice under a tree. The law must have consistency and continuity, but *stare decisis* is not an immutable vault sealed up against the expansion of legal concepts to match the evolution of social and economic conditions. In breaking away from the narrow and sterile concept of "freedom of contract" that the Court had built up over the years, Roberts rendered a notable service, not only to the country but also to judicial craftsmanship.

From my discussion with him I concluded that it would be going too far to say that he changed his mind under the lash of criticism from the bar and the public. Roberts' opinion for the Court in the *Nebbia* case is sufficient evidence that he was thinking in fairly broad terms about the power of the states to cope with the ravages of depression.¹¹ When the Hughes-Brandeis-Stone-Cardozo foursome insisted on hearing the *Tipaldo* case, Roberts' mental processes really went no further than resistance to that choice of a case as a vehicle for a new look at the powers of the states. The formalities of recording votes made Roberts an integral part of the prevailing quintette, but he did not so regard himself.

Undoubtedly the criticism that was heaped upon the *Tipaldo* majority quickened Roberts' disposition to dig into the fundamental issues. He made clear to me that he was relieved to have the issue brought promptly before the Court once more in a posture that made consideration of its fundamental merits imperative. With his sense of proprieties satisfied, his regard for judicial responsibility and his devotion to the national wel-

fare caused him to sustain a broad view of governmental power without any encroachment upon the constitutional guarantee of freedom to the individual.

This is the antithesis of expedient maneuvering in response to public clamor or executive threats. Roberts was undoubtedly at fault in failing to face the basic issue in question when the *Tipaldo* case first came before the Court. The national interest in having a timely disposal of the issue far outweighed the Justice's desire to have a better case on which to base his judgment. But that mistake of timing and procedure is a far

cry from the unsustainable conclusion that he yielded to pressure.

There is nothing more than surmise to support the charge that Roberts changed his vote to save the Court or to escape personal criticism. All the known facts indicate that, after being caught in an unfortunate bind not of his own making, he honorably extricated himself by independently examining the issue he had previously tried to push aside and by following his sound judicial intuition to a well-reasoned position in keeping with the public interest.

Footnotes

¹ 298 U. S. 587.

² *Adkins v. Children's Hospital*, 261 U. S. 525.

³ *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398.

⁴ 291 U. S. 502.

⁵ *West Coast Hotel v. Parrish*, 300 U. S. 379.

⁶ Author's interview with Roberts, May 31, 1946.

⁷ Pusey, Merlo J., *Charles Evans Hughes*, vol. II, p. 757.

⁸ Author's interview with Roberts, May 31, 1946.

⁹ Pusey, Merlo J., *Charles Evans Hughes*, vol. II, p. 753.

¹⁰ See Note 6.

¹¹ *Nebbia v. New York*, 291 U. S. 502.

JUDICIAL POTPOURRI

OR,

"De Minimis,"



"Chief Justice of the United States:" History and Historiography of the Title

by Josiah M. Daniel, III

Many Americans, laymen and lawyers alike, do not know the correct and official title of the Supreme Court's *primus inter pares*: "Chief Justice of the United States." The title is fixed by statute. Congress, in the exercise of its authority to constitute the Court, had provided that "[t]he Supreme Court shall consist of the *Chief Justice of the United States* and eight associate justices."¹ The matter of the Chief's true title has been surprisingly problematic for a considerable period of our national history.

Although they debated extensively the offices of President and Vice-President, the framers of the Constitution gave little attention to the office of the chief judge of the federal court system. The records of the Constitutional Convention contain a running debate on the necessity for and the scope of federal jurisdiction, but reflect virtually no discussion about the organization and staffing of the third branch of the national government.² No doubt the delegates simply drew upon their experience with colonial, and then state, courts. By 1787 a number of the states had named their highest appellate courts "Supreme Courts" and had provided for "Chief Justices" thereof.³

