Introduction

Melvin I. Urofsky

We begin our fortieth year of publication with pride and optimism. Pride that over the years we have been able to bring to our readers interesting articles about many different aspects of U.S. Supreme Court history written by some of the leading scholars in the field. Optimism that we can continue to do this in the years to come. This issue suggests that our optimism is not unfounded.

Historians have long puzzled over John Jay and his decision to step down as Chief Justice, and then a few years later to decline an offer to re-establish him in that position. A leading figure of the Revolutionary period, a statesman, jurist, a co-author of *The Federalist Papers,* governor of New York, a diplomat, and our nation's first Chief Justice, there is no question that his place in American history is honored and secure. He failed, however, to see the opportunity that leading the High Court could provide to help shape the new nation's destiny. When he resigned, he claimed that the judiciary would never be an important part of the government. Matthew Van Hook explores Jay's ambivalence about the Court, and tries to make sense of it in light of Jay's own ambitions and talents. Mr. Van Hook is a Ph.D. candidate in political science at the University of Notre Dame.

One can hardly pick up the newspaper these days, nor turn on the radio or television news, without another story about immigration. Historians are well aware that immigration did not just become a contentious issue in the past few years. During the Progressive Era there was a great national debate over the wisdom of continuing to allow unrestricted numbers of people, especially those from eastern and southern Europe, to enter the country. The debate finally ended in the 1924 statute severely limiting migration into the United States. In the nineteenth century the debate involved those who came from China, many of whom helped build the transcontinental railroad.

A question then, as now, is who had the power to regulate that migration—the states or the federal government. While we pay little attention to those decisions now, the Supreme Court heard several cases on the matter, and whether there was a federal police power that could be called into service. Adam Carrington,

an assistant professor of politics at Hillsdale College, looks at one of the most important Justices of the latter nineteenth century, Stephen J. Field, and his evolving views on this subject.

When legal scholars play the game of "Who Are the Great Justices?" it is fairly certain to say that William Rufus Day is never mentioned. Day, appointed by Theodore Roosevelt in the spring of 1903, served on the Court until his resignation in November 1922, nearly two full decades, and in that time heard hundreds of important cases. He is remembered, if at all, as the author of the majority opinion in *Hammer v. Dagenhart* (1918). Yet Jesse Bair thinks Day's service is underappreciated and that he deserves a re-evaluation. Mr. Bair, a student of Professor Brad Snyder while at the University of Wisconsin Law School, won the Society's Hughes-Gossett Student Prize for 2014 with this article. He is now an associate at the Madison, Wisconsin, office of Perkins Cole LLP.

We now come to the second installment of Barry Cushman's "The Clerks of the Four Horsemen," dealing with those men serving George Sutherland and Pierce Butler. We know far more about the clerks of the "great Justices," such as Holmes and Brandeis, who often wrote about the wonderful year they spent with "their" Justice. The diary of a frustrated McReynolds clerk sent Professor Cushman—who is the John P. Murphy Foundation Professor at Notre Dame Law School—on a quest to see how other clerks fared with these four, particularly in their post-clerkship careers.

Finally serendipity—as it often does—played a role in securing our last article. I was one of the speakers at a symposium sponsored by his clerks held at the Court last spring to mark the seventy-fifth anniversary of William O. Douglas's appointment to the Bench. The keynote talk was given by an old acquaintance of mine, David J. Danelski who has long been at work on a biography of Douglas. David, the Boone Centennial Professor of Political Science Emeritus at Stanford University, spoke about the machinations surrounding the appointment and I immediately asked him to submit the talk to the *Journal*.

As always, a rich and varied repast. Enjoy!

Founding the Third Branch: Judicial Greatness and John Jay's Reluctance

MATTHEW VAN HOOK

In the fall of 1789, George Washington's appointments for the first Justices of the Supreme Court moved remarkably fast. Two days after formal nomination, all six appointments were confirmed by the United States Senate, an unfathomable speed by present day standards. A few days later, President Washington sent a letter to John Jay accompanying his commission as the newly appointed first Chief Justice. Washington wrote, "And I have full confidence that the love which you bear our Country, and a desire to promote general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the Key-stone of our political fabric."[1] In return, Jay pledged his heart to the task and replied, "I assure you that the Sentiments expressed in your Letter of Yesterday, and implied by the Commission it enclosed, will never cease to excite my best Endeavour to fulfill the Duties imposed by the latter, and as far as may be in my power, to realize the Expectations which your nominations, especially to important Places, must naturally create."[2] Washington presented Jay with an opportunity to assume greatness as the father of the judicial branch of the United States, yet rarely does Jay's honorable name arise when "great justices" are listed by scholars, lawyers and historians.[3] A present day casual observer therefore might be tempted to assume that Jay did not "realize the Expectations" set forth by Washington and secure the Supreme Court as the "Key-stone of our political fabric."

I contend that Jay achieved a type of founding success, but missed an opportunity to achieve the sort of lasting judicial greatness that his Federalist heir John Marshall realized.[4] Jay displayed a distinctive Federalist perspective while on the Court that expounded the principles outlined by the Federalist defenders of the new Constitution, yet differed from their goals as a developing

political party. Chief Justice Jay thus represents a unique branch of Federalist political thought.[5] He worked to establish a principled, yet cooperative, independent judicial branch as evident in his intellectual positions on two particular policy issues: the dilemma of Supreme Court Justices serving simultaneously on the federal circuit courts and the impropriety of judicial advisory opinions. This effort also extended to his rulings in the critical cases that arose during his tenure. In particular, *Hayburn's Case*, *Chisholm v. Georgia* and *Glass v. Sloop Betsey* offer insight into cases that Jay might have more firmly established as first steps in entrenching his Federalist political goals into the judiciary, not by ruling differently, but by ruling more explicitly.[6] Jay's reluctance to give voice to these cases and establish them as the cornerstone of a clear and steady Federalist jurisprudence represented his forfeiture to a claim of national judicial greatness in spite of his personally distinctive legacy of diverse public and private service. Consider an astounding counterfactual history: if Jay had remained Chief Justice until his death in 1829, his forty-year tenure would have included the opportunity to rule on nearly all of the "great" cases that came before John Marshall and placed him as the longest serving Supreme Court Justice to this day.[7]

A Federalist Chief Justice

Jay may have been one of the most wondrously qualified statesmen nominated to Chief Justice in the history of the Supreme Court. By the time of this appointment he had already served as president of the Continental Congress, chief justice of New York's highest court, and secretary for foreign affairs under both the Articles of Confederation and the Constitution, not to mention his diplomatic role in brokering the final peace settlement of the Revolution, his receipt of the third-highest total electoral votes in the first U.S. presidential election and a litany of other achievements. The loyal Federalist who had written *The Federalist Papers* with Alexander Hamilton and James Madison to ensure ratification of the United States Constitution in New York had a curriculum vitae worthy of leading the new nation as the head of its independent judiciary.[8] How he would use this position to advance the post-ratification Federalist effort to uphold and support the new Constitution and shape its institutions was not yet clear.

The unsurprising absence of cases in the Supreme Court's opening session in February 1790 led to a few months delay for Jay to find a fitting forum in which to set forth basic guiding principles for the judicial branch. The significance of the decision to find such a proper forum should not be overlooked. As Chief Justice, with no prior precedent for what should be included in an opening Supreme Court session, Jay could have elected to deliver an elaborate speech defining the role that the independent third branch would play in America. Such a daring move may have been inappropriate, presumptive and political—yet are not these characteristics often precisely what modern scholarship of all three branches tends to associate with greatness? In fact, by refraining from doing so, Jay, on his very first day at the Supreme Court, may very well have laid aside any claim to the type of greatness expected of modern leaders. I propose an alternative explanation—Jay saw the bench as distinct from the stump and therefore wanted to ensure that a proper forum for judicial rhetoric would reflect the right role of that branch under the separation of powers theory that he had defended. Specifically, Jay found a more appropriate venue to establish his expectation for the role of the judiciary two months later in the distinctly judicial task of instructing his first grand jury on the federal circuit.

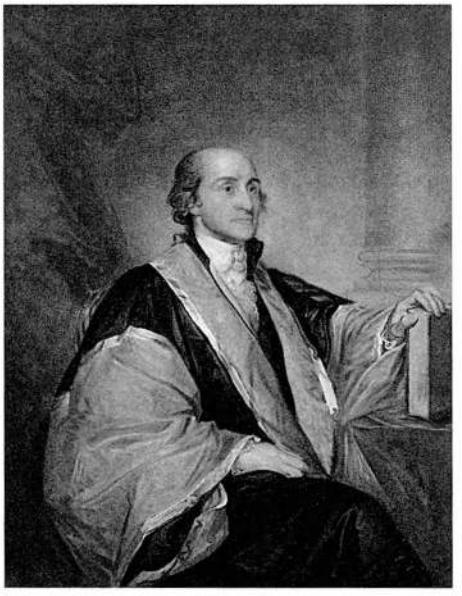
Jay's charge to the federal grand jury in April 1790 is widely cited by scholars of the

early court and epitomizes the type of high exposition of the American constitutional project one would expect from a famed statesman at the helm of one of the three branches of the new government. New Yorkers who were present to hear his address, or read it later that summer upon its release to the newspapers, must have noted the striking similarity to the opening tone of Publius in *The Federalist Papers.* (This similarity does not surprise today's reader for whom Jay's identity as one of the three voices of Publius is no longer a secret.) Jay opened his charge to the jury with the statement, "Whether any People can long govern themselves in an equal uniform and orderly manner, is a Question which advocates for free Governments justly consider as being exceedingly important to the Cause of Liberty." The Framers had claimed that self-government and liberty were compatible. In the past, governments of supposed popular consent were corrupted by "the arts of designing Individuals, whose apparent Zeal for Liberty and the public good enabled them to take advantage of the Credulity and misplaced Confidence of their fellow citizens." Under the U.S. Constitution, however, an effective independent judiciary would rightfully establish the people's confidence in their liberty. Like the permanent judges on the federal courts, Jay recognized that grand juries would also hold this confidence in their hands.[9]

Regarding the separation of powers doctrine specifically, Jay noted, "The Constitution of the United States has accordingly instituted these three Departments, and much Pains have been taken so to form and define them, as that they may operate as Checks one on the other, and keep each within its proper Limits."[10] Yet Jay went on to describe these "Pains" as only the first steps that would be either accepted or rejected in "Practice" where the real work to establish the validity of the republican theory had only just begun. Jay emphasized that national courts necessarily were built as bodies in which the "Laws of Nations" as well as the "national laws" would not only be adjudicated, but interpreted. Interpretation had been a problem under the former system in which "our Jurisprudence varied in almost every State, and was accommodated to local not general Convenience; to partial not national Policy."[11] Jay's striking statement proposed that the Courts would support national policy through a proper and uniform interpretation of the twin pillars of national law and the Laws of Nations. None who trust the sincerity of this address should be surprised then to find that Jay would proceed to exhibit cautious prudence when determining lawful means of supporting national ends. Again echoing *The Federalist Papers*, Jay exhorts the jurors with the following reminder:

> It cannot be too strongly impressed on the Minds of us all, how greatly our individual Prosperity depends on our national Prosperity; and how greatly our national Prosperity depends on a well organized vigorous Government, ruling by wise and equal Laws, faithful executed. Nor is such a Government unfriendly to Liberty, to that Liberty which is really inestimable . . . Let it be remembered that civil Liberty consists not in a Right to every Man to do just what he pleases, but it consists in an equal Right to all the Citizens to have, enjoy, and to do, in peace, Security and without Molestation, whatever the equal and constitutional Laws of the Country admit to be consistent with the public Good. It is the Duty and the Interest therefore of all good Citizens, in their several Stations, to support the Law and the Government which thus protect their Rights and Liberties.[12]

Jay's closing remarks in his April 1790 address to the federal grand jury upheld



The author argues that John Jay Jay's five years on the Court portray a great Justice in the making, but one who was reluctant to exploit cases to their full potential, not by ruling differently, but by ruling more explicitly. Had Jay remained and established a more vocal Supreme Court, less supportive of the other branches and more detached from the national government, he may have been the first name in American law.

individual rights by emphasizing national duty to a national cause of liberty and prosperity and this theme set forth his guiding principles evident in his later decisions as Chief Justice. Citizens, jurors and judges must all fulfill their duties with respect to the law, he admonished, if the nation is to remain free and thrive. However, Jay would come to strongly object to the impropriety of Justices serving on both the federal circuit and the Supreme Court, opening him up to long-lasting criticism that he was unwilling to fully embrace his own duties as set forth by Congress in the Judiciary Act of 1789.

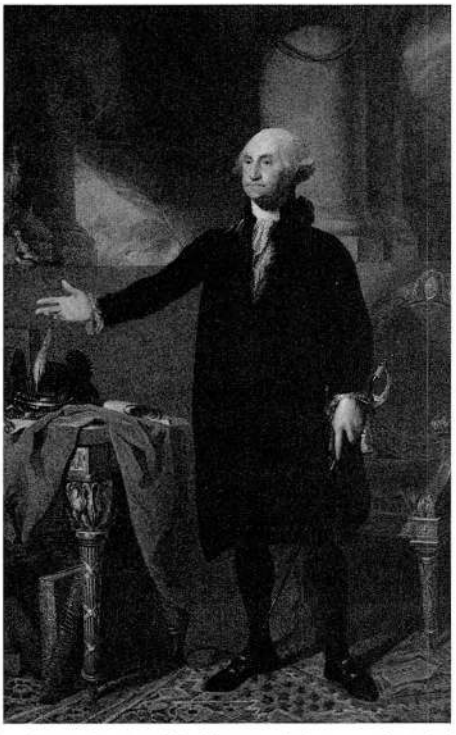
Riding Circuit

The broad framework of Article III of the Constitution left the new Congress with many options for designing the federal judicial system. When Congress immediately set to work on this task in 1789, they were judicious with personnel resources and designed federal circuit courts composed of a local federal district judge and two Supreme Court Justices performing a sort of double duty. Supreme Court historians Maeva Marcus and Natalie Wexler contend that the framers of the Judiciary Act of 1789, which created these circuit courts along with a host of other basic structural and administrative regulations, "overwhelmingly concerned themselves with creating a judicial system that safeguarded federal interests without antagonizing those who favored a strong role for the states."[13] Congress, by sending prominent national figures into local judicial circuits, not only enhanced federal authority in real terms through the power of these new federal courts, but also in symbolic terms by sending national officers of the court to preside in front of the people in their home states. However, it was not long before Chief Justice John Jay and his court colleagues questioned the practicality and propriety of imposing such an arduous duty on the Supreme Court of the United States.[14]

Jay has been historically stigmatized as somewhat of a Founding "Whiner" for his outspoken frustration with the duty of riding

circuit, a strange stigma indeed for a statesman who endured some of the most difficult overseas diplomatic missions of his time in Spain and Great Britain. Jay would carry the fight against circuit-riding throughout his time on the Court, but he was hardly the first to note the personal burden this would present. Robert Harrison had turned down his appointment to the Supreme Court by citing to President Washington the combined difficulties of riding the circuit and personally relocating to the new seat of government in New York.[15] Washington intimated to Harrison that circuit duty might be abolished, and that "such a change in the system is contemplated, and deemed expedient by many in, as well as out of Congress, as would permit you to pay as much attention to your private affairs."[16] Unfortunately, as both Washington and Jay would discover, Congress stubbornly held on to this requirement, though it did reduce the annual trips from two to one in 1793.[17]

Interestingly, President Washington perceived circuit-riding as a way to learn about the path of the new nation. Washington sent an official letter to the Supreme Court Justices before they departed on their first circuit duties in April 1790 with a modest request, "As you are about to commence your first Circuit, and many things may occur in such an unexplored field, which it would be useful should be known; I think it proper to acquaint you, that it will be agreeable to me to receive such Information and Remarks on this Subject, as you shall from time to time Judge expedient to communicate."[18] The difficulty in interpreting this letter from Washington demonstrates one of the problems with Supreme Court Justices sitting on the circuits in general. If misconstrued, the letter might appear to be a request for official advisories of the sort that Jay would later consider improper for the Supreme Court to provide, as will be discussed at length in the following section. A more plausible reading, however, could simply interpret this as Washington's request that opinions and events be brought to his attention so that as chief executive he could well and faithfully discharge the duties of his office in a lawful manner. No immediate response to this request was submitted, but Jay later crafted a draft reply after discussing general concerns with his fellow Justices when they met for the Supreme Court's second session in August 1790.[19] Among other concerns, Justice William Cushing expressed to Jay the high-minded belief that they had been appointed to serve as the wisdom of the nation and lamented that the Justices, in their circuit-riding, would be "so long absent from those facilities which they might find at home, as to have no Opportunity of consulting books, or of studying to advantage."[20]



President George Washington (above, painted by Gilbert Stuart) sent an official letter to the Supreme Court Justices before they departed on their first circuit duties in April 1790 with a modest request, "As you are about to commence your first Circuit, and many things may occur in such an unexplored field; which it would be useful should be known; I think it proper to acquaint you, that it will be agreeable to me to receive such Information and Remarks on this Subject, as you shall from time to time Judge expedient to communicate."

Jay circulated a draft letter of recommendations to his fellow Justices after their initial meeting with the intent to send it to Washington, who would then forward it to Congress. The letter appears to have never been delivered to George Washington, but based on Harrison's earlier declination of the post he might have anticipated its contents. Jay's letter began by acknowledging the likelihood of defects in any new system and infers that the Judiciary Act of 1789 should be viewed as a first draft of sorts, one to be amended as necessary after actual practice had demonstrated certain defects. He goes on to argue the impropriety of the Supreme Court Justices serving simultaneously as circuit court judges based in part on the dilemma of appearing to correct their own errors in appellate cases. Furthermore, the tone suggests that the Supreme Court should stand alone as the highest judicial body and demonstrate its distinction from the lower courts in order to receive due respect from the public. He notes the paradox that "the public Confidence would diminish almost in Proportion to the Number of Cases in which the Supreme Court might affirm the Acts of any of its Members."[21] In other words, Jay demonstrates the problem arising in cases in which Supreme Court Justices will "be at the same Time both the Controllers and the controled [sic]."[22]

In plainer words still, Jay and the other Justices simply thought this part of the Act to be unconstitutional: "We, for our Parts, consider the Constitution as plainly opposed to the Appointment of the same Persons to both Offices nor have we any Doubts of their legal Incompatibility."[23] Yet, without a specific case to highlight this impropriety, Jay's initial solution was to provide this perspective as an administrative note to George Washington and allow Congress to amend its error before it resulted in a case that might render the Act unconstitutional by decision of the Supreme Court. In Jay's view, the separation of powers did not require the complete isolation of the branches from one another. When Jay and the Justices finally submitted a new letter to Washington in August of 1792, Jay opened by noting the president's "official connection with the Legislature" and viewed this procedural method of identifying problems and coordinating with the other branches as "respectful to Government."[24] This letter reiterated to Washington and Congress the graver danger to republican government, "That the distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the supreme Court, which it is so essential to the public Interest should be reposed in it."[25]

Congress responded to the Justices' complaint of the personal burden of circuit riding by amending the requirement in the Judiciary Act of 1793 to reduce the requirement from two Supreme Court Justices per circuit to one, yet Congress ignored the constitutional question the Justices had posed to them. In response, Jay and the Justices sent yet another official correspondence through Washington to Congress in early 1794. This letter acknowledged that the reduction had provided greater time for "studies made necessary by their official duties," but also restated the more pressing problem of opinion discontinuity that the rotating circuit system would continue to suffer. Such an "Evil, naturally tending to render the Law unsettled and uncertain," demanded the "Interposition of Congress."[26] Ultimately Jay was unsuccessful in his efforts to persuade Congress of the constitutional problem of circuit riding. The policy was briefly taken up again in 1798, "corrected" (by Jay's standard) in the Judiciary Act of 1801, but quickly repealed again in 1802, repudiating the Jay Court's position for another ninety years and validating Jay's fear that, once this bad policy was entrenched, it would be difficult to overturn.[27]

The Jay Court had identified a problem that seemed difficult to overcome: how could the Supreme Court attain the high level of respect afforded the other branches if they remained a dispersed set of judicial officers? When John Marshall began his tenure as Chief Justice, the question remained unresolved as he watched a new Democratic-Republican Congress dismantle the short-lived independent circuit system in 1802. Like Jay before him, Marshall was able to find a way to uphold the new act's constitutionality in order to preserve the precarious standing of the Court.[28] Yet Marshall managed to build the Court's prestige in spite of the challenge of riding circuit. In any case, it appears Marshall considered his circuit duty less personally onerous than Jay. If Jay's circuit duty had been confined to New York, perhaps he might have embraced the role of Chief Justice in a different way. On the other hand it would be difficult to argue that Jay's circuit duties alone kept him from introducing case management ideas such as restructuring the Court's opinions from a seriatim format to the issuance of majority and dissenting opinions, since Marshall would later implement these changes under similar circuit restraints.[29]

Jay had done his best to offer a cooperative solution to what he viewed as a constitutional problem, but bitterly deferred to Congress in the end. This might appear as a mark of failure to some scholars, but modern judicial observers should not lose sight of Jay's goal of establishing a cooperative relationship between the branches that still preserved the core theoretical principle of the separation of powers. Jay accomplished this by deferring only to the Congress's constitutional right to interpret its Article III powers to set up and maintain the federal court system, while retaining interpretive independence in his own rulings. Later sections of this article will examine certain cases that provided Jay the chance to rule on the legitimacy of constitutional questions within the purview of the judicial branch. Prior to examining cases, however, it is worthwhile to note another crucial aspect of Jay's leadership of the third branch. Jay protected independent judicial thought by drawing one clear line of restraint on his cooperative separation of powers doctrine; he established the policy of refusing to issue advisory opinions on questions submitted from the other branches, a policy that has endured to the present.

Advisory Opinions

Jay believed that the primary and proper manner in which the Court would establish its

Jay has been stigmatized for his constant complaining about the duty of riding circuit, but he was hardly the first to note the personal burden this would present and he was willing to endure some of the most difficult overseas diplomatic missions of his time in Spain and Great Britain. Chief Justice Marshall is pictured above at left chatting in a tavern while riding circuit.

legitimacy was through deciding the cases presented to it. This conviction allowed him to set one of the most enduring precedents on the principled limitations of his cooperative separation of powers doctrine. In 1793, when President Washington, through Secretary of State Thomas Jefferson, asked the Court to provide advice on a set of legal questions regarding neutrality in the British-French conflict, Jay concluded that the Court could not offer official advisory opinions on potential executive (and presumably legislative) actions. Initially this might seem contradictory coming from the Chief Justice who had sent multiple letters to the executive and legislative branch advocating for a change to the judicial system, yet the context was substantively different. In the former case, Jay was presenting factual evidence that would be necessary for Congress to obtain if it were to properly restructure the judicial branch. The direct tie between the circuit-riding advisory and Jay's responsibility for the proper functioning of the judicial branch distinguishes it from the type of foreign affairs advisory opinion that Washington sought regarding U.S. neutrality.[30]

The Chief Justice had been placed in a public and precarious position by Washington's new request. Jefferson was straightforward when relaying the questions and admitted that, though the request was out of a genuine concern to avoid errors in executive conduct, the first and foremost question was "Whether the public may, with propriety, be availed of their advice on these questions? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion forbid them to pronounce on."[31] Jefferson, on behalf of Washington, had essentially left the Justices free from pressure to comply if they did not deem it fitting within the proper role of the judicial branch. The situation was complicated by the fact that newspapers had already received word of the administration's request before the Court had received formal delivery of the questions, making the Court's dilemma a public one before it issued a decision.[32] Since only Jay and Justice William Paterson were in Philadelphia to respond to the president's initial requests in July 1793, Jay's prudent choice was to delay a decision until the full body of the Supreme Court was assembled, but he hinted that the decision would rest on whether or not it would prove consistent with the Court's official duties.[33]

Jay drafted the Court's final decision based on his overarching commitment to the separation of powers. Though the Supreme Court could be cooperative when the Constitution provided such an opportunity, such as in the circuit-riding advisories, the "lines of separation" also included checks on the other branches. Jay specifically mentions their role as "Judges of a court in the last Resort" as an additional argument against providing advisory opinions "extrajudicially."[34] The implication in Jay's reply was that the Court may later rule on the legality of federal executive action and therefore should not be bound to any previous abstract advisory opinions when determining the proper adjudication of specific cases that might arise. This tradition has effectively stood the test of time and saved the Court from problems that would have otherwise ensued if Jay had extended his cooperative judiciary model too far.

Interestingly, Jay himself still felt free to offer *personal* advisories to George Washington in his private capacity. He even offered a draft proclamation of neutrality to Washington and publicly defended the administration's final policy.[35] He had also maintained correspondence with Washington on the circuit regarding items of federal interest such as the coining of money and postal roads.[36] Most notably, he readily accepted the mission when Washington assigned him the task of serving as envoy to Britain to secure a treaty that would tie up loose

ends of the Revolution and define the future relationship between the two countries. His son, William Jay, who produced the first significant biography of Jay, omits reference to any personal misgivings Jay might have had regarding the propriety of his acceptance of this post while concurrently serving as the Chief Justice. William mentions only that the appointment was contentious in the Senate.[37] This portrayal of Jay's attitude toward the constitutionality of his appointment to England seems to be upheld in later biographies as well.[38] According to Senator Rufus King's personal notes, opposition to Jay's envoy appointment in the United States Senate mainly centered on distrust of his affinity for England as displayed in his earlier diplomatic missions. King does record, "Mr. Taylor also opposed the appointment, and upon the ground of incompatibility in the office of Ch. Justice and Envoy extraordinary—upon the idea that such an appointment would destroy the independence of the Judiciary by teaching them to look for lucrative employment from and dependent on the pleasure of the Executive," but concern over a violation of the separation of powers principle was secondary to the concern over Jay's ability to adequately fight for American interests.[39]

Jay's acceptance of the diplomatic mission to Britain might appear improper to present day observers, but his decision falls well in line with the conception of Jay as a Chief Justice who supported limited inter-branch cooperation in order to further the ends of the national government.[40] Prior to Jay's appointment, Congress itself had twice indicated that the Justices were capable of simultaneously holding two roles, first within the judiciary (as judges serving on multiple federal levels) and later outside of the judiciary, as will be discussed in the Pension Act dilemma. Jay merely extended the principle to extrajudicial roles, which would fall short of violating the constitutional separation of powers. As William Casto states in his book on the early Court, "Insofar as advisory opinions are concerned, a distinction might be drawn between private opinions offered by individual Justices and formal opinions issued by the Court as an institution. The Justices, however, never explicitly drew this distinction."[41]

Jay was comfortable with a self-division that allowed him, in his private capacity as a thoughtful Federalist, to carry on informal political correspondence with his contemporaries in the other branches, and in his official capacity as Chief Justice to serve not only as judge, but public statesman abroad and, as we will see in *Hayburn's Case*, public commissioner when necessary. Those who would critique Jay as an unimaginative Chief Justice simply because his imagination differed from Marshall, neglect his creativity in balancing an independent judiciary with the necessity of mutual support between the branches during the first years of the Republic. *Hayburn's Case* and consequently *U.S. v. Yale Todd* demonstrate Jay's judicial application of his innovative interpretation of his division of roles.

Hayburn's Case

Robert B. Morris, founder of The John Jay Papers project at Columbia University, is a rare defender of Jay as belonging "in the first rank of the Founding Fathers." Morris includes Jay's leadership on the Supreme Court in this assessment and devotes a chapter of his short book to Jay's role in securing the subordination of the states to the new federal government.[42] Morris claims that critics have not properly distinguished "Jay the Chief Justice from Jay the Federalist statesman."[43] Perhaps more accurately, they have failed to understand how these two identities are interrelated through Federalist ideas. Federalist theory was committed to both energetic national government and a constitutional separation of powers. When conflicts between these two commitments arose, Jay worked to provide innovative resolutions. An excellent example of this

can be found in Jay's judicial actions leading up to the case of William Hayburn aimed at preserving both the independence of the Court and the energy of the national government through a liberal interpretation of an act of Congress.

Hayburn's Case is unique because it brings together three major tenets of Jay's broad Federalist philosophy as applied to the judiciary. The case upholds Jay's position on official advisory opinions, reiterates the circuit system problems and also demonstrates his ability to find ways for the Court to cooperatively support the other branches when faced with a possible unconstitutional legislative requirement.[44] The case arose from Congress's creation of the 1792 Invalid Pensions Act, which placed the bureaucratic task of determining the validity of veterans' pensions in the hands of the United States circuit courts. The Pensions Act appeared to violate the separation of powers through an improper connection of all three branches. The legislative branch had assigned a nonjudicial duty to the circuit courts and also required their decisions to be reported to the executive through the Secretary of War in a chain-of-command-style structure. Presented with what was understood by Jay and the other Justices to be an improper duty for the circuit courts in their judicial capacity, Jay released the recorded minutes from the New York Circuit Court session to George Washington, as a means of conveying both the problem and the solution.[45]

The problem with the structure proposed by Congress was twofold. First, it failed the test of a *positive* separation of powers that assumes the distinctive capability and responsibility of the judicial branch to make strictly legal rather than bureaucratic judgments. The structure also endangered the judicial branch's ability to check the other branches under a *negative* separation of powers model; by participating in the pension decisions as circuit judges, they would be unqualified to properly adjudicate cases in which Congress or the Secretary of War might later strip or grant pensioners benefits. More crucially, the other branches would be effectively acting as an appellate body on the circuit courts' pension validity decisions.[46] Yet Jay's commitment to a cooperative separation of powers led him to reassign the duty to himself and his fellow Justices as voluntary "commissioners" rather than judicial magistrates. Jay explained, "As therefore the business assigned to the Court by this act is not judicial nor directed to be performed in a judicial manner, the act can only be considered as appointing commissioners for the purposes mentioned in it by official instead of personal descriptions."[47] This maneuver allowed Jay to support the badly undermanned executive branch by a means that gave deference to Congress. He assumed Congress had intended to take an action permitted by the Constitution, but the Act's language lacked a certain clarity that Jay and the Court could plausibly read into it.

In their article titled "*Hayburn's Case*: A Misinterpretation of Precedent" Maeva Marcus and Robert Tier remark, "Fortunately for the future reputation of John Marshall, Jay and his fellow judges on the New York Circuit Court never used the word 'unconstitutional,' did not issue a formal opinion, and did not officially strike down the law in question."[48] Their comment indicates that Jay missed an opportunity to clearly voice the Court's claim to the power of judicial review. Jay was not the only Justice to make the constitutional claim at the time, but his innovation stands out from the actions of the other circuit courts in Pennsylvania and North Carolina that refused to examine any pension cases, including William Hayburn's, because of the illegitimacy of the statute. Jay's notion of judicial review may have been no different from that of his fellow Justices on the Court, but he demonstrated a deeper commitment to making the national project work by recognizing the necessity of assigning dual roles until the executive branch could

Congress enacted the Invalid Pensions Act of 1792 as a scheme for disabled Revolutionary War veterans to apply for pensions to the United States circuit courts. Did Jay miss an opportunity to clearly voice the Court's claim to the power of judicial review when it reviewed the Act in *Hayburn's Case*?

be properly manned.[49] Here, as in his acceptance of British diplomatic mission, Jay demonstrated his belief that a cooperative separation of powers incorporated private voluntarism of public officials. Alternatively, Jay left himself open to criticism that he missed an opportunity to defend a stricter version of the separation of powers doctrine and avoid the questionable constitutionality of the Pensions Act altogether.

Attorney General Edmund Randolph, presumably on his own authority, wasted no time in trying to bridge the gap between Jay's New York circuit court policy and the other circuits' refusal by petitioning the Supreme Court to act on Hayburn's case. The details of the Supreme Court proceedings on the case are complex. Marcus and Tier find that the absence of a record explaining exactly why the Justices rejected multiple versions of Randolph's request for a writ of mandamus to the Pennsylvania federal circuit court to hear Hayburn's case has led to misinterpretation on what it actually set as precedent. In the final resolution, at least half of the Justices, including Jay, were unwilling to give Hayburn his day in court based either on the impropriety of the format of the suit by the Attorney General, or more broadly because of the unconstitutionality of the Pension Act itself. Though the former leads to interesting conundrums for lawyers, the latter is of greater interest to those interested in judicial review. More importantly for the purposes of this article, Chief Justice Jay allowed the Hayburn case to expire, giving Congress an opportunity to fix its error before a similar case could arise.[50] Once again Jay's dedication to a cooperative separation of powers, rather than pure legislative deference, characterizes his part in *Hayburn's Case*. Yet Jay's handling of the case also illustrates his reluctance to give the Court a louder voice and establish a clear majority opinion capable of setting precedent for the cases ahead.

In February 1794 Jay and the Court would get a second chance to deliberate on their role as pension commissioners in the cases of *Ex parte Chandler* and *United States v. Yale Todd*. Few details remain from either case, but the *Yale Todd* case in particular appears to be another missed opportunity for Jay to claim greatness by giving voice to the Court's opinion on the constitutionality of the Pension Act. The federal government had brought suit against Todd for a fraudulent pension claim in spite of the documented fact that Todd had been placed on the pension list by Jay and his fellow judges on the Connecticut Federal Circuit Court acting as commissioners. In both cases, the Supreme Court effectively ruled against the non-judicial opinions of the circuit court justices as commissioners, but without providing an opinion on why the pensions

were invalid. The report from Attorney General William Bradford Jr. to the Secretary of War, Henry Knox, suggested that the Court had ruled that "such adjudications" completed by the commissioners were invalid. The other branches could have taken this statement to mean that the Court had actually ruled both the Pension Act and Jay's "commissioner solution" as unconstitutional.[51] What Maeva Marcus, et al. reveal in their summary of these cases, however, is that, if the executive branch had actually taken it as unconstitutional, then other actions should have logically followed, including removal of all pensioners who had been validated by the circuit court judges. In practice, the decision seemed to have little overall meaning other than its direct effect on the specific cases before them.[52]

Hayburn's Case and the two related pension cases reflect unexploited opportunities for Jay to have firmly established judicial review nearly a decade before *Marbury v. Madison*. Jay helped render portions of the Pension Act effectively unconstitutional by setting the decisions of these cases as factual precedent, yet made no clear declaration of what he and the Court were doing. He simultaneously upheld judicial commitment to his unique Federalist conception of a cooperative separation of powers and delayed a more public discussion of broad-based judicial review. If these were intentional goals, this admirable course supports a type of judicial greatness in Jay that is distinct from Marshall's boldness in *Marbury v. Madison,* yet equally potent. If, on the other hand, judicial boldness in opinion writing is a prerequisite for greatness, Jay has at least one claim on this ground in what is considered by some to be his one great opinion, *Chisholm v. Georgia*.[53]

Chisholm v. Georgia

John Jay's 1793 *Chisholm v. Georgia* opinion put his Federalist view of state sovereignty in full public display.[54] Though his opinion may have been more poignant if he had instituted a majority opinion system in lieu of the traditional seriatim opinions of all the Justices, the case still shows his willingness to give voice to the Court when his most crucial conceptions of federal sovereignty were on the line. The primary question decided in the case was whether a private citizen could bring suit against a state other than his own in federal courts under the Constitution and the Judiciary Act of 1789. The Court decided 4 to 1 that Article III of the Constitution granted jurisdiction to the Supreme Court for such cases, with a lone dissent from Justice James Iredell. Jay's opinion did not necessarily promote a stronger view of federal supremacy than his fellow Justices, but as Chief he assumed additional responsibility for the Court's direction.

Jay's opinion appealed to the overarching aims of the Constitution and brought the Preamble's ends to bear as support for the federal powers subsequently granted. Jay claimed the extension of federal judicial power to address the controversies outlined in the Constitution was wise, honest, and useful.[55] *Chisholm* was, for Jay, a test of whether the people of the United States were truly sovereign, therefore, he confidently asserted, "The attention and attachment of the Constitution to the equal rights of the people are discernible in almost every sentence of it, and it is to be regretted that the provision in it which we have been considering has not in every instance received reluctant acquiescence if not opposition."[56]

Jay's opinion and the *Chisholm* ruling itself received reluctant acquiescence rather than approbation. Congress, includingavowed Federalists, quickly moved to overturn it by initiating what would become the Eleventh Amendment.[57] In 2007, Randy Barnett directed scholarly attention back to this event as a case rightly decided and an amendment that was far less than a full repudiation of the Jay

Court's decision. Though the amendment gave immunity to states from suits by individuals of other states or nations, it left much of the federal judicial power over other types of state controversies completely intact.[58] The significance of the Eleventh Amendment becomes more striking when you consider that, potentially, it was the only amendment to a major principle ofthe Constitution between the ratification of the Bill of Rights and the Civil War. The only other amendment during this time fixed an unforeseen anomaly in the presidential election apparatus, but did not contradict any of the fundamental principles of the Constitution. Admittedly, those who contextually find state sovereign immunity implied in Article III are unlikely to view the Eleventh Amendment as an adjustment of a constitutional principle.

Jay's disappointment in the political response to *Chisholm* is understandable. He had worked to deliver sound judicial wisdom steeped in the language of the Constitution for the rights of United States citizens. He had employed the full judicial power granted in the Constitution against the only real competitor for such power (the states) and the subsequent amendment seemed to set back, at least partially, Federalist national aims. On the other hand, one must consider the aftermath of *Chisholm* in terms of Jay's overall goal of establishing an independent judicial branch capable of upholding the positive separation of powers. Rather than ignore the unpopular decision, Americans gave it due regard and used the Framers' primary intended means of constitutional change. Rule of law prevailed even if, as Jay likely believed, Americans had lawfully, willingly, and foolishly given away federal protection of a basic right.

Unlike the Federalists in Congress who led the amendment charge, Jay held tightly to a strong conception of federal sovereignty in its proper constitutional sphere that so often is attributed to Marshall as indicative of his judicial greatness. In this instance he did not hesitate to officially voice the constitutional issues at hand in his opinion and outline the major premises of his distinctive Federalist position on federal sovereignty in relation to the states. Most importantly, Jay so clearly laid out the precedent of *Chisholm* that opponents of this philosophy were compelled to move to the radical step of constitutional amendment in order to partially limit its reach. Jay's voice, however, would be decidedly less clear in later cases that risked damage to the other federal branches instead of the states.