On June 4, 1787, early in the Convention, the Committee of the Whole passed favorably on the first clause of Edmund Randolph's ninth resolve; "That a national judiciary be established." Six weeks later the delegates agreed that "One supreme Tribunal" would form the apex of the national judiciary, and on September 7-8 they concluded debate of the judicial proposals by agreeing that the Chief Executive would appoint the judges of the Supreme Court and that the Senate would try impeachments.⁴ Without expressly

discussing the matter, the Convention's delegates simply assumed that there would be a "Chief Justice" of the "One supreme Tribunal." In the recorded debates the office was mentioned by name only twice: in an unadopted proposal for Council of State⁵ and as potential successor to the President in the event of disability.⁶

The resulting document, our Constitution, embodies the Founders' implicit assumption that the Supreme Court would be headed by a "Chief Justice." Surprisingly, Article III, the judicial article, omits to name the office; it refers only to "Judges, both of the supreme and inferior tribunals."⁷ Similarly, Article II, the executive article, empowers the President to nominate and appoint "Judges of the Supreme Court."⁸ Only in the legislative article, Article I, does the Constitution mention the office, and then obliquely: at an impeachment trial of the President by the Senate, "the *Chief Justice* shall preside."⁹

The Constitution obviously contemplates that Congress should flesh out the judicial skeleton,¹⁰ and the Judiciary Committee of the First Congress undertook this task. The committee, appointed early in 1789, consisted of ten members, five of whom had served in the Convention and were presumably acquainted with its intent as to the federal judiciary. Oliver Ellsworth prepared a bill which featured, *inter alia*, a Supreme Court of six judges.¹¹ As enacted on September 24, 1789, Section One of the First Judiciary Act provided that "the Supreme Court of the United States shall consist of a *chief justice* and five associate justices."¹²

President Washington, however, commissioned John Jay on October 5, 1789 under the amplified title "Chief Justice of the Supreme

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An 1894 Kurz and Allison engraving of "the Chief Justices of the United States."

Court of the United States,"¹³ and the succeeding six Chiefs — Ellsworth, Marshall, Taney, Chase, and Waite — were likewise commissioned under that ponderous nomenclature.¹⁴ The antebellum Congresses, on the other hand, perpetuated the original statutory title "Chief Justice" through the fluctuations of the Court's membership from six to five in 1801,¹⁵ back to six in 1802,¹⁶ to seven in 1807,¹⁷ to nine in 1837,¹⁸

and to ten in 1863.¹⁹ The legislators also referred to the office by a third designation in several judiciary-related statutes: "Chief Justice of the United States."²⁰ Thus Congressional legislation and executive usage provided *three* competing variants of the Chief's title. Although the matter is less than clear, "Chief Justice" should be deemed the official title during this period since it was the designation used in the statutes

which constituted the Supreme Court.

The inconsistency remained unresolved in 1866 when the official title was changed to its present style. In that year Chief Justice Salmon P. Chase submitted, *sub rosa* through Senator Lyman Trumbull, an amendment to a judiciary bill providing that

No vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the supreme court shall consist of a *chief justice of the United States* and six associate justices. . . .²¹

The Senate accepted the amendment, Congress passed the bill, and President Andrew Johnson signed it into law.²² One of Chase's motives for seeking this amendment, now documented, was his personal desire for greater compensation; reducing the number of justices was designed to free the resources necessary to raise the Court's salaries.²³ Chase was commissioned as "Chief Justice of the United States."²⁴

No one noticed the insertion of a new official title until 1870, when Senator Charles P. Drake discovered and reported to Congress that "in 1866, doubtless by inadvertence, there crept into an act of Congress an improper and illegal designation of the '*Chief Justice of the Supreme Court of the United States*.'" ²⁵ The Act of April 10, 1869, which fixed the Court's membership at nine, had repeated the reformed title.²⁶ The Senator also found that Chase had so styled himself during the impeachment proceeding in 1868, but he did not learn that the Chief had in fact been the agent of this revision in title. Drake proposed an amendment to a pending bill in order to correct the 1866 and 1869 statutes and to declare that the official title was "Chief Justice of the Supreme Court of the United States." Although the amendment was adopted, the bill died on the table.²⁷ President Ulysses S. Grant commissioned Morrison R. Waite in 1874 under the title championed by Drake; but, beginning with Grover Cleveland and Melville W. Fuller in 1888, subsequent Presidents have commissioned each of Waite's successors as "Chief Justice of the United States."²⁸

Yet the confusion persisted, and in 1895 William A. Richardson, Chief Justice of the Court of Claims, endeavored to settle the question of the true title by publishing an article entitled "Chief Justice of the United States or Chief

Justice of the Supreme Court of the United States?" It was Chief Justice Chase himself who directed Judge Richardson's attention to the subject, as the writer noted.

I remember a conversation with him [Chase] about 1871, in which he called my attention to the question, and said I should find on investigation that the Chief Justice was separate and distinct from the court, that, as he stated it, "the court was built up around the Chief Justice." On account of that conversation and the suggestion he made I thereupon examined the constitution and statutes, and this article embodies the result of my investigation.²⁹

Richardson admitted that he could not determine how much Chase had to do with the 1866 and 1869 statutes, but he quite clearly suspected a nexus. After adducing the long executive usage and reviewing the 1866 and 1869 statutes, the judge concluded "that both titles are correct, or that neither is wrong," but he expressed a preference for "Chief Justice of the United States."³⁰

Richardson's article later caught Charles Warren's eye. In his 1923 book *The Supreme Court in United States History*, Professor Warren remarked in a footnote that "[t]he official title of the Chief Justice seems to have varied at different periods of the Court's history." He listed some, but not all, of the divergent statutes and cited Richardson's article; but, apparently perplexed, he reached no conclusion about the correct title."³¹

Congress too remained uncertain and for a considerable time it failed to use the new title consistently. For instance, salary statutes of 1873 and 1911 referred to the "Chief Justice of the Supreme Court of the United States."³² The codification of the judicial statutes in 1948 eliminated many inconsistent references in favor of "Chief Justice of the United States,"³³ but even today traces of the short title "Chief Justice" and of the amplified "Chief Justice of the Supreme Court of the United States" linger in the United States code."³⁴

The puzzling origin of the 1866 statutory change remained to be solved by Charles Fairman, who published the magisterial *Reconstruction and Reunion 1864-88, Part One* in 1971 as Volume VI of the History of the Supreme Court of the United States series, which is sponsored by the Oliver Wendell Holmes Devise. In Chase's papers in the Pennsylvania Historical Society's archives, Professor Fairman discovered a draft

of the 1866 amendment in Chase's handwriting together with correspondence about the matter to the bill's ostensible sponsor, Senator Trumbull.³⁵ Fairman thereby established the agency which Richardson had suspected but could not prove.

The Chief Justice of the United States serves

not only as the head of the Supreme Court but also as the leader of the entire American judiciary, federal and state.³⁶ Chief Justice Chase, whatever his personal motive, obtained for the office a title which accurately signifies its dignity and importance.

Footnotes

¹ 28 U.S.C. § 1 (1976) (emphasis added).

² 1 M. Farrand, *The Records of the Federal Convention of 1787*, pps. 22, 220, 232, 243-44, 292 (rev. ed. 1966) [hereinafter cited as M. Farrand]; 2 *id.* 132, 136, 186, 430-32; 3 *id.* 600-01.

³ R. Pound, *Organization of Courts*, pps. 58-103 (1940). The Framers must also have known that a "Chief Justice" had presided over the Court of the King's Bench for centuries. See J. Campbell, *The Lives of the Chief Justices of England* (1849).

⁴ 1 M. Farrand, *supra* note 2, at p. 95; 2 *id.* pps. 37, 495.

⁵ 2 *id.* pps. 335, 342, 367 ("Chief Justice of the Supreme Court").

⁶ 2 *id.* p. 427 ("Chief Justice").

⁷ U. S. Constitution art. 3, § 1.

⁸ *Id.* art. 2, § 2, cl. 2.

⁹ *Id.* art. 1, § 3, cl. 6 (emphasis added).

¹⁰ *Id.* art. 1, § 8, cl. 9; art. 3, § 1.