Glass v. Sloop Betsey

One of the main propositions of this article is that Jay's reluctance to rule explicitly on key cases has led to a diminished respect for him as a great Justice. This article rejects the idea that Justices "luck out" by having great cases handed to them, but rather assumes that great Justices are able to spot cases that have the potential for greatness and handle them accordingly. The case of *Glass v. Sloop Betsey* should have been the ideal vehicle for Jay to tie together the various aspects of his Federalist thought and jurisprudence into a resounding defense of the independent judiciary and the Constitution as a whole. The case pitted the American owners of a vessel, the *Sloop Betsey*, against a French privateer who had captured the ship in American territorial waters. The United States government subsequently seized the *Betsey* in Baltimore and held her while the case was under review. When the Supreme Court took the case on appeal, Chief Justice Jay, who had previously authored four *Federalist Papers* praising the new Constitution's power to set America's foreign affairs on much surer footing, had an opportunity to use the power of the federal judiciary to make an international statement on the application of the Laws of Nations under the Constitution. Furthermore, Jay now had a clear way of signaling to President Washington how the

Court would rule on matters of his neutrality policy and consequently supporting the executive without violating the separation of powers. The lower courts had denied that they had jurisdiction over the case and the Supreme Court could now decide indirectly on the constitutionality of the Judiciary Act of 1789 that extended that jurisdiction to the federal courts.[59] All that remained was to deliver the Court's message on U.S. sovereignty in light of the Constitution.

The response from Jay perfectly illustrates how near he was to giving an explicit interpretive statement on judicial power, while still failing to go as far as circumstances allowed. Jay delivered the unanimous opinion of the Court without seriatim opinions. This format could have been much more powerful, as Marshall would later recognize, if it were accompanied by a longer and reasoned opinion as Jay had offered in *Chisholm*. Jay could have shown the complete unanimity of the Court regarding possession of the power to rule on the constitutionality of acts of Congress. A claim as bold as this from the Court in 1794 would have generated contention, but upholding an act of Congress would have been an easier transition to the claim of judicial review power than declaring one unconstitutional. Jay, perhaps unwilling to risk more for the judicial branch than necessary at the time, opted not to take the bolder step. Instead he offered only a few short but forceful paragraphs that included the following statement: "The judges being decidedly of opinion that every district court in the United States possesses all the powers of a court of admiralty" and remanded the case back to the district court.[60]

Jay had moved to assert the Court's jurisdiction as granted by the Judiciary Act of 1789 and the Constitution, but he had failed to deliver a detailed opinion that would have enhanced both his own legacy and the Court's reputation as an independent branch prepared to defend all aspects of its power, including positive judicial review over federal statutes. Jay fulfilled, at least partially, the expectations of Washington to use the Court to establish federal power at the same time that he confirmed his own commitment to a cooperative separation of powers. Yet Jay remained reluctant to use the full potential of cases like *Yale Todd* and *Glass* to more effectively give voice to the Court and consequently publicly display his leadership as Chief Justice. Furthermore, he could have procured new cases to deliver a type of continued national education in Federalist thought with the *Federalist Papers* as a primer. Instead Jay chose an alternative model of public service and left the Court shortly after he had helped it attain steady, if not high, ground as a properly functioning third branch of government.

Jay's Judicial Greatness Reconsidered

In spring of 1794, shortly after *Glass v. Sloop Betsey*, Jay accepted the diplomatic assignment to Britain from George Washington and negotiated what became known as the Jay Treaty. This mission effectively ended his time on the Court. He returned from Britain in 1795 and accepted the governorship of New York, to which he had been elected.[61] In weighing his best political options for furthering his Federalist ideas, one should not discount the significance of taking the reins of the Empire State as its first Federalist governor. New York's only governor prior to Jay was the popular George Clinton, who had held the post since 1777. In 1792 Jay had previously accepted a nomination to run for the office and unseat Clinton but was defeated by the narrowest of margins in a disputed election. Ironically, Jay's Republican opponent for governor in 1795, Robert Yates, had been nominated ahead of Jay as Federalist's 1792 candidate (despite Yates's earlier collaboration with

Clinton against the Constitution during the Philadelphia Convention and ratification debates in New York) but had declined the nomination. By defeating Yates and replacing his retiring rival Clinton, Jay's accession to the governorship made a strong symbolic statement of the strength of the consolidated Federalist momentum in the state.[62] Arguably then, Jay chose to serve where he was most needed out of a personal code that placed public service to the nation above personal ambition. Others could argue that Jay exhibited a restless spirit that could never quite completely settle into a singular public office. In any case, Jay's legacy as a Founding Father was secured by the multitude of services he effectively carried out for his country, but he may have bought that legacy at a higher price than was necessary. If Jay had been willing to restrain his diverse public service and remained firmly on the Court Bench, the innovation and resolve he demonstrated throughout his other public posts would have been effective in moving the Court in the direction he thought proper as a principled but cooperative independent third branch.

Lawyers and constitutional scholars have come to regard the Federalist judicial thought of John Marshall as the proper origin of the modern Supreme Court and with this comes an unstated claim that the Court was always destined to move in this direction.[63] Before closing, it is useful to consider what might have happened if Jay had remained on the Court and combined the inventive methods of *Hayburn's Case* with his own particular Federalist vision for the country. Judicial review certainly would have continued on the march his Court had set it. Whether his adherence to a cooperative separation of powers would have continued with Jefferson as President is unclear, but nothing in Jay's career appears to indicate that he would have abandoned his deeply held Federalist conviction on the supremacy of the federal government as embodied in the Constitution.

In December of 1800, when Jay turned down President John Adams' nomination (already confirmed by the Senate) to return to the position of Chief Justice, it appeared to be a logical final departure from the claim to judicial greatness. After Jefferson and the Democratic-Republicans achieved a dramatic victory in the 1800 election, Adams recognized the precarious position of the Federalist cause. In his letter to Jay he stated, "In the future administration of our country, the firmest security we can have against the effects of visionary schemes or fluctuating theories, will be in a solid judiciary; and nothing will cheer the hopes of the best men so much as your acceptance of this appointment."[64] If Jay was truly a weak Chief Justice who had simply been deferential to his Federalist allies in the legislative and executive branches, one must ask why Adams had such confidence that he would be capable of using the Court to hold Federalist ground against the wave of Democratic-Republican dominance. I contend that Adams had only to look to Jay's fervent dedication to federal sovereignty over the states and firm establishment of cooperative, though hardly deferential, judicial independence, to consider him as the right man to reestablish himself as the true father of the Supreme Court. Though Adams may very well have been correct, Jay declined the offer to "render a most signal service" to his country and complete his career as the judicial savior of the Federalist cause, leaving the door of opportunity wide open for John Marshall.

Interestingly, William Jay, in his combined biography and collected papers of his father, does not even include Jay's reply to Adams and instead briefly comments, "The governor's determination to retire from public life had been formed with too much deliberation and sincerity, to be shaken by the honor now tendered to him, and the appointment was promptly and unequivocally

declined."[65] Jay's decision was probably more complex than William's comment indicates. Jay's personal reasons included his own health but, more importantly, his devotion to his wife Sarah, who had recently suffered a stroke and steadily declining health.[66] As for Jay's political reasons, his own words in his reply to Adams have led to the conventional speculation that he was incapable of transforming the judicial branch. His short letter begins with the intimation that Congress had failed to employ "obvious Principles of sound Policy," and remove the Supreme Court Justices from the circuit courts completely and permanently. Jay's frustration with Congress reflects his belief that under a cooperative separation of powers theory all three federal branches should lend limited and principled support to each other to uphold the respect and sovereignty of the federal government. Jay therefore concluded, "I left the Bench perfectly convinced that under such a system so defective, it would not obtain the Energy, weight and Dignity which are essential to its affording due support to the National Government, nor acquire the public Confidence and Respect which, as the last Resort of the Justice of the nation, it should possess."[67]

Modern readers may read these words in light of John Marshall's work on the Court and conclude that Jay was wrong about the Court's broad potential. An alternative explanation, however, is that Jay was actually restating his own unique Federalist theory: that for the national government to thrive in the best possible way, the branches should support each other at a fundamental level. He did not doubt that the rival branches would at times be called to check one another, but he also sought to avoid an environment of perpetual hostility between the branches. He had done his part to accomplish this as Chief Justice, but saw a lack of reciprocation and mutual support from Congress. In essence, the Court would be doomed to gain respect only by publicly and explicitly taking it, a method that Jay found inimical to his understanding of the purpose of the Federalist project as a whole. Marshall's subsequent redirection of the Court proves, rather than repudiates, Jay's ideas since, in order to preserve the Court, Marshall had to transform it. Jay was not "incapable" but rather unwilling on principle to take this step.

Although a full comparison of Jay and Marshall is far beyond the scope of this essay, a few final remarks on Marshall should help clarify why a certain juxtaposition of them is unavoidable. During the 200th anniversary celebration of Marshall's accession to Chief Justice, a series of essays on his judicial legacy emphasized the widespread agreement among Americans on his greatness and status as the "father" of the Supreme Court.[68] He is often credited with clearly distinguishing the legal nature of the Court from the primarily political nature of the other two branches of government and giving the Court its special relationship to the Constitution that contemporary audiences take for granted.[69] Marshall accomplished this by leaving a large body of forceful opinions that future Justices could (and did) access as precedent—in biblical language, what Jay whispered in the ear, Marshall proclaimed from the rooftops,[70] and by doing so irrevocably enhanced judicial independence. Jay's cooperative separation of powers concept faded into the background because it required a more muted form of judicial independence.

Even late in John Marshall's career, however, one can catch small signs that indicate Jay's concept had not faded entirely. Robert Faulkner describes the 1833 case of *Ex Parte Randolph*, in which he finds Marshall subtly upholding a federal statute that vested a certain amount of judicial power in executive officers. Marshall accomplishes this in a manner akin to Jay's "commissioner" solution to the dilemma of executive power being vested in the Justices on the judicial circuit.[71] Yet, Marshall's approach in this

case was more exception than rule, and Faulkner himself argued elsewhere, "The Marshall Court's crucial achievement was to establish the Supreme Court's authority to limit other federal branches and to limit state governments."[72] While the latter was certainly one of Jay's clear priorities for the Court, placing limitations on the other branches was not an end in itself, but merely a necessary step in extreme cases.

In sum, Jay and Marshall were both Federalist Chief Justices, but that held a different meaning for each of them and they marked out decidedly different roles for the Court. Both wanted to increase national respect for the Supreme Court but, unlike Jay, Marshall appears to have been aiming for an even higher bar—something close to coequality with the other branches. After the election of 1800 firmly entrenched political parties into the American system, a continued commitment to Jay's cooperative separation of powers concept would have been difficult to achieve in a divided government, to say the least. As a distinguished biographer of Marshall noted, "In the coming battle of Armageddon, the Court might just be the salvation of the Republic. In any case, as John Adams and his new chief justice well knew, it was the only show in town."[73] By 1800, Jay and Marshall both foresaw that a new approach to the role and methods of the judiciary would be required if any semblance of the Federalists' interpretation of the Constitution was to survive, but only one was willing to energetically initiate the necessary adjustments.

John Jay's legacy of diverse public service, as the perpetual "first choice" for difficult national tasks, marks him with a particular but subtle form of national greatness. The public fame he received in his own time has been greatly overshadowed by the reverence for his fellow Founders in ours. Though he questioned his own ability "to Place the judicial Department on a proper Footing," the Marshall Court proved otherwise.[74] Jay had, in fact, laid the groundwork of judicial independence as evidenced through his positions against circuit-riding and advisory opinions and through the underlying constitutional statements made in cases such as *Hayburn's Case*, *Chisholm* and *Glass*. Laying the foundations, however, does not automatically entitle him to judicial greatness. Jay's five years on the Court portray a great Justice in the making, but one who was reluctant to exploit cases to their full potential, not by ruling differently, but by ruling more explicitly. Had Jay remained and established a more vocal Supreme Court, less supportive of the other branches and more detached from the national government, he may have been the first name in American law. Yet, if the great American statesman and founding Chief Justice had taken this risk in the nascent third branch, he would have jeopardized the entire Federalist endeavor as he saw it and that danger gave great cause for Jay's reluctance.

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Endnotes

[1] George Washington to John Jay, 5 October 1789, in **Documentary History of the Supreme Court of the United States, 1789–1800**, 6 Vols., ed. Maeva Marcus et al. (New York: Columbia University Press, 1985) 1:11; hereafter abbreviated as **DHSC**.

[2] John Jay to George Washington, 6 October 1789, **DHSC**, 1:11–12.

[3] William D. Pederson and Norman W. Provizer, **Great Justices of the U.S. Supreme Court: Ratings and Case Studies** (New York: P. Lang, 1993), 1–31; Henry J. Abraham, **Justices and Presidents: A Political History of Appointments to the Supreme Court**, 3rd ed. (New York: Oxford University Press, 1992), Appendices A-D 412–27. *See also* William Casto's critique of these appendices' omission of the early court Justices in William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (Columbia: University of South Carolina Press, 1995), 249–53.

[4] An earlier version of this paper was presented at the 71st Annual Conference of the Midwest Political Science Association on April 12, 2013.

[5] In this article I present Jay's political thought as one possible "Federalist" constitutional direction that America could have taken after ratification. Insofar as this direction differs from that of other Federalist thinkers, such as Alexander Hamilton or John Marshall, it is no less "Federalist" and deserves its own place in the intellectual debate.

[6] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Glass v. Sloop Betsey*, 2 U.S. (3 Dall.) 6 (1794).

[7] Richard B. Morris, **John Jay, the Nation and the Court**, (Boston: Boston University Press, 1969), 69.

[8] Walter Stahr, **John Jay: Founding Father** (New York: Hambledon and London, 2005); Marcus, et al., **DHSC**, 1:3–8; For an excellent analysis of Jay's political thought and actions and their relationship to the Court *see also* Sandra Frances VanBurkleo, "'Honor Justice, and Interest': John Jay's Republican Politics and Statesmanship on the Federal Bench," in **Seriatim: The Supreme Court Before John Marshall**, ed. Scott Douglas Gerber (New York: New York University Press, 1998).

[9] John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, 12 April 1790, **DHSC**, 2:25–26.

[10] *Ibid.*, 27.

[11] *Ibid.*

[12] *Ibid.*, 30.

[13] Maeva Marcus and Natalie Wexler, "The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?" in **Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789**, ed. Maeva Marcus (New York: Oxford University Press, 1992), 29.

[14] For an extensive history of the circuit riding debate *see also* Wythe Holt, "'The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects': The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793," *Buffalo Law Review* 301 (1987).

[15] Robert H. Harrison to George Washington, 27 October 1789, **DHSC**, 1:36–38. Ironically, if Harrison had joined the Court, he would have benefitted as the capitol moved closer to his home in Annapolis, Maryland and continued to move further away from Jay's New York home to Philadelphia and finally Washington, DC.

[16] George Washington to Robert H. Harrison, 25 November 1789, **DHSC**, 2:10.

[17] Holt, "The Federal Courts Have Enemies," 336-37.

[18] George Washington to the Justices of the Supreme Court, 3 April 1790, **DHSC**, 2:21.

[19] *See* Footnote 1 in Marcus et al., **DHSC**, 2:92.

[20] William Cushing to John Jay, 5 August 1790, **DHSC**, 2:83–84.

[21] Justices of the Supreme Court to George Washington [Draft], 13 September 1790, **DHSC**, 2:90.

[22] *Ibid.*

[23] *Ibid.*, 91.

[24] Justices of the Supreme Court to George Washington, 9 August 1792, **DHSC**, 2:288–89.

[25] Justices of the Supreme Court to the Congress of the United States, 9 August 1792, **DHSC**, 2:290.

[26] Justices of the Supreme Court to the Congress of the United States, 18 February 1792, **DHSC**, 2: 443–44.

[27] *See* Footnote 4 in Justices of the Supreme Court to the Congress of the United States, 18 February 1792, **DHSC**, 2:444.

[28] John Marshall himself, when given the chance to firmly rule on the propriety of Supreme Court Justices riding circuit, avoided the constitutional question and instead deferred to the general acceptance of its practice. *See* Michael W. McConnell "John Marshall and the Creation of a National Government," *Journal of Supreme Court History* 27, no. 3 (2002): 281. *See also* R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (Baton Rouge: Louisiana State University Press, 2001), 152–57, and Stephen G. Calabresi and David C. Presser, "Reintroducing Circuit Riding: A Timely Proposal," *Minnesota Law Review* 90 (2005–2006): 1386–1416.

[29] Stahr, **John Jay**, 294.

[30] *See* the series of letters between Jefferson, Washington and the Supreme Court Justices 18 July–8 August 1793 in **DHSC**, 6:745–57.

[31] Thomas Jefferson to the Justices of the Supreme Court, 18 July 1793, **DHSC**, 6:747.

[32] **General Advertiser**, 17 July 1793, **DHSC**, 6:745.

[33] Justices of the Supreme Court to George Washington, 20 July 1793, **DHSC** 6:752.

[34] Justices of the Supreme Court to George Washington, 8 Aug 1793, **DHSC**, 6:755.

[35] Stahr, **John Jay**, 301–2.

[36] John Jay to George Washington, 13 November 1790, **DHSC**, 2:107.

[37] William Jay, **The Life of John Jay**, vol. 1 (New York: J & J Harper, 1833), 300–321; *See also* his personal conviction regarding this duty as expressed to his wife Sarah: John Jay to Sarah Livingston Jay, 15 April 1794, **Selected Letters of John Jay and Sarah Livingston Jay**, ed. Landa M. Freeman, Louise V. North and Janet M. Wedge (Jefferson, NC: McFarland & Company Inc., 2005), 220.

[38] Stahr, **John Jay**, 313–20; Kenneth Bernard Umbreit, **Our Eleven Chief Justices: A History of the Supreme Court in Terms of Their Personalities** (New York: Harper & Brothers, 1938), 45–47; Frank Monaghan, **John Jay: Defender of Liberty** (New York: The Bobbs-Merrill Company, 1935), 361–70.

[39] Rufus King, **The Life and Correspondence of Rufus King**, ed. Charles R. King (New York: G.P. Putnam's Sons, 1894) 1:522; Interestingly, Samuel Bemis, in his seminal work on the Jay Treaty, references King's notes on the contentious 18–8 Senate confirmation vote, but omits Taylor's objection to the separation of powers problem. *See* Samuel Flagg Bemis, **Jay's Treaty: A Study in Commerce and Diplomacy** (New Haven: Yale University Press, 1962), 269–70.

[40] Casto, **The Supreme Court in the Early Republic**, 173–83.

[41] *Ibid.*, 180.

[42] Morris, **John Jay, The Nation and the Court**, ix-x.

[43] *Ibid.*, 44.

[44] Maeva Marcus and Robert Tier, "Hayburn's Case: A Misinterpretation of Precedent," *Wisconsin Law Review* 527 (1988): 528.

[45] Extract from the Minutes of the United States Supreme Circuit Court for the District of New York, 5 April 1792, **DHSC**, 6:370.

[46] Marcus and Tier, "Hayburn's Case," 530.

[47] Extract from the Minutes of the United States Supreme Circuit Court for the District of New York, 5 April 1792, **DHSC**, 6:370.

[48] Marcus and Tier, "Hayburn's Case," 530.

[49] Casto, **The Supreme Court in the Early Republic**, 215.

[50] Marcus and Tier, "Hayburn's Case," 527–46; Casto, **The Supreme Court in the Early Republic**, 175–78.

[51] Chief Justice Roger Taney would later interpret and set the precedent of *Yale Todd* in exactly this way as evidenced in a note inserted at the end of *United States v. Ferreira*, 54 U.S. 40 (1851).

[52] Marcus et al., **DHSC**, 6:33–45, 283–95, 370–86; *See also* David P. Currie, "The Constitution in the Supreme Court 1789–1801," *The University of Chicago Law Review* 48 (1981), 822–31.

[53] Umbreit, **Our Eleven Chief Justices**, 44; Irving Dilliard, "John Jay" in **The Justices of the United States Supreme Court 179–1969: Their Lives and Major Opinions**, ed. Leon Friedman and Fred L. Israel (New York: Chelsea House Publishers, 1969), 14; Randy E. Barnett, "The People or the State?: *Chisholm v. Georgia* and Popular Sovereignty," *Virginia Law Review* 93 (2007): 1729–58.

[54] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *See also* Marcus et al., **DHSC**, 5:127–351; Morris, **John Jay**, 41–70; Currie, "The Constitution in the Supreme Court," 831–43.

[55] *Chisholm*, 2 U.S. (2 Dall.) at 474–75, 479.

[56] *Chisholm*, 2 U.S. (2 Dall.) at 478.

[57] Casto, **The Supreme Court in the Early Republic**, 188–212; U.S. Const. art. I §2, cl. 2.

[58] Barnett, "The People or the State," 1729–58.

[59] Marcus et al., **DHSC**, 6:297–312; Casto, **The Supreme Court in the Early Republic**, 82–87.

[60] *Glass v. Sloop Betsey*, 2 U.S. (3 Dall.) 6 (1794).

[61] Stahr, **John Jay**, 313–40.

[62] John P. Kaminski, **George Clinton: Yeoman Politician of the New Republic** (Madison, WI: Madison House, 1993), 201–49; Stahr, **John Jay**, 283–88, 339–64.

[63] Robert Faulkner illustrated the prevalence of this idea in Justice Oliver Wendell Holmes's appraisal of Marshall. *See* Robert Kenneth Faulkner, **The Jurisprudence of John Marshall,** (Princeton, NJ: Princeton University Press, 1968), 231–32. See also Casto, **The Supreme Court in the Early Republic**, 247–53.

[64] Jay, **Life and Writings of John Jay**, 1:421.

[65] *Ibid.*, 1:421–22.

[66] John Jay to Peter Jay, 8 December 1800, **Selected Letters**, 272.

[67] John Jay to John Adams, 2 January 1801, **DHSC**, 1:146–47.

[68] These essays were collected in Volume 27, Issue 3 of the *Journal of Supreme Court History* in November, 2002. The essays most relevant to this study include Louis H. Pollak and Sheldon Hackney, "Remarks on the 200th Anniversary of the Accession of John Marshall as Chief Justice," Robert Lowry Clinton, "The Supreme Court Before John Marshall," William E. Nelson, "*Marbury v. Madison* and the Establishment of Judicial Autonomy," Michael W. McConnell, "John Marshall and the Creation of a National Government," and Charles E. Hobson, "Remembering the Great Chief Justice."

[69] Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence: University Press of Kansas, 1996), 150–55; Nelson, "Establishment of Judicial Autonomy," 249. *See also* Robert Clinton's explanation of Marshall's effort to "legalize" the Constitution in "The Supreme Court Before John Marshall," 222–27.

[70] Matthew 10:27

[71] Faulkner, **Jurisprudence of John Marshall**, 74–75.

[72] Robert K. Faulkner, "The Marshall Court and the Making of Constitutional Democracy," in **John Marshall's Achievement: Law, Politics, and Constitutional Interpretations**, ed. Thomas C. Shevory (New York: Greenwood Press, 1989), 17.

[73] Newmyer, **John Marshall**, 145.

[74] John Jay to John Adams, 2 January 1801, **DHSC**, 1:147.

Police the Border: Justice Field on Immigration as a Police Power

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Many in our political discourse celebrate America as "a nation of immigrants." Yet who may immigrate to the United States is a subject of recurring and contentious debate. Legislation in 1986 sought to curb future illegal immigration while legalizing certain current residents.[1] Nearly two decades before that, the Immigration Reform and Control Act of 1965 greatly liberalized immigration policy, lifting severe restrictions on movement from places such as Asia and Eastern Europe. Many such restrictions dated back as far as the late nineteenth century, a period of increasing restriction culminating in the Johnson-Reed Act of 1924.[2] In these various phases of immigration policy, three important questions continuously emerged. What purposes should immigration policy pursue? Moreover, who may pursue such purposes within the American system of federalism—the national government, the states, or both? Finally, how far does this power of government extend within the domestic/foreign policy divide?

The Supreme Court's contribution to this debate also extended back to the latter half of the nineteenth century. Here, the Court first addressed immigration policy's purposes as well as which government entities may pursue them. This article examines how one of the period's most influential Justices—Stephen J. Field—answered these questions, drawing on his opinions in some of the first Court cases to review restrictive immigration legislation. Justice Field answered these questions in the context of declaring immigration regulation to be a police power. In so doing, Field uniquely stated immigration both to be an exclusively *national* police power and one whose purpose lay in protecting individual rights. He further refined these claims by giving significant attention to immigration's place along the divide between domestic and foreign policy, arguing that the national government only owed rights' protection to its own citizens and to those non-citizens residing within United States' jurisdiction.

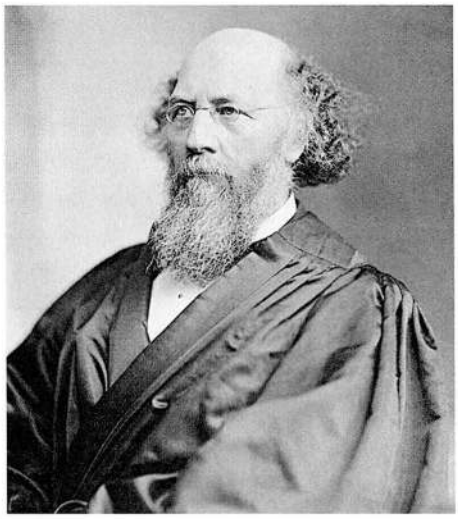
Justice Field was particularly suited for examining these matters. Appointed by President Abraham Lincoln in 1863, Field served on the nation's highest bench for thirty-four years, retiring in December of 1897. He is best known as one of the earliest articulators of Fourteenth Amendment "substantive due process" and "liberty of contract"[3] as they related to state police power legislation. These judicial concepts, which Field most notably articulated through dissenting opinions in the *Slaughterhouse Cases* and *Munn v. Illinois,* gained a consistent majority on the Court near the end of Field's tenure—a majority that lasted until the New Deal "Switch in Time" in 1937. In addition to his well-known work on the Fourteenth Amendment and police power, Field also took a leading role in the Court's first considerations of restrictive immigration legislation. These laws reacted to increased Chinese immigration to California, Field's home state and the epicenter of his circuit-riding duties. Between 1884 and 1893, Field wrote three important Supreme Court opinions in these cases, articulating his distinct understanding of immigration as a police power whose purpose lay in protecting rights and whose exercise rested with the national government wherever it held sovereign jurisdiction.

This article presents a new angle of investigation on these matters. Much scholarship exists on Justice Field's police power jurisprudence as it pertained to the Fourteenth Amendment. A few scholars also have addressed Field's immigration opinions.[4] This article, however, links the two by considering Field's claim that immigration was a form of a national police power. In so doing, this work also provides a new perspective on Field's understanding of police power in general, both in its purpose of protecting individual rights and its scope as a power of the national—not just the state—governments.[5] Looking to Field, we first articulate his general conception of police power. Unique on the Court at his time, Field was one of the first Justices to explicitly ground police power in the protection of individual rights instead of merely federalism. He was also the first Justice to discuss the concept of a national police power, doing so in several cases regarding the Commerce Clause and Congressional power over the post office. Second, we turn to his immigration opinions. Here Field discussed immigration power as police power and clarified the extent of this authority in the unique intersection of domestic and foreign policy.

Field's Police Power: State and National

Traditionally, the police power is described as the power to regulate for the public good, particularly concerning subjects such as the public health, safety, peace, and morals. Scholarship widely discusses Justice Field's jurisprudence on this subject through his attempts to limit its exercise.[6] These limits often came in appeals to the then newly ratified Fourteenth Amendment. The Amendment's first section declared "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." Field utilized these two phrases, commonly called the "Privileges or Immunities" and the "Due Process" clauses, to secure individual rights against state action.

Justice Field believed the protection afforded by these clauses partook of a deeper, wider logic within America's Constitutional government. The rights protected by the Fourteenth Amendment harkened back to the Declaration of Independence. Field argued that the Amendment "was intended to give practical effect to the declaration of 1776 of inalienable rights which are the gift of the Creator, which the law does not confer,



In his opinions considering immigration in the 1870s, Justice Stephen Field defined immigration power as a form of police power and clarified the extent of this authority in the unique intersection of domestic and foreign policy.

but only recognizes."[7] The Fourteenth Amendment gave the Declaration's principles Constitutional force against state infringement. Field thus asserted the Privileges or Immunities and Due Process clauses in voting to strike down numerous state regulations, especially those restricting the use of property or the liberty over one's occupational choices.[8]

Yet Field's use of the Fourteenth Amendment to restrict police power failed to tell the whole story. Field did not see legitimate police power as antagonistic to the Fourteenth Amendment's purposes. The two, in fact, were intended to cooperate. To understand this unique view, we must look to Field's famous *Munn v. Illinois* dissent. The case concerned a law passed by the Illinois legislature regulating the prices that grain elevator owners could charge farmers wishing to store grain. The elevator owners sued, claiming that the regulation violated their right to property under the Fourteenth Amendment's Due Process Clause. The majority upheld the law as a proper police regulation, stating that the warehouses' dominance over so important a service meant that "the whole public has a direct and positive interest" in it, making the warehouses, in the Court's view, a "private property . . . devoted to public use."[9] As such, the price controls constituted a legitimate regulation of a public entity by the government.

Field disagreed. He asserted that, under the majority's definition of public use, "there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community in which the public has not an interest in the sense in which it is used by the court."[10] He thus concluded, "[i]f this be sound law . . . all property and all business in the State are held at the mercy of a majority of its legislature."[11] But the law's legitimacy, according to the majority, was grounded in the state's police power. Field saw this reasoning as part of a larger, pernicious tendency. He commented that "the police power of the state . . . from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government."[12] This articulation accorded with regular judicial descriptions of the power. In his 1911 opinion in *Noble State Bank v. Haskell,* for example, Justice Oliver Wendell Holmes, Jr., said the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[13] In other words, the police power was what legislative majorities said it was. Police power's lack of real definition thus left little to limit its scope; for it could expand as majorities in the legislature willed. This situation, Field feared, threatened the very notion of limited government by Constitutional means.

Field therefore sought to curb the ever-elastic police power by giving it a firmer definition and hence more discernible limits. This firmer definition in turn would unite police power's purpose with that of the

Fourteenth Amendment. Field began this definition with a standard judicial description of the police power, saying that "[w]hatever affects the peace, good order, morals, and health of the community comes within its scope."[14] State legislation could certainly touch upon such matters. Yet for what purpose did government address these issues? Field argued that, far from mere assertions of majority will, police power regulations comprised "legislation which secures to all protection in their rights."[15] Instead of comprising a competitor to individual rights, the purpose of police power lay in their protection. The distinction between police power and the Fourteenth Amendment lay not in what was protected (individual rights) but in which threats to those rights each provision addressed.

This distinction in what each provision addressed was important for Field. The Fourteenth Amendment's prohibitions begin with the phrase "no state." States are barred from violating privileges or immunities as well as the rights to life, liberty, and property without due process. Therefore, in Field's view the Fourteenth Amendment did not pertain to the actions of individuals.[16] Yet not all threats to individual rights stemmed from government. Threats existed from other individuals or groups, who could violate one's right to life, liberty, and property as surely as could an officer of the state. For rights to be truly secure, some entity must protect them against non-governmental dangers. Field's answer rested in police power. Thus, under its police power the state "may control the use and possession of . . . property, so far as may be necessary for the protection of the rights of others."[17] Whatever legislation was needed to protect life, liberty, and property the state's police powers could enact and enforce. These rights, furthermore, were expansive. By the right to life "more is meant than mere animal existence. . . . but of whatever God has given to everyone with life for its growth and enjoyment" while by liberty "something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness."[18]

Such an articulation left wide scope for government legislation, one that tied traditional police power categories to the rights to life, liberty, and property. In Field's many other state police power opinions, he articulated numerous ways in which traditional police power categories protected the rights to life, liberty, and property. In *Dent v. West Virginia,* for example, Field tied regulations requiring doctors to obtain licenses before practicing to the patients' health as part of his right to life.[19] Safety regulations protected the same, including Field's sustaining numerous regulations on railroads, from putting up fences along tracks to protect passengers from train collisions with wandering livestock to requirements that engine operators not be colorblind, on the basis of protecting life and property from harm.[20] Field even argued that the rights to life, liberty, and property received protection by laws ensuring good morals. Those who act publicly in moral ways do no violence to person and property. Thus, he supported restrictions on alcohol, saying that doing so protected society from "waste of property" and threats to "health" coming from the decried evils of intoxication.[21]

While allowing broad state regulatory power, this concept also kept a recognizable limit on government's reach. Field argued that the police power "can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects,"[22] meaning the protection of rights. Government cannot act or legislate as it wills and call it police power; it must defend its actions by the standard of protecting individual rights. This clearer standard would

not be self-judged by the legislature alone but would be open to judicial scrutiny as well. By this articulation, amorphous police power would be more clearly defined and more readily subject to scrutiny from the judicial branch.

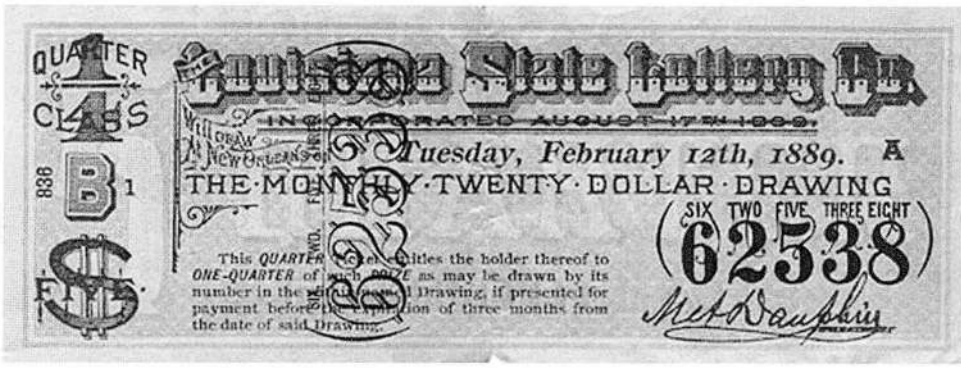
In connecting police power to individual rights, Field sought to justify the power on the same ground as the Fourteenth Amendment. This common ground constituted the very purpose for which government was created. In his opinion in *Butcher's Union,* Field cited the Declaration of Independence, where it said "to secure these rights [life, liberty, and the pursuit of happiness], governments are instituted among men."[23] Field saw the protection of individual rights as the ultimate purpose behind the creation of America's government. Thus, he saw the Fourteenth Amendment and police power cooperating toward this same higher goal. Questions of balance between the two would remain as each provision sought to protect rights against a different threat. Still, Field understood his conception of police power as giving a Constitutionally grounded understanding that better connected it to the greater purposes of American government.

National Police Power

Though Field often discussed police power in the context of the states, he did not believe such authority rested therein alone. As the power was intended to protect rights, it was the legitimate province of all governments, state or national. At the same time, national police power was restricted by the Constitution and its system of federalism. Both state and national governments operated through "delegated" powers given by the people through state and national constitutions. Therefore, when the national government acted, "authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist."[24]

In Field's view, one source of national police power rested in the Commerce Clause. This Clause, found in Section 8 of Article I, stated that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Often contrasted to the police power of the states, Field saw it as a police power all its own. In the 1888 case of *Gloucester v. Pennsylvania,* for example, Justice Field defended Congressional use of the Clause, doing so by quoting legal scholar Thomas Cooley's claim that "Congress may establish police regulations as well as the states."[25] This police power, though restricted to interstate commerce, held great authority within its prescribed sphere. Field argued that the Commerce Clause empowered Congress to "control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."[26] These regulations could be placed on subjects "of an infinite variety," and, when these concerned solely national objects, "the power of Congress is exclusive."[27] Hence the Commerce Clause presented a circumscribed yet expansive police power with which the national government could act, with Field often giving arguing that its objects included the protections for the life, liberty, and property of persons.

Another source of national police power rested in Congressional authority, also found in Article I, Section 8, "to establish post offices and post roads." In *Ex Parte Jackson,* Field upheld Congressional restrictions on mailed material pertaining to lotteries. The Justice and the rest of the Court concluded that lotteries were "supposed to have a demoralizing influence on the people."[28] Though legitimate worries about First and Fourth Amendment violations should be considered, Field continued that Congress's object in the ban "has not been to interfere with the freedom of the press, or with any



Field found that Congress possesses the power to regulate, for the protection of public morals, a broad police power. He often led the Court in upholding police power cases involving alcohol sales and lotteries. Above is an 1889 ticket for the Louisiana State Lottery, which had a reputation for corruption.

other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals."[29] Here Field said that Congress possesses the power to regulate, for the protection of public morals, a classic police power. This power, like that over interstate commerce, was broad. Field declared that, "the right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[30] Congress could regulate, restrict, even exclude objects carried by mail for police power purposes, purposes Field previously described, in relation to alcohol, as protecting individual rights.

Immigration as National Police Power

In the Commerce Clause and the power over the mail, we find that Field articulated police power on a national level. It is with this foundation that we turn to the subject of immigration. Field wrote opinions in three cases during the late 1880s and early 1890s pertaining to statutes restricting immigration from China. In these opinions, Field argued that immigration was a power that was both national in exercise and police in nature. He also discussed immigration's special place along the foreign-domestic divide, showing the extent of police power protections and their judicial enforcement under Constitutional jurisdiction.