¹¹ J. Goebel, *Antecedents and Beginnings to 1801 at 458-70* (1971) (Vol. I of History of the Supreme Court of the United States); D. Henderson, *Courts For A New Nation*, p. 10-20 (1971).

¹² Act of September 24, 1789, ch. 20, § 1, 1 Stat. 73 (emphasis added).

¹³ 1 C. Warren, *The Supreme Court in United States History*, pps. 35, 36 n. 1 (1923) [hereinafter cited as C. Warren]; Richardson, "Chief Justice of the United States or Chief Justice of the Supreme Court of the United States?," 49 *New Engl. Hist. & Genealogical Reg.* pps. 275, 276 (1895) [hereinafter cited as Richardson].

¹⁴ C. Warren, *supra* note 13, at 11 n. 2; Richardson, *supra* note 13, at 276.

¹⁵ Act of February 13, 1801, ch. 4, § 3, 2 Stat. 89.

¹⁶ Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

¹⁷ Act of February 24, 1807, ch. 16, § 5, 2 Stat. 420.

¹⁸ Act of March 3, 1837, ch. 34, § 1, 5 Stat. 176.

¹⁹ Act of March 3, 1863, ch. 100, § 1, 12 Stat. 794.

²⁰ Act of March 3, 1801, ch. 21, § 2, 2 Stat. 111 (relieving duties concerning the mint); Act of February 20, 1819, ch. 27, 3 Stat. 484 (raising salary); Act of August 10, 1846, ch. 176, § 3, 9 Stat. 102 (member of Board of Regents of Smithsonian Institution).

²¹ C. Fairman, *Reconstruction and Reunion 1864-88, PART ONE*, p. 166 (1971) (Vol. VI of History of the Supreme Court of the United States) [hereinafter

cited as C. Fairman] (emphasis added).

²² Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209.

²³ C. Fairman, *supra* note 21, at 163-67; see also S. Kutler, *Judicial Power and Reconstruction Politics*, pps. 54-55 (1968).

²⁴ C. Fairman, *supra* note 21, at 163-64, 166. One biographer writes: [Chase had] a confirmed conviction that there was nobody in the country who was quite his equal as a statesman." K. Umbreit, *Our Eleven Chief Justices*, p. 249 (1938). But the more exalted title brought him no additional prestige because no one apprised the public of it. C. Fairman, *supra* note 21, at 171.

²⁵ *Cong. Globe*, 41st Cong., 2d Sess. 3977 (1870) (emphasis added).

²⁶ Act of April 10, 1869, ch. 22, § 1, 16 Stat. 44. This statute changed the article preceding the title from "a" to "the."

²⁷ *Cong. Globe*, 41st Cong., 2d Sess. 4864 (1870).

²⁸ C. Fairman, *supra* note 21, at 171; Richardson, *supra* note 13, at 276, 277, 278.

²⁹ Richardson, *supra* note 13, at 278.

³⁰ *Id.* at 279.

³¹ C. Warren, *supra* note 13, at 11 n. 2.

³² Act of March 3, 1873, ch. 226, 17 Stat. 454; Act of March 3, 1911, ch. 231, § 218, 36 Stat. 1194.

³³ The legislative history of the codification does not mention this conformation. H.R. Rep. No. 308, 80th Cong., 1st Sess. 1 et seq. (1947).

³⁴ A review of the United States Code (with the assistance of LEXIS, the computer-assisted legal research service) reveals that "Chief Justice of the United States" is used uniformly except for references to "Chief Justice" in nine sections, 18 U.S.C. § 3771 (1976); 20 *id.*, § 41; 28 *id.* §§ 3, 5, 674(b), 2072, 2075 & 2076; 50 *id.* 1802(a)(3); one reference to "Chief Justice of the Supreme Court," 2 *id.* § 135; and one reference to "Chief Justice of the Supreme Court of the United States," 48 *id.* § 1465. To be entirely accurate, a few statutes use "Chief Justice of the United States" for the first reference and thereafter use the short "Chief Justice." See, e.g., 28 *id.* §§ 672, 673.

³⁵ C. Fairman, *supra* note 21, at 163-67. Fairman's scholarship on this point inspired this article.

³⁶ See Mason, "The Chief Justice of the United States: Primus Inter Pares," 17 *J. Pub. L.* 20 (1968).

Toward 1987: A "Pre-Constitutional" Law Case

William F. Swindler

The year 1783 was marked by two major events in the slowly coalescing constitutional shape of the United States. One was the final signing at Paris of the definitive treaty of peace, after more than a year of desultory negotiations which were finally approved by both Britain and the United States—and, somewhat reluctantly, by America's quondam ally, France. Now, finally, the thirteen independent states under the Articles of Confederation had an official status among "the powers of the earth"—such as it was—and could undertake to resume, in the states at least, the normal functions of government and law which had been suspended from July of 1776 or earlier.

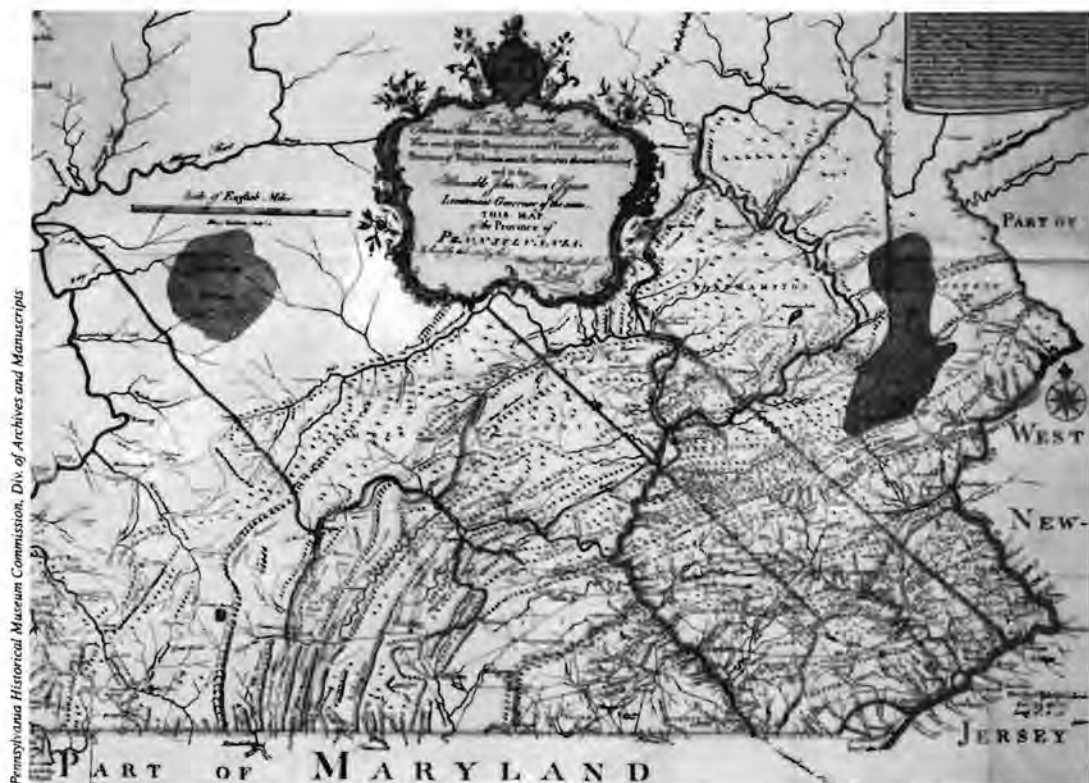
For different states, the period of suspension of normal operations had been one of various lengths. Virginia, for example, eventually declared a moratorium on certain proceedings, such as statutes of limitations affecting a number of types of legal actions, for a period beginning April 12, 1774 to September 3, 1783. The earlier date marked the closing of the last colonial legislative session by the last royal governor. The latter date was the date of the signing of the Treaty of Paris. For the national government, on the other hand, the treaty ratified the status of the United States as a government at least theoretically able to incur international treaty obligations, open formal diplomatic relations with other countries of the world, and generally to claim sovereign status in the family of nations. While its standing abroad might be questionable for another generation, its domestic or "municipal" authority, as the final arbiter of relations between states, now was settled. The Articles had set up a national government of sorts, and the treaty made it a recognized national entity with the final word on internal affairs.