History of Chinese Immigration and Restrictions

Before addressing Field's immigration opinions, we must first understand the complex set of actions, treaties, and laws precipitating review before the Court. Chinese immigration to the United States was minimal in the first half of the nineteenth century. In fact, from 1820, when immigration records were first kept, until 1849, only forty-three Chinese persons arrived on American shores.[31] Yet the 1850s began a time of significant movement from China to the United States. Driven by wars at home and lured by the discovery of gold in California, many departed their homeland for the place they called "Gold Mountain." All told, around 110,000 Chinese immigrated to America between 1850 and 1882.[32]

During most of this period, immigration was relatively free of legal restrictions. No laws existed proscribing or prescribing Chinese entry into the United States. The treaties negotiated between China and the United States in 1844 and 1858 made no mention of

immigration, focusing instead on trading ports and the rights of Americans conducting business in China.[33] This permissive silence changed in 1868 with what was known as the "Burlingame-Seward" treaty. In it, both sides agreed to respect liberty of conscience and religion for the other's immigrants. Furthermore, Article V of the treaty stated that "the United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other, for purpose of curiosity, of trade, or as permanent residents."[34] This treaty, therefore, welcomed immigration to the United States, helping bring thousands more Chinese workers to the West Coast.[35]

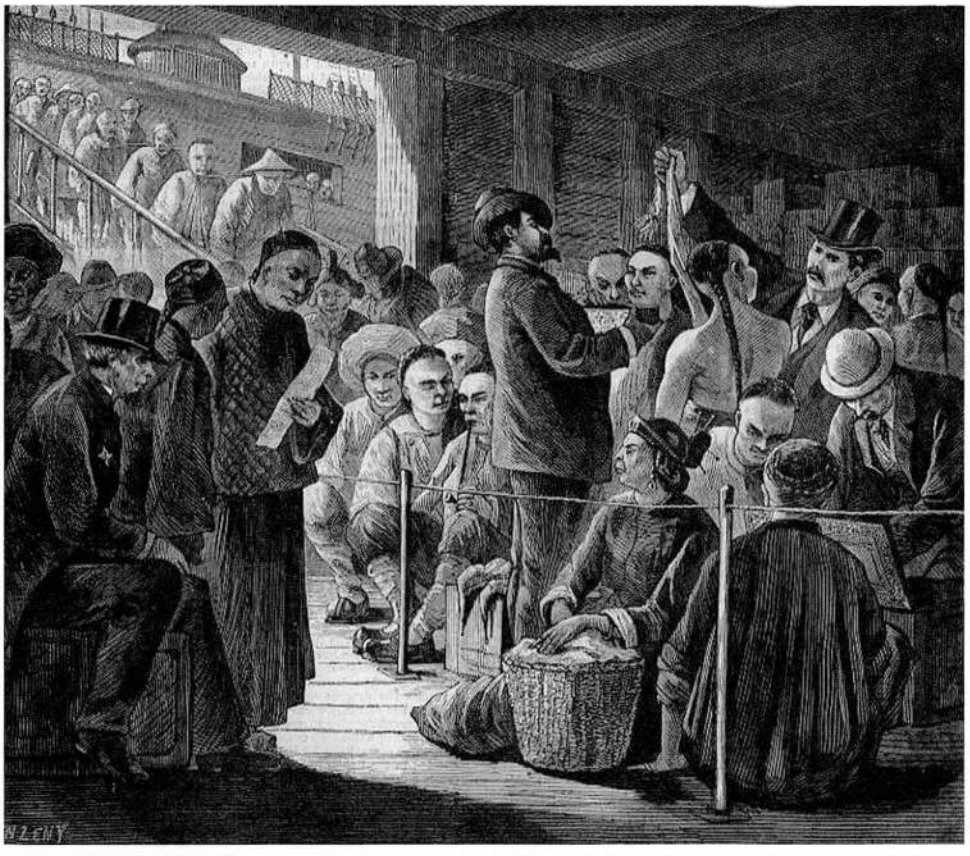
Though racial animosity existed against the Chinese throughout, popular clamor for restrictive immigration legislation did not gain significant support until the second half of the 1870s. At this point, Chinese laborers were competing for scarce low-wage jobs in a harsh economy.[36] Such circumstances combined with racism to produce appeals from California to Congress for immigration restrictions. In 1879 Congress complied, passing a law that restricted to fifteen the number of Chinese passengers on any ship docking in the United States.[37] This measure was, however, vetoed by President Rutherford B. Hayes, who expressed sympathy for "the grave discontents of the people of the Pacific States," but concluded that Congress did not have the power to negate or modify an existing treaty.[38]

Hayes' veto resulted in new negotiations between China and the United States to modify Burlingame-Seward. The 1880 amendment to the treaty allowed America to "regulate, limit, or suspend" Chinese immigration so long as it was not absolutely prohibited.[39] Congress then moved to pass restrictive legislation again. After vetoing a twenty-year ban on immigrating Chinese laborers, President Chester A. Arthur did sign the "Chinese Exclusion Act of 1882." This law banned "skilled and unskilled laborers and Chinese employed in mining" from migrating to the United States for ten years.[40] Exceptions did exist for many non-laborers, including merchants, teachers, students, diplomats, and travelers. However, such persons could only immigrate if they received verification from the Chinese government that they met the stated qualifications. Additionally, those Chinese persons already in the United States would have to obtain certifications to re-enter the country if they left America for any space of time.

This process for certification was fairly easy, though, leading to numerous evasions by immigrating Chinese laborers posing as those re-entering. Due to these enforcement problems, the law was revised in 1884, tightening standards for determining who was re-entering and who was immigrating for the first time.[41] When this legislation also failed to eliminate fraud, Congress in 1888 passed the Scott Act, which prohibited outright any re-entry to the United States by Chinese immigrants regardless of certificate or previous law.[42]

The final piece of legislation to come under review arose when the original exclusion act expired in 1892. Congress quickly replaced it with the Geary Act. This act extended the ban on Chinese laborers for another decade, while also requiring all Chinese persons in the United States to obtain and keep certificates of residence and certificates of identity to prove their legal status and right to remain in America.[43] In addition, the law stipulated that, when a Chinese person's immigration status was challenged, two white persons must affirm his or her legal residence or the person faced imprisonment and deportation.

All of these legislative acts were the subject of three suits bringing immigration before Field and the rest of the Court. The resulting decisions were mixed, with Field



Field's opinion in *Chew Heong*, rendered when he was sitting on the U.S. Circuit Court for the District of California, denied an immigrant's assertion of the right to re-enter the United States. He failed to sway his Brethren, however, when the Supreme Court reviewed the case, and Field was forced to dissent. Above are Chinese immigrants entering a San Francisco customs house in 1887.

dissenting twice and writing for the majority once. The first case, *Chew Heong v. United States,* pertained to a Chinese laborer who arrived in the United States in November of 1880, left in June of 1881, and finally was denied re-entry when he returned to America in September 1884. Between his departure and attempted re-entry, the Chinese Exclusion Act and its 1884 amendment became law. These statutes required certificates for Chinese re-entering the country, certificates that Chew Heong did not possess. The Court, with Field dissenting, decided in his favor, allowing his re-entry into the United States. The second case was known as the *Chinese Exclusion Case.* This case concerned a Chinese immigrant who obtained the necessary papers for re-entry under the 1884 amendment only to be rejected in 1888 due to the statute passed that year denying re-entry to any Chinese person, papers or not. Here Field wrote the majority opinion, in which the Court found against this Chinese worker, denying him re-entry and upholding the Scott Act. The third and final case, *Fong Yue Ting v. United States,* regarded the Geary Act. Three Chinese persons residing in the United States were to be deported without a hearing for not possessing the necessary certificates. The Court found in favor of the government, denying due process rights to the immigrants and saying that the power to deport was no different from the power to exclude. Justice Field, along with Chief Justice Fuller and his nephew, Justice

David Brewer, penned stinging dissents from the Court's majority.

Field's opinions in these cases articulated a fully formed view of immigration as a national police power. To examine this view, we first establish that Field considered there to be a national police power to include immigration. We then turn to the extent of that power in its place along the foreign-domestic divide, concluding with a discussion of judicial power over these matters in the international context.

Immigration: A National Police Power

The concern whether immigration was a national police power was two fold. First, we must establish that for Field immigration was a *national* power. Second, we turn to whether that national authority was a *police* power. Field firmly placed immigration power in the national government. He granted the existence of federalism, saying that "for local interests, the several states of the union exist."[44] When an issue only concerned a particular locality, it was within the power of the state to address it. However, Field continued that "for national purposes, embracing our relations with foreign nations, we are but one people, one power."[45] The states do not separately declare war, negotiate treaties, or do any other international actions. Foreign affairs rest with the national government alone. Field continued that national authority extended not only to "foreign countries" but also "their subjects or citizens."[46] Those from other nations desiring to immigrate to the United States were the subjects or citizens of foreign lands. They constituted part of the international field in which America is "one people, one power." Therefore, for Field, immigration was a decidedly national concern, not one for the states.

If immigration was a national authority, was it also a police power? Justice Field answered this question in the affirmative in several ways. To begin, Field spoke of immigration legislation using language parallel to that used for police power. Regarding immigration laws, Field declared government as "possessing the powers which are to be exercised for protection and security."[47] Field's police power jurisprudence also spoke of the power to protect and secure, specifically the life, liberty, and property of persons under the government's care.

Field further connected immigration laws to police power—and thus to the protection of individual rights—by describing such laws according to traditional police power categories. These immigration laws for Field addressed certain perceived threats to the peace, safety, health, and morals—subjects that he consistently linked to securing persons and property from violation. In applying these principles to Chinese immigration, we shall see that Field's language often partook of racist views common to the time. Nevertheless, his appeal to traditional police power categories was not dependent on such language but on the claim that government's purpose lay in protecting those under its care.

In *Chew Heong,* for example, Field said the competition between Chinese and native laborers caused "frequent conflicts" often erupting in violence between hostile factions. Such conflicts "disturbed the peace of the community in many portions of the state"[48] of California, threatening the lives and the property of its people. Protecting peace—and the security doing so gave to individual rights—was one particular object of the police power, meaning immigration laws could be a means of achieving the general peace police power seeks for the people. The labor competition also posed a threat to public health, a police power category that Field connected to the right to life. Of the Chinese immigrants, Field declared that "very few of them had families."[49] In part due to their familial status, they could live under meager

Fong Yue Ting and two others were arrested for violating provisions of the 1892 amendments to the Chinese Exclusion Act (satirized in this cartoon), which required Chinese living in the United States to obtain a certificate of residence from an internal revenue officer stating that they were legally entitled to be here. The Court found in favor of the government, denying due process rights to the immigrants, but Justice Field, along with his nephew, Justice David J. Brewer, and Chief Justice Melville W. Fuller, penned stinging dissents.

conditions "without injury to their health."[50] Field claimed that Chinese laborers therefore could work for very low wages in various kinds of manual jobs. Domestic-born workers who did have families and better living conditions could not compete without accepting similarly low wages. Doing so tended to "degrade labor,"[51] affecting the health and therefore lives of workers and doing similar harm to workers' families.

Furthermore, in his majority opinion in the *Chinese Exclusion Case,* Field said "the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon the public morals."[52] Public morals also fell under Field's police power categories. Field hinted that the public morality threatened pertained to common customs and a common religion. The Chinese "retained the habits and customs of their own country."[53]

Field implied that such diversity of customs weakened the moral unity of the nation and hence the power notions of the good have on its inhabitants. In particular, Field noted in *Chew Heong* the need "to preserve to ourselves the inestimable benefits of our Christian civilization."[54] Field appeared to see some form of Christian consensus as integral to the public morals of the American regime, a factor that he thought should be taken into account in immigration policy. For Field, a common morality here protected individual liberty much as did restrictions on alcohol, as moral human beings refrained from infringing on the life, liberty, and property of others. Again, much of this argument was racially charged in its assumptions and applications. Still, Field's arguments drew upon long-established and still existent police power categories regarding public morality to support them, building on his broader argument that doing so protected individual rights.

Finally, Field noted one more problem with the refusal of Chinese immigrants to assimilate to the customs and practices of the United States. This problem he saw as legitimating claims of "foreign aggression and encroachment . . . from vast hordes of its people crowding in upon us." The power to combat such an "invasion," Field argued, "is involved in the right of self-preservation."[55] Though also racially charged in its object, self-preservation itself fell under traditional police power objectives. The ultimate threat to health and safety was death. As the health and safety of an individual implied the underlying right of self-preservation, so the same relationship existed for a political community regarding its material and cultural interests. Self-preservation, again, connected for Field to the right to life. Here, a broadly understood right to life extended to nation as well as to the individuals comprising it.

Thus we see that, in each immigration case, Field utilized general police power language of protection for traditional police power categories of peace, health, safety, or morals. These categories, like in his other jurisprudence, linked to the securing of persons and property. Yet Field was even more direct than this in making the connection. He added to these statements a quote by President Arthur's Secretary of State, Frederick Frelinghuysen, when the Secretary said that governments could not contest the right of other nations in excluding their citizens "on police or other grounds."[56] Here Field specifically named police power as a legitimate ground for immigration restrictions. Thus, in Field's jurisprudence immigration regulation was both in function and in name a police power of the national government.

In these statements we see that for Field immigration policy securely stood as a national police power. The Federal government therefore could make immigration policy to protect the health, safety, and morals of the public. In this, immigration held the same purpose as the Commerce Clause, postal authority, and every other form of police power: protection of individual rights. The rights that regulations of peace, safety, and morals sought to protect Field found under legitimate threat from Chinese immigration. Thus, if government was to fulfill its ultimate purpose, the only entity in the Federal system empowered to address immigration—the National government—must possess the authority to regulate it.

The Extent of Immigration Police Power

Immigration's status as a national police power revealed its rights-protecting purpose in Field's thought. Protecting the public's health, safety, peace, and morals in immigration legislation guarded individual rights just as did states' police power legislation. Yet this categorization leaves open several questions regarding immigration, questions that Field's general theory of police power did not answer. For Field's other police power cases

only pertained to domestic policy. Questions regarding the Commerce Clause focused on state versus national power. *Ex Parte Jackson* only addressed mail delivery in the United States. But immigration issues do not occur only within the United States. Instead, immigration toes the line between domestic and foreign policy. Entering this country from another involves international law. At the same time, successful entry makes an immigrant a part of the domestic scene. From this situation arise unique questions concerning immigration as a national police power.

The first question immigration poses concerns the objects of police power protection. Who is to be protected by regulating health, safety, and morals? In asking this question, we must understand the extent of Constitutional powers and protections as Justice Field understood them. For Field it was true that all men have inalienable rights, not bestowed by government but given by God. Yet the truth of universal natural rights did not mean those rights in fact were universally protected. Threats to rights abounded, threats that could succeed in denying their realization. The inalienable rights of persons thus needed protections, state and national, in order to be secure.

Such protection was the purpose behind the creation of particular governments. Yet here a problem was revealed; for while individual rights extended across the globe, particular governments' authority did not. The international sphere was composed not of one political body but of many nations. And Field asserted that America, as one nation among others, possessed the quality of "independence."[57] The United States was not part of any larger political body, not a portion of any other regime. It was and is its own government with its own laws, institutions, and people.

Field considered this independence an essential element of a nation's sovereignty. Sovereignty he described as "supreme power."[58] That power that is supreme knows no superior. To be an independent, sovereign nation means that no other country can dictate laws or actions to it. Nations may negotiate treaties, making concessions that they find in their overall interest. But these decisions do not come by the compulsion of a common sovereign; they come by mutual consent. Thus immigration laws in one nation cannot be dictated by another or by another's subjects. Field warned that, if a nation "could not exclude aliens, it would be to that extent subject to the control of another power."[59] Such a situation could not be for an independent, sovereign nation. Thus, the government's "power to exclude foreigners from the country" may be exercised "whenever in its judgment the public interests require such exclusion."[60]

The question of sovereignty proved crucial. For the extent of sovereignty determined for Field the extent of police power protection. Though all men possessed natural rights, a government's power and obligation to secure them only extended as far as did its sovereignty; to go beyond these bounds would violate the independence of other nations. Thus, for Field, police power regulations only reached as far as did American sovereignty.

How far, then, did American control reach in Field's view? The extent of American sovereignty first pertained to the persons involved. In the *Chinese Exclusion Cases,* Field addressed whether it is beyond Congressional power to prohibit re-entry to those Chinese immigrants who left the country and now wished to return. He began by saying, "[t]hose laborers are not citizens of the United States; they are aliens."[61] The difference between citizens and non-citizens was an important one. While America was sovereign in its independence from other nations, the government was not the ultimate source of sovereignty. Field stated that "sovereignty or supreme power is in this country vested in the people, and only in the people."[62] The people were the ultimate source of authority, the ones

who in America had no superior. Yet though the people ruled ultimately, they did not rule directly. Field continued that "by them certain sovereign powers have been delegated to the Government of the United States."[63] This delegation came in the form of the Constitution by which the people form a government and prescribe its duties.

Here we should remember Field's belief concerning the reason governments are formed. Citing the Declaration, he declared "to secure these rights [life, liberty, and the pursuit of happiness], governments are instituted among men."[64] For Field, the American people formed a government by means of the Constitution to protect their inalienable rights. American citizens continued to comprise the ultimate sovereignty, maintaining the Constitution and its institutions for the same purposes for which they were created. Thus, for police power to not include citizens in its protection would deny the intentions of its Constitutional creators and sustainers. If police power protection applied to anyone, it applied to citizens.

With citizens protected by Constitutional and hence police power, the remaining persons to consider were non-citizens. All three of Field's immigration opinions pertained to this category. In these cases, Field did not argue for or against the rights' claims of immigrants across the board. His opinions in *Chew Heong* and the *Chinese Exclusion Cases* denied an immigrant's assertion of the right to re-enter the United States while *Fong Yue Ting* upheld immigrants' claims that they should not be summarily deported. The difference between these decisions addressed the second mark of American sovereignty: geography. A nation's sovereignty did not bring about its own government, institutions, and citizens alone. Sovereignty also entailed land. America, to be independent and sovereign in relation to other nations, must hold territory over which its power exclusively reaches. Field recognized this principle when declaring, "Jurisdiction over its own territory . . . is an incident of every independent nation."[65] It was within this jurisdiction that the Constitution as the ruling document of the sovereign people held force. Hence it was within U.S. borders that police power protections operate. As borders determined the extent, not a person's citizenship status, such protections must apply to immigrants residing within the United States as well as to citizens. Field argued "the moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent . . . he becomes subject to all their laws, is amenable to their punishments, and entitled to their protection."[66] In fact, once immigrants legally enter the country, they "are entitled to all the guarantees for the protection of their persons and property which are secured to native-born citizens."[67]

The reason for the equality of protection stemmed from the deepest assertions of the Declaration of Independence. Field argued, "as men having our common humanity, they are protected by all the guarantees of the Constitution."[68] Though a single government did not possess the universal sovereignty to enforce the inalienable rights of everyone, all human beings who enter within United States' sovereignty could and must see their rights secured by a government whose most fundamental purpose resided in such protection. Field even argued that denying the rights to life, liberty, and property to residing immigrants posed a threat to citizens' rights. Allowing such treatment said that a "dangerous and despotic power lies in our Government,"[69] which threatened to overturn its rights-protecting purpose for all. Thus the deportation of Fong Yue Ting without the protections of due process, without regard to "the breaking up of all the relations of friendship, family, and business there contracted" was something not only against our laws and principles but was something that "as to its cruelty, nothing can exceed."[70]

These protections, while strong, were not absolute. Field described the protected persons as "from a country at peace with us" and as coming "with their [U.S. governmental] consent.[71] The Justice left open the right to deport those residing here illegally as well as those whose nation of origin comes into a state of war with America. Deporting those here against the law, Field would argue, upholds her sovereignty—the sovereignty such immigrants violated—in determining who can and cannot enter. Still, deporting those from a hostile country, he implied, would be an extraordinary power incident to preserving the nation itself, including the preponderance of loyal residents the government was sworn to protect. Furthermore, his insistence on due process to determine status would ensure basic protections even for those here apart from the law until removal.

While legal residents, citizen or not, deserved all the police protections of America's government, those rights and protections did not extend to non-citizens outside the country. In making this argument, Field said that "between legislation for the exclusion of Chinese persons—that is, to prevent them from entering the country—and legislation for the deportation of those who have acquired a residence in the country under treaty with China, there is a wide and essential difference."[72] The difference rested in the object of Constitutional, including police power, protection. Those in the national sphere were the objects of protection, living under its geographical reach. Those outside, residing beyond American sovereignty, were not. In fact, those outside constituted potential threats to the rights of those under the Constitution's protection. Hence Field reiterated that government had absolute power to exclude foreigners from immigrating "at any time when in the judgment of the government, the interests of the country require it."[73] The difference for non-citizens between residence and non-residence was total: reside and one was an object of protection; live outside and receive none.

This difference even extended to those who once resided here and wished to re-enter. Once a non-citizen left the country, he left the sphere of American sovereignty, thus no longer remaining an object for protection; in fact, he constituted a potential threat. Though the government may have previously granted departing immigrants the right to return, such a right was granted at the government's pleasure and that alone. To rule otherwise would mean that the nation's sovereign authority in guarding its jurisdiction could be voided. Field vigorously asserted that such powers "cannot be abandoned or surrendered."[74] To do so would deny the exercise of police power for those under American protection for the sake of those outside her jurisdiction. Such a situation would reverse the very point of government in Field's understanding. If an immigrant chose to leave, he or she had no right to return not subject to the will of the government.

Treaties, Laws, and Protecting Rights

Yet the foreigner wishing to return could make one more claim. Field noted "the objection made is that the act of 1888 [Scott Act] impairs a right vested under the treaty of 1880."[75] The immigration laws, it could be argued, violated our treaties with China. As treaties, the 1868 and 1880 accords were made between sovereign nations in the international realm. Congressional legislation, on the other hand, was made only by the U.S. government within its domestic jurisdiction. This distinction, one could assert, meant that Congress could not legislate to negate provisions of treaty agreements. That which was made by common consent could only be undone by common consent. Furthermore, such a point was justiciable in the Supreme Court because of its Article III, Section 2 power to interpret treaties.

Therefore, the Court could and should protect those immigrant rights vested by treaties against Congressional abrogation.

Citing a previous case, Field granted that "it would always be a matter of the utmost gravity and delicacy to refuse to execute a treaty."[76] Yet, while doing so may constitute bad faith and bad policy, Field argued "the power to determine them [treaty violations] has not been confided to the judiciary, which has no suitable means to execute it."[77] The Court could not have determined legislative treaty violations for two reasons. First, the Court did not generally possess Constitutional authority to adjudicate international claims. For Field the international realm, recall, was comprised of nations with distinct sovereignties. While common natural laws do exist in this arena, no common sovereign with a common government exists to bind countries' actions to them by positive law. These countries thus may only bind themselves by mutual consent, consent that may only be enforced by good faith or forceful (and hence sovereignty-infringing) aggression.

Yet in Field's understanding, the role of the judiciary was essentially tied to the "administration of existing laws."[78] Under its Article III powers, judges adjudicated competing claims (cases and controversies) by interpreting law in one or the other claimant's favor. Thus, the existence of a law to interpret was essential to the judge's role as arbiter; no law meant no means by which to judge. But to adjudicate competing claims according to law necessitated an enforceable law common to both parties and to the Court. This situation only occurred when all shared a common sovereign, one that commanded the common allegiance of the parties and that empowered the judiciary to judge their claims according to common positive laws. Such circumstances simply did not exist in international affairs. Parties did not share a common sovereign; the U.S. Constitution only applied to one. As the Constitution was the means by which the American sovereign empowered the Judiciary, the fact that the Constitution only applied to one party precluded the Court's adjudication of claims between the United States and another sovereign state. This reasoning undergirded Field's statement that "whether our government is justified in disregarding its engagements with another nation is not one for the determination of the Courts." With no common law stemming from a common sovereign, a judiciary possessed no means by which to judge disputes between independent, sovereign nations.

Second, the Court could not determine legislative violations of treaties because of the Constitutional relationship between laws and international accords. Field stated that laws and treaties "are both declared to be the supreme law of the land" by the Constitution. As both are supreme, "no paramount authority is given to one over the other." The Court cannot look beyond this Constitutional viewpoint. Therefore a treaty was, as far as judicial interpretation, "the equivalent of a legislative act."[79] Treaty and statute were Constitutionally equal. Field then reminded the parties that later laws can and do negate previous ones, since preference is given to later laws as the last articulation of legislative will. This situation meant that "such legislation [treaties] will be open to future repeal or amendment"[80] just like normal statutes. When a law was passed negating stipulations of a previous treaty, the Court must treat the later law as determinative. In Field's mind, the Constitution provided the Court with no other means of interpretation.

Thus, whether a law of Congress violated internationally negotiated treaties could not be determined by the Court. Field concluded that it is "to the executive and legislative departments of the government, and that it belongs to diplomacy and legislation"[81] that complaints of treaty violations should be made. They, not the Court, could make law and negotiate agreements. They, not the Court, were the place for nations and foreign

subjects to seek justice in an international realm. Certain rights may exist that deserved protection. But the Court was not the venue to seek such protection.

In these opinions we see Field's understanding of the extent of Constitutional jurisdiction and hence of police power protection. The police power protected the citizens who created and sustained government and those non-citizens who legally resided within U.S. borders. In doing so, Field argued that the government showed fidelity to the purposes for which it was created—the protection of rights for all human beings under its care.

Conclusion

Justice Stephen Field's jurisprudence helps us to better see how the late nineteenth century Supreme Court addressed three fundamental, recurring questions regarding the immigration power. His opinions offered clear conceptions of police power's purpose in protecting individual rights. He further articulated that immigration was a national manifestation of that power, one that the federal government alone could wield to protect the life, liberty, and property of those under its protection. Finally, Field's jurisprudence detailed the reach of such authority within the delicate foreign/domestic divide that immigration inhabits; the universal purpose of government in protecting rights only applied to particular governments within their sovereign sphere.

A number of these concepts would leave a lasting legacy on the Court's jurisprudence. Field's view that the federal government held exclusive control over immigration would continue to hold significant power on the Court.[82] Furthermore, the plenary power of that government regarding who may immigrate also maintained significant judicial adherence, as did Field's justification that such power was a necessary attribute of national sovereignty.[83] In these ways, the reasoning from Field's opinions remains followed precedent up to the contemporary Court.

But with such precedent, much of the current Court's adherence to Field focuses on the question of who within government may act and to what extent. What receives less attention is purpose: Field's claim that immigration regulation's purpose rests *in* protecting individual rights. Field is not a perfect guide on these issues, particularly in light of his attitudes on race. Yet, despite such attitudes, in Field's opinions we do see a plea for the rights of all men, an acknowledgment of "our common humanity" that should entail persons being "protected by all the guarantees of the Constitution."[84] In other words, the contemporary Court may find in Field a late nineteenth-century voice for the human dignity and inherent rights of those who have and who still wish to join this "nation of immigrants."

Endnotes

[1] *See* "Immigration Reform and Control Act" Pub. L. 99–603.

[2] Pub. L. 68–193.

[3] Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Lawrence: University of Kansas Press, 1997), 4–5; Roberty G. McCloskey, **American Conservatism in the Age of Enterprise: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnagie** (Cambridge, MA: Harvard University Press, 1951), 1, 77–79, 89, 115–116; Carl Brent Swisher, **Stephen J. Field: Craftsman of the Law** (Washington, DC: Brookings Institute, 1930), 124–125, 396, 424–425.

[4] For examples of police power scholarship, *see ibid.* Works discussing Field's immigration opinions include Carl Brent Swisher, **Craftsman of the Law**, 205–239; Wallace Mendelson, "Mr. Justice Field and Laissez Faire" *Virginia Law Review* 36(1)(1950): 49; Howard Jay Graham, "Justice Field and the Fourteenth Amendment" *Yale Law Journal* 52(4)(1943): 873.

[5] For comparison, *see* Kens, **Shaping Liberty**, 211; Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," *The Journal of American History* 61(4)(1975): 971–974, 977–983; Howard Gillman, **The Constitution Besieged; The Rise and Demise of *Lochner* Era Police Powers**

Jurisprudence (Durham, NC: Duke University Press, 1993), 66, 70.

[6] *See* Kens, 4–5; Swisher, 204–205, 375, 396; Robert McCloskey, **American Conservatism in the Age of Enterprise, 1865–1910** (Cambridge, MA: Harvard University Press, 1951), 2, 7, 77–79.

[7] *Slaughterhouse Cases,* 83 U.S. 105 (1873).

[8] *See*, for example, *Slaughterhouse Cases* 83 U.S. 36 (1873); *Stone v. Wisconsin* 94 U.S. 101 (1876); *Munn v. Illinois* 94 U.S. 113 (1877); *Powell v. Pennsylvania* 127 U.S. 678 (1888).

[9] *Ibid.,* 94 U.S. 133, 130.

[10] *Ibid.,* 94 U.S. 141.

[11] *Ibid.,* 94 U.S. 140.

[12] *Ibid.,* 94 U.S. 145.

[13] *Noble State Bank v. Haskell* 219 U.S. 111 (1911). Markus Dirk Dubber, for example, has noted that, historically, "[t]he police power's defining characteristic became its very undefinability." *See* Dubber, **The Police Power: Patriarchy and the Foundations of American Government** (New York: Columbia University Press, 2005), 120.

[14] *Munn,* 94 U.S. 145.

[15] *Ibid.,* 94 U.S. 145.

[16] The Court said this much in its majority opinion in *The Civil Rights Cases,* 109 U.S. 3 (1883). Justice Field, while not writing an opinion, joined the majority.

[17] *Munn,* 94 U.S. 145.

[18] *Munn,* 94 U.S. 142.

[19] *See Dent v. West Virginia* 129 U.S. 114 (1889); *Baltimore & Potomac Railroad v. Fifth Baptist Church* 108 U.S. 317 (1883).

[20] *Minneapolis & St. Louis Ry. Co. v. Emmons* 149 U.S. 366 (1893); *Nashville, Chattanooga, and St. Louis Railway Company v. Alabama* 128 U.S. 96 (1888).

[21] *Crowley v. Christensen* 137 U.S. 86, 91 (1890).

[22] *Munn,* 94 U.S. 145–146.

[23] *Butcher's Union Co.* 111 U.S. 757; *see also* Swisher, 413.

[24] *Fong Yue Ting v. U.S.* 149 U.S. 758 (1893).

[25] *Gloucester v. Pennsylvania* 114 U.S. 215 (1885).

[26] *Ibid.,* 114 U.S. 204.

[27] *Ibid.; see also Bowman v. Chicago & Northwestern Ry. Co.* 125 U.S. 500 (1883); *United States v. Forty-Three Gallons of Whiskey* 108 U.S. 491 (1883).

[28] 96 U.S. 736.

[29] *Ex Parte Jackson* 96 U.S. 736 (1873).

[30] *Ibid.,* 96 U.S. 727.

[31] Shih-Shan Henry Tsai, **The Chinese Experience in America** (Bloomington: Indiana University Press, 1986), 2.

[32] Kitty Calivita, "The Paradoxes of Race, Class, Identity, and 'Passing': Enforcing the Chinese Exclusion Acts, 1882–1910," *Law and Social Inquiry* 25(1) (Winter 2001): 4; Mark Kanazawa, "Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California" *The Journal of Economic History* 65(30) (Sept. 2005): 779; Tsai, 3–4, 8.

[33] Erica Lee, **At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943** (Chapel Hill, NC: University of North Carolina Press, 2007), 2; *Chinese Exclusion Cases,* 130 U.S. 590–592 (1889).

[34] "Burlingame-Seward Treaty, Article V," **The Columbia Documentary History of the Asian American Experience**, edited by Franklin Odo (New York: Columbia University Press, 2002), 32; Fritz, 26.

[35] *See* Tsai, 10–11.

[36] *See* Charles J. McClain and Laurene Wu McClain, "The Chinese Contribution to the Development of American Law" **Entry Denied: Exclusion and the Chinese Community in America, 1882–1943**, edited by Sucheng Chan (Philadelphia: Temple University Press, 1991), 4–16; Kanawa, 78, 802–803; Fritz, 25.

[37] *See* "Chinese Immigration: Its Social, Moral, and Political Effect—Report to the California State Senate of Its Special Committee on Chinese Immigration" (Sacramento, CA: State Office, 1878); also H.R. 2423, 45th Congress, 2nd Session.

[38] Rutherford B. Hayes, "Veto Message of March 1, 1879" **A Compilation of the Messages and Papers of the Presidents, Vol. IX**, (New York: Bureau of National Literature, 1897), 4470.

[39] Calivita, 4.

[40] "Treaty Concerning the Immigration from China" **Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, Volume I,** edited by W. M. Malloy (New York: General Books LLC, 1913), 237.

[41] 23 Statute 115 c220.

[42] *Congressional Record,* 50th Congress, First Session, 1064.

[43] John Seonnichsen, **The Chinese Exclusion Act of 1882** (Santa Barbara, CA: Greenwood, 2011), 80–82.

[44] *Chinese Exclusion Cases,* 130 U.S. 606.

[45] *Ibid.,* 130 U.S. 606.

[46] *Ibid.,* 130 U.S. 604.

[47] *Ibid.,* 130 U.S. 606.

[48] *Chew Heong,* 112 U.S. 566.

[49] *Ibid.,* 112 U.S. 565.

[50] *Ibid.,* 112 U.S. 555–556.

[51] *Ibid.,* 112 U.S. 568.

[52] *Chinese Exclusion Cases* 130 U.S. 595.

[53] *Ibid.*

[54] *Chew Heong,* 112 U.S. 569.

[55] *Chinese Exclusion Cases,* 130 U.S. 606, 608.

[56] *Ibid.*

[57] *Chinese Exclusion Cases,* 130 U.S. 603, 608.

[58] *Fong Yue Ting v. U.S.* 149 U.S. 758.

[59] *Chinese Exclusion Cases,* 130 U.S. 604.

[60] *Ibid.,* 130 U.S. 606.

[61] *Ibid.*, 130 U.S. 603.
[62] *Fong Yue Ting*, 149 U.S. 758.
[63] *Ibid.*
[64] *Butcher's Union Co.*, 111 U.S. 757.
[65] *Chinese Exclusion Cases*, 130 U.S. 603.
[66] *Fong Yue Ting*, 149 U.S. 754.
[67] *Ibid.*
[68] *Ibid.*
[69] *Fong Yue Ting*, 149 U.S. 750.
[70] *Ibid.*, 149 U.S. 759.
[71] *Ibid.*, 149 U.S. 754.
[72] *Ibid.*, 149 U.S. 746.
[73] *Chinese Exclusion Cases*, 130 U.S. 609.
[74] *Ibid.*
[75] *Ibid.*, 130 U.S. 600.
[76] *Chinese Exclusion Cases*, 130 U.S. 602.
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*, 130 U.S. 600.
[80] *Ibid.*
[81] *Ibid.*, 130 U.S. 602.
[82] *See* the arguments made in *U.S. v. Arizona* 132 S. Ct. 2507 (2012); *Galvan v. Press* 347 U.S. 531 (1954).
[83] *See* Scalia's dissenting opinion in *U.S. v. Arizona* 132 S. Ct. 2512 (2012); *See also Fiallo v. Bell* 430 U.S. 791 (1977); *Zadvydas v. Davis* 533 U.S. 678 (2001); *Kleindienst v. Mandel* 408 U.S. 765–766 (1972).
[84] *Fong Yue Ting v. United States* 149 U.S. 754.

"The Silent Man": From *Lochner* to *Hammer v. Dagenhart*, A Reevaluation of Justice William R. Day

JESSE BAIR

Legal academics have written little about Justice William R. Day. In fact, the only formal biography about him was published in 1946,[1] twenty-three years before the Library of Congress arranged and described his papers.[2] As a result, that biography almost exclusively relied on the text of Day's opinions.[3] In doing so, it broadly concluded that Day strictly construed national powers and liberally construed state powers.[4]

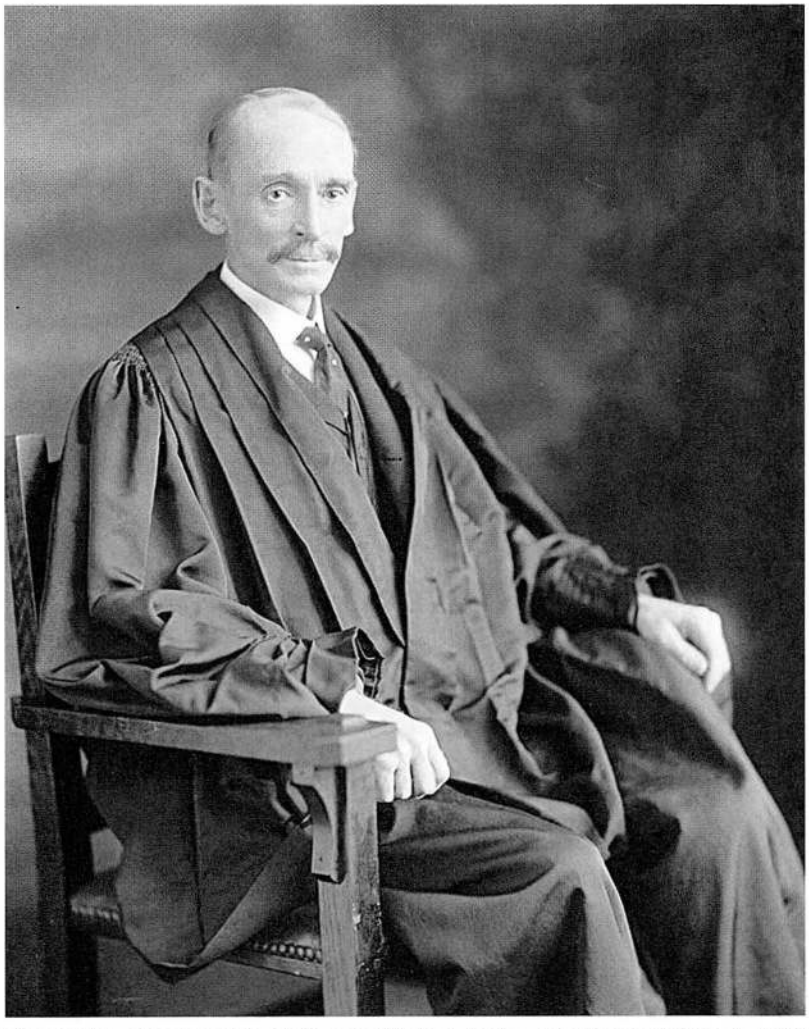
Yet it is not easy to classify Justice Day's jurisprudence. In the early twentieth century, descriptions of his philosophical tendencies spanned the ideological gamut. On the one hand, some publications referred to Day as a "progressive mind"[5] who, along with Justices Oliver Wendell Holmes, Jr., and Charles Evans Hughes, sought to eliminate the laissez-faire philosophy of the Supreme Court and its Fourteenth Amendment liberty-of-contract decisions.[6] On the other hand, some chastised Day as being "reactionary"[7] and an "old-fashioned law and precedent jurist."[8] More recent attempts to describe Day's judicial philosophy have proven equally unsatisfying.[9] Justice Day served on the Supreme Court between 1903 and 1922, during the period of time commonly referred to as the *Lochner* Era, and his positions on key cases bear further examination.[10]

Lochner v. New York[11] and *Hammer v. Dagenhart* are two cases often associated with the perceived judicial activism of that time period.[12] In *Lochner*, the Court struck down a New York state statute regulating maximum hours for bakers.[13] In *Hammer*, the Court invalidated a congressional enactment that prohibited the interstate shipment of goods

produced by child labor.[14] Although both cases typify the popular belief that the *Lochner* Era Court struck down a multitude of economic regulations,[15] Day did not join the majority in both cases. Rather, Day joined Justice John Marshall Harlan's dissent in *Lochner* and thirteen years later wrote the majority opinion in *Hammer*. This article aims to answer the question of *why* Justice Day made this switch, by examining his jurisprudence, belief in federalism, politics, personality, and other factors.