This led to the other important event of 1783—actually the formal filing of a report on litigation

which had taken place the previous fall—which was the final settlement of the "Wyoming Valley" dispute between the states of Connecticut and Pennsylvania. This, as it turned out, was to be the only "Constitutional" case pursued to final judgment under the Articles of Confederation, and before creation of a national court system under Article III of the 1787 Constitution. By authority of Article IX under the Confederation, the Continental Congress was empowered to create two judicial bodies—a Special Court of Appeals which heard admiralty cases from the various state courts, and ad hoc "legislative courts" to settle land and border disputes between states.

The judges who met at Trenton, New Jersey in the fall of 1782 to hear the "Wyoming Valley" dispute more nearly resembled a border settlement commission. Of the five members of the tribunal, only two had substantial professional credentials—David Brearly, chief justice of New Jersey, and Cyrus Griffin of Virginia, a member of the appeals court and the first judge-to-be of the United States District Court for Virginia six years later. William Whipple, of New Hampshire, although just appointed to his state's high court, seems to have been a non-lawyer; and Welcome Arnold, of Rhode Island, certainly was. The fifth member of the tribunal was William C. Houston of New Jersey, who had been admitted to the bar in 1781 after a decade as professor of mathematics at the College of New Jersey (now Princeton).

Yet this disparate group had a fundamental constitutional question before it. The Wyoming Valley was a region in northeastern Pennsylvania, just under the New York border (see map), between the Susquehanna and Lackawanna Rivers, claimed by both Connecticut and Pennsylvania under their respective colonial charters. Such conflicting grants were not unusual in a



Pennsylvania Historical Museum Commission, Div. of Archives and Manuscripts

The disputed territory, appearing to the right of the legend of W. Scull's famous 1770 map of the province of Pennsylvania.

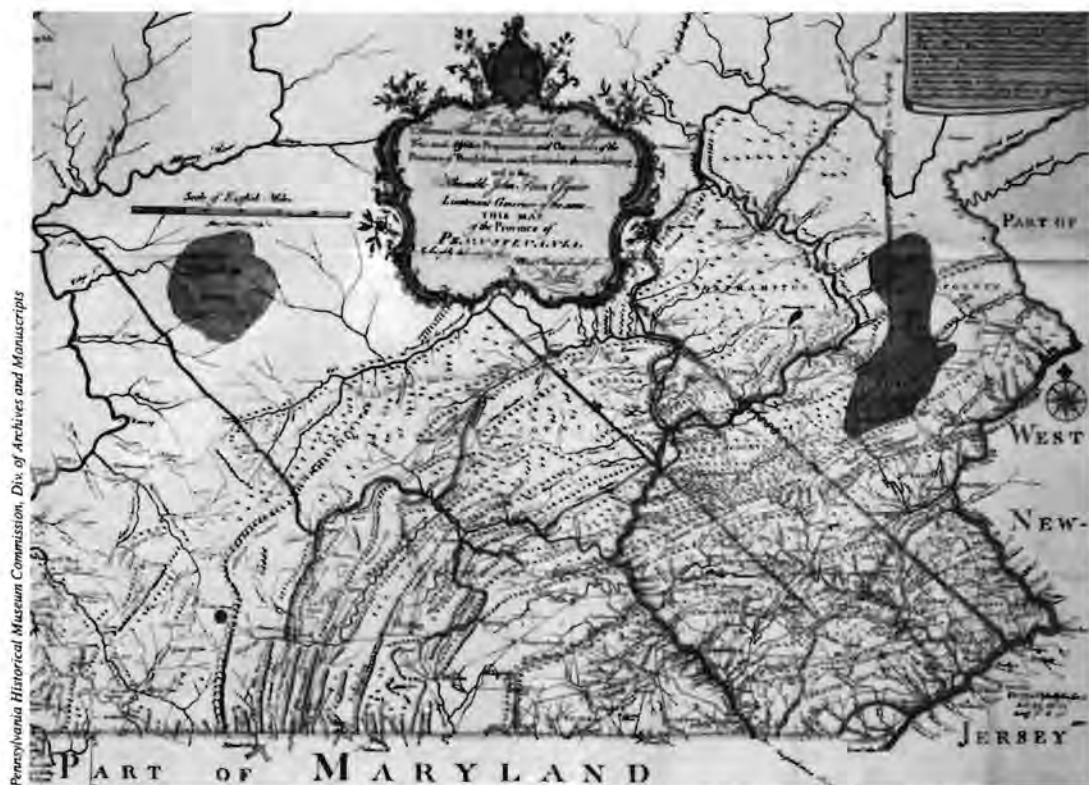
time of imperfect knowledge in England of the areas they were dealing with in the New World. In any event, Connecticut's 1661 charter was obviously senior, and when the lavish grants to the Duke of York cut through the 1662 territory, it left the main government of Connecticut cut off from two important tracts which were to figure in its later history.