Day's Reluctance to Dissent

Day's reluctance to dissent is an important factor in explaining his switch. To say that he dissented infrequently would be an understatement. Day penned only eighteen dissents during his nineteen-year tenure on the Supreme Court.[16] Harold Laski, a longtime acquaintance of Justice Holmes, took note of this trend when he stated that he "did not think it possible for Day[] to be in the minority on any ground."[17] Part of Day's reluctance to dissent likely stemmed from the



Justice William R. Day, who almost never dissented, joined Justice John Marshall Harlan's 1905 dissent in *Lochner* supporting a New York statute regulating maximum hours for bakers.

prevailing legal culture of the time, which disfavored dissents.[18] In particular, Chief Justice William H. Taft believed that dissents created unnecessary uncertainty in the law.[19] In a 1923 letter, an attorney wrote to Taft that dissenting opinions should be "dispensed with" because they "discredit the court,"[20] arguing that, when laymen see judges disagreeing over the law, "the decision is consequently only the opinion of individuals and not that of the court."[21] Taft replied that he "agreed with [the attorney] about dissenting opinions" and that "it would be better to have none."[22]

An exchange of letters between Justice Day and Justice Mahlon Pitney illustrate that Day shared this general reluctance to dissent. After reading a draft opinion written by Holmes, Day wrote Pitney that he thought their dissenting views "should at least be written out, to call them to the attention of the brethren."[23] Due to an illness, however, Day felt he could not write the dissent and he implored Pitney to do so. Pitney replied that, although he felt the majority opinion remained "indefensible" and was "unjust to the defendant in error," he believed they should "submit in silence" because of his concern that the Court may "adhere to the decision notwithstanding such express dissent, [and] the decision might do general mischief by being cited as precedent." [24] Pitney further noted that if "in spite of my suggestion to the contrary above made, you still feel the dissent ought to be written, I will write something upon the lines indicated in your letter." Day responded that should Justice Pitney write a silent dissent, he would also join his name.[25] However, he added that he was also "content to let the whole thing go." The decision, published five days later, ultimately did include a silent dissent from Day and Pitney.[26] Similarly, regarding a different case,[27] Day wrote to Justice Willis Van Devanter that he hoped he would "say a word" because Day disagreed with the majority opinion.[28] Day stated that he would "be glad to concur" if Van Devanter went ahead with a dissent.[29]

Evidently, Day sometimes went along with majority opinions with which he disagreed if he could not convince others to dissent. Regarding a 1916 case, he wrote to Pitney: "I . . . express[] the hope that you might expand your memorandum into a dissent. In my belief, Justice Holmes has reached a wrong conclusion . . . I shall not write a dissent myself, as I have not time so to do."[30] Justice Day's papers do not contain a response from Pitney. Without a dissent to sign on to, Justice Day joined Justice Holmes's decision only a week after describing it as "wrong."[31]

Day's reluctance to write dissents may also be attributed to the Supreme Court's high volume of cases. During his tenure on the Bench, the Supreme Court did not have the power to control the size of its docket the way it does today.[32] Only after aggressive lobbying by Chief Justice Taft did Congress pass the Judiciary Act of 1925, which granted the Court its modern form of discretionary review. As a result, the Court during Day's time had a heavily congested docket. For example, the Court docketed 1,069 cases for October Term 1915 and disposed of 547 of those cases.[33] A Westlaw search indicates that the Court published 234 merit opinions that term. (In contrast, the Court wrote only seventy-six merit opinions during October Term 2011.)[34] One newspaper went as far as to call the Supreme Court "crippled" by work after Justice Day fell ill and Justice Hughes resigned from the Bench in 1916.[35] When asked about the workload of a Supreme Court Justice, Day replied that "[h]e is the hardest worked man in the government, I think."[36]

The Court took pride in its efficiency in disposing of cases. Chief Justice Edward D. White conveyed his excitement to Day about the Court's productivity for October Term 1915 when he wrote: "I honestly believe when we come to the end of this year we will have made the best showing that the Court has

Day wrote the majority opinion in *Hammer v. Dagenhart* (1918), invalidating a congressional enactment that prohibited the interstate shipment of goods produced by child labor. Why did he seemingly switch from his position in *Lochner* thirteen years earlier?

ever made in history, so far as quantity is concerned, and I hope and pray we will not have fallen below a proper standard of quality."[37] At the close of the term, the Chief Justice proudly reported to Day (who had been ill much of the term), that "[w]e took off the docket more than we took last year, which you know was a record breaking one, and we left fewer cases on the docket than we did when we rose last year."[38] He even joked that Justice Holmes was so busy with his Court obligations that he no longer reads the newspaper.[39]

The media took note of the Justices' heavy workload. The *Philadelphia Inquirer* described the 1915 Term as the busiest since 1890.[40] Another newspaper reported favorably that the Justices "are called among the hardest working government officials" and "devot[e] to work each day more hours than any other officials excepting the president and members of his cabinet."[41] Media outlets also reported the efforts of individual Justices.[42] The *New York Times* declared Justice Holmes the "ready opinion writer of the Supreme Court," noting that his opinion total for October Term 1912

equaled one short the number written by Justices Hughes, Van Devanter, and Joseph R. Lamar combined.[43] Justice Day ranked second that term, penning twenty-six opinions compared to Justice Holmes's thirty-two. These articles hint that at least one barometer the public used to judge the Supreme Court was the Court's productivity—something that would have declined if individual Justices had decided to write a large number of dissents.

Several factors thus explain Day's aversion to dissents: his personal reluctance to write dissents, a legal culture of the time that disfavored dissents, and the Court's heavy workload and need for high productivity from individual Justices. Each of these factors counseled Day to hesitate before penning a dissent. Considering this, he may not have dissented in *Lochner* had Harlan not written a dissent himself. As Day's correspondence reveals, he seemed to prefer to try and persuade other Justices to dissent, rather than write a dissent himself. If he could not find another Justice willing to write a dissent, Day would sometimes resort to joining majority opinions with which he disagreed.[44]

Day wrote only one dissent in 1905—the year the Court published the *Lochner* decision.[45] He wrote one dissent during the previous two years combined.[46] When Day did dissent, it appears he did so only when he felt compelled by issues of particular importance.[47] It is unclear whether Day, at the time in only his third year on the Bench, would have considered *Lochner* sufficiently important to warrant writing his own dissent. Likewise, it seems doubtful that he would have joined Holmes's other dissent in *Lochner*, as Day and Holmes signed on to the same dissent only once during their entire tenure on the Court.[48] A more likely scenario is that Day would have joined the majority opinion in *Lochner* rather than sign on to Holmes's dissent.

An added wrinkle in this situation is that at least one historian has argued that Justice Harlan wrote his opinion as a majority statement, with the Court originally voting 5–4 to uphold the New York law.[49] After one Justice changed his mind between the original conference and the final vote, Harlan made only minor changes to his opinion and submitted it as a dissent.[50] It is possible that Day originally voted to join the majority, but may have felt reluctant to abandon Harlan when the final vote changed. At a minimum, Day's dissent in *Lochner* may partially be explained by convenience: Harlan's dissent provided a vehicle by which he could dissent without the burden of writing his own dissent or joining that of Holmes—two possibilities Day's jurisprudence indicate would have been unlikely to occur.

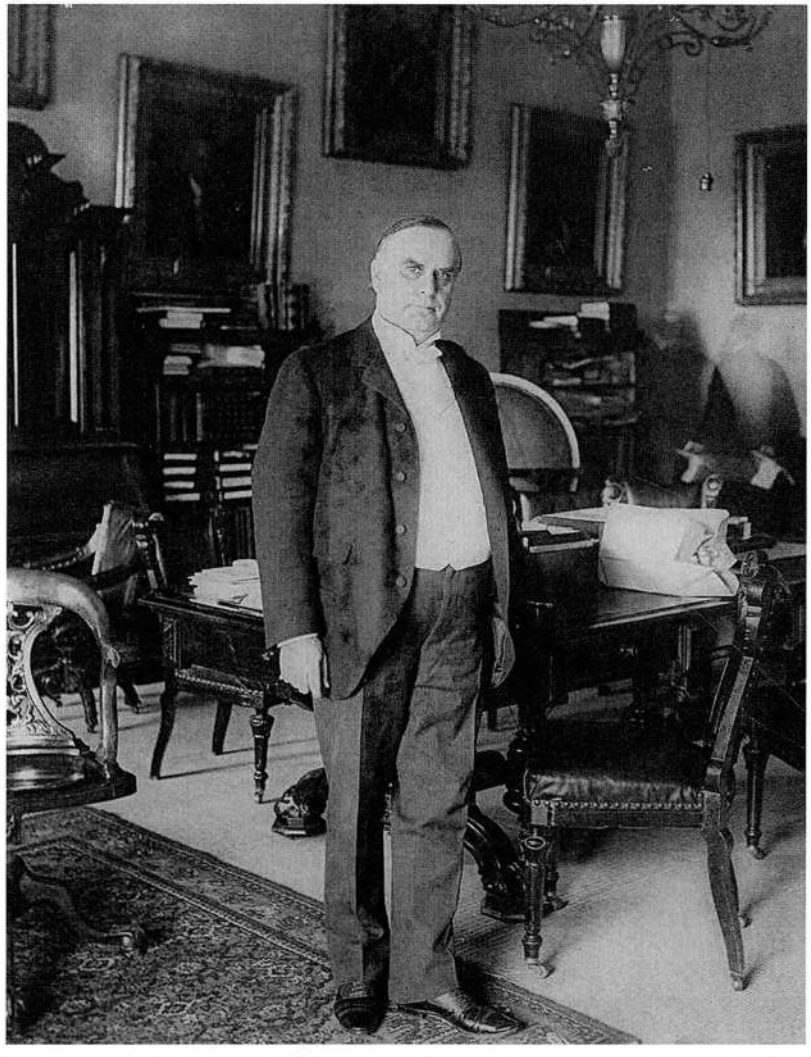
Day's Views on National v. State Powers

A second factor in explaining Day's "switch" between *Lochner* and *Hammer* is his belief in federalism. Preserving what he felt were the proper spheres of state and federal government were important considerations for him. Before the 1916 presidential election, Day nearly always upheld state labor laws and struck down federal enactments of the same type. For example, Day voted with a unanimous Court to uphold an Oregon law regulating maximum hours of work for women, he wrote the majority opinion upholding an Arkansas law requiring coal mines to pay workers based on the weight of unscreened coal (as opposed to screened coal), and he wrote a unanimous opinion upholding a Chicago ordinance regulating the size of bread.[51] A more notable illustration of Day's affirmation of state police power, however, was his dissent in *Coppage v. Kansas*.[52] In *Coppage*, Day criticized the majority's reliance on liberty of contract and declared that "nothing is better settled by the repeated decisions of this court than that the right of contract is not absolute and unyielding."[53] Day also described the scope of state

police powers expansively[54] and outlined a narrow role for judicial review.[55]

Yet the fact that Day went so far as to write a separate dissent from Justice Holmes demonstrated Day's general reluctance to approve federal regulatory legislation, even during his early judicial career. Holmes's dissent made clear his desire to overrule *Adair v. United States*,[56] a case involving a federal law similar to the Kansas statute at issue in *Coppage*. Like Holmes, other progressives also loathed the *Adair* decision. Felix Frankfurter wrote to Holmes that he "was happy when I saw you drive another spike into the *Adair* case."[57]

By contrast, Day did not seek to overrule *Adair*.[58] Unlike Holmes, who dissented in *Adair*, Day had joined Justice Harlan's majority opinion in that case.[59] This proved somewhat problematic for Day, as the majority in *Coppage* declared that the case "cannot be distinguished from *Adair v. United States*" in that both cases impermissibly infringed on the constitutional right of freedom of contract.[60] Instead of challenging *Adair*'s liberty of contract reasoning, Day



Day and William McKinley (above) became friends when they were lawyers active in Republican Party circles in Canton, Ohio. After he won the presidency, McKinley appointed Day to the State Department in 1897 and then to the United States Court of Appeals for the Sixth Circuit in 1899.

skirted the issue and argued that differences between the two statutes made *Adair* inapplicable to the statute at issue in *Coppage*.[61] Day's somewhat tenuous distinction allowed him to deliver a forceful argument against liberty of contract without directly confronting the majority—and his own holding in *Adair*.

In the same way that Day tended to uphold state economic statutes, he generally struck down federal labor laws. As mentioned earlier, Day joined Justice Harlan's majority in *Adair* and struck down a federal statute that prohibited employers from firing employees who joined a union.[62] Day dissented in a case upholding a Congressional statute creating an eight-hour day for railroad workers and temporarily regulating their wages.[63] He also joined Justice Taft's majority in striking down the Child Labor Tax Law as an improper use of Congress's taxing power.[64] Yet Day's most notable decision striking down federal labor legislation was his majority opinion in *Hammer v. Dagenhart*. In *Hammer*, Day avoided any discussion of liberty of contract and struck down the law at issue solely as a violation of Congress's commerce clause powers.[65] His opinion acknowledged that Congress could regulate commerce, but rejected the idea that Congress could "equalize" labor conditions among the states. Day warned of the far-reaching consequences of upholding a law of this type, and declared that the Court had "no more important function" than ensuring the constitutional separation of state and federal authority.[66]

Justice Day received an encouraging letter from one of his sons after he issued his opinion in *Hammer*.[67] Stephen A. Day's letter echoed his father's concerns about preserving the proper spheres of state and federal government. He was supportive that his father had "thrown out" the child labor law "for the preservation of our present form of Government, under the Constitution, and ha[d] won what must have been a hard fight against a . . . legal philosophy which [George] Creel expresses."[68] Stephen further declared that the opinion was "not a stand pat decision but a *shining* re-affirmance of Constitutional Limitations."[69] Indeed, he regarded the decision as "one of the monuments to [Justice Day] who has been as staunch a defender of the Law of the Land as ever [has] sat on the court." As the aforementioned cases and his son's letter indicate, Day firmly believed in a limited role for federal labor legislation.

Justice Day also became more aggressive in striking down state economic legislation during the latter part of his judicial career. For example, Day joined Justice James C. McReynolds's majority opinion in *Adams v. Tanner*,[70] which struck down a Washington state law that prohibited the operation of "employment agencies" within the state.[71] That decision represented an abrupt change for Day, considering that he advocated for judicial deference to state legislatures and declared the preservation of state police powers to be of the "the utmost importance" only two years prior in his *Coppage* dissent.[72] Justice Louis D. Brandeis considered the *Adams* decision to be on par with *Lochner*, in terms of erroneous decisions of the Court.[73] Day also wrote a unanimous decision striking down a Louisville segregation ordinance in *Buchanan v. Warley*.[74] Like the majority in *Adams*, Day struck down the law using a due process analysis. He held that the statute at issue violated the Fourteenth Amendment in that it infringed on the plaintiff's right to dispose of his property as he saw fit. His opinion also stated that, although state police powers are broad, they "cannot justify the passage of a law or ordinance which runs counter to the limitations of the federal Constitution."[75] Additionally, Day joined Justice Taft's majority opinion invalidating an Arizona law that prevented state courts from issuing injunctions against striking workers.[76] Felix Frankfurter hinted at a change in Day's economic regulation jurisprudence over the years when

he wrote that the Ohio Justice "used to see pretty straight in these matters."[77]

Day's generally broad interpretation of state police powers and narrow construction of federal powers thus provides another partial explanation for his "switch" between *Lochner* and *Hammer*. But Day's increased willingness to strike down state labor legislation after 1917 indicates that other factors besides his belief in federalism also influenced him. These factors likely included his political affiliations and his friend Charles Evans Hughes's 1916 presidential election defeat.

Justice Day, Politics, and His Changing Jurisprudence

A third factor that may have contributed to Day's "switch" is politics. Politics always played a major role in his life. While practicing law in Canton, Ohio, Day became acquainted with William McKinley and the two quickly developed a close friendship.[78] Day served as an advisor to McKinley during his 1896 presidential campaign, and, after the election, McKinley "lifted [Day] from comparative obscurity" by naming him Assistant Secretary of State.[79] Though prestigious in title, Day's appointment meant a substantial decline in his yearly income. President McKinley, speaking about Day's appointment and resultant salary reduction, remarked that "[Day] would not do it if he did not love me."[80] Day was eventually promoted to Secretary of State, but he served only a year and a half at the State Department before President McKinley appointed him to the Sixth Circuit Court of Appeals. The *New York Tribune* wrote that he "had an aptitude for political work but no relish for it" and that he "never learned to be a handshaker."[81] He served as an appeals court judge for four years. In 1903, President Theodore Roosevelt nominated him to the Supreme Court. Because of his connections, several newspapers made clear their view that Day's nomination was politically motivated.[82] At the time of his endorsement, one newspaper described Day as "an intense partisan and . . . one of the wheel horses of his party."[83]

Politics continued to play a role in Day's life, even after his appointment to the Bench. He maintained friendships with powerful players in Republican politics, including George Cortelyou[84] and Charles Fairbanks.[85] Day also remained committed to his friend William McKinley long after his assassination in 1901, serving as president of the McKinley National Memorial Association and devoting considerable time to raising funds to build a monument in honor of his friend.[86] Furthermore, Justice Day continued to receive campaign solicitations and invitations from local Republican Party chapters.[87]

More commonly, individuals wrote Day seeking recommendations from him for judicial or other governmental employment. Day denied many political patronage requests.[88] However, he did advocate on behalf of those he knew on multiple occasions. For example, Day met with President Roosevelt to support an Ohio district court judge seeking to fill Day's vacant Sixth Circuit seat.[89] Similarly, Day met with President Taft and endorsed an acquaintance for a position in the Office of the Collector for the Seventh District of Kentucky.[90] Day also wrote to the War Department seeking employment on behalf of a laborer.[91] Moreover, fellow Justices sometimes pressured Day for assistance with pending appointments.[92] In at least one instance, President Roosevelt actively solicited Day's advice on a prospective appointment.[93] Day continued to receive letters of this sort after President Woodrow Wilson took office, though the Justice readily acknowledged that he no longer carried much influence at the White House.[94] And although Day would sometimes advocate on behalf of individuals for a particular appointment, he took care not to engage in any improper conduct. Accordingly, before Justice Day appointed his son Stephen to be his

stenographic clerk, he wrote to Justice Brewer for advice.[95] Brewer responded that Day's proposed appointment would not violate any anti-nepotism laws, but cautioned that it could draw criticism nonetheless.[96] These letters indicate that Day remained in the political loop even after he began his tenure on the High Bench.

Additionally, Justice Day kept abreast of current political issues. He believed "all lawyers should be interested in politics, in public questions and in the nomination and election of good men to office."[97] A letter from Day to Chief Justice White sheds light on how he viewed the changing political climate of the 1910s.[98] Day wrote about what he perceived as the "political upheavals" occurring throughout the country. In particular, he focused on a series of amendments to the Michigan Constitution put to voters of that state over the summer of 1912.[99] Day described the amendments as being offered by a "convention largely and empathetically progressive . . . upon very short notice to enable voters to understand and appreciate the radical departures intended." He derided one failed amendment as "a most vicious attempt to limit the powers of the courts in enforcing their orders and injunctions to protect life and limb in cases arising from labor disputes."[100] Looking toward the 1912 presidential election, Day also predicted that Roosevelt would do well in Michigan and that a Wilson victory would likely occur over the "divided ranks" of the Republican Party.

National politics became more personal for Day in 1916, when the Republican Party selected Associate Justice Charles Evans Hughes as its candidate to challenge President Wilson. Day and Hughes shared a friendship that went beyond a mere working relationship.[101] Naturally, Justice Day discussed the electoral fortunes of his former colleague often.[102] Chief Justice White went so far as to say "I trust in God [Hughes] is going to win and hope so with all my heart." Though White felt confident Hughes would win, he cautioned Day that "it is a long cry . . . to look now and there is no telling what desperation may not cause the other side to do."[103] As the Chief Justice predicted, opponents of Hughes's candidacy began leveling personal criticisms at the former Justice. One such criticism accused Hughes of not voting for seven years and being a "slacker" of a citizen.[104] This "scurrilous report" prompted a local Republican leader in Washington State to write to Justice Day and request "information on how long it [has been] since Chief Justice White has voted."[105] The writer presumed that White did not travel to his home state of Louisiana to vote in every election and that information on the Democratic Chief Justice's voting habits would "kill all this talk about Hughes." Day's papers do not include a response to this writer and no newspaper article of the time contained any such story about White. Day's lack of response is not surprising, however, considering his close friendship with the Chief Justice.[106] Nonetheless, the letter indicates that Republican Party officials still considered Day a sympathetic ear to their political causes well into his tenure on the Supreme Court.

One Wilson surrogate who leveled particularly harsh criticism against Hughes was George Creel. A close advisor to Wilson and a prolific newspaper editor, Creel strongly advocated for child labor reform and was an early supporter of the federal child labor law.[107] On the campaign trail, however, Creel assumed the role of attack dog. Creel constantly derided Hughes as being a friend of Wall Street.[108] Hughes and his Wall Street supporters, according to Creel, wanted to roll back a myriad of economic legislation—including the child labor law.[109]

Creel even went as far as comparing women's groups who endorsed Hughes to "cow[s] that lead[] others to slaughter."[110] When the contentious campaign finally came to an end, President Wilson had prevailed over Hughes by a narrow margin of twenty-three electoral votes.

While politics does not fully explain Day's majority opinion in *Hammer*, it is an

external factor that likely had some influence on the Justice. Stephen Day specifically mentioned Creel in the approving letter he sent to his father shortly after Day's decision in *Hammer*.[111] Considering the role Creel played in the 1916 campaign and Day's close relationship with Hughes, perhaps it is not surprising that Day's son mentioned Creel by name. Though concerns about preserving the traditional spheres of state and federal power undoubtedly motivated Day's opinion to some extent, the opportunity for an old "partisan" like Day to exact some political revenge on Creel likely did not escape the Justice.

Day's jurisprudence after his friend's presidential defeat became more aggressive in striking down state economic legislation. Though Day disfavored federal labor legislation throughout his tenure on the Bench, *Wilson* and *Hammer* both provided Day opportunities to strike a blow at the Wilson Administration.[112] Beyond solely the 1916 election, the increasing passage of labor laws around the country and the rise of the "progressive" wing of the Republican Party may have precipitated a shift in Day's jurisprudence. For a moderate like Day,[113] with his party divided and having lost two straight presidential elections, he may have decided that the time was right to take a less deferential posture towards state and federal economic legislation.[114] Day's political inclinations, coupled with his more anti-labor shift after the 1916 election, are factors that need to be considered in explaining his "switch" between *Lochner* and *Hammer*.

The "Silent Man"

A final factor that needs to be considered in analyzing Justice Day's "switch" is Day's rather curious personality. *The Nation* reported that one of Day's most striking characteristics was his "directness."[115] The article elaborated on that comment: "Nobody despise[d] more than [Day] the meaningless frills and furbelows of human intercourse."[116] His serious outward demeanor even prompted a classmate of Day's at the University of Michigan to picture Day as "running an undertaker's establishment and driving the hearse himself." *The Nation* illustrated Day's "frankness of approach" with a story from his college years. After finishing his engineering exam—a course Day despised—instead of waiting with the rest of his classmates for grades to be posted, Day approached the professor directly. When the professor questioned Day as to why he needed to know his grade immediately, Day replied that "I want to know, and to know at once because I want to get rid of the whole blamed thing!" The article concluded that with Day's disposition to "get things done," it is no wonder why his opinions are commended "for the way they go straight to the point."[117]

As a corollary of his "directness," Day cared little for small talk and socializing. While working at the State Department, Day "weighed every word carefully" before speaking and said little to those with whom he dealt.[118] Consequently, Day developed a reputation as a "decidedly quiet man"[119] who "carried reticence to an extreme."[120] Washingtonians responded to Day's behavior by giving him a nickname: "The Silent Man."[121] And though many people knew Day, "few friends [knew] him well."[122] One newspaper even opined that "[p]robably the only man [Day] allowed to share his inner thoughts was President McKinley."[123]

As a result of his preference for solitude, Day "was not fond of society life."[124] He "loved the silent bench and the barred conference room" of the Supreme Court.[125] A reporter who observed Day on the bench remarked that he "seem[ed] all brain."[126] Day lived simply; he resided in an "unostentatious" home and spent his free time reading or with his family.[127] In fact, *The New York Times* wrote that Day "lived as simple a life as any man who has held high office in the Government."[128]

Day's secluded lifestyle may partially be explained by his lifelong battle with poor health.[129] Reporters often commented on Day's thinly physique.[130] Indeed, a month after taking his seat on the Court, Justice Day developed a severe case of the flu.[131] Rumors circulated on multiple occasions that his health would cause him to resign.[132] Day also missed the majority of the October Term 1915 as a result of poor health.[133] He may simply have lacked the energy to write dissents when he was feeling poorly. Or he may have been so grateful to his Brethren for shouldering his work when he was absent that he did not want to disagree with them openly.

Though Day's personality—like other factors analyzed in this paper—does not fully explain his "switch" between *Lochner* and *Hammer*, it provides better insight into him as a person. His seriousness, reticence, and ill health may all have impacted how the Justice viewed the role of dissents, responded to the politics of the early twentieth century, and interpreted the Court's precedent.

Conclusion

Legal scholars have produced countless works analyzing, criticizing, and rehabilitating the *Lochner* Era. For better or for worse, however, history has largely forgotten Justice Day. Day stood on opposite ends of two of the most notable cases of this time period. Neither a friend of labor nor an adherent of liberty of contract, Justice Day was a swing vote.

His story is essential in understanding the *Lochner* Era Court. No single factor prompted Day to "switch" his vote between *Lochner* and *Hammer*. Mainly, Day seemed to be influenced by a legal culture that discouraged dissents. And while his early jurisprudence indicated consistently broad interpretations of state police powers and limited interpretations of federal power, Day's later decisions demonstrated a greater willingness to strike down both state and federal labor legislation. A proud Republican, Day never fully removed himself from politics when he took the Bench. External political influences may have affected his jurisprudence. These factors are compounded by his inscrutable personality and continually poor health and give us a more complete picture of the motivations of Justice William R. Day, "The Silent Man."

Endnotes

[1] JOSEPH E. MCLEAN, WILLIAM RUFUS DAY: SUPREME COURT JUSTICE FROM OHIO (Baltimore: The Johns Hopkins University Press, 1946).

[2] Edward William Johnson, William R. Day Papers: A Finding Aid to the Collection in the Library of Congress, Manuscript Division: Library of Congress (2011), *available at* http://memory.loc.gov/service/mss/eadxmlmss/eadpdfmss/2011/ms011204.pdf (papers arranged in 1969).

[3] MCLEAN, *supra* note 1, at 60 (noting that the majority of the book is "devoted to a technical treatment of [Day's] Supreme Court opinions"). For a book review criticizing McLean's work on this ground, see *Book Note: William Rufus Day: Supreme Court Justice From Ohio*, 61 HARV. L. REV. 203, 204 (1947) ("Unfortunately, the paucity of the Justice's non-judicial writings forced the author to rely almost entirely on Mr. Justice Day's court opinions and to rationalize from them, rather than compare them with his off-the-bench views.").

[4] MCLEAN, *supra* note 1, at 68, 114.

[5] Editorial, *The Liberty to Make Oppressive Contracts*, INDEPENDENT, Feb. 15, 1915, at 225 [hereinafter *Liberty*].

[6] Felix Frankfurter, Editorial, *Brandeis*, NEW REPUBLIC, Feb. 5, 1916, at 5.

[7] *See* Editorial, *A Disheartening Decision*, WILKES-BARRE TIMES LEADER, June 10, 1918, at 8 [hereinafter *Disheartening Decision*].

[8] Editorial, *Child Labor Law Declared Useless*, NAT'L LAB. TRIB., June, 13, 1918, at 8.

[9] Leon Friedman and Fred Israel stated that "Day's position in [the Court's] ideological lineup remained equivocal because of the curiously ambivalent legal philosophy which he brought with him to the bench." LEON FRIEDMAN & FRED. L. ISRAEL, THE JUSTICE OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS VOL. III, at 1783–84 (1969). David Bernstein described Day as a "[m]oderate traditional jurist." David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 854 (1998).

[10] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14–15 (1980) ("[The Court's]frequent invalidations of various sorts of worker protection provisions during the first third of [the twentieth] [C]entury . . . are conventionally referred to under the head of *Lochner v. New York*.").

[11] 198 U.S . 45 (1905). Although referred to in this paper as *Lochner*, this decision was popularly known during the early twentieth century as the "bakeshop case." *See, e.g., Raps Supreme Court: In Speech before Legislature, Roosevelt Criticizes Its Decisions*, FORT WORTH STAR-TELEGRAM, Aug. 30, 1910, at 3.

[12] Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) ("The received wisdom is that *Lochner* was wrong because it involved 'judicial activism': an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government . . . The basic understanding has been endorsed by the Court in many cases taking the lesson of the *Lochner* period to be the need for judicial deference to legislative enactments.").

[13] *Lochner*, 198 U.S . (1905) at 64–65.

[14] *Hammer*, 247 U.S . (1918) at 277.

[15] *See* ELY, *supra* note 10, at 14. *But see* Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 754 n.19 (2009) (arguing that the number of economic statutes struck down during the *Lochner* Era is substantially smaller than the "over two hundred" number commonly taught to law students).

[16] *See* MCLEAN, *supra* note 1, at 64. By contrast, a Westlaw search indicates that Justice Holmes wrote forty-two dissents during this same time period.

[17] Letter from Laski to Holmes (Mar. 20, 1917), *in* HOLMES-LASKI LETTERS: THE CORESPONDENCE OF MR. JUSTSICE HOLMES AND HAROLD J. LASKI, at 1:68–69 (Mark DeWolfe Howe, ed., 1953) [hereinafter HOLMES-LASKI] (referencing Laski's surprise at Day's dissent in *Wilson v. New*).

[18] *See* W. W. Thornton, *The Welter of Reports and Court Opinions*, 90 CENT. L.J 316, 318 (1920) ("Dissenting opinions have received the censure of many lawyers and writers . . . What the lawyer wants is the Court's opinion in which is given the reasons for the Court's decision."); Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35 (1994) (noting that up until 1928, dissents and concurrences were filed in only about fifteen percent of Supreme Court cases). By contrast, sixty-four percent of the Court's cases in October Term 2011 included a dissent. *Stat Pack for October Term 2011*, SCOTUS BLOG, 5 (Sept. 25, 2012), http://sblog.s3.amazonaws.com/wp- content/uploads/2013/03/SCOTUSblog_Stat_Pack_OT11_Updated.pdf [hereinafter *Stat Pack*]. *See also* Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313, 315–17 (2005).

[19] *See* Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1311 (2001).

[20] Letter from Walter S. Whiton to Taft, Apr. 16, 1923, Taft Papers, Reel 252.

[21] *Id.*

[22] Letter from Taft to Walter S. Whiton, Apr. 19, 1923, Taft Papers, Reel 252. Taft acknowledged, however, that the custom could not easily be destroyed at this point. *Id.*

[23] Letter from Day to Pitney, Dec. 8, 1915, Day Papers, Box 4, Letterpress Book 2.

[24] Letter from Pitney to Day, Dec. 8, 1915, Day Papers, Box 30, Folder 5.

[25] Letter from Day to Pitney, Day Papers, Dec. 9, 1915, Box 4, Letterpress Book 2.

[26] *Atchison, T. & S. F.R. Co. v. Swearingen*, 239 U.S . 339, 344 (1915).

[27] *First Nat'l Bank of Bay City v. Fellows ex rel. Union Trust Co.*, 244 U.S . 416 (1917).

[28] Letter from Day to Van Devanter, May 30, 1917, Day Papers, Box 4, Letterpress Book 2.

[29] *Id.* In this case, Justice Van Devanter wrote a three-page dissent. *First Nat'l Bank*, 244 U.S . at 429–33 (Van Devanter, J., dissenting). Day concurred, as he indicated he would in his letter. *Id.* at 433 (Van Devanter, J., dissenting).

[30] Letter from Day to Pitney, Nov. 28, 1916, Day Papers, Box 4, Letterpress Book 2.

[31] *Id.*; *see United States v. Oppenheimer*, 242 U.S . 85 (1916).

[32] *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflection Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1643 (2000).

[33] Letter from James Maher to Day, June 26, 1916, Day Papers, Box 31, Folder 4.

[34] *Stat Pack*, *supra* note 18, at 1.

[35] *Supreme Court Crippled*, OREGONIAN, Apr. 4, 1916, at 1.

[36] James B. Morrow, *A Talk with Judge W. R. Day*, L. A. TIMES, May 14, 1905, at VI17 ("We hear cases five days a week and give one day to conference. There is no interruption in this arrangement; we grind every day."); *see also* Letter from Day to James Angell, Feb. 18, 1912, Day Papers, Box 3, Letterpress Book 2 ("I find the court work never so pressing as at present, and every member has all that he can possibly do from now until the adjournment in June.").

[37] Letter from Edward D. White to Day, Mar. 9, 1916, Day Papers, Box 31, Folder 6. Unfortunately, the Court fell short of his goal. The Court's disposition of 547 cases during October Term 1915 placed it third in terms of productivity. *See* letter from James Maher to Day, June

26, 1916, Day Papers, Box 31, Folder 4. Despite this, the Court's clerk still felt the court made a "very good showing." *Id.*

[38] Letter from White to Day, June 15, 1916, Day Papers, Box 31, Folder 6.

[39] Letter from White to Day, Mar. 9, 1916, Day Papers, Box 31, Folder 6.

[40] *Supreme Court's Busy Term*, PHILA. INQUIRER, June, 18, 1916, at 13.

[41] *U.S. Supreme Court Enjoying Vacation*, SAN JOSE MERCURY NEWS, Jul. 6, 1915, at 7 ("For eight months of the year they sit in gown in the courtroom as many hours as need be, hearing the arguments; then four hours more at least reading briefs, and any amount of time beside in study and conference.").

[42] *See Opinion Record to Holmes*, N. Y. TIMES, Apr. 19, 1913, at 2.

[43] *Id.* Although, to be fair, the article noted that Justice Holmes's opinions tended to be shorter than the other Justices.

[44] *See* letter from Day to Pitney, Nov. 28, 1916, Day Papers, Box 4, Letterpress Book 2.

[45] *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 374 (1905) (Day, J., dissenting). The case involved statutory interpretation of a bankruptcy act.

[46] MCLEAN, *supra* note 1, at 63.

[47] *See Coppage v. Kansas*, 236 U.S. 1, 27 (1915) (Day, J., dissenting) ("The character of the question here involved sufficiently justifies, in my opinion, a statement of the grounds which compel me to dissent from the opinion and judgment in this case. The importance of the decision is further emphasized by the fact that it results not only in invalidating the legislation of Kansas . . . but necessarily decrees the same fate to like legislation of other states of the Union.").

[48] *See Eisner v. Macomber*, 252 U.S. 189, 219–20 (1920) (Holmes, J., dissenting). By comparison, Day and Harlan joined the same dissent eleven times, despite having ten fewer years on the Bench together than Day and Holmes.

[49] Alan F. Westin, *The Supreme Court and Group Conflict: Thoughts on Seeing Burke Put Through the Mill*, 52 AM. POL. SCI. REV. 665, 667 n.3 (1958).

[50] *Id.*

[51] *Muller v. Oregon*, 208 U.S. 412, 423 (1908); *McLean v. Arkansas*, 211 U.S. 539, 552 (1909); *Schmidinger v. Chicago*, 226 U.S. 578, 589–90 (1913) ("The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely."). For an overview of additional cases where Justice Day upheld state regulatory legislation, see MCLEAN, *supra* note 1, at 114–25.

[52] *Coppage* involved a Kansas statute that prohibited employers from requiring employees to sign a contract promising not to join a union as a condition of employment. *Coppage v. Kansas* 236 U.S. 1 (1915), at 6. The majority ruled that the Kansas statute violated the due process provision of the Fourteenth Amendment by infringing on an employer's liberty of contract rights. *Id.* at 11. For a positive review of Day's dissent, *see Liberty*, *supra* note 5 (describing Day as writing with "force and reason"). For a more negative analysis, see Editorial, *Our Rule of Liberty*, N. Y. TIMES, Jan. 27, 1915, at 8 (criticizing Day's opinion and declaring that unionists have a stranglehold on certain communities and that "such communities are put to [a] choice between the union and the militia").

[53] *Id.* at 28 (Day, J. dissenting).

[54] *Id.* at 30–31 (Day, J. dissenting) ("It is therefore the thoroughly established doctrine of this court that liberty of contract may be circumscribed in the interest of the state . . . The preservation of the police power of the states, under the authority of which that great mass of legislation has been enacted which has for its purpose the promotion of the health, safety, and welfare of the public, is of the utmost importance.").

[55] *Id.* at 38 (Day, J. dissenting) ("Whatever our individual opinions may be as to the wisdom of such legislation, we cannot put our judgment in place of that of the legislature and refuse to acknowledge the existence of the conditions with which it was dealing.").

[56] 208 U.S. 161 (1908).

[57] Letter from Frankfurter to Holmes (Jan. 27, 1917), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE,1912–1934, at 25–26 (Robert M. Mennel & Christine L. Compston eds., 1996) [hereinafter HOLMES AND FRANKFURTER] (emphasis in original omitted). As for Day, Frankfurter wrote that he "liked [Holmes's] dissenting company." *Id.*

[58] This distinction between the two dissents was not lost on the media at the time. *See, e. g., Court Finds Union Labor Law Invalid*, CLEVELAND PLAIN DEALER, Jan. 1, 1915, at 4 (contrasting Justice Day's distinguishing of the *Adair* case with Justice Holmes's desire to overrule *Adair*).

[59] *Adair*, 208 U.S. 161 (1908) at 166.

[60] *Coppage*, 236 U.S. at 13; *see also id.* at 11 ("Unless [*Adair*] is to be overruled, th[at] decision is controlling upon the present controversy; for if Congress is prevented from arbitrary interference with the liberty of contract because of the 'due process' provision of the 5th Amendment, it is too clear for argument that the states are prevented from the like interference by virtue of the corresponding clause of the 14th Amendment."). The *Adair* majority had also held that the federal statute exceeded Congress's commerce powers. *Adair*, 208 U.S. at 166.

[61] *Coppage*, 236 U.S. at 32–33 (Day, J., dissenting). Day differentiated the two statutes on the grounds that the

federal statute in *Adair* prohibited employers from terminating a current employee who joined a union, while the Kansas statute at issue in *Coppage* prohibited employers from conditioning present or future employment on a promise not to join a union.

[62] *Adair*, 208 U.S . at 166.

[63] *Wilson v. New*, 243 U.S . 332, 364 (1917) (Day, J., dissenting). The deference to legislatures Day described in *Coppage* is noticeably absent in his dissent in *Wilson*. *Id.* at 367–68 (Day, J., dissenting) ("While it is true, as stated in the majority opinion, that it is the duty of courts to enforce lawful legislative enactments of Congress, it is equally their duty and sworn obligation when differences between acts of the legislature and the guaranties of the Federal Constitution arise . . . to discharge the duty imposed upon it."). Day considered the law at issue in the case unconstitutional because it violated the railroad company's Fifth Amendment due process rights in that the statute's wage regulations amounted to a deprivation of the railroad company's property. *Id.* at 370–71 (Day, J., dissenting). Day recognized, however, that the statute's regulation of hours and wages for railroad workers fell within Congress's commerce powers. *Id.* at 364–65 (Day, J., dissenting). Justice Holmes, who joined Chief Justice White's majority in *Wilson*, stated that "Day's dissent [was] wrong but the most rational" (the dissents of Justices Pitney and McReynolds stated that the law in question fell outside Congress's commerce powers). HOLMES-LASKI, *supra* note 17, letter from Laski to Holmes (Mar. 20, 1917), at 1:69.

[64] *Bailey v. Drexel Furniture Co.*, 259 U.S . 20, 43–44 (1922).

[65] 247 U.S . at 276–77. Day distinguished commerce from production, and held that the production of goods was beyond the reach of Congress's commerce powers. *Id.* at 272.

[66] *Id.* at 277 ("The far reaching result of upholding the act [is that] . . . all freedom of commerce will be at an end, and the power of the state over local matters may be eliminated, and thus our system of government be practically destroyed.").

[67] Stephen may have felt compelled to write something encouraging to his father. Several media outlets heavily criticized Day's opinion. *See Disheartening Decision*, *supra* note 7 (declaring that "[g]reedy, dollar-chasing mill owners, alone will rejoice in Justice Day's dictum"); Editorial, *An Infamous Decision*, KALAMAZOO GAZETTE, June 6, 1918, at 4 ("The decision is damnable . . . Those five cold-hearted old men, sitting in solemn state in ermine robes, could not have seen the endless rows of [] pinched faces and shrunken bodies of the child slaves . . . when they rendered that decision."); Editorial, *A Disappointing Decision*, KAN. CITY STAR, June 4, 1918, at 14. Such criticism, however, was not universal. *See* Editorial, *A Righteous Decision*, CHARLOTTE OBSERVER, June 14, 1918, at 4 ("[The child labor law] was a cleverly designed measure and if it should have [been] held in law it would have destroyed the cotton mill industry of the South as a whole."); George W. Alger, Op-Ed., *Tax Child Labor to Death*, N. Y. TRIB., Jul. 6, 1918, at 8 (agreeing with the Court's commerce clause analysis and arguing that a child labor tax would be a more appropriate means to end child labor).

[68] Letter from Stephen A. Day to Justice Day, June 10, 1918, Day Papers, Box 33, Folder 1.

[69] *Id.* (emphasis in original).

[70] 244 U.S . 590 (1917).

[71] *Adams*, 244 U.S . at 591, 596–97. The "employment agencies" described in this opinion were organizations that would take a fee from people seeking work and attempt to find them a job. *Id.* at 591. The majority opinion quoted *Allgeyer v. Louisiana* favorably and held that the statute violated the Fourteenth Amendment rights of the employment agencies by depriving them of their liberty to engage in a useful business. Justice Brandeis's dissent discussed at length the problems associated with these organizations. *See id.* at 597 (Brandeis, J., dissenting). For example, some agencies colluded with employers such that the employer would hire job-seekers and subsequently fire them a few days later in exchange for a portion of the fee the employment agency collected from the job seeker. *Id.* at 601 (Brandeis, J., dissenting).

[72] *Coppage*, 261 U.S . at 31 (Day, J. dissenting).

[73] Letter from Brandeis to Frankfurter (Apr. 23, 1924), *in* LETTERS OF LOUIS D. BRANDEIS, at 3:126 (Melvin I. Urofsky & David W. Levy eds., 1973).

[74] *Buchanan v. Warley*, 245 U.S . 60, 69, 82 (1917). Day's opinion in *Buchanan* proved to be of such great interest that the clerk of the Supreme Court informed Day that "[t]he demand for the[] opinion[] has been so great that this exhausts the number supplied for the use of the court." Letter from James Maher to Day, December 3, 1917, Day Papers, Box 32, Folder 4.

[75] *Id.* at 82 and 74.

[76] *Truax v. Corrigan*, 257 U.S . 312, 322 (1921). The majority opinion held that the Arizona law contravened the Fourteenth Amendment in that it violated the employer's liberty of property rights. *See id.* at 328.

[77] HOLMES AND FRANKFURTER, *supra* note 57, letter from Frankfurter to Holmes (Apr. 25, 1921), at 111. Frankfurter wrote this letter shortly after the Court upheld a temporary D. C. rent regulation in *Block v. Hirsh*. Though Day joined Holmes's majority opinion, the letter indicates that Holmes needed to persuade Day to join the majority and coax him "over the hurdles." *Id.*

[78] *See* Morrow, *supra* note 36 ("I was a Republican, a lawyer and his neighbor and we naturally grew into an early friendship."). Though Day and McKinley both practiced law, Day was regarded as the "better lawyer."

Notes from the Capital: *William R. Day*, THE NATION, Feb. 24, 1916, at 216 [hereinafter *Notes*].

[79] William L. McPherson, *A Politician Against His Will*, N. Y. TRIB., Jul. 11, 1923, at 12 ("Day had keen political judgment. He saw some things more clearly than McKinley did."); "lifted from comparative obscurity" quote from *William R. Day's Career*, N. Y. TIMES, Jul. 10, 1923, at 19 [hereinafter *Day's Career*].

[80] *Day's Career*, *ibid.* Specifically, Day's appointment to the State Department meant he had to trade in his $15,000 a year salary as a private attorney for the $4,500 post as Assistant Secretary of State.

[81] McPherson, *supra* note 79.

[82] *See Judge Day's Promotion*, CLEVELAND PLAIN DEALER, Jan. 29, 1903, at 4 (collecting editorial comments about Day's appointment from around the nation); *id.* (quoting the *Buffalo Courier*) ("Judge Day, although a good, is not a great man, and the fact that the appointment is political is unfortunate. The highest talent the country can produce should only be eligible for the supreme bench."); *id.* (quoting the PITTSBURGH POST) ("The appointment was a legacy from President McKinley which President Roosevelt deemed himself pledged to carry out, although he would have preferred to appoint someone else. We have nothing to urge against Judge Day's selection only it appears to have been set up as a matter of politics and not as a question of judicial propriety."). Notwithstanding the politics of his appointment, most publications reacted positively to Day's nomination. *See Another New Justice on the United States Supreme Court*, 56 CENT. L. J. 141, 141 (1903) (describing Day as a "lawyer of more than ordinary ability"); *see also Current Topics*, 65 ALBANY L. J. 33, 33 (1903) ("That his appointment strengthens the tribunal will, we think, be universally conceded.").

[83] Walter N. Lester, *Judge William R. Day, A Judge Who Comes from Two Families of Judges*, SAN ANTONIO EXPRESS, Feb. 1, 1903, at 13.

[84] *See, e. g.,* letter from George Cortelyou to Day, Jul. 7, 1904, Day Papers, Box 20, Folder 1 (discussing summer vacation plans). Cortelyou served as Chairman of the Republican National Committee, and as a Cabinet official in Theodore Roosevelt's administration.

[85] *See* Letter from Charles Fairbanks to Day, Jul. 2, 1904, Day Papers, Box 20, Folder 2 (describing their friendship as something he "prize[d] in the very highest possible degree"); *see also The Country Lawyer*, 58 ALBANY L. J. 239, 239 (1898) (describing a story Fairbanks told at the Union League Club of New York about former "country lawyer" Day "thoroughly demoraliz[ing]" a group of Boston attorneys at trial and leaving the Boston Bar "wondering what had happened to them"). Fairbanks served with Day on the McKinley Memorial Foundation, as Vice-President in the Roosevelt Administration, and as Charles Hughes's running mate in the 1916 presidential election.

[86] *Ready To Consider Designs*, N. Y. TRIB., June 3, 1903, at 9. He also distributed carnations to his fellow Justices each year on McKinley's birthday. *Flowers In Supreme Court*, KAN. CITY STAR, Jan. 29, 1913, at 1.

[87] Letter from York County, PA Republican Party to Day, Day Papers, Nov. 10, 1904, Box 21, Folder 1 (inviting Day to attend their event "to celebrate the recent glorious Republican victory of the entire nation and especially the tremendous victory in York [C]ounty."); *see also* letter from Republican Central Committee of Stark County, OH to Day, Sept. 26, 1904, Day Papers, Box 20, Folder 1 (soliciting campaign contributions).

[88] *See, e. g.,* letter from Day to Charles J. Kintener, Nov. 7, 1905, Day Papers, Box 2, Letterpress Book 3 (refusing to provide a recommendation on behalf of Mr. Kintener to the President for an opening at the Patent Office because "it is the uniform practice of the members of the Supreme bench to refrain from making recommendations for appointments to office").

[89] Letter from Day to A. C. Thompson, Jan. 29, 1903, Day Papers, Box 2, Letterpress Book 2. Day wrote to Thompson that he "had a full talk with [the President] as to the judicial situation" and that the "endorsement [the district judge] received from the judges of the circuit court made no little impression upon the president." *Id.* He went on to encourage the judge to "bring all possible pressure to bear [to secure the seat]."

[90] Letter from Day to Charles H. Berryman, Jan. 13, 1910, Day Papers, Box 3, Letterpress book 1. Day reported to Berryman that he "had an interview with the President. [The President] was fully advised of your candidacy . . . and he spoke of you in the highest terms and of his pleasant acquaintance with you." Day explained that the President did not intend to make any personnel changes in that office at the present time, but he advised that "local endorsements, and particularly that of the Republican Senator from Kentucky, will be a strong influence in settling the appointment when it becomes available."

[91] Letter from Robert Shaw Oliver to Day, May 31, 1905, Day Papers, Box 21, Folder 1 ("I have the honor to acknowledge the receipt of your letter . . . recommending Robert Hawkins for temporary appointment in this Department as laborer . . . [The President's recent Civil Service order] is strict and permits no exception, and the Department is therefore, I regret very much to say, not able to meet your wishes in Mr. Hawkins' case, which the Department would be glad to do if it were possible.").

[92] Letter from Justice Harlan to Day, Sept. 20, 1904, Day Papers, Box 20, Folder 3 ("The Chief Justice knows the brother [of the deceased Master in Chancery of the Circuit Court at Chicago] . . . I think under the statute you have something to say in the matter as Circuit Justice . . .

There may be reasons why you prefer not to interfere in this matter . . . You will be able to judge from all the circumstances as to what you may do. One thing is certain, and that is if you can interfere in the matter and help along the application of Henry Booth, it will be a kindness to the Chief Justice.").

[93] Letter from Roosevelt to Lodge (Sept. 12, 1906), *in* SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884–1918, at 1:231 (Henry C. Lodge ed. 1925). The President arranged a meeting with Justice Day and then Secretary William H. Taft to discuss the possible appointment of Horace Lurton to the Bench.

[94] Letter from Day to David K. Watson, Nov. 21, 1914, Day Papers, Box 4, Letterpress Book 1 ("I feel . . . that I must say to you frankly that I will probably be able to be of little assistance [with your desired appointment] . . . I have not felt authorized to make representations to President Wilson in such matters, for reasons you will readily appreciate.").

[95] Letter from Justice Brewer to Day, Aug. 13, 1905, Day Papers, Box 20, Folder 1.

[96] *Id.* ("[I]t is not impossible that some overzealous friend of reform or grave enemy of the court or yourself may, when finding that your son is your stenographer, criticize the appointment."). President Taft later appointed Day's oldest son, William L. Day, to the position of United States District Judge for Northern Ohio. *Justice Day's Son A Judge*, N. Y. TIMES, Apr. 7, 1911, at 7.

[97] Morrow, *supra* note 36. Justice Day, however, cautioned that it would be a mistake for a lawyer, as a minister of justice, to look upon his profession as a stepping stone into politics.

[98] Letter from Day to White, Sept. 10, 1912, Day Papers, Box 2, Letterpress Book 3.

[99] *Id.* Day spent every summer at his cottage on Mackinac Island in Michigan.

[100] *Id.* Day reported that the "so called country districts" voted heavily against this amendment.

[101] *See* Letter from Hughes to Day, Apr. 16, 1916, Day Papers, Box 31, Folder 3 ("I rejoiced in the messages recently sent you by the Committee of the American Bar Association and by the Ohio Society—voicing not only deep respect but personal affection. Your name is never mentioned [but] with the most sincere expression of friendship."); *see also* Letter from Hughes to Day, Jul. 9, 1916, Day Papers, Box 31, Folder 3 ("Never shall I forget our cordial relation as brother Judges and I hope that in the years to come we may have abundant opportunities to meet and 'reweave the old charm.'"); letter from Hughes to Day, Dec. 31, 1916, Day Papers, Box 31, Folder 3 (inviting Day to visit Hughes in New York City and describing Day's letter as a "drink from the old spring").

[102] *See, e.g.,* Letter from John Lombard to Day, Sept. 4, 1916, Day Papers, Box 31, Folder 4 ("The sentiment [in Ohio] seems to be that Justice Hughes is losing votes among the voters at large by his campaigning in the West, and among the Progressives because of his 'stand-pat-ism,' . . . I don't know much about it, but I think he can lose a lot of votes on these grounds and still win on his other merits. Anyway, I don't think he would shake his fist first and then his finger, as Wilson does.")

[103] Letter from White to Day, June 15, 1916, Day Papers, Box 31, Folder 6.

[104] Editorial, *Candidate Hughes Has Not Voted Since 1909*, WILKES-BARRE TIMES LEADER, Oct. 11, 1916, at 11.

[105] Letter from H. G. Murphy to Day, Sept. 18, 1916, Day Papers, Box 31, Folder 5.

[106] *See* Letter from White to Day, Nov. 5, 1916, Day Papers, Box 31, Folder 6 ("One of the blessings of my life is the kindness you ever show me and which touches me deeply."); *see also* letter from White to Day, Apr. 17, 1918, Day Papers, Box 33, Folder 4 ("I cannot stay the years as they flow, but I can wish with all my heart that their current as they come may be laden with blessed things for you.").

[107] Clara Gruening Stillman, *Only When We Are Wrought to a High Emotionalism by the Spectacle of Two Million Child Workers in This Country Will Their Slavery Be Abolished, George Creel Holds*, N. Y. TRIB., Mar. 22, 1915, at 7 (interviewing George Creel about the urgency of the child labor issue). Following U.S . entry into World War I, Wilson tabbed Creel to head his newly created war propaganda agency, the Committee on Public Information.

[108] George Creel, Op-Ed., *Democratic Catalogue of President's Enemies*, SAN JOSE EVENING NEWS, Oct. 13, 1916, at 1 ("Never was choice so plain. On one side a president who has fought for the people and for America; on the other side every sinister force that has been poisoning the wells of democracy."). Creel declared that "[all of Wall Street] is for Hughes, pouring their millions into his campaign funds, and supporting him with mad enthusiasm in those magazines and newspapers that they own." *Id.*

[109] George Creel, Untitled Op-Ed., SAN JOSE EVENING NEWS, Oct. 24, 1916, at 2. *See also* George Creel, Op-Ed., *The Hughes Myth*, LEXINGTON HERALD, Oct. 31, 1916, at 1 (criticizing Hughes's record as Governor of New York); George Creel, Op-Ed., *Holds Charles E. Hughes An Absolute Reactionary*, WILKES-BARRE TIMES LEADER, Oct. 19, 1916, at 2 (calling the idea that Hughes is progressive an "amazing fiction" and describing Hughes as "iron in his standpatism").

[110] *Creel Scolds Women Who Support Hughes*, N.Y. TRIB., Oct. 18, 1916, at 5.

[111] Letter from Stephen A. Day to Justice Day, June 10, 1918, Day Papers, Box 33, Folder 1.

[112] The Republican Party criticized the Adamson Act, upheld by the Court in *Wilson v. New* during the 1916 campaign. George G. Hill, Op-Ed., *Roosevelt Friend of Labor Says G. O.P.*, SAN JOSE EVENING NEWS, Nov. 3, 1916, at 2 ("[The Adamson Act] is going to do more injury than good to labor. It is obvious that the only men it can help are the members of the railway brotherhoods, and they constitute only 20 percent of the railway employees.").

[113] Letter from Justice Day to William L. Day, Jan. 15, 1906, Day Papers, Box 3, Letterpress Book 1 (advising his oldest son after he was elected City Solicitor to "[k]eep in the middle of the road").

[114] While Day's anti-labor legislation trend is noticeable following the 1916 election, *Bunting v. Oregon* stands out as an exception. 243 U.S . 426, 438 (1917) (joining Justice McKenna's majority upholding an Oregon law regulating maximum hours for mill workers).

[115] *Notes*, *supra* note 78.

[116] *Id.* at 216–17.

[117] *Id.*

[118] *Mr. Justice Day*, JACKSON DAILY CITIZEN, Feb. 28, 1903, at 4 [hereinafter *Mr. Justice Day*].

[119] *Id.*

[120] *See* McPherson, *supra* note 79.

[121] *Death Takes Justice Day*, L. A. TIMES, Jul. 10, 1923, at 12 [hereinafter *Death Takes Day*].

[122] *Mr. Justice Day*, *supra* note 118.

[123] *Death Takes Day*, *supra* note 121.

[124] *Id.*; *see also Judge William R. Day*, WORCESTER DAILY SPY, Jan. 17, 1903, at 6 ("He is a scholarly man, quiet in his tastes, a lawyer of great ability, and a learned and skillful judge. He does not care for society, in the ordinary acceptance of the word. To life in Washington he preferred rather his chosen sphere of action at home.").

[125] *See* McPherson, *supra* note 79.

[126] Albert F. Baldwin, *The Supreme Court Justices*, OUTLOOK, Jan. 28, 1911, at 158.

[127] *Day's Career*, *supra* note 79.

[128] *Id.*

[129] Illness forced Day to resign before he could take office after President Benjamin Harrison nominated him to the federal bench in Ohio in 1889. *Will Go on the Supreme Bench*, CLEVELAND PLAIN DEALER, Jan. 27, 1903, at 5; *see also Day's Career*, *supra* note 79 ("Justice Day's health was never good . . . He was of slight physique, and never took part in any games or sports.").

[130] *See, e.g.*, Lester, *supra* note 83 ("In appearance Mr. Day is not impressive . . . He is thin to the point of cadaverousness and his walk would never earn him a fortune on the stage.").

[131] *U.S. Justice Very Ill of Grip*, PAWTUCKET TIMES, Mar. 12, 1903, at 1.

[132] *Justice May Retire*, SAN JOSE EVENING NEWS, Apr. 17, 1906, at 2.

[133] *Death Takes Day*, *supra* note 121.

The Clerks of the Four Horsemen (Part II, George Sutherland and Pierce Butler)

BARRY CUSHMAN

This is the second part of a two-part article. Please see volume 39, no. 3, pages 368-424 for the Introduction and Part I, discussing the clerks to James C. McReynolds and Willis Van Devanter.

The Sutherland Clerks

Justice Sutherland served from 1922 to 1938, but during that time he had only four clerks. The first, whom he inherited from his predecessor in office, was a career civil servant. The others were all graduates of George Washington University's Law School, and went on to enjoy interesting and highly successful careers in private practice.

Samuel Edward Widdifield was an 1898 graduate of the Detroit College of Law who clerked for Sutherland during the 1922 and 1923 Terms.[1] Widdifield might be characterized as a career or serial clerk: he clerked for four different Justices. Born in Uxbridge, Ontario, Widdifield moved to Michigan as a young boy in 1880 and was naturalized in Detroit in 1896. He was admitted to practice in Michigan in 1898, and in Massachusetts in 1904. Early in his career, Widdifield handled collections in the office of a Detroit lawyer and practiced with the Traverse City, Michigan firm of Gilbert & Widdifield. He then moved to Pittsfield, Massachusetts, where he was secretary and law assistant to the president of the Stanley Electrical Company.[2] He first came to the Court in 1904 at the age of twenty-nine to clerk for Justice Rufus Peckham. After Peckham's death in 1909, Widdifield clerked for Justice Joseph Rucker Lamar during the 1910 and 1911 Terms.[3] Following his clerkship with Justice Lamar, Widdifield engaged briefly in private practice in Lansing, Michigan before returning to Washington to serve as a secretary to Senator James P. Clarke of Arkansas and as a messenger to the Senate Commerce Committee from 1913 to 1916.[4] He then returned to the Court to clerk for Justice John Hessin Clarke,

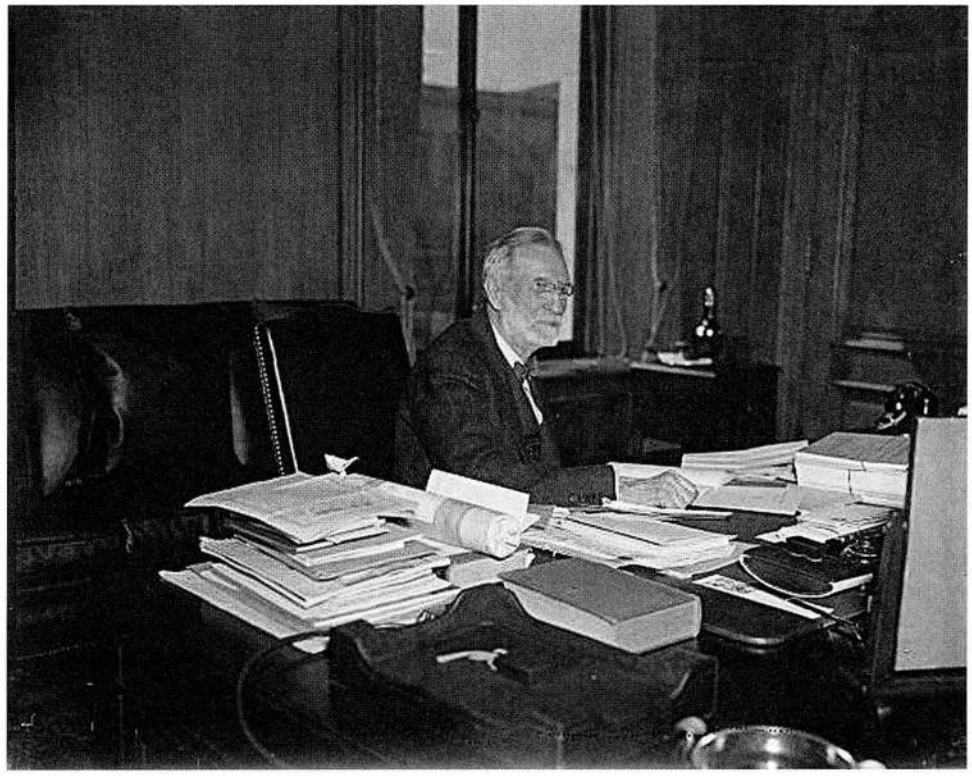
and, upon Clarke's resignation in 1922, Widdifield moved to the chambers of Clarke's successor, Justice Sutherland.[5] After two years with Sutherland, Widdifield left to serve for more than five years as assistant counsel to the German Mixed Claims Commission in the State Department. In 1930 he operated his own real estate business in North Beach Maryland, where he served as mayor. From December of 1930 to August of 1931 he worked as an assistant clerk to the House Judiciary Committee. Widdifield then returned to the Court as assistant clerk, a position that he held for eighteen years until his retirement in 1949.[6] In 1937 he sought to return to the position of law clerk, unsuccessfully applying for a position with the incoming Justice Hugo Black.[7] He died in 1960 at the age of eighty-five, a widower survived by two children, six grandchildren, and one great-grandchild.[8]

Alan E. Gray clerked for Sutherland from the 1924 term through the 1930 term.[9] Gray may have been the most colorful of the Sutherland clerks. His father was a Scottish immigrant who came to Minnesota at a young age and settled in Grafton, North Dakota in 1891.[10] Alan was born in 1899, took his B.A. from the University of North Dakota in 1921, and received his law degree from George Washington University in 1924.[11] That year he married fellow Graftonite Grace Lunding Hope, and the couple moved to Chevy Chase, Maryland.[12] Following his clerkship with Sutherland, Gray remained for several years in Washington,[13] where he engaged in a law practice focused on tax matters.[14] By 1938, the Grays had moved to Southern California, where they divorced by 1948. Gray quickly married Joan Kettering in 1949, but was as quickly divorced from her the following year. He then married Jan Hanson Fisher, who left him a widower. In 1967 he married his old Grafton schoolmate Helen Tombs, to whom he remained married until his death.[15]

Gray practiced in Southern California for the balance of his career.[16] He continued to specialize in the tax area,[17] and was recognized as an "income tax expert."[18] This expertise brought him into contact with a number of celebrities in the entertainment industry. He represented George Burns and Gracie Allen in their 1938 claim for a refund on their 1935 state income taxes.[19] From 1937 to 1941 he prepared the income tax returns of W.C. Fields, and was called as a witness in the sensational 1949 trial over the comedian's estate.[20] And in 1951 he represented actor Charles Coburn and four of his poker buddies charged with flouting the gambling ordinance of Beverly Hills.[21] He kept an office in Los Angeles until 1984, when he died at the age of eighty-four.[22] His estate plan created an endowment with the University of North Dakota Foundation, which the University has used to establish a law professorship in his name.[23]

Justice Sutherland's most distinguished alumnus was Francis Robison Kirkham, who clerked for the Justice during part of the 1930 Term and for the 1931, 1932, and 1933 Terms.[24] Kirkham was born in Fillmore, Utah in 1904. His grandparents were among the earliest Mormon pioneers to settle in the Salt Lake Valley, and his mother and father met at Brigham Young University (BYU). His father went on to take a bachelor's degree at the University of Michigan, a law degree from the University of Utah, and a Ph.D. in education from the University of California at Berkeley. The senior Kirkham taught at BYU, served as Utah's director of education, and was the superintendent of the largest school district in the state. The Kirkham parents emphasized the importance of education: each of their six children graduated from college, and each of the three sons obtained an advanced degree. Francis' brother, Don, became a distinguished physicist.[25]

Kirkham was admitted to the Naval Academy at Annapolis for college, but at his father's insistence remained in Utah, studying for two years at the University of Utah and then at the Utah Agricultural College. As a young man he served in the National Guard, did a two-year mission for



Justice George Sutherland served on the Supreme Court from 1922 to 1938, but employed only four clerks during his tenure. He inherited his first clerk, S. Edward Widdifield, from his predecessor, Justice John H. Clarke; three others were graduates of George Washington University's law school.

the LDS Church in England, and spent six adventure-filled months backpacking around Europe and the Middle East with a friend. For a time he worked at some of the farms his father owned, but regional droughts drove the father to New York to serve as the director of the National Child Welfare Association, and the son in 1927 to George Washington University (GWU) to complete his undergraduate degree and to study law.[26]

Kirkham received his A.B. from GWU in 1930, and graduated first in his law school class the following year. To pay his way through school, he worked part-time at the Interstate Commerce Commission and later in the Washington office of the Cravath firm. During Kirkham's final year of law school, a chance conversation between Justice Sutherland and Bill Allison, a Kirkham friend who was deputy clerk of the Supreme Court, resulted in Kirkham being invited to interview with the Justice. Sutherland winnowed the field to two candidates, Kirkham and a graduate of Columbia University Law School. Sutherland then arranged a competition for the finalists. He gave each of them several sets of the briefs and records of cases in the Supreme Court, and asked them to prepare memoranda for him. Kirkham labored all night in the law school library on the assignment, and Sutherland selected him for the position. Kirkham worked part-time for Sutherland alongside Alan Gray while he was completing his studies and taking the D.C. bar examination, on which Sutherland informed him that he received the highest score among the 480 students sitting for that administration. He began clerking for Sutherland full time at the outset of the 1931 Term.[27]

As Sutherland's law clerk, Kirkham prepared statements analyzing petitions for *certiorari* and making recommendations

concerning whether the writs should be granted. He also conducted research for the opinions that Sutherland wrote. Among his more notable contributions were the historical research appearing in Sutherland's 1932 majority opinion in *Powell v. Alabama*,[28] the decision holding that the Due Process Clause entitled the "Scottsboro Boys" to competent defense counsel in a capital case, and the historical research appearing in Sutherland's dissent from *Home Building & Loan Association v. Blaisdell*,[29] the 1934 decision upholding the Minnesota Mortgage Moratorium.

Kirkham described the working atmosphere with Sutherland as "a very close personal relationship . . . he was an extraordinarily wonderful person to be with and work with. A warm nature, very brilliant scholar, extremely appreciative . . . you'd just do anything and he'd overpraise you for it and that'd make you work your tail off to do something better." Kirkham recalled an occasion on which Sutherland asked him to see whether he could find some authority in support of a particular statement contained in one of his draft opinions. Kirkham searched diligently, but came up empty. He went to Sutherland and said to him, "'Mr. Justice, I just can't find anything. Your statement is right, it should be the law, I just can't find the case that says that it is.'" Sutherland "looked up and smiled, picked up his pen, signed his opinion and said, 'Well, it is now.'"[30] At the conclusion of his clerkship with Sutherland in the summer of 1934, Kirkham stayed on to clerk with the "indefatigable" Chief Justice Hughes until December of 1935.[31]

In 1929 Kirkham married Ellis Musser, whom he had known from his youth in Utah. Ellis, who had studied at the University of Utah and Mills College before marrying Francis, moved to Washington and completed her undergraduate studies at George Washington University in 1931. While Francis was working day and night clerking for Sutherland and Hughes, Ellis worked for the National Academy of Sciences, spent six months traveling in Europe and the Middle East, and completed her first year of medical school. Together the couple would have four children.[32] Ellis was the older sister of Milton Musser, and Kirkham played a role in facilitating Milton's clerkship with Justice McReynolds during the Court's 1938 and 1939 Terms.[33]

Ellis' medical studies were cut short when Francis concluded his clerkship with Hughes in December of 1935. Though Francis had accepted an offer to join the Cravath firm, the Kirkhams were apprehensive about living in New York. Judge Harold Stephens of the U.S. Circuit Court of Appeals for the D.C. Circuit, who was an old family friend, intervened and persuaded Kirkham to consider opportunities in other cities. On his own initiative, Stephens wrote letters of introduction for Kirkham to numerous firms around the country. Cravath gracefully released Kirkham from his acceptance, and, after interviewing in several cities, the Kirkhams decided to move to San Francisco in 1936 to join the firm of Pillsbury, Madison & Sutro. As his partner James O'Brien relates, "His talents and skill were so quickly recognized that even senior partners soon vied for his help in major cases making their way to the Supreme Court." Kirkham became a partner at Pillsbury in 1940, and remained with the firm until 1960, when he left to serve as general counsel to Standard Oil. He returned to Pillsbury in 1970, retiring as senior partner in 1991.[34]

During his career Kirkham represented many of his clients before the Supreme Court of the United States.[35] He became a Fellow of the American College of Trial Lawyers, a member of the American Law Institute, the chairman of the American Bar Association's section on antitrust law, and a member of two important national commissions on law reform: the Attorney General's National Committee to Study the Antitrust Laws (1953–55), and the National Commission on the Revision of the Federal Appellate

System (1973). He was also the author of two highly regarded works, **The Jurisdiction of the Supreme Court of the United States,** and **General Orders and Forms in Bankruptcy.**[36] He was a member of the American Judicature Society, the American Society of International Law, the Order of the Coif, and several clubs. He received the George Washington University Alumni Achievement Award in 1970 and the University of Utah Alumni Merit Honor Award in 1976. The Law School at Brigham Young University, on whose Board of Visitors he served, established a professorship in his name in 1989. He also served on the Board of Visitors of the University of Chicago Law School. He died in 1996 at the age of ninety-two.[37]

At Pillsbury, Kirkham always wore a dark blue suit, a white shirt, black shoes, and a black tie.[38] His partners spoke of him with unreserved admiration. Turner H. McBaine described him as "an absolutely outstanding man: superb intellect, marvelous personality, ability to get along with people, and a man full of enthusiasm for what he was doing." "His legal writing was excellent," and his briefs were "a pleasure to read," "not only technically outstanding, but artistically outstanding, as a matter of the English language." Kirkham's "habits were not always regular, in the sense that no matter what time he started working in the morning, if he got into something, he might well be there at three the next morning. And he produced,time after time, legal miracles."[39] Wallace Kaapcke similarly portrays Kirkham as "a wonderful fellow," "the most welcoming and warm, friendly person," a "kind, accomplished gentleman."[40] Kaapcke marveled at the way in which Kirkham "accomplished the brilliant results that he often did" in difficult cases, achieving "the impossible."[41] For example, explains James O'Brien, "Against all odds, he persuaded the antitrust division to permit the merger of Standard Oil Company of Kentucky and Standard Oil of California."[42] John Bates explains that Kirkham "was always looked upon as being the most powerful legal intellect in the firm. I mean he was the bright star; he was the real genius. He took on all the complicated antitrust cases." Kirkham "had a really powerful reputation in the legal community, and he deserved every bit of it. And yet he was and is a very humble, likeable, politic person."[43] Yet Kirkham was not a retiring bookworm. Even as he got older, "[h]e'd still go any anyplace, anytime."[44] As James O'Brien put it, "Kirkham is the kind of lawyer . . . that was prepared to take off his coat and get down and wrestle on the barroom floor."[45]

O'Brien, who wrote the introduction to the interview that Kirkham provided for the Pillsbury, Madison & Sutro Oral History Series, was particularly effusive in his praise. "Few men have come to the profession of law with greater gifts of mind, spirit, and will," O'Brien wrote. "None has used those exceptional gifts and experiences with greater skill in achieving a national reputation as a superb advocate" and "a devoted and compassionate friend." Kirkham had "a rare combination of qualities: a strong constitution, boundless energy and vitality, resourcefulness, the will and tenacity to master his profession," and "confidence in his capacity to deal with any issue that involved the law." "His pioneer background" had given him "a sturdy independence, a sense of responsibility," and "individual initiative." "Few lawyers" could "match the quality of his writing: clear and simple, plain and compelling, seemingly effortless." Kirkham was a "tall, handsome figure, dignified, courteous, with a warm, confident personality, a quick and easy smile, a resonant voice." He was "a formidable courtroom adversary" who had "made friends of his adversaries." O'Brien described Kirkham as a gentle, compassionate, modest person who loved "life," "nature," "song and laughter," "his myriad friends," and "his beautiful family." He

was "a great lawyer" who "fashioned a memorable career at the Bar." It was, O'Brien concluded, "difficult to conceive that a single lawyer [could] have achieved so much in one lifetime."[46]

John Wiley Cragun was Sutherland's final clerk, serving from the 1934 Term through the Justice's retirement during the 1937 Term.[47] Cragun was born in Ogden, Utah in 1906. He arrived in Washington in 1924, and worked as a clerk, typist, and stenographer in the Department of the Interior for several years before receiving his A.B. from George Washington University in 1932.[48] He then attended George Washington's law school while working simultaneously as a legal stenographer in the Washington office of Cravath, Swaine, & Moore. He compiled "an excellent academic record," graduated in 1934, and was promptly admitted to the D.C. bar.[49] During his clerkship with Sutherland, Cragun occasionally took on special assignments for Chief Justice Hughes, and "established among the Justices and the employees of the Court a reputation for excellence, which was later to play an important role in his professional practice."[50]

Sutherland hired two clerks originally from his home state of Utah, Francis R. Kirkham and John W. Cragun. Cragun (above) went into private practice and became an expert in administrative law. He also represented several Native American tribes.