One of these was in western New York and northernmost Pennsylvania—the area which historically became the “Western Reserve,” a “re-settlement” area which the colony, in the course of its cession of its western lands, had kept for the victims of the “firelands,” burnt-out coastal regions attacked by British warships in the course of the Revolution. The other was the Wyoming Valley which was claimed by Connecticut not only by right of charter but early settlement. The colony even went so far as to organize this as a county which was entitled to representation in the assembly in Hartford.

Pennsylvania's counterclaims had not been pursued with particular vigor up to the time of independence, and it was actually the events of the war which brought matters to a head. In 1778 a combined force of Indians and Tories had

launched a campaign against the settlements in the Wyoming Valley, coming down from the major areas held by the Six Nations in the central part of New York, the result being a combined massacre and expulsion of the settlers from virtually the entire region. The Continental Congress perceived that the threat could only be removed by counter-attacks on the Six Nations themselves, and in due course these areas were destroyed and the Indian power broken.

As survivors undertook to return to the area from which they had been driven, Pennsylvania authorities decided that the question of territoriality had to be settled at last, and accordingly brought a formal petition to Congress to establish a special agency to adjudicate the matter. Congress issued a commission in August 1782 empowering the special agency to convene, hear and determine the matter, and on November 12 Justice Isaac Smith of New Jersey administered the oath to Brearly and Houston, the first two commissioners to appear. A week later, all the commissioners had made their way to Trenton and been sworn, while the phalanx of lawyers for the two states also assembled with their credentials.



The disputed territory, appearing to the right of the legend of W. Scull's famous 1770 map of the province of Pennsylvania.

time of imperfect knowledge in England of the areas they were dealing with in the New World. In any event, Connecticut's 1661 charter was obviously senior, and when the lavish grants to the Duke of York cut through the 1662 territory, it left the main government of Connecticut cut off from two important tracts which were to figure in its later history.

One of these was in western New York and northernmost Pennsylvania—the area which historically became the “Western Reserve,” a “re-settlement” area which the colony, in the course of its cession of its western lands, had kept for the victims of the “firelands,” burnt-out coastal regions attacked by British warships in the course of the Revolution. The other was the Wyoming Valley which was claimed by Connecticut not only by right of charter but early settlement. The colony even went so far as to organize this as a county which was entitled to representation in the assembly in Hartford.

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For Connecticut, the three attorneys were Eliphalet Dyer, William Samuel Johnson and Jesse Root. Pennsylvania was represented by four lawyers — William Bradford, Jr., Joseph Reed, Jonathon D. Sergeant and James Wilson, the state solicitor, Henry Osborne, was also present. Among these several well-known attorneys, the future Supreme Court Justice James Wilson was probably the most eminent.

The case began with the usual procedural maneuvers, Connecticut's counsel challenging the jurisdiction of the Trenton tribunal and Pennsylvania filing a rebuttal. Connecticut then submitted a statement that its best evidence, an "original deed from the Indians . . . obtained from their chiefs and sachems at their council fire in Onandaga" in 1763, was "now in England, left there before the commencement of the present unhappy war." Insofar as this statement laid the ground for a motion to postpone the trial of the issue, Pennsylvania asked the court for a rule to continue the trial forthwith.

The case in chief, of course, consisted of the original charters and subsequent documentary



King Charles II, whose various colonial charters resulted in extended territorial disputes.

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evidence establishing the sovereignty of the particular colony over the area. Connecticut began with the original 1620 charter of Massachusetts Bay, from which emanated subsequent grants in 1629 and 1631 creating the settlements of New Haven and Hartford, leading eventually to the separate charter of April 23, 1662 to "the company and society of the colony of Connecticut." Trouble began two years later, however, when Charles II granted to his brother, the Duke of York and future James II, an area (which Charles intended to wrest from the Dutch) extending in a corridor between the Connecticut and Hudson Rivers (including Long Island and its Connecticut settlements) to the upper reaches of Chesapeake Bay.

Following a decade in which the area changed hands several times, it finally went to England by treaty in 1674, with postwar amendments to the charter of New York and "the Jerseys" which extended Connecticut's western border with New York but remained silent on the lands beyond the upper Delaware river, which Connecticut regarded as part of its original grant. Typical charter language of the time began most of these grants at "the western shores of the Atlantic" (i.e., west from England) and continued them to "the South seas," a vague reference to some large body of water which eventually came to be treated as the Mississippi.



James Wilson, perhaps the most eminent attorney involved in the case, was appointed to the Supreme Court six years later in 1789.

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In 1681 Charles granted to William Penn a territory extending from the Delaware river "westward five degrees in longitude," the northern border of which was to be the forty-third degree of latitude and the southern beginning at the "twelve-mile arc" around Newcastle, Delaware, and proceeding along the northern border of Maryland. This language had already created one problem, which was solved by the famous Mason-Dixon survey authorized by Lords Penn and Calvert in 1765. As for the northern area, counsel for Pennsylvania now offered documents of grants to the "right of soil" made between the proprietors and various Indian tribes in 1736, added to the fact that its 1681 charter contained a map indicating clearly that the grant to Penn extended northward "to the end of the forty-second degree."

Connecticut's rejoinder declared that in 1753, "having located and settled all their lands within their patent east of New York, and being in a condition to extend their settlements on the other part of their patent aforesaid, to the westward of the Delaware river," the Susquehanna Company was chartered as a land development agency—typical of a number of such projects of the time—and the following year purchased the "right of soil" from the Indians claiming title to the region. Connecticut's counsel apparently were unable to produce original documents for

1754 and had already admitted that those of 1763 were not obtainable, and offered instead to submit corroborating depositions.

The Trenton tribunal thereupon put the two states to their proofs, and heard testimony for the rest of the year. On December 30, 1782 the five commissioners gave a unanimous judgment for Pennsylvania. While they gave no reasons for their finding, it is pretty clear, first, that the 1664 New York charter and the 1681 Pennsylvania charter, by failing to reserve any Connecticut interests, extinguished the latter *sub silentio*. The additional fact that the Indian agreement of 1736, apparently touching the territory in question, antedated the 1754 and 1763 purchases of Connecticut and its land company, settled the matter.

The jockeying for strategic advantage—including the creating of a county of Westmoreland representing the Wyoming Valley area in the Connecticut legislature, in 1776—was finally ended with this judgment. But more than five thousand persons held titles to lands issued by the Susquehanna Company, and it was not until 1799 that Pennsylvania enacted an "act of compromise" confirming titles in seventeen erstwhile Connecticut townships. Upon payment of nominal fees to Pennsylvania, the problem was finally extinguished, and the only complete "constitutional" case before the Constitution itself was finally closed.



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William Penn and his seal as proprietor of the province of Pennsylvania.





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