For the rest of his life, Cragun engaged in an active Washington practice. Following his clerkship, Cragun entered a successful association and later partnership with what would become the firm of Wilkinson, Cragun & Barker.[51] He went out on his own for five years beginning in 1945, and in 1950 and 1951 was associated with the specialized tax practice of D.C. lawyer Robert Ash.[52] In 1951 he returned to the Wilkinson firm as a partner, and remained there until his death at the age of sixty-two in 1969.[53] His clients included the National Grange and a large number of Native American tribes.[54] He was remembered as "an unusually expert brief writer" who "was often employed to prepare petitions for writs of *certiorari* to the Supreme Court of the United States." Indeed, a mid-century survey indicated that "he had achieved a higher degree of success in obtaining grants of *certiorari* than any other private practitioner."[55]

Cragun was a lawyer of national prominence. He served on a wide variety of professional committees, including as Chairman of the American Bar Association's Section on Administrative Law and Chairman of the ABA's Special Committee on the Code of Administrative Procedure.[56] In the late 1940 s, Cragun lectured on civil procedure at his *alma mater*. He was a member of numerous clubs, and was the founder and Recording Secretary of the Society for Appropriate Recognition of Elegant Mixed Metaphors. Cragun married three times. His first marriage, to Hazel Gabbard in 1931, produced three children before ending in divorce. He remarried to Hilda Henderson in 1957, but she left him widowed seven years later. His third and final marriage, to Priscilla A. Martin in 1965, endured until complications from emphysema brought about his untimely demise nearly four years later.[57]

The Butler Clerks

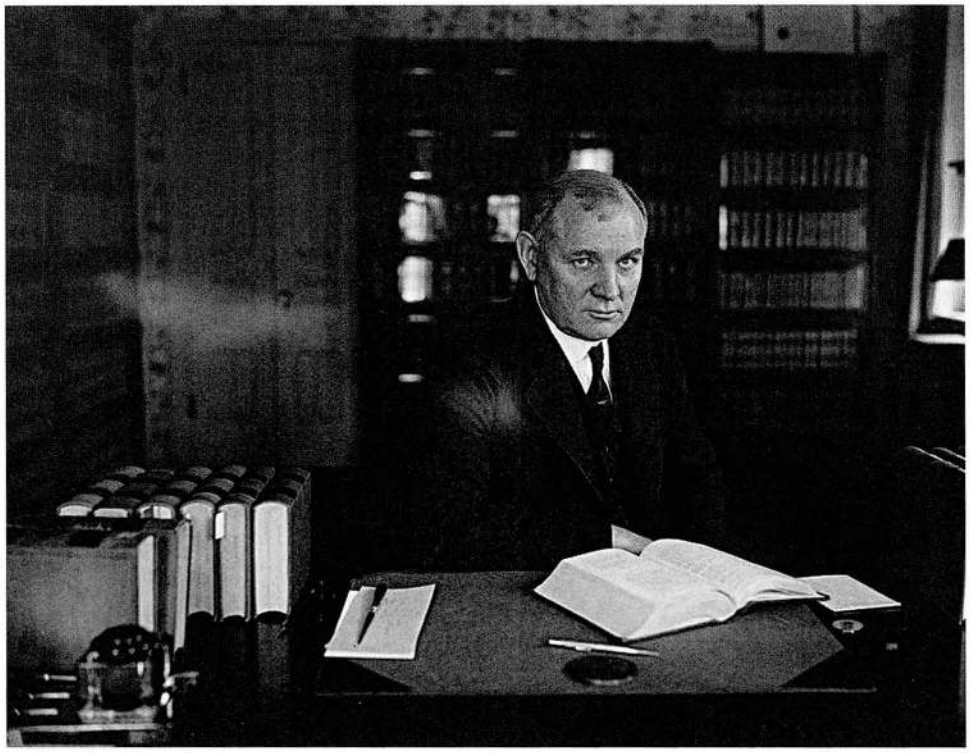
Although Congress had appropriated funds in 1919 so that the Justices could hire a law clerk and a stenographer, Justice Sutherland managed with just one clerk. Justice Butler, by contrast, employed two. One, John Francis Cotter, remained in Butler's employ for the Justice's entire tenure on the Court. Others joined Cotter for shorter stints of service.[58]

Cotter was born in 1900 in the District of Columbia, and graduated from its Central High School. As a young man he worked as a messenger in the Treasury Department, a stenographer for the Interstate Commerce Commission, and a clerk for the U.S. Shipping Board and the Census Bureau. He also served briefly in the Army during World War I.[59] He received his law degree from Catholic University in 1921,[60] and was admitted to the District of Columbia Bar in September of that year.[61] After serving as a stenographer and law clerk to a local attorney for a little over a year, the young bachelor went to work for Butler in February of 1923, shortly after the Justice took his seat.[62] He was hired as a "stenographic clerk" at a salary of $2,000, but was promoted to law clerk at a salary of $3,600 for the 1925 Term.[63]

At Butler's death, it was Cotter who carried out Butler's instructions that his Court papers be destroyed.[64] Cotter also served as the administrator of Butler's estate, and prepared his estate tax returns.[65] Thereafter he embarked upon a successful career as an attorney in the Lands Division of the Justice Department, for which he is listed as counsel in a series of appeals before the federal courts between 1940 and 1956.[66] In 1942 the now-confirmed bachelor enlisted in the Army, and within fewer than four years he had risen to the rank of Major. He served as an officer in the J.A.G. Corps and as a member of the Claims Commission sitting in France, Belgium, and the United Kingdom.[67] After his return from military leave he resumed his duties in the Lands Division, from which he retired in the latter part of 1955.[68] From 1957 Martindale-Hubbell lists him as a lawyer in private, perhaps solo, practice, in Washington, D.C.,[69] though his absence from other public records during this period suggests that he may have been in semi-retirement. He died in November of 1978.[70]

William A.D. Dyke, who clerked for Justice Mahlon Pitney for the portion of the 1922 Term preceding the Justice's stroke and retirement in December of that year, spent only the remainder of that Term in Butler's chambers.[71] Before clerking for Pitney, Dyke worked as an assistant clerk in the U.S. Senate from 1918 to 1921[72] and was initiated into the Order of the Elks.[73] In 1921, he received an L.L.B. and a M.P.L. from Georgetown University, where he was the class poet. After leaving Butler, Dyke returned to Georgetown to earn an M.D. in 1929, and went on to pursue a medical career.[74] He is listed as a First Lieutenant serving in the Medical Corps of the U.S. Army Reserve at a Pennsylvania Civilian Conservation Corps camp in 1933.[75] Dr. Dyke died in an automobile accident in 1941 at the young age of forty-two, leaving a widow, Cuba A. Dyke. Seven years later, Mrs. Dyke met a dramatic end, collapsing and dying immediately following Christmas dinner. The couple, who are buried side by side at Arlington National Cemetery, apparently had no children.[76]

Norris Darrell joined Cotter in Butler's chambers as a law clerk for the 1923 and 1924 Terms.[77] Darrell was born on St. Kitts in 1899, was brought by his parents to the United States the following year, and was naturalized in 1910. The son of a "modestly paid clergyman," as he would later describe his father, he served in the infantry during World War I. In 1923, he received his L.L.B. from the University of Minnesota, where he was elected to the Order of the Coif. The summer following his graduation from law school, Darrell was traveling on the West Coast and contemplating a career practicing



Pierce Butler (above) employed two clerks each Term during his service on the Court from 1923 to 1939. John Francis Cotter, a graduate of Catholic University Law School, remained in Butler's employ for the Justice's entire tenure, while six other clerks joined him for shorter stints of service. The Minnesota Justice hired several graduates from the University of Minnesota Law School; he himself had "read law" there after earning an undergraduate degree from Carleton College.

in that region when he received a telephone call from the dean of his *alma mater*. Dean Everett Fraser informed Darrell that Justice Butler had asked him to recommend a member of the graduating class to serve as a law clerk, and that Fraser had recommended Darrell. Fraser asked Darrell to cut his western trip short and to return to Minneapolis so that he might meet with Justice Butler to discuss the possibility. The conversation must have gone well, as Darrell soon found himself at Butler's elbow in Washington.[78]

The clerkship with Butler changed the course of Darrell's professional career. The Justice urged him to return to Minneapolis to practice, insisting that he would enjoy a fuller and happier life there.[79] But Professor Noel Dowling, who had taught Darrell at Minnesota and recently moved to Columbia, encouraged the young lawyer to consider practicing in New York. Dowling enlisted former Columbia dean Justice Harlan Fiske Stone in his campaign of persuasion, and it was at Stone's urging that Darrell interviewed with Sullivan & Cromwell. Darrell was offered a position with Sullivan and two other Wall Street firms, and his future path was set during a consultation with Dean Fraser on a return trip to Minneapolis. Darrell held his breath as Fraser examined the letterhead of each of the firms listing their partners. Then, Darrell later reported, "he suddenly threw down one of them, pointed to the name of a partner far down the list who was unknown to me and said that I should by all means go there because he had taught that man when he was teaching Property: Future Interests at a law school in Washington, D.C., that the man never kept notes in class as expected—his notebook being usually blank except for doodles—but

NORRIS DARRELL . . . Minneapolis

Law

Alpha Tau Omega; Phi Delta Phi; Editorial Board Minnesota Law Review, 3; Garrick Club 1, 2; President Garrick Club 3; A Night at an Inn, 1; In the Zone, 2; Bound East for Cardiff, 2; Captain Brassbound's Conversion, 3; Masquer 2, 3; Daily Reporter, 1; Sec'y-Treas. Mid-Law Class; Tau Upsilon Kappa; Student Dramatic Advisory Committee.

Norris Darrell, who clerked alongside Cotter during the 1923 and 1924 Terms, was recommended by Everett Fraser, dean of the University of Minnesota Law School. Darrell went on to develop a renowned practice in tax law at Sullivan & Cromwell.

that he regularly had the highest marks in his class." The firm was Sullivan & Cromwell; the doodling student was John Foster Dulles. Near the end of his career Darrell wrote that following Fraser's advice was a decision that he never regretted.[80]

In his conversation with Darrell about his future, Butler told him about two of his former associates from Minnesota who had pursued divergent professional paths. One accepted an offer with a New York firm and "worked hard in his practice, made a lot of money and gave a lot to charity but he never married. He rode the subways, was little known in his community and played no part in community affairs." The other lawyer declined a New York firm's offer and instead remained in St. Paul. He "lived very comfortably with his wife and family on his income of a hundred thousand to one hundred fifty thousand dollars a year, was widely known and greatly admired in his community in which nothing of great importance happened without his participation." Years later, Butler and Darrell "had a good laugh" over the story and the subsequent history of its protagonists. The man who went to New York was Carl Taylor. The man who stayed in St. Paul was William D. Mitchell, who went on to become Attorney General of the United States. After concluding his service in Washington, however, Mitchell did not return to St. Paul. Instead, he moved to New York and joined Taylor's firm.[81]

Darrell went on to enjoy a distinguished career with Sullivan & Cromwell in New York, Paris, and Berlin. He was made a partner in 1934, eventually becoming both head of the tax group and vice-chairman of the firm, and remained with Sullivan & Cromwell as counsel following his retirement from the partnership in 1976. He served on the boards of numerous corporations and professional organizations, including the American Law Institute (ALI), of which he was president for fifteen years and chairman of the council thereafter. He was also the chairman of the Supervisory Committee of the ALI Tax Project that culminated in the Internal Revenue Code of 1954. Darrell received several awards recognizing his professional achievements, including the University of Minnesota's Outstanding Achievement Award in 1965, the Marshall-Wythe Medallion from the College of William and Mary in 1967, and the New York Bar Association's Gold Medal Award for Distinguished Service in the Law in 1978. In 1953, the Eisenhower Administration approached Darrell about taking the position of undersecretary of the Treasury. Darrell didn't want the job and didn't want to leave New York, but also didn't feel that he could say no. Fortuitously, his senior partner, John Foster Dulles, who did not know of Darrell's preferences, inadvertently helped Darrell to wriggle off the hook. Dulles had been named Secretary of State, and his brother Allen, also

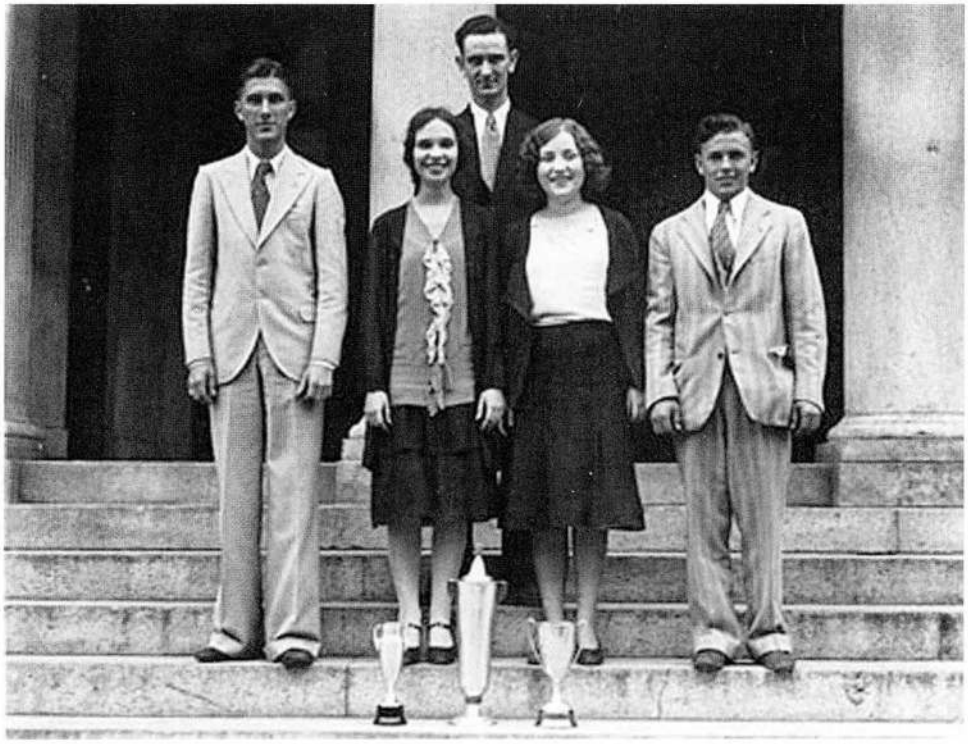
a Sullivan & Cromwell partner, had been tapped to head the CIA. As Dulles and Eisenhower were returning from a trip to Hawaii, Dulles talked the President out of the Darrell appointment, suggesting that it would be unfair to ask three senior partners from the same firm to serve the Administration at the same time. Dulles wrote to Leonard Hall, the head of the Eisenhower transition team, that were the Administration to appoint three Sullivan & Cromwell partners to such important posts, "a rather frightening picture could be drawn by unfriendly persons." A relieved Darrell thus was able to remain in his beloved New York.[82]

Darrell married Doris Clare Williams in 1925, and together they had two sons. Doris passed away in 1943, and in 1945 Darrell married Mary Hand Churchill, the divorced daughter of Judge Learned Hand, the liberal icon who had derided Butler as one of the "mastiffs" back in the 1920 s and 1930 s.[83] It was Darrell who, as literary executor of Hand's estate, persuaded Gerald Gunther to write Hand's biography.[84] In 1966 Darrell joined Warren Christopher, Lloyd Cutler, Erwin Griswold, Burke Marshall, Louis Pollak, Eugene Rostow, and ten other leading lawyers in a letter to Congress supporting the constitutionality of the proposed Civil Rights Act of 1966.[85] Darrell died in Manhattan in 1989 at the age of ninety, survived by Mary, the two sons from his first marriage, a stepson, and two grandchildren.[86]

After Darrell left Butler's employ, Cotter was promoted to law clerk and served alone during the 1925 and 1926 Terms. Butler hired Richard L. Sullivan to work alongside Cotter during the 1927 Term at the "stenographic clerk" salary.[87] Sullivan was born in 1901, and by 1926 had graduated from both college and law school at the University of Minnesota.[88] By the early 1930 s, Sullivan had been admitted to the Supreme Court bar and become associated with the Manhattan firm of Kirlin, Campbell, Hickox, Keating, & McGrann.[89] He was a member of the Maritime Law Association of the United States, and his practice focused on admiralty matters.[90] In 1933 he became a member of the Aeronautics Committee of the Bar of the City of New York, on which he served until at least 1937.[91] He practiced with the Kirlin firm until 1953.[92] He died in 1970 in Oakland, California.[93]

William Devereaux Donnelly, also a graduate of the University of Minnesota Law School, served as a Butler clerk from the 1928 Term through the 1936 Term. He went on to private practice and argued several cases before the Court, most notably the landmark Free Exercise case, *Sherbert v. Verner* (1963). Like Adell Sherbert, the plaintiff he represented, Donnelly was a Seventh-day Adventist, and he represented his church in other legal proceedings as well.

William Devereaux Donnelly served as Cotter's co-clerk from the 1928 Term through the 1936 Term.[94] He earned the lower "stenographer" salary, but performed all the duties of a law clerk. Donnelly was born in Cass Lake, Minnesota in 1905, and graduated from Central High School in Minneapolis. He came to Washington in 1928 after taking his law degree from the University of Minnesota, where he also received his bachelor's degree. He married Patricia Arnold in 1932. After clerking for Butler, he worked as an attorney



Luther E. "L.E." Jones, Jr. co-clerked with Cotter during the 1938 Term and until the Justice's death in November of 1939. Before clerking for Butler, Jones (left) served on the staff of freshman Congressman Lyndon B. Johnson, who had been his speech coach on the Sam Houston High School debate team (pictured, with Johnson at top, in 1931).

in the Lands Division of the Justice Department from 1937 to 1940, serving as special assistant to the Attorney General in 1939 and 1940.[95] In 1940 he went to work for the newly formed Washington firm of Cummings & Stanley (later Cummings, Stanley, Truitt & Cross).[96] The Cummings in question was, of course, Homer Cummings, Franklin D. Roosevelt's former Attorney General and the author of the infamous Court-packing plan introduced during Donnelly's final year of service with Butler.[97] Donnelly engaged in a widely varied practice with the Cummings firm, ranging from civil and criminal litigation to estate planning.[98] Shortly after joining the firm, for instance, Donnelly assisted Cummings in representing the notorious Chicago gambler, William R. Johnson, on charges of tax evasion. In 1946, Donnelly was called before a special federal grand jury looking into how Johnson had managed to stay out of prison for five-and-a-half years following his conviction.[99]

Donnelly was admitted to the Supreme Court bar in 1939,[100] and periodically briefed and argued cases before the Court.[101] The capstone of his career as a Supreme Court advocate came with his successful representation of the petitioner in the landmark Free Exercise case of *Sherbert v. Verner*.[102] Like Adell Sherbert, Donnelly was a Seventh-Day Adventist, and he represented the Bethesda community in the Church's General Conference.[103] Donnelly represented his church in other legal proceedings as well,[104] and in 1955 testified on its behalf at hearings on proposed amendments to the Fair Labor Standards Act held before the Senate Committee on Labor and Public Welfare.[105] In 1964 he joined 227 other constitutional scholars and lawyers in signing a letter to the House Judiciary Committee co-authored by Brandeis clerk

Paul Freund in opposition to the proposed Becker Amendment to the Constitution, which would have overruled the recent school-prayer and devotional-Bible-reading decisions of *Engel v. Vitale* and *Abington School District v. Schempp*.[106]

Donnelly was a partner in the Cummings firm by 1945,[107] and remained with the firm until 1956,[108] when he established his own solo practice.[109] A decade later he formed a partnership with a young lawyer named Gerald Golin,[110] and he continued to practice with Donnelly & Golin until his death in 1975.[111] He was an active member of the District of Columbia Bar Association,[112] where he served on committees with John Cragun.[113] He also belonged to the University Club and the Congressional Country Club. A widower, he died of a stroke at the age of sixty-nine, leaving four children.[114]

Irving Clark joined Butler for the 1937 term,[115] immediately following his graduation from Harvard Law School. A native of Duluth, Clark received his bachelor's degree in literature and philosophy from the University of Minnesota in 1934. In 1938, the Justice's son Francis met Clark while visiting the elder Butler in Washington, and he asked Clark to join his St. Paul firm upon the completion of his clerkship. Excepting his service in the Army during the Second World War, Clark remained with Doherty, Rumble & Butler from 1938 until his retirement in 1985, acting as the firm's managing partner from 1953 to 1975.[116] His practice was varied,[117] but it centered on agricultural cooperatives and nonprofit organizations.[118] He served on the boards of many charitable foundations,[119] and he was the board chairman of the Twin Cities' antipoverty agency in the 1960 s.[120] He died at the age of eighty-four in January of 1997, leaving a widow, three children, and three grandchildren.[121]

Luther E. "L.E." Jones, Jr. was the last clerk to team up with Cotter, working for Butler during the 1938 Term and until the Justice's death in November of 1939.[122] Jones was in some ways Butler's most interesting case, in part because he was a protégé of Lyndon Baines Johnson. Jones was the son of an impoverished druggist, and grew up in a Houston slum from which he was desperate to escape.[123] As a student at Sam Houston High School working part-time as a delivery boy, Jones was remembered as "tall, handsome, brilliant, but stiff and aloof – 'smart as hell, but cold as hell.'"[124] In Jones's senior year of 1930–1931, Johnson came to teach at Sam Houston, and under the tutelage of his new public speaking instructor and debate coach Jones progressed to the finals of the Texas State Debate Championship. His loss by a narrow vote of three-two actually prompted his deeply disappointed and notoriously uncouth coach to vomit on the spot.[125] After his graduation in 1931, Jones worked his way through two years at Rice University (then Rice Institute), but he feared that he would be unable to secure employment upon graduation. Johnson had in the meantime left teaching to become secretary to Congressman Richard M. Kleberg, and asked Jones to come to Washington to serve on Kleberg's staff at a salary of $1,100 a year. Johnson wrote to him, "'I know you are going places and I'm going to help you get there,'" urging him that the place to begin was in a government position in Washington.[126] Jones insisted that he needed a salary of $1,200, and Johnson cut his own salary in order to provide the extra $100.[127] Jones worked out of the Corpus Christi office from August to December of 1933, when he went to Washington.[128] There he shared a small basement room in the Dodge Hotel with Johnson and Gene Latimer, Jones's high school debate partner who had come to Washington to work for Johnson the preceding summer. Each of the three roommates paid rent of fifteen dollars per month, and shared a bathroom with the adjoining room.[129]

Jones's clerkship with Butler must have seemed like a stroll in the park after working for Lyndon Johnson. Johnson "drove himself

and his staff relentlessly."[130] "They worked phenomenally hard—fourteen-, sixteen-, often eighteen-hour days," frequently seven days a week.[131] Jones reported for work at 7:30 AM and often could be found at his desk at midnight.[132] Johnson forbade them to take a break to drink a cup of coffee, smoke a cigarette, or receive a personal telephone call.[133] "Even going to the bathroom was frowned upon."[134] Johnson "insisted on perfection," Jones recalled, and, when he first started made him rewrite and retype hundreds of letters, no matter how long it took.[135] Johnson would compare members of his staff unfavorably in order to instill competition among them.[136] LBJ reserved his greatest abuse for the scholarly Jones, who was the best educated and most independent and self-contained member of his staff.[137] "He would publicly ridicule any error he found in one of his letters, belittling his style of writing, his spelling, his typing, or any failing that put him in a subordinate position."[138] The "stiff" and "prim" Jones was also the first victim of what became Johnson's lifelong, revolting practice of insisting that subordinates come into the bathroom with him to receive instructions or take dictation while he sat on the toilet defecating.[139] Jones "'would stand with his head and nose averted, and take dictation,'" Latimer later told Robert Caro.[140] For Jones "it was a source of humiliation and a means by which Johnson dominated him or exercised control."[141] Jones was understating the matter when he later reflected that "Lyndon Johnson was a hard man to work for."[142]

"At times, Latimer and Jones found it nearly impossible to keep working" for Johnson. "He was so demanding and occasionally so overbearing and abusive that they periodically wanted to quit."[143] But other considerations led Jones to persevere. First, this child of the Houston slums was very ambitious, and LBJ cultivated that ambition, telling him, "You work hard for me, and I'll help you." Later in life Jones would recall, "I always had the feeling that if I worked for Lyndon Johnson, goodies would come to me . . . I was on the make, too . . . I wanted to improve myself."[144] Second, Jones was personally drawn to Johnson's own talent, energy, and ambition. Years later, Jones would report that "[m]ost people who had anything to do with Lyndon Johnson loved him . . . the people who worked for him liked him. He had some faults, but most people were willing to overlook them because the guy was obviously a genius in politics."[145] "I always felt like we were making history," Jones added.[146] "[T]he atmosphere was full of challenge, and this guy's enthusiasm was just absolutely contagious." Even then, Jones and his co-workers thought it was likely that Johnson would one day be President. They were convinced that he was "going to be a man of destiny."[147] Johnson, whom Jones later remembered as "a steam engine in pants,"[148] drove himself as hard as he drove his staff, and his fierce loyalty to his subordinates inspired reciprocal loyalty from them. "Both Jones and Latimer recall that when all was said and done, they liked, even loved Lyndon Johnson."[149]

One illustration of Johnson's concern for his staff occurred when Jones and Latimer decided to enroll in evening classes at Georgetown's Law School in the fall of 1934. Johnson gave each of them a raise—for Jones it was an additional $150 per year—and made sure that they had two to three hours free each day to study.[150] (Jones turned out to be a diligent student, completing his first year of law school at Georgetown; but Johnson, who briefly enrolled along with them, never studied, didn't enjoy the experience, and soon dropped out with what he called a "B.A.—Barely Attended.")[151] During the fall of 1934, Johnson and Jones also worked together on liberal firebrand Maury Maverick's successful congressional campaign.[152] But soon Jones had saved enough money to pay tuition at the University of Texas Law School, and in the late spring of 1935 he returned to Austin to complete his legal studies. He told Maverick's

son that he "had to get away" from Johnson, or he'd "be devoured."[153]

As it would happen, Johnson also returned to Texas in the summer of 1935, to head the Texas chapter of the National Youth Administration (NYA). That summer, Jones worked as a part-time administrative assistant for Johnson at the NYA in Austin, and he continued to do so briefly after beginning his studies in the fall. For a time he lived with Lyndon and Lady Bird in an upstairs room of their Austin duplex, and during this period he looked on Lyndon as an older brother with whom he was proud and excited to be associated.[154] In his third year of law school, Jones worked as an apprentice for the firm of Johnson's patron and mentor, Texas State Senator Alvin J. Wirtz, and he was present in Wirtz's office for the conference between Johnson and Wirtz during which Johnson decided to run for Congress.[155] Jones worked as an advance man for Johnson's successful 1937 congressional campaign, driving a sound truck announcing Johnson's imminent appearance through small towns in Texas.[156] Jones graduated from the University of Texas Law School in June of 1937, and then moved to Washington to work as a temporary secretary in the offices of Kleberg and Johnson until the new congressman helped him to secure a job as a briefing attorney in the Lands Division of the Justice Department that December.[157] During his stint at the Justice Department, Jones continued to lend a hand in Johnson's office in the evenings and on the weekends.[158]

Jones went to work for Butler in October of 1938, and remained with the Justice until Butler's death in November of 1939. Like Donnelly, he earned the lower "stenographic clerk" wage, but he worked alongside Cotter preparing critical analyses of *certiorari* petitions and researching opinions for the Justice. Jones then worked on a temporary basis in LBJ's congressional office while he looked for another full-time position.[159] There he encountered the young John Connally, who had joined Johnson's staff earlier in the year. Randall Wood reports that, "[a]mong his fellow roomers at the Dodge, Connally quickly gained a reputation for vanity. Luther Jones remembered him standing in front of the mirror by the hour brushing his lustrous, wavy hair."[160] Jones soon found steadier work back at the Lands Division, but in January of 1940 Wirtz became Undersecretary of the Interior, and he hired Jones to serve as his executive assistant. After a year of service at Interior, Jones returned to the Lands Division offices in Houston and Corpus Christi to work on federal condemnation cases for land for the Naval Air Station. He took an indefinite leave from the Justice Department in December of 1942 to enlist in the Army.[161]

During his time with Wirtz, Jones still periodically performed services for Johnson. One Sunday morning at Johnson's Dodge Hotel apartment, Jones had the honor of introducing Johnson to Jake Pickle.[162] Jones and Pickle had been Delta Theta Phi fraternity brothers at the University of Texas, and Pickle was then a young member of the Texas National Youth Administration who had been summoned to Washington to discuss a proposed highway project with Johnson. Little did they know at the time that Pickle would later become Johnson's successor to the congressional seat, which Pickle would hold for thirty-one years.[163] As Pickle relates the story, "As I prepared myself for the big meeting, Luther kept telling me how important LBJ was, how the Congressman was going places, and how, if I played my cards right, I could go places, too. We all could. 'You should watch him, Pickle!,' Luther said. 'He's amazing. He'll have you doing things you never thought possible. Big things! Important things!'"[164]

They entered the apartment to find Johnson seated "on the throne," as Pickle put it. Pickle ducked back behind a door, but Johnson insisted that Luther join him in the

bathroom. After a few minutes, Pickle relates, Johnson said, "'Luther, hand me some more paper!' And Luther did."[165] After Johnson had concluded his "business" in the *salle de bain*, the three men had a meeting about a proposed highway project. Pickle reports that "[n]othing was settled, but the meeting gave Johnson the chance to observe me, and vice versa. Of course, I had already observed more of Johnson that day than I had anticipated! . . . if I had looked forward to a personal meeting, I sure got one!"[166] "That day, as we left Johnson's room," Pickle concludes the story, "I couldn't resist sticking it to Luther. 'You're right,' I said. 'Johnson *does* have you doing things you never thought possible. Important things! For instance, I notice you did a fine job handing him that paper!'" "Luther," Pickles adds, "took it good-naturedly."[167]

Jones was destined to go on to even bigger and more important things. After serving as a second lieutenant in the Army during the War, he returned to Corpus Christi, this time as a full-time assistant to City Attorney Oliver Cox.[168] In 1947 he entered a successful solo practice specializing in criminal law and oil and gas law.[169] The following year Johnson called on him in a moment of crisis, asking Jones to join the legal team representing Johnson in the controversy arising out of the disputed Texas Democratic Party United States Senatorial Primary Election of 1948. Jones answered the call of duty, and Johnson went on to win a seat in the Senate, but this marked the end of their professional association.[170] In 1958 Jones was elected to serve as a member of the Board of Directors of the National Association of Criminal Defense Lawyers.[171] In 1965, President Johnson had his old debate student and other honored guests bussed from Corpus Christi to the little one-room schoolhouse just down the road from the LBJ Ranch to witness the signing of the historic Elementary and Secondary Education Act.[172] That same year, Jones was honored by the Texas State Bar for his distinguished service. A magazine profile published in 1968 characterized Jones as a "lawyer's lawyer," the "finest appellate lawyer" in Texas, and "the man with probably the finest technical legal knowledge in the state." "As a money earner," the article proclaimed, "he is probably in the top five-percent of Texas lawyers; as a legal scholar he is second to none. Many colleagues consider him the finest appellate lawyer in the country."[173] That year Jones was among 250 honored guests at a White House reunion of longtime friends of Lyndon and Lady Bird.[174] In 1968 he also sat on the State Bar's committee charged with revising the Texas Code of Criminal Procedure, and was made first assistant district attorney for Nueces County.[175] He retired from that position in 1970 in order to spend time with his family and to pursue his interests in philosophy, literature, travel, and dancing,[176] but he continued to publish law review articles and to engage in occasional private practice into the 1980s.[177] Throughout his professional career, Jones retained his fierce independence. He "would never join a law firm, because he did not want partners." Even "at the peak of his career, when he was earning impressive legal fees, he worked alone in a converted, book-lined garage behind his house in Corpus Christi."[178] Luther Jones died at the age of eighty-five in September of 1999, survived by his wife, four children, and nine grandchildren.[179]

Conclusion

The careers of some of the clerks for these "conservative" Justices may seem at first blush counterintuitive, but only because of the power of such reductive political taxonomy to mislead. It may seem odd that Luther Jones became one of the nation's leading criminal defense attorneys, until we recall that Chief Justice Hughes regarded Butler as a stickler for the protection of the rights of the accused,[180] so much so that his

colleague Justice Stone thought that Butler was soft on crime.[181] It may seem strange that John Cragun became one of his generation's leading lawyers for Native American tribes, until we are reminded that Justice Van Devanter was an Indian law expert whose colleagues regarded him as "the Indians' best pal" on the Court.[182] The philanthropic activities of clerks such as George Howland Chase, Norman Frost, Tench Marye, and Irving Clark may seem puzzling until we reflect that Justice McReynolds was a generous philanthropist during his life and left the bulk of his estate to charity.[183] Upon closer inspection, these ostensible ironies dissipate.

Some of the personal and professional relationships of these clerks might also seem at first glance surprising: Chester Gray's secretarial position with Assistant Navy Secretary Franklin D. Roosevelt; Allan Sherier's father's secretarial job with labor leader Samuel Gompers; Luther Jones's secretarial post with the young Lyndon Johnson; Norris Darrell's marriage to Learned Hand's daughter;William Donnelly's partnership with Homer Cummings. The last of these, which notably did not occur until after Justice Butler's death, may remain puzzling even upon reflection. But at least some of these pairings seem less startling when we recall that Butler's first law partner was Stan Donnelly, the son of Butler's friend, the Populist leader Ignatius Donnelly;[184] that McReynolds was a crusading trustbuster appointed by Theodore Roosevelt and Woodrow Wilson;[185] and that regular Republicans Van Devanter and Sutherland reportedly got along very well with their more liberal colleagues.[186] With the exception of McReynolds, these Justices could disagree without being disagreeable.

It is also noteworthy that so many of the Four Horsemen's clerks pursued careers in public service, and particularly with the federal government. There are at least two possible factors helping to explain this. First, particularly in the 1930s, the expansion of the federal government often offered more promising career prospects to young lawyers than did the private sector.[187] Relatedly, many of these clerks were raised and/or educated in Washington, and probably wished to remain there. Washington was a government town, and the government was where the employment opportunities lay. At first blush it may seem curious that so many of these clerks entered government service when their Justices had fought so tenaciously for limited government. And to be sure, there is no gainsaying the irony of the subsequent activities of some of the McReynolds clerks: John Fowler's work on the *Gold Clause Cases*; Tench Marye's and T. Ellis Allison's service in the National Recovery Administration; Allison's contributions to the drafting of the Social Security Act; Marye's work for the Social Security Administration. Indeed, one is tempted to wonder whether these activities may have been in part reactions against their experiences with the Justice. At the same time, however, we must remember that limited government is not no government, and that with the exception of Butler, who served on the Court for sixteen years, each of the Four Horsemen spent the bulk of his professional life in some form of public service.[188] Thus, it is misleading to characterize Sutherland or his fellow Horsemen as men "against the state."[189] They were instead, like many of their clerks, men *of* the state.

A review of the careers of the clerks of the Four Horsemen also serves to highlight the anomalous character of the case of John Knox, the only clerk of the Four Horsemen about whom much has been written previously. To be sure, only a few of these men rose to what might be regarded as the heights of their professions. But a great many of them had interesting and varied careers, achieving admirable success in business, private practice, government service, or some combination of these. Moreover, unlike the unfortunate, isolated Mr. Knox, most of them seem to have been blessed with fulfilling family and social lives, and were actively engaged in the affairs of their communities.

This may help to explain why these other clerks did not write comparable remembrances of their service in chambers. Unlike Mr. Knox, who was lonely and often at loose ends, they had busy lives and other things to do.

Despite all of the interesting variation in the careers of the clerks of the Four Horsemen, however, they share one common similarity: Unlike the clerks for Holmes, Brandeis, and Stone, and their many successor Justices, not a single one of them developed a career as a law professor. This, too, may help to account for the absence of a clerkship remembrance literature, which has been generated predominantly by academics. And relatedly, I would suggest that this fact has had a powerful effect on the ways in which these Justices have been perceived by the academy, and by the legal profession at large. But that is a story for another day.[190]

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Endnotes

[1] Employment Record of Edward S. Widdifield, National Personnel Records Center, National Archives at St. Louis (on file with the author) (hereinafter "Widdifield Employment Record"). George Sutherland's clerks' dates of service were provided by the Supreme Court of the United States Library in correspondence dated June 26, 2002 (hereinafter Supreme Court Library Correspondence). While there is no complete list of all Supreme Court law clerks, the Library maintains unofficial internal files relating to clerks' service at the Court, which it recognizes may contain incomplete and unverified information.

[2] Widdifield Employment Record; 2 Polk's Traverse City And Grand Traverse County Directory: 1901–1902, 106 (1902).

[3] Widdifield Employment Record; ARTEMUS WARD & DAVID L. WEIDEN, SORCERER'S APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 32 (2006); *Former Aide of Supreme Court Dies*, WASH. POST, Oct. 2, 1960, p. B6; *Widdifield, 74, Retires As Supreme Court Aide*, WASH. POST, Feb. 1, 1949, p. 13.

[4] Widdifield Employment Record; OFFICIAL CONGRESSIONAL DIRECTORY 218 (2d ed. 1914); OFFICIAL CONGRESSIONAL DIRECTORY 190 (1st ed. 1915); S. Doc. No. 627, at 18 (1914) (Report of the Secretary); S. Doc. No. 1, at 11 (1915) (Report of the Secretary); S. DOC. NO. 556, at 11, 21 (1916) (Report of the Secretary); 1916–1 CONG. DIR. 215; Letter from Christopher J. Doby, Financial Clerk, United States Senate, to the author, March 20, 2014 (on file with the author); *Former Aide of Supreme Court Dies*; *Widdifield, 74, Retires as Supreme Court Aide.*

[5] Widdifield Employment Record; WARD & WEIDEN, SORCERER'S APPRENTICES at 32; *Former Aide of Supreme Court Dies*; *Widdifield, 74, Retires as Supreme Court Aide.*

[6] Widdifield Employment Record; *Former Aide of Supreme Court Dies*; *Widdifield, 74, Retires as Supreme Court Aide*; OFFICIAL CONGRESSIONAL DIRECTORY 257 (2d ed. 1931); *Miss Widdifield Will be Bride of E.H. Fraser*, WASH. POST, June 2, 1935, at S2; E-mail from Katherine Logan, CPP, Director of the Office of Payroll and Benefits, U.S. House of Representatives, to the author, April 29, 2014 (on file with the author).

[7] Widdifield to Black, Aug. 12, 1937, Box 442, Hugo L. Black MSS, LC, quoted in TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 61 (2006).

[8] *Former Aide of Supreme Court Dies*; *Obituary 8 - No Title*, WASH. POST, Oct. 2, 1960, p. B6.

[9] Francis R. Kirkham, "Sixty Rewarding Years in the Practice of Law: 1930–1990," an oral history conducted 1985–1990 by Sarah Sharp and Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 11–12 (1994) (hereinafter "Kirkham Oral History"). *See also* Supreme Court Library Correspondence.

[10] *James E. Gray*, 21 N.D. B. BR. 125 (1944).

[11] 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 1308, XI, 73rd Annual Edition (Martindale-Hubbell, Inc. 1941), *microformed on* LLMC Martindale-Hubbell, Directories (1941) No. 92–001A F5; *Area Briefs:UND's Zierdt Gets Law Professorship*, GRAND

FORKS (N.D.) HERALD, Nov. 28, 2001, 2001 WLNR 2295318.

[12] http://www.walshhistory.org/publications/walsh-heritage/Walsh-Heritage-Volume-1/files/assets/basic-html/page164.html, p. 169.

[13] *See, e.g., $461,650 in Sales, Recently Effected, Reported by Firm*, WASH. POST, Nov. 6, 1927, at R5 (Gray purchase of home in Chevy Chase, Maryland); *Legal Notices*, WASH. POST, Oct. 7, 1933, at 21 (Gray publication of legal notice stating his occupation and office address in the Old Shoreham Building); http://www.walshhistory.org/publications/walsh-heritage/Walsh-Heritage-Volume-1/files/assets/basic-html/page164.html, p. 169.

[14] *See, e.g., Jewel Tea Co., Inc. v. United States*, 90 F.2d 451 (2d Cir. 1937); *Keener Oil & Gas Co. v. Commissioner*, 32 B.T.A. 186 (1935); *Anderson v. P. W. Madsen Inv. Co.*, 72 F.2d 768 (10th Cir. 1934); *Severs Hotel Co. v. Commissioner of Internal Revenue*, 62 F.2d 1080 (10th Cir. 1932).

[15] http://www.walshhistory.org/publications/walsh-heritage/Walsh-Heritage-Volume-1/files/assets/basic-html/page164.html, p. 169; Charles Curtis, *Jack Gage Wrecks Par*, L.A. TIMES, June 3, 1939, at 10 (listing Gray as a resident of the San Diego suburb of Lakeside).

[16] *See, e.g.*, 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 1348, 70th Annual Edition (Martindale-Hubbell, Inc. 1938), *microformed on* LLMC Martindale-Hubbell, Directories (1938) No. 92–001A F5; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 119, 87th Annual Edition (Martindale-Hubbell, Inc. 1955), *microformed on* LLMC Martindale-Hubbell, Directories (1955) No. 92–001A F7; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 343, 107th Annual Edition (Martindale-Hubbell, Inc. 1975), *microformed on* LLMC Martindale-Hubbell, Directories (1975) No. 92–001A F14.

[17] *See, e.g., Wilson v. Commissioner of Internal Revenue*, 14 T.C.M. (CCH) 299 (1955); *Cole v. Commissioner of Internal Revenue*, 13 T.C.M. (CCH) 1135 (1954); *Hutchins v. Commissioner of Internal Revenue*, 8 T.C.M. (CCH) 809 (1949); *Dean v. Davis*, 166 P.2d 15 (Cal. Dist. Ct. App. 1946).

[18] *Mrs. Fields Called "Vulture" in Letter*, L.A. TIMES, May 6, 1949, at 2.

[19] *Burns-Allen Tax Plea Filed*, L.A. TIMES, Dec. 15 1938, at 1.

[20] *Mrs. Fields Called "Vulture " in Letter.*

[21] *Coburn and His Poker-Playing Friends Fined*, L.A. TIMES, June 14, 1951, at A1.

[22] 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 385, 116th Annual Edition (Martindale-Hubbell, Inc. 1984), *microformed on* LLMC Martindale-Hubbell, Directories (1984) No. 92–001A F7; Social Security Death Index (Lexis Advance, Public Records, Death Records).

[23] *Area Briefs:UND's Zierdt Gets Law Professorship*, GRAND FORKS (N.D.) HERALD, Nov. 28, 2001, 2001 WLNR 2295318.

[24] Kirkham Oral History at 11–12. *See also Francis Robison Kirkham*, THE COMPLETE MARQUIS WHO'S WHO (Marquis Who's Who 2001); Supreme Court Library Correspondence.

[25] Kirkham Oral History at viii, 1–2, 98–101; *Francis Robison Kirkham*, THE COMPLETE MARQUIS WHO'S WHO; *Francis R. Kirkham*, SAN FRANCISCO CHRONICLE, Oct. 26, 1996, p. A20; *Death: Francis R. Kirkham*, DESERET NEWS, Oct. 27, 1996, p. 11.

[26] Kirkham Oral History at 3–7.

[27] Kirkham Oral History at iii, 11–12; *Francis Robison Kirkham*, THE COMPLETE MARQUIS WHO'S WHO; *Francis R. Kirkham*, SAN FRANCISCO CHRONICLE, *Death: Francis R. Kirkham*, DESERET NEWS.

[28] 287 U.S. 45 (1932).

[29] 290 U.S. 398 (1934).

[30] Kirkham Oral History at 12–14.

[31] Kirkham Oral History at 14–16, 23.

[32] Kirkham Oral History at 7–9; *Francis Robison Kirkham*, THE COMPLETE MARQUIS WHO'S WHO; *Francis R. Kirkham*, SAN FRANCISCO CHRONICLE; *Death: Francis R. Kirkham*, DESERET NEWS.

[33] After his interview with McReynolds, Musser wrote to Kirkham, "Sutherland's immediate recommendation vital. Please arrange this. Will count on it." Telegram from Milton S. Musser to Francis R. Kirkham, March 24, 1938, Box 23, Folder 1, Milton Shipp Musser MSS, Utah State Historical Society. Musser also listed Kirkham as a reference on the resume he submitted to McReynolds following the interview. *See* Musser to McReynolds, April 16, 1938, Box 23, Folder 1, Musser MSS. For more detail on Kirkham's role in the events leading up to McReynolds' hiring of Musser, *see* Clare Cushman, "Beyond Knox: James C. McReynolds' Other Law Clerks, 1914–1941," in Clare Cushman and Todd Peppers, eds., OF COURTIERS AND KINGS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES (UVA Press, forthcoming).

[34] Kirkham Oral History at vi, 16–19, 23; *Francis Robison Kirkham*, THE COMPLETE MARQUIS WHO'S WHO; *Francis R. Kirkham*, SAN FRANCISCO CHRONICLE; *Death: Francis R. Kirkham*, DESERET NEWS; *Hearings Before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations*, 93d Cong. 405 (1974) (statements by Francis R. Kirkham, cited as General Counsel to Standard Oil Co. of California).

[35] *See, e.g., Western Union Tel. Co. v. Nester*, 309 U.S. 582 (1940); *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965); *United States v. Leiter Minerals, Inc.*, 381 U.S.

413 (1965); *City of San Francisco v. Skelly Oil Co.*, 389 U.S. 817 (1967); *Perkins v. Standard Oil Co. of California*, 393 U.S. 1013 (1969); *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972).

[36] Kirkham Oral History at v-vi, 16, 23–24, 122–24; *Francis Robison Kirkham*, THE COMPLETE MARQUIS WHO'S WHO; *Francis R. Kirkham*, S.F. CHRONICLE; *Death: Francis R. Kirkham*, DESERET NEWS. *See also* Francis R. Kirkham, et al., *Colloquy on Complex Litigation*, 1981 B.Y.U. L. REV. 741; Francis R. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497 (1979); Francis R. Kirkham, *Complex Civil Litigation - Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976); Reuben G. Hunt, *Arrangements Under Chapter XI of Bankruptcy Act*, 1939 Sec. Comm. L. 21, 22 (1939).

[37] Kirkham Oral History at 125; *Francis Robison Kirkham*, THE COMPLETE MARQUIS WHO'S WHO; *Francis R. Kirkham*, S.F. CHRONICLE; *Death: Francis R. Kirkham*, DESERET NEWS.

[38] Wallace Kaapcke, "General Civil Practice: A Varied and Exciting Life at Pillsbury, Madison and Sutro," an oral history conducted 1986–1987 by Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 21, 310 (1990).

[39] "I had a long association with him and I enjoyed every bit of it. I enjoyed it intellectually and enjoyed it personally. And I stress both, because sometimes you can enjoy people personally that maybe you don't enjoy intellectually and vice versa, but Mr. Kirkham is one of the outstanding lawyers that I've ever had any contact with in combining those two qualities." Turner H. McBaine, "A Career in the Law at Home and Abroad," an oral history conducted 1986 by Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 69–70 (1989).

[40] Wallace Kaapcke, "General Civil Practice: A Varied and Exciting Life at Pillsbury, Madison and Sutro," an oral history conducted 1986–1987 by Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 21 (1990).

[41] *Id.* at 248. "The summation of what I learned from Francis Kirkham was the importance of always doing it right. Taking every care that you had to take to be sure that your conclusion, your action, your contract, your document, your brief, your pleading, whatever it was, was done right. I think I've had a lifetime course at the feet of Francis Kirkham in always doing it right. I want to express my thanks to him for that and also for a lifetime of professional and personal friendship." *Id.* at 311.

[42] Kirkham Oral History at vii.

[43] John Bates, "Litigation and Law Firm Management at Pillsbury, Madison and Sutro," an oral history conducted 1986 by Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 202–03 (1988). Explaining why Kirkham did not serve on the firm's management committee, Bates stated, "I think the senior partners felt that Francis Kirkham was so valuable to the total profession, really a genius in the practice of law, that they didn't want to impose on him to bother with the management of the affairs of the firm. They were quite happy to give him top recognition and distributions and all that sort of thing, but they didn't want to burden him with the day-to-day management of the affairs of the firm." *Id.* at 204. *See also* Charles F. Prael, "Litigation and the Practice of Labor Law at Pillsbury, Madison and Sutro, 1934–1977," an oral history conducted 1985 by Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 26 (1986) (Kirkham "contributed tremendously to the standing of the firm").

[44] Turner H. McBaine, "A Career in the Law at Home and Abroad," an oral history conducted 1986 by Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 77 (1989).

[45] James O'Brien, "Odyssey of a Journeyman Lawyer," an oral history conducted 1987–1989 by Carole Hicke, Regional Oral History Office, The Bancroft Library, University of California at Berkeley 210 (1991). *See also id.* at 194–96 on Kirkham's talents as a lawyer.

[46] Kirkham Oral History at ii-viii.

[47] Supreme Court Library Correspondence.

[48] Employment Record of John W. Cragun, National Personnel Records Center, National Archives at St. Louis (on file with the author); 5 WHO WAS WHO IN AMERICA 156 (1973); *Indian Claims Commission Files of Wilkinson, Cragun, & Barker, ca. 1950–1982*, Brigham Young University, http://files.lib.byu.edu/ead/XML/MSS2291.xml

[49] 5 WHO WAS WHO IN AMERICA 156 (1973); Robert W. Barker, *Memorial to John Wiley Cragun Presented to the United States Court of Claims, May 6, 1969*, 21 ADMIN. L. REV. xvii (1969).

[50] Barker at xvii.

[51] 5 WHO WAS WHO IN AMERICA 156 (1973); Barker at xvii.

[52] *Indian Claims Commission Files of Wilkinson, Cragun, & Barker, ca. 1950–1982*, Brigham Young University, http://files.lib.byu.edu/ead/XML/MSS2291.xml. See, e.g., *Pierce Estates, Inc. v. Commissioner*, 16 T.C. 1020 (1951); Barker at xvii.

[53] 5 WHO WAS WHO IN AMERICA 156 (1973); *Indian Claims Commission Files of Wilkinson, Cragun, & Barker, ca. 1950–1982*, Brigham Young University, http://files.lib.byu.edu/ead/XML/MSS2291.xml; Barker at xvii.

[54] 5 WHO WAS WHO IN AMERICA 156 (1973); Barker at xviii, xix. *See, e.g., Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Kake Village v. Egan*, 369 U.S. 60 (1962); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Dodge, Superintendent of*

the Osage Indian Agency v. United States, 362 F. 2d 810 (Ct. Cl. 1966); *Big Eagle v. United States*, 300 F. 2d 765 (Ct. Cl. 1962); *Upper Skagit Tribe of Indians v. United States*, 20 Ind. Cl. Comm. 381 (1969), http://digital.library.okstate.edu/icc/v20/iccv20p381.pdf; *Northern Cheyenne Indians of the Tongue River, Montana v. United States*, 13 Ind. Cl. Comm. 1 (1963), http://digital.library.okstate.edu/icc/v13/iccv13p001.pdf. *See generally Indian Claims Commission Files of Wilkinson, Cragun, & Barker, ca. 1950–1982*, Brigham Young University, http://files.lib.byu.edu/ead/XML/MSS2291.xml

[55] Barker at xviii.

[56] 5 WHO WAS WHO IN AMERICA 156 (1973); Barker at xvii-xviii; Robert M. Benjamin, *A Lawyer's View of Administrative Procedure - The American Bar Association Program*, 26 LAW & CONTEMP. PROBS. 203, 206 n.14 (1961); John W. Cragun, *Who Is the Judge, Agency or Court?*, 13 WYO. L.J. 111 (1958); John W. Cragun, *Admission to Practice: Present Regulation by Federal Agencies*, 34 A.B.A. J. 111 (1948).

[57] 5 WHO WAS WHO IN AMERICA 156 (1973); Barker at xx.

[58] Chester A. Newland, *Personal Assistants to the Supreme Court Justices: The Law Clerks*, 40 ORE. L. REV. at 303, 307, 308, 312 (1961); Norman Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 MODERN LAW REVIEW 265, 265 (1963); David Schroeder, "More Than a Fraction, The Life and Work of Justice Pierce Butler" (unpublished Ph.D. dissertation, Marquette University, 2009) at 166–67; John G. Kester, *The Law Clerk Explosion*, 9 LITIGATION 20, 22 (1983). *See also* correspondence from the Supreme Court of the United States Library dated June 26, 2002 (hereinafter Supreme Court Library Correspondence). While there is no complete list of all Supreme Court law clerks, the Library maintains unofficial internal files relating to clerks' service at the Court, which it recognizes may contain incomplete and unverified information.

[59] Cotter Employment Record.

[60] 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 403, 88th Annual Edition (Martindale-Hubbell, Inc. 1956), *microformed on* LLMC Martindale-Hubbell, Directories (1956) No. 92–001A F20. *See also* Supreme Court Library Correspondence; Schroeder, "More Than a Fraction," at 166.

[61] Schroeder at 166–67.

[62] *Id.* at 166; Employment Record of John Francis Cotter, National Personnel Records Center, Valmeyer, Illinois, on file with the author (hereinafter "Cotter Employment Record").

[63] *Id.* at 166; Cotter Employment Record.

[64] *Id.* at 4, 82 n.197, 167.

[65] Cotter Employment Record.

[66] *See, e.g.*, *U.S. v. Fixico*, 115 F. 2d 389 (10th Cir. 1940); *U.S. v. Tilley*, 124 F. 2d 850 (8th Cir. 1941); *U.S. v. Foster*, 131 F.2d 3 (8th Cir. 1942); *U.S. v. Waterhouse*, 132 F. 2d 699 (9th Cir. 1943); *Sioux Tribe of Indians v. United States*, 329 U.S. 684 (1946); *Arenas v. U.S.*, 331 U.S. 842 (1947); *U.S. v. Woodworth*, 170 F.2d 1019 (2d Cir. 1948); *U.S. v. Hayes*, 172 F.2d 677 (9th Cir. 1949); *City of Fort Worth v. U.S.*, 185 F.2d 397 (5th Cir. 1950); *U.S. v. Marks*, 187 F.2d 784 (9th Cir. 1951); *Title Ins. & Guar. Co. v. United States*, 194 F.2d 916 (9th Cir. 1952); *United States v. Catlin*, 204 F.2d 661, 662 (7th Cir. 1953); *United States v. South Dakota*, 212 F.2d 14 (8th Cir. 1954); *Werner v. United States*, 233 F.2d 52, 53 (9th Cir. 1956).

[67] AncestryLibrary.com, U.S. World War II Army Enlistment Records, 1938–1946 Cotter Employment Record.

[68] Cotter Employment Record.

[69] *See, e.g.*, 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 365, 89th Annual Edition (Martindale-Hubbell, Inc. 1957), *microformed on* LLMC Martindale-Hubbell, Directories (1957) No. 92–001A F19; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 592, 97th Annual Edition (Martindale-Hubbell, Inc. 1965), *microformed on* LLMC Martindale-Hubbell, Directories (1965) No. 92–001A F27; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 945, 107th Annual Edition (Martindale-Hubbell, Inc. 1975), *microformed on* LLMC Martindale-Hubbell, Directories (1975) No. 92–001A F47.

[70] Ancestry.com, U.S. Social Security Death Index, 1935-Current.

[71] Supreme Court Library Correspondence.

[72] Letter from Christopher J. Doby, Financial Clerk, United States Senate, to the author, March 20, 2014 (on file with the author); S. Doc. No. 158, at 14 (1919) (Report of the Secretary).

[73] *What the Big Fraternal Orders Are Doing*, WASH. POST, Mar. 21, 1920, p. 57.

[74] *Georgetown Alumni Directory*, 1947 *Tablet Unveiled for Hilltop Boys Who Died in the War*, WASHINGTON HERALD, June 15, 1921, p. 2.

[75] *Names Asked of Reservists for Schooling: Infantry and Engineer Courses*, WASH. POST, Oct. 15, 1933, p. 16.

[76] *Mrs. C.A. Dyke Dies Following Holiday Feast*, WASH. POST, Dec. 26, 1948, p. M12. *Deaths*, SO. MED. J., Dec. 1941, p. 1294.

[77] Supreme Court Library Correspondence.

[78] *See Norris Darrell, Lawyer and Tax Expert, 90*; N.Y. TIMES, Aug. 15, 1989, p. B5; *Norris Darrell*, NEWSDAY, Aug. 16, 1989, p. 45; WHO'S WHO IN AMERICAN LAW 198 (2d ed.); Norris Darrell, "Some Personal Reminiscences," in "Reminiscences by Alumni Who Graduated Fifty Years or More Ago From the University of Minnesota Law School" 4 (Minneapolis, 1976) (unpublished manuscript on file with the University of Minnesota Law School).

[79] Norris Darrell, "Some Personal Reminiscences," at 4.

[80] *Id.* at 5.

[81] *Id.* at 5–6.

[82] *See Norris Darrell, Lawyer and Tax Expert, 90,* N.Y. TIMES, Aug. 15, 1989, p. B5; *Norris Darrell*, NEWSDAY, Aug. 16, 1989, p. 45; WHO'S WHO IN AMERICAN LAW 198 (2d ed.); NANCY LISAGOR AND FRANK LIPSIUS, A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM SULLIVAN & CROMWELL 100, 119–20, 130, 203–04 (1988); SULLIVAN & CROMWELL, 1879–1979: A CENTURY AT LAW 39, 58–60, 64 (1979); *Reminiscences of Norris Darrell* in WILLIAM PIEL, JR., et al., eds., LAMPLIGHTERS: THE SULLIVAN AND CROMWELL LAWYERS APRIL 2, 1879 TO APRIL 2, 1979 110–17 (1981). Darrell published widely on issues of federal taxation and professional responsibility. *See, e.g.,* Norris Darrell and Paul A. Wolkin, *The American Law Institute*, 52 N.Y. ST. B.J. 99 (1980); Norris Darrell, *Conscience and Propriety in Tax Practice,* in THE LAWYER IN MODERN SOCIETY 361, 363 (VERN COUNTRYMAN et al. eds., 2d ed. 1976); Norris Darrell, *Reflections on the Federal Income Tax*, 28 REC. ASS'N B. CITY N.Y. 412 (1973); Norris Darrell, *The Role of Universities in Continuing Professional Education*, 32 OHIO ST. L.J. 312 (1971); Norris Darrell, *Responsibilities of the Lawyer in Tax Practice*, reprinted in PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE 87 (BORIS I. BITTKER, ed., 1970); Norris Darrell, *The Tax Lawyer's Duty to His Client and to His Government*, 7 PRAC. LAW. 23 (1961); Norris Darrell, *Some Challenges of the Legal Profession,* 57 BRIEF 8 (1961); Norris Darrell, *The Use of Reorganization Techniques in Corporate Acquisitions*, 70 HARV. L. REV. 1183 (1957); Norris Darrell, *Responsibilities of the Lawyer in Tax Practice*, in WILLIAM M. TRUMBULL, ed., MATERIALS ON THE LAWYER'S PROFESSIONAL RESPONSIBILITY 291 (1957); Norris Darrell, *Internal Revenue Code of 1954--A Striking Example of the Legislative Process in Action*, in MAJOR TAX PROBLEMS OF 1955 1 (JOHN W. ERVIN, ed., 1955); Norris Darrell, *The 1954 Internal Revenue Code - One Year Later: A General Review*, 8 TAX EXEC. 23 (1955); Norris Darrell, *The Tax Treatment of Payments Under Section 16(B) of the Securities Exchange Act of 1934*, 64 HARV. L. REV. 80 (1950); Norris Darrell, *Recent Developments in Nontaxable Reorganizations and Stock Dividends*, 61 HARV. L. REV. 958 (1948); Norris Darrell, *The Scope of Commissioner*, 24 TAXES 266 (1946); Norris Darrell, *Creditors' Reorganizations and the Federal Income Tax*, 57 HARV. L. REV. 1009 (1944); Norris Darrell, *Corporate Liquidations and the Federal Income Tax*, 89 U. PA. L. REV. 907 (1941); Norris Darrell, *Discharge of Indebtedness and the Federal Income Tax*, 53 HARV. L. REV. 977 (1940). He was also a frequent public speaker on these issues. *See, e.g., Further Revisions Seen in U.S. Income Tax Laws*, L.A. TIMES, Oct. 21, 1954, p. 36; *Douglas, Bradford Listed as Speakers in Harvard Law Series*, DAILY BOSTON GLOBE, Dec. 9, 1951, p. C24; *Display Ad 190 - No Title*, N.Y. TIMES, Oct. 7, 1946, p. 35; *Events Today*, N.Y. TIMES, Apr. 27, 1944, p. 21.

[83] *See Norris Darrell, Lawyer and Tax Expert, 90,* N.Y. TIMES, Aug. 15, 1989, p. B5; *Norris Darrell*, NEWSDAY, Aug. 16, 1989, p. 45; *Norris Darrell Takes Bride*, WASH. POST, June 29, 1945, p. 12; *Reminiscences of Norris Darrell,* in PIEL, JR., et al. at 116–17. Hand had kinder things to say about Butler at the Justice's death. *See* Richard J. Purcell, *Mr. Justice Pierce Butler (1866–1939),* 10 THE RECORDER 33, 36 (May 1, 1940).

[84] *Reminiscences of Norris Darrell,* in PIEL, JR., et al. at 116–17; Gerald Gunther, *"'Contracted' Biographies and Other Obstacles to 'Truth,'"* 70 N.Y.U. L. REV. 697 (1995); GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE xix (1994); David Margolick, *In the Mentor's Steps: Law Professor Tries to Capture Professional, Personal Aspects of Jurist Learned Hand*, DALLAS MORNING NEWS, May 8, 1994, p. 8A.

[85] *17 Leading Lawyers Call Civil Rights Bill Constitutional*, N.Y. TIMES, Sept. 19, 1966, p. 37.

[86] *See Norris Darrell, Lawyer and Tax Expert, 90,* N.Y. TIMES, Aug. 15, 1989, p. B5; *Norris Darrell*, NEWSDAY, Aug. 16, 1989, p. 45.

[87] Supreme Court Library Correspondence.

[88] 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 11406, 67th Annual Edition (Martindale-Hubbell, Inc. 1935), *microformed on* LLMC Martindale-Hubbell, Directories (1935) No. 92–001A F4.

[89] 1932 J. SUP. CT. U.S. 47 (1932); *U.S. v. Stephanidis*, 47 F.2d 554 (2d Cir. 1931).

[90] ANNUAL MEETING, THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, APRIL 26, 1935 (Document No. 207, April, 1935), p. 2135; *The Santa Lucia*, 44 F. Supp. 793 (D.C.N.Y. 1942); *Public Warehouses of Matanzas, Inc. v. Fidelity & Deposit Co. of Maryland*, 77 F.2d 831 (2d Cir. 1935); *Lloyd Royal Belge Societe Anonyme v. Elting*, 289 U.S. 730 (1933); *St. Paul Fire & Marine Ins. Co. v. Pure Oil Co.*, 63 F.2d 771 (2d Cir. 1933), 81 Ins. L.J. 315 (1933); *Earl & Stoddart, Inc., v. Elderman's Wilson Line, Ltd.*, 287 U.S. 420, 423 (1932); *Prince Line v. American Paper Exports, Inc.*, 55 F.2d 1053 (2d Cir. 1932); *The Pasadena*, 55 F.2d 51 (4th Cir. 1932).

[91] *Bar Adds Notables to Its Committees*, N.Y. TIMES, Jul. 12, 1933, p. 34; *Bar Committees Chosen for Year*, N.Y. TIMES, Jul. 10, 1936, p. 10.

[92] *See, e.g.*, 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 11406, 67th Annual Edition (Martindale-Hubbell, Inc. 1935), *microformed on* LLMC Martindale-

Hubbell, Directories (1935) No. 92–001A F4; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 1452, 77th Annual Edition (Martindale-Hubbell, Inc. 1945), *microformed on* LLMC Martindale-Hubbell, Directories (1945) No. 92–001A F49; 2 THE MARTINDALE-HUBBELL LAW DIRECTORY 1530, 85th Annual Edition (Martindale-Hubbell, Inc. 1953), *microformed on* LLMC Martindale-Hubbell, Directories (1953) No. 92–001A F67.

[93] Richard L. Sullivan, AncestryLibrary.com.

[94] PEPPERS at 93.

[95] Employment Record of William D. Donnelly, National Personnel Records Center, National Archives at St. Louis (on file with the author); *William D. Donnelly, Former D.C. Lawyer*, WASH. POST, March 12, 1975, p. C6. *See, e.g., U.S. v. Price*, 111 F.2d 206 (10th Cir. 1940); *U.S. v. Harris*, (9th Cir. 1939); *City of Springfield v. U.S.*, 99 F.2d 860 (1st Cir. 1938). In August of 1937 Donnelly applied to serve as Justice Black's clerk. PEPPERS at 93.

[96] *William D. Donnelly, Former D.C. Lawyer*, WASH. POST, March 12, 1975, p. C6. *See, e.g., Decker v. U.S.*, 140 F.2d 375 (4th Cir. 1944); *Douglas Aircraft Co. v. U.S.*, 95 Ct. Cl. 140 (1941).

[97] *See* Homer Stille Cummings Papers, Special Collections, University of Virginia, Series III, V, & VI.

[98] *See* Boxes 323, 325, and 327, Cummings Papers.

[99] *Attorney Ends Testimony in Johnson Probe*, CHI. TRIB., Apr. 24, 1946, p. 8; *Johnson Legal Aid Denounces U.S. Jury's Quiz*, CHI. TRIB., Apr. 23, 1946, p. 20.

[100] 1938 J. SUP. CT. U.S. 127 (1939).

[101] *See, e.g., Girouard v. U.S.*, 328 U.S. 61 (1946); *Herget v. Central Nat. Bank & Trust Co. of Peoria*, 324 U.S. 4 (1945); *Chrysler Corp. v. U.S.*, 316 U.S. 556 (1942); *Glasser v. U.S.*, 315 U.S. 60 (1942). *See also, e.g., Diaz v. Southeastern Drilling Corp. of Argentina, S.A.*, 449 F.2d 258 (5th Cir. 1971); *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970); *Rossi v. Fletcher*, 418 F.2d 1169 (D.C. Cir. 1969); *Schleit v. British Overseas Airways Corp.*, 410 F.2d 261 (D.C. Cir. 1969); *Vinson v. Rexrode*, 404 F.2d 830 (D.C. Cir. 1968); *Wheaton Triangle Lanes, Inc. v. Rinaldi*, 236 Md. 525 (1964); *Trent Trust Co. v. Kennedy*, 307 F.2d 174 (D.C. Cir. 1962).

[102] 374 U.S. 398 (1963); 50 A.B.A. J. 82 (1964).

[103] *Solicitors' Ordinance Draws Fire*, WASH. POST, Oct. 28, 1953, p. 32. Donnelly also represented the Seventh-Day Adventist Welfare Service, Inc. in *Orient Mid-East Lines, Inc., v. Cooperative for Am. Relief Everywhere, Inc.*, 410 F.2d 1006 (D.C. Cir. 1969), and the General Conference in *Town of Green River v. Martin*, 71 Wyo. 81 (1953).

[104] *See, e.g., Orient Mid-East Lines, Inc., v. Cooperative for Am. Relief Everywhere, Inc.*, 410 F.2d 1006 (D.C. Cir. 1969); *Gallagher v. Crown Kosher Market*, 366 U.S. 617, 618 (1961); *Town of Green River v. Martin*, 71 Wyo. 81 (1953). Donnelly also filed an *amicus* brief on behalf of his church in *McCullom v. Board of Education*, 333 U.S. 203 (1948). The Church had the firm on retainer, and also asked Donnelly and Cummings to file an amicus brief in *Everson v. Board of Education*, 330 U.S. 1 (1947). Before this request was made, however, Cummings was approached about the matter by an acquaintance taking the opposing position. Cummings was embarrassed by the conflict, and asked both parties to seek other representation. William H. Speer to Homer Cummings, June 10, 1946, Homer Cummings to William D. Donnelly, June 12, 1946, William D. Donnelly to Homer Cummings, June 20, 1946, Homer Cummings to William H. Speer, June 21, 1946, William D. Donnelly to Homer Cummings, August 10, 1946, Homer Cummings to William H. Speer, August 16, 1946, William H. Speer to Homer Cummings, August 22, 1946, Box 323, Cummings MSS.

[105] 101 CONG. REC. D271 (1955); *Hearing on S. 18, S. 57, S. 274, S. 662, S. 1288, S. 1437 and S. 1447 Before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare*, 84th Cong. 1156 (1955) (hearings on proposed minimum wage legislation, testimony of William D. Donnelly).

[106] *Hearing on H.R.J. Res. 693 Before the H. Comm. on the Judiciary*, 88th Cong. 2483–85 (1964).

[107] Cummings & Stanley Partnership Agreement, January 1, 1945, Box 258, Cummings MSS.

[108] *See, e.g.*, 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 348, 82nd Annual Edition (Martindale-Hubbell, Inc. 1950), *microformed on* LLMC Martindale-Hubbell, Directories (1950) No. 92–001A F19; 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 219, 87th Annual Edition (Martindale-Hubbell, Inc. 1955), *microformed on* LLMC Martindale-Hubbell, Directories (1955) No. 92–001A F14.

[109] 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 219, 88th Annual Edition (Martindale-Hubbell, Inc. 1956), *microformed on* LLMC Martindale-Hubbell, Directories (1956) No. 92–001A F14.

[110] 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 630, 98th Annual Edition (Martindale-Hubbell, Inc. 1966), *microformed on* LLMC Martindale-Hubbell, Directories (1966) No. 92–001A F29.

[111] 1 THE MARTINDALE-HUBBELL LAW DIRECTORY 952, 107th Annual Edition (Martindale-Hubbell, Inc. 1975), *microformed on* LLMC Martindale-Hubbell, Directories (1975) No. 92–001A F47.

[112] *See* 29 J. B. ASSN. D.C. 544 (1962); 28 J. B. ASSN. D.C. 528 (1961); 26 J. B. ASSN. D.C. 399 (1959); 25 J. B. ASSN. D.C. 487 (1958); 23 J. B. ASSN. D.C. 558 (1956); 22 J. B. ASSN. D.C. 483 (1955); 21 J. B. ASSN. D.C. 415, 536 (1954); *District*

Barristers Hear about Flotsam, Jetsam and Ligan at 70th Annual Dinner, WASH. POST, Dec. 7, 1941, p. 14.

[113] 27 J. B. ASSN. D.C. 483 (1960); 26 J. B. ASSN. D.C. 399 (1959); 23 J. B. ASSN. D.C. 557–58 (1956); 21 J. B. ASSN. D.C. 536 (1954); 16 J.B. ASSN. D.C. 231, 582 (1949).

[114] *William D. Donnelly, Former D.C. Lawyer*, WASH. POST, March 12, 1975, p. C6.

[115] Supreme Court Library Correspondence.

[116] *Civic Leader Irving Clark Dies at 84; Was St. Paul Law Firm Partner*, MINN. STAR TRIB., Jan. 21, 1997, p. 7B.

[117] *See, e.g., Matter of Schroll*, 297 N.W.2d 282 (Minn. 1980); *Walgreen Co. v. Commissioner of Taxation*, 252 Minn. 522 (1960); *Cut Price Supermarkets v. Kingpin Foods, Inc.*, 256 Minn. 339 (1959); *U.S. v. Goodson*, 253 F.2d 900 (8th Cir. 1958); *Gilfillan v. Kelm*, 128 F. Supp. 291 (D.C. Minn. 1955); *Reynolds v. Hill*, 184 F.2d 294 (8th Cir. 1950); *Myers Motors v. Kaiser-Frazer Sales Corp.*, 178 F. 2d 291 (8th Cir. 1950); *State v. Peery*, 224 Minn. 346 (1947); *U.S. v. Northwest Airlines*, 69 F. Supp. 482 (D. Minn. 1946). *See also* Irving Clark & Eugene M. Warlich, *Taxation of Cooperatives: A Problem Solved?*, 47 MINN. L. REV. 997 (1963).

[118] *Civic Leader Irving Clark Dies at 84. See, e.g., Land O'Lakes Co. v. U.S.*, 675 F. 2d 988 (8th Cir. 1982); *Associated Milk Producers, Inc. v. Commissioner*, 68 T.C. 729 (1977); *Louis W. and Maud Hill Family Foundation v. U.S.*, 347 F. Supp. 1225 (D.C. Minn. 1972); *Farmers Union Co-op Oil Assn. of South St. Paul v. Commissioner of Taxation*, 1968 WL 20 (Minn. Tax. Ct. 1968).

[119] *Civic Leader Irving Clark Dies at 84*; *Funeral Notices*, ST. PAUL PIONEER PRESS, Jan. 18, 1997, p. B5; *Hill Family and Foundation Squabble Over Charity's Future*, MINN. STAR TRIB., Jan. 31, 1994, p. 1A; *Minnesota Foundations Keep Family Connections*, MINN. STAR TRIB., Jan. 31, 1994, p. 6A.

[120] *Antipoverty Pioneers Defend Legacy of '60s*, MINN. STAR TRIB., May 24, 1992, p. 1A.

[121] *Civic Leader Irving Clark Dies at 84;Funeral Notices*, ST. PAUL PIONEER PRESS, Jan. 18, 1997, p. B5.

[122] Supreme Court Library Correspondence; Employment Record of Luther E. Jones, Jr., National Personnel Records Center, National Archives at St. Louis (hereinafter "Jones Employment Record") (on file with the author).

[123] ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER 230 (1982).

[124] CARO at 207–08.

[125] Interview with Luther E. Jones, Jr., conducted by David McComb, June 13, 1969, Lyndon Baines Johnson Library, 1, 2–4, http://millercenter.org/scripps/archive/oralhistories/detail/2638 (hereinafter McComb interview); CARO at 207–11; MERLE MILLER, LYNDON: AN ORAL BIOGRAPHY 35 (1980).

[126] McComb interview at 1–2, 5; CARO at 229–30; ROBERT DALLEK, LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES, 1908–1960 100 (1991); ALFRED STEINBERG, SAM JOHNSON'S BOY: A CLOSE-UP OF THE PRESIDENT FROM TEXAS 59 (1968); Jones Employment Record.

[127] RANDALL B. WOOD, LBJ: ARCHITECT OF AMERICAN AMBITION 78 (2006); DALLEK at 100.

[128] DALLEK at 100.

[129] McComb interview at 8; WOOD at 78; DALLEK at 100; CARO at 231; RONNIE DUGGER, THE POLITICIAN: THE LIFE AND TIMES OF LYNDON JOHNSON: THE DRIVE FOR POWER, FROM THE FRONTIER TO MASTER OF THE SENATE 166 (1982).

[130] WOOD at 79.

[131] DALLEK at 100; WOOD at 79; STEINBERG at 77; MILLER at 41.

[132] McComb interview at 9; DALLEK at 100.

[133] WOOD at 79; DALLEK at 101; CARO at 232.

[134] DALLEK at 101.

[135] McComb interview at 6; DALLEK at 101; MILLER at 41; STEINBERG at 77.

[136] WOOD at 79; CARO at 232.

[137] CARO at 339; DALLEK at 101; WOOD at 79.

[138] DALLEK at 101. *See also* WOOD at 79.

[139] CARO at 238–39; DALLEK at 101–02; WOOD at 79; IRWIN UNGER & DEBI UNGER, LBJ: A LIFE 371 (1999).

[140] CARO at 239.

[141] DALLEK at 102. *See also* CARO at 239; UNGER & UNGER at 371.

[142] McComb interview at 6; WOOD at 79; DALLEK at 101; MILLER at 41.

[143] DALLEK at 101. *See also* WOOD at 79.

[144] CARO at 238.

[145] Interview with Luther E. Jones, Jr., conducted by Michael L. Gillette, October 14, 1977, Lyndon Baines Johnson Library, 15, http://millercenter.org/scripps/archive/oralhistories/detail/2639 (hereinafter Gillette interview). *See also* McComb interview at 29.

[146] DUGGER at 187.

[147] McComb interview at 9; MILLER at 41.

[148] McComb interview at 23; DUGGER at 125.

[149] WOOD at 79–80.

[150] WOOD at 79–80; DALLEK at 102; UNGER & UNGER at 44; STEINBERG at 77. Johnson also frequently wrote to each of the young men's parents to report on their progress. WOOD at 80.

[151] McComb interview at 2; Gillette interview at 18–20; WOOD at 90; DUGGER at 179; CARO at 338; UNGER & UNGER at 44–45.

[152] Gillette interview at 23–24; HAL K. ROTHMAN, LBJ'S TEXAS WHITE HOUSE 28 (2001); DUGGER at 174–75; CARO at 276–77.

[153] DUGGER at 217; CARO at 239.

[154] McComb interview at 2; Gillette interview at 26, 28; CARO at 340–48; PAUL K. CONKIN, BIG DADDY FROM THE PEDERNALES: LYNDON BAINES JOHNSON 75 (1986); WOOD at 114; DUGGER at 186–87; Jones Employment Record.

[155] McComb interview at 16, 20; Gillette interview at 13–15; Jones Employment Record; CARO at 396; CONKIN at 80; DUGGER at 190. Jones reported that it was also decided at that meeting that Johnson would support the Court-packing Plan, to which Wirtz was opposed and about which Johnson simply did not care. The men agreed that Johnson could not win without the Roosevelt vote. *Id.*; CARO at 396.

[156] McComb interview at 2–3, 19–20; Gillette interview at 35; CARO at 443–44.

[157] McComb interview at 22; Gillette interview at 37–38; *Former Assistant District Attorney Jones Dead at 85; Luther E. Jones Jr. Served Corpus Christi in Various Areas of Legal Practice, Served as Assistant to Federal Agencies*, CORPUS CHRISTI CALLER-TIMES, Sept. 9, 1999, p. F6; E-mail from Katherine Logan, CPP, Director of the Office of Payroll and Benefits, U.S. House of Representatives, to the author, April 29, 2014 (on file with the author); DALLEK at 102. When Jones had left Washington to attend law school in Austin, Johnson had promised him that he would help Jones find a Washington job upon his graduation. *Id.*; CARO at 239.

[158] McComb interview at 23; DALLEK at 186.

[159] WOOD at 131; Jones Employment Record. *See also* Gillette interview at 20–21; McComb interview at 23 ("I became clerk to Justice Butler on the Supreme Court for about thirteen months"). This is the only mention of the Butler clerkship in the Jones oral history. The interviewer made no further inquiry about the clerkship.

[160] *Id.* at 133. For Jones's more discursive report of Connally's love affair with his own locks, *see* MILLER at 40.

[161] Jones Employment Record; McComb interview at 23; Gillette interview at 13; *Former Assistant District Attorney Jones Dead at 85; Luther E. Jones Jr. Served Corpus Christi in Various Areas of Legal Practice, Served as Assistant to Federal Agencies*, CORPUS CHRISTI CALLER-TIMES, Sept. 9, 1999, p. F6. *See, e.g., U.S. v. 2,049.85 Acres of Land, More or Less, in Nueces County, Texas*, 49 F. Supp. 20 (S.D. Tex. 1943); *U.S. v. 250 Acres of Land, More or Less, in Nueces County, Texas*, 43 F. Supp. 937 (S.D. Tex. 1942); *U.S. v. 16,572 Acres of Land, More or Less*, 45 F. Supp. 23 (S.D. Tex. 1942).

[162] JAKE PICKLE & PEGGY PICKLE, JAKE 37–38 (1997).

[163] *Id.*; Lynwood Abram, *Congressman Shares Storied Tenure*, HOUSTON CHRONICLE, June 1, 1997, 1997 WLNR 6609922.

[164] PICKLE & PICKLE at 38.

[165] *Id.*

[166] *Id.* at 38–39.

[167] *Id.* at 39.

[168] McComb interview at 23; *Former Assistant District Attorney Jones Dead at 85; Local History: Mayor Makes Hires.*

[169] *Former Assistant District Attorney Jones Dead at 85; See, e.g., Ex Parte Flores*, 452 S.W.2d 443 (Tex. Crim. App. 1970); *Gonzalez v. State*, 397 S.W.2d 440 (Tex. Crim. App. 1965); *Huffmeister v. State*, 170 Tex. Crim. 460 (1960); *Adame v. State*, 162 Tex. Crim. 78 (1955); *Niemann v. Zarsky*, 233 S.W.2d 930 (Tex. Civ. App. 1950); *Wingo v. Seale*, 212 S.W.2d 968 (Tex. Civ. App. 1948); *Corpus Christi Insurance Man Surrenders on Charge of Selling Note Illegally by Mail*, WALL ST. J., Jan. 13, 1964, p. 6.

[170] McComb interview at 22, 24–27; CARO at 239; DALLEK at 337; Josiah M. Daniel, III, *LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*, 31 REV. LITIG. 1, 42 (2012); *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948); *Johnson v. Stevenson*, 335 U.S. 801 (1948).

[171] 32 FEB-CHAMPION 39 (2008).

[172] WOOD at 567; ROTHMAN at 186.

[173] Bowmer, TEXAS PARADE, May, 1968, p. 45, quoted in CARO at 237–38, 807.

[174] McComb interview at 27; *Johnsons Are Hosts At Reunion*, WASH. POST, Sept. 14, 1968, p. E1.

[175] *Former Assistant District Attorney Jones Dead at 85.* See, e.g., *Buntion v. State*, 444 S.W.2d 304 (Tex. Crim. App. 1969).

[176] *Former Assistant District Attorney Jones Dead at 85; Funerals, Obituaries, Deaths: Jones*, CORPUS CHRISTI CALLER-TIMES (Sept. 8, 1999), http://www.caller2.com/1999/september/08/funeralstext.html

[177] *See, e.g., Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984); *Hart v. Sims*, 702 F.2d 574 (5th Cir. 1983); *Atchley v. Greenhill*, 517 F.2d 692 (5th Cir. 1975); *Hoover v. Beeto*, 439 F.2d 913 (5th Cir. 1971); Jim D. Bowmer, Bob Burleson, & Luther E. Jones, Jr., *Aggravated Robbery: Texas Style*, 33 BAYLOR L. REV. 947 (1981); Percy Foreman & Luther E. Jones, Jr., *Submitting the Law of Parties in a Texas Prosecution*, 33 BAYLOR L. REV. 267 (1981); Luther E. Jones, Jr., *Theft: Texas Style*, 41 TEXAS B.J. 1062 (1978); Percy Foreman & Luther E. Jones, Jr., *Indictments Under the New Texas Penal Code*, 15 HOUS. L. REV. 1 (1977); Luther E. Jones, Jr., *Admissibility of Confessions in a State Prosecution*, 29 BAYLOR L. REV. 1 (1977); Luther E. Jones, Jr., *Criminal Law and Procedure*, 27 SW. L.J. 227 (1973); Luther E. Jones, Jr., *Translating Recent Supreme Court Decisions Into Courtroom Reality*, 19 BAYLOR L. REV. 391 (1967); Luther E.

Jones, *Fruit of the Poisonous Tree*, 9 S. TEX. L.J. 17 (1967); Luther E. Jones, Jr. & Warren Burnett, *The New Texas Code of Criminal Procedure*, 8 S. TEX. L.J. 16 (1966); Jim D. Bowmer, Bob Burleson, & Luther E. Jones, Jr., *Peace Officers and Texas' New Code of Criminal Procedure*, 17 BAYLOR L. REV. 268 (1965); Jim D. Bowmer, Luther E. Jones, Jr. & John H. Miller, *The Charge in Criminal Cases*, 12 BAYLOR L. REV. 261 (1960).

[178] CARO at 238.

[179] *Former Assistant District Attorney Jones Dead at 85.*

[180] BROWN at 92. *See also* DANELSKI at 181–82; Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 571–79, 639–42 (1997).

[181] Recollection of Herbert Wechsler in KATIE LOUCHHEIM, THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK 53 (1983) (Stone "thought Butler was too soft in dealing with criminal matters").

[182] *The Honorable Supreme Court*, FORTUNE, May, 1936, pp. 79, 180, 182. *See also* JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920 249 (1978).

[183] JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF [SIC] JUSTICE JAMES CLARK MCREYNOLDS 5, 116–18, 136 (1992).

[184] Richard J. Purcell, *Mr. Justice Pierce Butler*, THE CATHOLIC EDUCATIONAL REVIEW (April 1944), at 192; DANELSKI at 8.

[185] BOND at 29–51.

[186] *See* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 115–17, 233 (1951); Jay S. Bybee, *George Suthlerland*, in CLARE CUSHMAN, ed., THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789–2012, 316–17 (3d ed. 2012); Schroeder, "More Than a Fraction," at 79, 128, 150–51, 153, 180, 234; DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 41, 159, 198–201 (1936).

[187] *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 221–29 (1976).

[188] Van Devanter served as the city attorney of Cheyenne in the mid-1880s, as a member of the Wyoming territorial legislature in the late 1880s, as chief judge of the Wyoming Territorial Supreme Court and of the Wyoming State Supreme Court in 1889 and 1890, as Assistant Attorney General in the Department of the Interior from 1897–1903, as a judge on the United States Court of Appeals for the Eighth Circuit from 1903–10, and on the Supreme Court from 1911–37. David Burner, *Willis Van Devanter*, in 3 LEON FRIEDMAN & FRED L. ISRAEL, eds., THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 968–77 (1997). McReynolds was Assistant Attorney General from 1903–06, Special Assistant to the Attorney General from 1907–12, and Attorney General in 1913 and 1914 before serving on the Court from 1914 to 1941. BOND at 27–51. Sutherland was a member of the Utah legislature from 1896–1900, a Congressman from 1901-03, and a United States Senator from 1905–17 before serving on the Court from 1922–38. PASCHAL at 36–98.

[189] *See* PASCHAL.

[190] *See* Barry Cushman, *The Four Horsemen in Historical Memory* (forthcoming).

The Appointment of William O. Douglas to the Supreme Court

DAVID J. DANELSKI

Late in the afternoon on Monday, February 13, 1939, William O. Douglas, who was then chairman of the Securities and Exchange Commission, glanced at his desk calendar and noticed that he was to attend a stag dinner that evening for Quigg Newton, his former student and SEC law clerk, at Edmund (Pavy) and Maude Pavenstadt's home.[1] He also noticed that the next day he was to meet with President Roosevelt at 4:30 p.m., when he planned to tell FDR that he would leave the SEC at the end of his term in June to become dean of the Yale Law School.[2] He had been on leave from the law school since he had become a member of the SEC in 1936, and his leave was about to expire. He was willing to leave the Commission because he believed that he had accomplished most of his goals as Chairman and he looked forward to returning to Yale to implement his ideas concerning legal education. Besides, he needed the money. His SEC salary had been $5,000 a year less than his Yale salary, and he had to borrow money to get by. Further, having given some thought to what he might do after his deanship, he had confided to one of his closest friends that he would like to end his legal career as a federal circuit court judge.[3] That was not an unrealistic ambition, for the Yale deanship had been a steppingstone to the U.S. Court of Appeals for Second Circuit for three previous deans—Henry Wade Rogers, Thomas W. Swan, and Charles E. Clark.[4]

An Unexpected Proposal

About eight in the evening on February 13, Douglas drove from his SEC office to the Pavenstadt home at 2428 Tracey Place, which is in the Kalorama section of Washington. Among the guests at the Pavenstadt dinner party were Jerome N. Frank, who was then an SEC commissioner, and Arthur Krock, who was the chief Washington correspondent of *The New York Times* and winner of the Pulitzer Prize in 1935 and 1938.[5]

Soon after Douglas arrived, he mentioned that he planned to leave the SEC in June and return to Yale, which disappointed

some of those present, for they thought that the Commission still needed him and his political star was still rising.

When Douglas left the party, Arthur Krock accompanied him to the hall, where he asked him why he was returning to Yale when he might succeed Louis D. Brandeis on the Supreme Court. Taken by surprise, Douglas said that he had not heard of Brandeis's retirement. Krock, who only a few hours earlier had written a front-page story about Brandeis's retirement, said to Douglas: "I believe [you] could be appointed to Mr. Brandeis's place if the effort were quickly and wisely made." He then asked Douglas if he "might approach the Attorney-General, Frank Murphy, in the matter and make certain other moves which seemed, in [his] judgment, effective and wise."[6] Though Douglas did not take Krock's proposal seriously, he "assented."[7]

The next day, Tuesday, February 14, Krock followed up on his proposal. He called Murphy and proposed Douglas as Brandeis's replacement. "That's an idea," said Murphy slowly. "That's an idea. He is a splendid fellow. I'll get busy at once." Murphy then put Douglas's name on the list of candidates for the President's consideration. Several days later, he "officially put it at the top of the list."[8]

Krock's next move was a news story he wrote, which appeared on the front page of *The New York Times* on February 15 1939. The story began as follows:

President, Recovered, Set for Caribbean Trip; W.O. Douglas Hinted as Brandeis Successor

Special to THE NEW YORK TIMES

WASHINGTON, Feb. 14—While President Roosevelt may name a successor to Associate Justice Brandeis of the United States Supreme Court before he leaves the White House for a Caribbean cruise on Thursday, administration circles consider that he will hold announcement of his choice in abeyance. Having expected, for several months, the retirement of Mr. Brandeis, the President has been considering potential candidates for the vacancy.

Prominent among those mentioned in capital discussion of those on whom the President's choice might fall is William O. Douglas, chairman of the Securities and Exchange Commission.

Mr. Douglas, formerly a Yale professor and identified with that group in the legal profession which the President calls liberal, was one of four persons on the White House visiting list today. He spent nearly half an hour in the private quarters of Mr. Roosevelt.

While the possibility of the retirement of Justice Brandeis has been discussed for several months and speculation has been current as to who might succeed him, Mr. Douglas has hitherto not been considered as a candidate. But, in view of the prevailing belief that the President desires to name a jurist from the West, the fact that Mr. Douglas was born and educated in the State of Washington is now having weight in the discussion of political observers.

In fact, Douglas was born in Minnesota, not Washington, and, although Douglas's meeting with the President was solely about his leaving the SEC to return to Yale, Krock wrote that Douglas's conference with the President was the only White House meeting that day, "suggesting the discussion of a successor to Mr. Brandeis."

Krock's story, which Douglas "thought was a hoax,"[9] had an immediate impact. Soon after reading it, Raymond Clapper, a Scripps-

Howard syndicated columnist, contacted sources in the Justice Department and tried to contact Thomas G. ("Tommy the Cork") Corcoran, a White House insider and protégé of Felix Frankfurter, for a follow-up story. He tracked Corcoran down to a bed at Johns Hopkins Hospital, where he was recovering from an appendectomy. Based on what he learned from Corcoran and others, Clapper published his column on Douglas in the evening newspapers on February 15, the same day Krock had published his story.

"Indicative of the power behind Douglas," wrote Clapper in his column, "are the facts that Atty. General Murphy is enthusiastic for him and Tommy Corcoran, who managed the campaign that placed Felix Frankfurter on the Supreme Court, sent word from his hospital bed in Baltimore that Douglas was his only candidate. Even working by remote control, Tommy still is a one-man lobby to be respected if past performance means anything." Clapper went on to say that Douglas had made his professional record largely in the East, but he was "born in Minnesota, educated in Washington, and married in Oregon . . . He looks, talks and thinks like a Westerner, and Tommy Corcoran is hoping he will pass with Harvard's Roosevelt as such."[10]

As a result of Krock's story and Clapper's column, several officials made appointments to see Douglas the next day. Among them were Harry Hopkins, Benjamin N. Cohen, Senator Homer T. Bone, of Washington, and Justice Felix Frankfurter. Hopkins and Cohen were White House insiders who had supported Frankfurter's appointment the previous month. Bone was enthusiastic about Douglas's possible

Members of the Securities and Exchange Commission were the first to congratulate William O. Douglas, its Chairman, on his nomination to the Supreme Court (left to right: Robert E. Healy, Jerome Frank, Edward C. Eicher, and George C. Mathews). Jerome Frank, who would succeed Douglas as Chairman, personally contacted Senator William E. Borah (R-Idaho), the ranking member of the Judiciary Committee, to endorse Douglas as a true westerner.

nomination mostly because he did not like his junior colleague Senator Lewis B. Schwellenbach, who was then the leading candidate to replace Brandeis. Frankfurter was enthusiastic about Douglas's possible nomination because he wanted him as a colleague on the Supreme Court.[11] Hopkins and Cohen cancelled their appointment, but Douglas met Bone at 9:00 a.m. at the SEC and then Frankfurter at 1 p.m. at the Supreme Court.[12]

The Western Campaign

As soon as Douglas's brother, Arthur, a New York lawyer and hotel executive, read Krock's story in *The New York Times*, he called Douglas at the SEC, and they agreed that Arthur should mount a campaign in the West in support of Douglas's nomination to the Supreme Court as a westerner.[13] In a letter dated February 16, 1939, Arthur wrote to fifteen western friends:

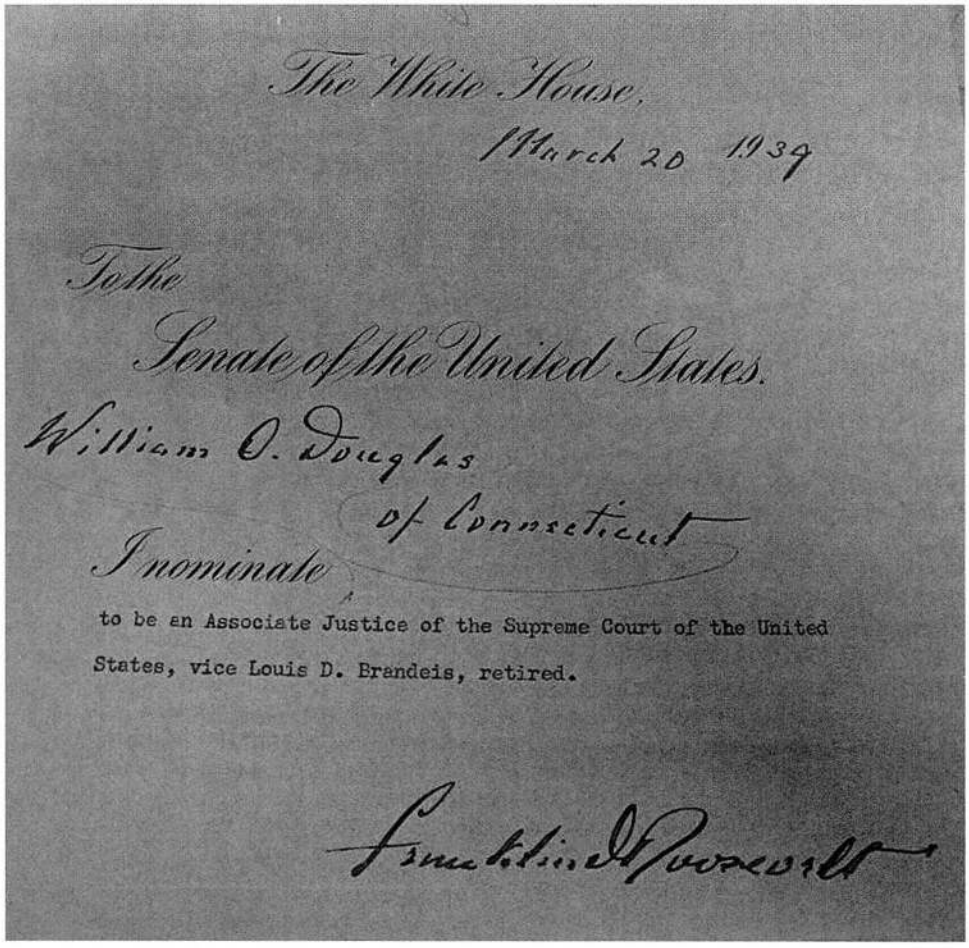
> You have perhaps read in the newspapers that my brother, Orville, is being prominently mentioned as a prospective nominee for the Supreme Court of the United States to fill the vacancy caused by the resignation of Justice Brandeis. The articles in the New York Times, Herald Tribune, and World Telegram seem to concede that by training, experience and demonstrated ability he is well qualified for the position. There is some feeling, however, that a westerner should be appointed by the President to fill the vacancy, and it is on that angle I am writing you.
>
> It is hard for me to conceive how Orville could be regarded as an easterner. Although he has made his national reputation in the east, he was born in the west, received his high school and college training there, has lived the major portions of his life in the west, and his thoughts, mannerisms and ideas are still all distinctly western. I am therefore extremely anxious that as many of his western friends as possible write to those who may have influence, emphasizing Orville's western origin, education and approach and urging that he be appointed to the Supreme Court.

In a postscript, Arthur added: "In writing, please refer to Orville as 'William O. Douglas,' which is his official name here."[14]

Arthur also asked several of Douglas's western friends to serve as campaign lieutenants. Among them were a Yakima educator, who sought the support of Washington's governor, who said he would do what he could; the president of Whitman College, who wrote FDR in Douglas's behalf and who urged the president of the Washington Bar Association to do the same; a former Columbia classmate, who secured the support of lawyers in Seattle, San Francisco, Bellingham, Everett, and Chehalis; the former Douglas family lawyer in Yakima, who circulated a testimonial supporting Douglas that thirty-three Yakima lawyers signed; a fraternity brother, who activated the Beta Theta Pi network, whose members undertook to prove that Douglas was a true westerner and would have undertaken to prove him a "Patagonian" if they had thought it would do any good; and two Walla Walla lawyers, who persuaded the Walla Walla County Bar Association to pass a resolution endorsing Douglas and also persuaded S.B.L. Penrose, president emeritus of Whitman College, to ask Senator William E. Borah to support Douglas as a westerner.[15] As a result of Arthur Douglas's efforts, FDR, Attorney General Murphy, and Senators Bone and Borah received more than 100 letters and telegrams from westerners claiming Douglas as a son of the West.

Even more important than letters and telegrams were western newspaper endorsements. At least ten newspapers in Washington, Oregon, and California endorsed Douglas, including the *Seattle Times, Spokane Spokesman-Review*, Portland *Oregonian,* and *San Francisco Chronicle*.[16] But not all Douglas's editorial support was due to Arthur's efforts. Some of it was the result of efforts by Wes Ballinger, an economist at the Federal Trade Commission, and Jay Jerome Williams, a Washington journalist.[17]

Saul Haas, Senator Bone's campaign manager, also attempted to secure western support for Douglas's nomination. On February 20, he showed up at Douglas's office and, according to Douglas, "did a strange thing." "He picked up my telephone," Douglas recalled, "and put in a long-distance call to Olympia, Washington. I protested, saying this was a government line and no personal long-distance calls were permitted. He waved that aside as a minor technicality, and, producing some liquor, poured himself a drink while the call went through. It came through and he talked with Bruce Blake, at that time Chief Justice of the Washington State Supreme Court. 'Our candidate for the Supreme Court is Bill Douglas. Understand, Bruce? Okay. Send off a telegram to FDR at once.' He hung up, poured himself another drink, and put in another call. I buzzed my


The White House,
March 20 1939

To the
Senate of the United States.

William O. Douglas
of Connecticut
I nominate

to be an Associate Justice of the Supreme Court of the United States, vice Louis D. Brandeis, retired.

Franklin D. Roosevelt

President Franklin D. Roosevelt was determined to appoint a westerner to the Supreme Court to replace Louis D. Brandeis in 1939. He initially hesitated to choose William O. Douglas because, although raised in Washington State, he had taught at Yale Law School in Connecticut for many years.

secretary, Miss Waters, to keep track of the charges . . . He called the presidents of most of the Bar Associations of the State of Washington, giving each the same instructions. All of this took nearly an hour, during which time he drank a pint of whiskey. After finishing the calls, he slipped out as quietly and mysteriously as he had arrived, his mission accomplished."[18] In fact, Haas did see Douglas on February 20, but he did not accomplish his mission.[19] Chief Justice Blake did not wire FDR. Instead, he wrote Haas, saying that he could not support Douglas because Douglas lacked judicial experience, and Haas's calls to the bar association presidents yielded no endorsements.[20]

Early Press Support

Though Douglas distanced himself from his western campaign, he was available for press interviews in Washington, D.C., particularly to friendly journalists. Two such journalists were Robert Kintner and Drew Pearson.

Kintner wrote in his syndicated column with Joseph Alsop on February 20 that FDR was willing to consider Douglas for the Supreme Court only if he could be called a true westerner.

> Therefore, a canvass of sentiment will be made while the President is away on his cruise or immediately on his return. Such leading Western Senators as Borah of Idaho and Norris of Nebraska will be sounded out. Inquiries will be made on the Pacific Coast. The argument will be offered, perfectly truthfully, that his years of teaching at Columbia and Yale have not faded the freshness of Douglas's Western viewpoint. His Western viewpoint birth and schooling will be dramatized. And then, if the reaction is favorable, the President will feel free to describe him to the Senate as "William Orville Douglas of the State of Washington."
>
> The object of all this prospective effort is one of the New Deal's real personalities. To be sure, he hardly looks like it. Scrawny but energetic, he likes baggy clothes, which look all the shabbier by contrast with the sleek garments of the bankers and brokers in the SEC's parish. His hair is tow-colored and rarely brushed. His face is freckled, pale and very thin, only lighted up by sharp blue eyes and a wry smile. But, although he suggests a surprisingly spry famine victim, he has many of the traits of a lion-tamer.
>
> . . .
>
> He is an odd fellow, humorous in small things, intensely serious in big, grimly honest, incurably idealistic, but ruthlessly practical withal. Whether or not he becomes a justice, you will hear from him again.[21]

After his appointment to the Court, Douglas expressed his "gratitude" to Kintner for his "generous comments." "I hope," he added, "I can turn out to be at least fifty per cent of the fellow that you said I was."[22]

Pearson wrote in his syndicated column with Robert S. Allen on February 24 that Douglas was the most likely candidate to replace Brandeis because "he has probably done the best job of regulating the stock market since the SEC was established, is a brilliant lawyer, a close advisor of Roosevelt's and would have no difficulty whatever in getting Senate confirmation."[23]

Other journalists who did not know Douglas personally also praised him. One of them was Ernest Lindley, a graduate of the University of Idaho and a Rhodes Scholar, who was Douglas's age.[24] In an op-ed piece in *The Washington Post* on February 19,

Lindley wrote that "Bill Douglas has the bluntness, directness and zip which Far Westerners like to think are sectional characteristics. And his spoken English is utterly devoid of New England corruptions. Whether he is an Easterner or Westerner would not be of concern to anyone if the West had not staked out a claim to the next Supreme Court appointment, and if the claim had not been acknowledged as valid by spokesmen for the Administration." Lindley went on to say that high-ranking New Dealers rated Douglas the No. 1 western candidate. "He is steady, brilliant and tough minded. His selection, in all probability, would be acclaimed by the bar; and curiously, he would probably would have less trouble obtaining Senate confirmation than would most of the other possible choices."[25]

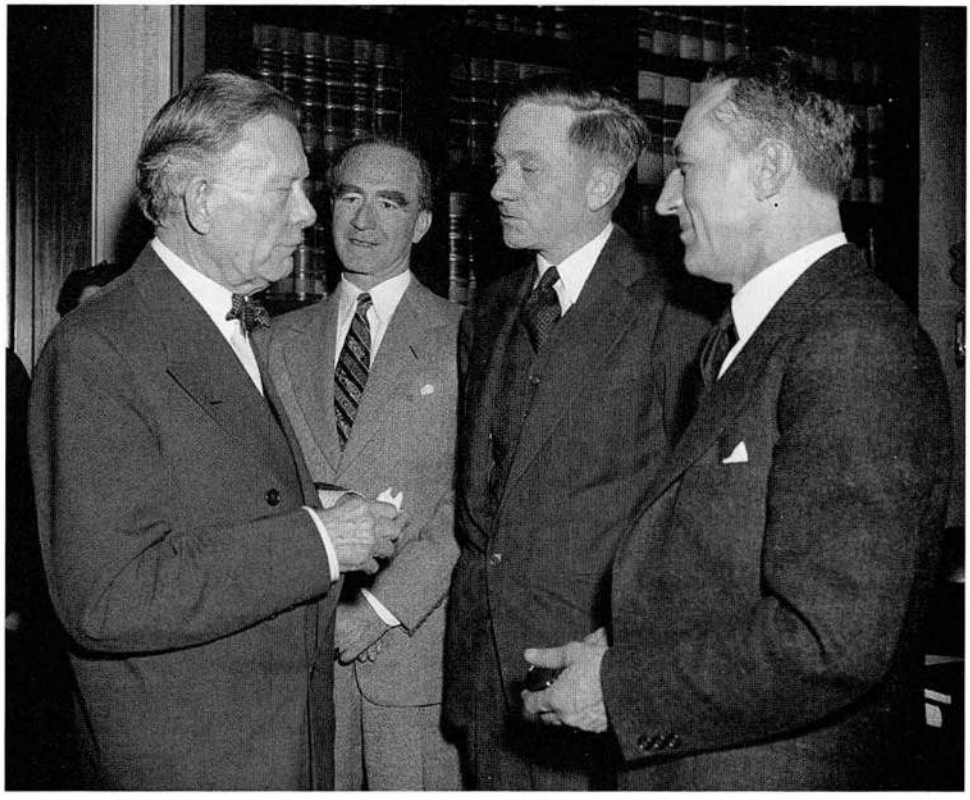
Insiders' Influence

While Arthur Douglas conducted Douglas's western campaign, Tom Corcoran managed Douglas's White House insiders' campaign. In his unpublished autobiography, Corcoran hardly mentions the campaign. He writes that he had intervened directly with the President to make Douglas Chairman of the SEC, but as to Douglas's Supreme Court nomination, Corcoran writes only that he had "advocated [Douglas's] rise to the bench."[26] Fortunately for history, Corcoran had worked closely with Harold L. Ickes on Douglas's behalf and reported his activities to Ickes, who recorded them in his diary.[27] After his discharge from the Johns Hopkins Hospital, Corcoran returned to Washington, where he suffered a blood clot that passed through his heart and lodged in one of his lungs. Rushed to the Washington Emergency Hospital, he registered under the name of Gardiner, his middle name.[28] Despite his condition, Corcoran continued to lobby for Douglas's nomination from his bed by telephone. When FDR returned from his Caribbean cruise, Corcoran was still in the hospital. On March 1, Ickes visited him and recorded in his diary: "Tom thinks that Bill Douglas stands a good chance to be appointed to the Supreme Court, although that is yet to be determined."[29]

Corcoran and Ickes were part of a group of White House insiders, consisting of Harry Hopkins, Ben Cohen, Frank Murphy, Jerome Frank, and Robert H. Jackson, who had persuaded FDR two months earlier to break his promise to western senators to nominate a westerner to replace Cardozo; thus, the President passed over the leading western candidates, Senator Lewis Baxter Schwellenbach, of Washington, and Dean Wiley Blount Rutledge, Jr., of the University of Iowa Law School, and nominated Felix Frankfurter.[30] When Brandeis retired a month later, Schwellenbach and Rutledge, in that order, were at the top of FDR's list to replace him.[31]

Schwellenbach was born in Superior, Wisconsin, on September 20, 1894. When he was eight, his family moved to Spokane, Washington, where he graduated from high school. He took pre-law courses at the University of Washington, attended its law school, and graduated with a law degree in 1917. Admitted to the Washington bar in 1919, he practiced labor law in Seattle until 1934 when he was elected to the U.S. Senate.[32]

Rutledge was born in Cloverport, Kentucky, on July 20, 1894. He grew up in Kentucky and Tennessee, where he attended Maryville College before transferring to the University of Wisconsin, from which he graduated in 1914. He then attended law school at Indiana University for a year. Thereafter, he taught in high schools in Indiana, New Mexico, and Colorado. From 1920 to 1922, he completed his legal education at University of Colorado Law School. Admitted to the Colorado bar in 1922, he practiced law until he joined the



Senator Borah, Attorney General Frank Murphy, Douglas, and chairman of the Judiciary Subcommittee Carl A. Hatch met on March 24, 1939, to discuss Douglas's nomination to the Court.

faculty of the University of Colorado Law School in 1924. He was later dean of the Washington University Law School at St. Louis and dean of the College of Law at the State University of Iowa.[33]

Douglas's resume was similar but more distinguished. He was born in Maine, Minnesota, on October 16, 1898. In 1902, his family moved to Estrella, California, and two years later to Cleveland, Washington. Less then a year later, upon the death of his father, the family moved to Yakima, Washington. He graduated valedictorian of his Yakima High School class in 1916, and he graduated Phi Beta Kappa from Whitman College in 1920. He then taught English and Latin at Yakima High School for two years. In 1922, he went to New York to attend Columbia Law School, where he was a member of the law review. Admitted to the New York bar in 1926, he practiced corporate law for approximately two years with a Wall Street law firm before teaching corporate law full-time at Columbia and then at Yale, where he became the Sterling Professor of Law at the age of thirty-three. He came to Washington to conduct an SEC study of protective committees in corporate reorganizations in 1934. He was appointed to the Commission in 1936 and became its chairman in 1937.[34] He was so successful as SEC chairman that W. Averell Harriman said, "I considered Harry Hopkins and Bill Douglas the two politically outstanding men of the New Deal."[35] Ickes, Corcoran, and several other White House insiders agreed with that assessment, and for that reason they urged FDR to appoint Douglas to the Supreme Court.

On Tuesday, March 7, Ickes had lunch at the Mayflower Hotel with Douglas and Robert Maynard Hutchins, president of the University of Chicago and Douglas's friend and former dean at Yale. Both Douglas and Hutchins told Ickes they wanted to be appointed to the Supreme Court. Ickes suggested that Douglas should take Brandeis's seat on the Court and Hutchins should take Douglas's place as SEC chairman. After lunch, Douglas and Hutchins visited Tom Corcoran at the Emergency Hospital. "Tom's heart," recorded Ickes, "is set on Douglas going on the Supreme Court." Corcoran agreed that, if Douglas went to the Supreme Court, Hutchins should replace him at the SEC.[36]

Despite Douglas's favorable press and strong support in the West and in the White House, his chances of replacing Brandeis on the Court remained slim, as Ickes learned much to his chagrin when he had lunch with FDR on Wednesday, March 8. The President, he recalled, "made it perfectly clear that [he] was still leaning strongly in the direction of Schwellenbach" and was seriously considering Rutledge. "I suspect," Ickes wrote in his diary, "that Tom Corcoran may be building up hopes that he may not be able to satisfy. After all, he has been in the hospital several weeks and has no personal contact with the President except occasionally over the telephone. I called him back after my luncheon with the President to tell him that Schwellenbach was in the lead."[37]

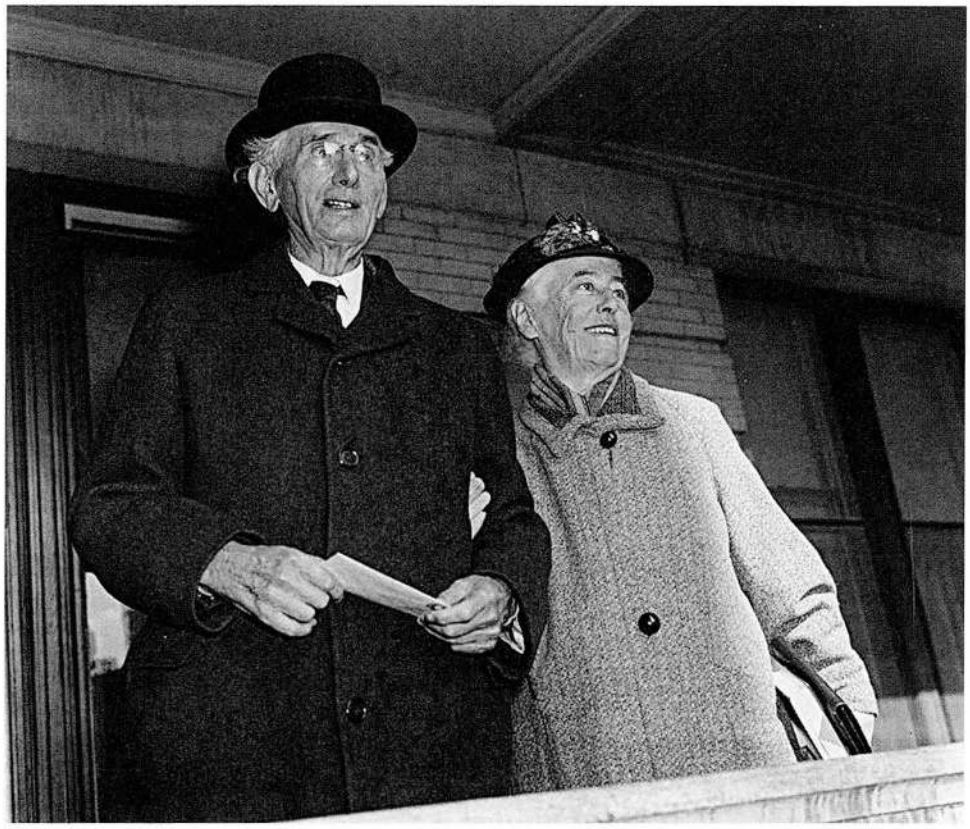
Schwellenbach's support came principally from labor unions and Senate colleagues, one of whom was Harry Truman, of Missouri, who thought that Schwellenbach was "a great guy" and "a wheel horse."[38] Other early Senate supporters were Sherman Minton, of Indiana, who said that Schwellenbach was "able, industrious, brilliant intellectually, and has liberalism in his heart," and Joseph F. Guffey, of Pennsylvania, who said that he was "an excellent man."[39]

There is evidence indicating that, about the time Ickes met FDR for lunch on March 8, the President had told John L. Lewis, CIO president, that he was inclined to nominate Schwellenbach to fill the Brandeis vacancy. Lewis immediately passed on that information to Schwellenbach through CIO general counsel, Lee Pressman, who later recalled in an oral history:

> Lewis gets ahold of me and makes me hot-foot over to the Senate to get word to Schwellenbach that he's probably going to be appointed to the United States Supreme Court. Well, with that kind of message, you move very fast, and I caught Senator Schwellenbach on the floor and asked him to come off the floor and said, "I'd like to see you. I've got a message from Mr. Lewis." We went to his office and I broke the news, at which he brought out the bottle and we had a drink, and clinked glasses to this great success and great honor. I left. It was a question of waiting for the announcement in the morning's paper that the President had made this appointment. The next morning and the [following] morning there was no news, and so we grew sort of fidgety. I forget how soon thereafter the announcement was made that Bill Douglas was nominated to the Supreme Court.[40]

Rutledge's support came principally from Irving Brant, an editorial writer for the *St. Louis Star-Times* and a gifted scholar, whom FDR liked and respected.

> On February 19, Brant wrote Rutledge that his sources indicated that Schwellenbach will be named, but he added: [Y]our name is so near the top of that list that it is almost a



Although Brandeis did not know him very well, he recommended Douglas to succeed him because he wanted his ideas to live on long after he was gone, and he believed that there was no one better than Douglas to carry out that work. "The honor of the position is in itself a great one. But the honor of following in your footsteps is even greater," wrote Douglas to Brandeis, after his nomination. Brandeis is pictured here in retirement with his wife, Alice.

tos-up. Were it not for some characteristics in FDR, I should reverse the position of you and Schwellenbach. This should not be taken to exclude two or three others who are possibilities. . . . A great deal of embarrassment was caused by an article in Raymond Clapper's column, stating that some of the White House circle proposed the name of W. O. Douglas to head off Schwellenbach. That was not true, but it created a situation which made it almost impossible for them to talk freely with the President. Incidentally, Douglas would make a fine member of the court, probably equal to anyone on it in several ways, but I don't think he is likely to be named because his western residence terminated shortly after he left college and he has been many years at Yale. If he were appointed as "a westerner," all those who don't like his liberal views would attack him and the appointment on the score of evasion of a promise to name a westerner.[41]

On Thursday, March 9, according to Ickes's diary, "Frank Murphy, who is supporting Douglas for [Brandeis's] place, saw the President, and Tom [Corcoran] told me that he (Murphy) had at least succeeded in holding the situation even."[42] Murphy had recommended Douglas to fill the Brandeis vacancy because he believed that Douglas was intellectually

and professionally superior to Schwellenbach and Rutledge. Murphy agreed with Ickes that "Schwellenbach is not a good enough lawyer,"[43] and he agreed with Dean Henry W. Bates, of the University of Michigan Law School, that, while Rutledge was "a pretty good lawyer," he wasn't "distinguished," and "there isn't much of a chance he would ever be thought of as a great judge."[44] Further, Murphy believed that geography should not trump quality in making Supreme Court appointments, and, to support his view, he gave FDR a memorandum reporting an empirical study that exploded the myth that the Supreme Court needed a westerner to interpret western laws.[45]

After FDR saw Murphy on Thursday, March 9, he met with Brandeis to discuss the Jewish situation in Palestine. At that meeting, according to Lewis J. Paper, a Brandeis biographer, Brandeis "recommended that Douglas be nominated to fill his seat."[46] In support of his statement, Paper cited an interview with Adrian (Butch) Fisher, Brandeis's last law clerk, in which Fisher quoted Brandeis saying as he introduced Douglas: "This is the man I recommended to take my place on the Court."[47] Whether Brandeis made the recommendation directly to FDR on March 9, as Paper believed, or indirectly through Frankfurter on that date or a different date, as Douglas suspected, "there is no question that [Brandeis] made the recommendation,"[48] and there is no question that such a recommendation would have helped Douglas's candidacy.[49]

Friday, March 10, marked the beginning of a series of fast-moving events that culminated in FDR's decision to nominate Douglas.

It was no accident that March 10 was also the day of Corcoran's discharge from the Washington Emergency Hospital.[50] Upon leaving the hospital, Corcoran went to the White House to advance Douglas's nomination, and a few hours later he was able to report to Ickes that "he believed that the Schwellenbach hurdle has been surmounted and that the President was turning his mind in the direction of Dean Rutledge."[51] There is evidence suggesting that Corcoran convinced FDR that Schwellenbach's appointment to the Court would significantly weaken the New Deal bloc in the Senate, for it was likely that the governor of Washington State, Clarence Martin, who did not sympathize with the New Deal, would appoint a conservative to succeed Schwellenbach in the Senate. At the time, support for the New Deal was waning in the Senate. Only three days earlier, Alsop and Kintner wrote in their syndicated column: "Matters have now reached a pass where even the most stalwart and optimistic New Deal Senators frankly admit that Majority Leader Alben W. Barkley has only 15 invariably reliable votes. And this in an overwhelming Democratic Senate, in which 69 men should be Barkley's faithful followers."[52] In any case, FDR acknowledged that he had eliminated Schwellenbach as a candidate because he needed him in the Senate.[53]

FDR's choice of Brandeis's successor was now between Rutledge and Douglas, and he was leaning toward Rutledge.

On Monday, March 13, Ben Cohen called Jerome Frank from the White House to tell him that FDR was on the brink of nominating Rutledge because he was clearly a westerner and Douglas's status as a westerner was questionable. Having anticipated that development, Jerome Frank had earlier devised a strategy to counter it. His strategy was to get Senator William E. Borah, of Idaho, a Republican and the ranking member of the Judiciary Committee, to endorse Douglas as a true westerner. Frank thought that Borah might do so since Douglas and Borah had served together on the Temporary National Economic Committee (TNEC) in 1938. Frank, who did not know Borah, hesitated to approach him without an introduction. So he called a Wall Street financier by the name of Alex Gomberg, who knew both Frank and Borah. At Frank's request, Gomberg

contacted Borah and told him that Frank wanted to see him.[54] Borah responded by inviting Frank to his office. After receiving the assurances he wanted from Borah, Frank wrote Murphy on February 21:

> At Senator Borah's request, I called on him yesterday. He authorized me to say that he would be glad, at any time, if you should ask him to do so, to advise the President that he considers William O. Douglas a Westerner and is confident that, if Douglas were appointed to the Supreme Court, that appointment would be generally considered as in all respects satisfying the demand for the appointment of a Western man. He would also be glad to say that he considers Douglas as eminently qualified to sit on the Supreme Court. He told me that sentiment in favor of Douglas on the Hill has grown to such a point that, in his opinion, his appointment would be exceedingly popular with most Western Senators.[55]

Corcoran then drafted a speech for Borah's use in announcing his support of Douglas as a westerner, which Cohen, Frank, and aides in Borah's office edited, but apparently Borah never delivered the speech.[56] There were, however, press reports that Borah supported Douglas as a westerner. On March 6, Pearson and Allen wrote that Borah was "drumming support from all over the country—particularly on the Pacific Coast," where he was "rallying endorsements for Douglas and has piled up an impressive list."[57]

Upon receiving Cohen's message from the White House on Monday, March 13, Frank asked Borah to contact the President and tell him that "you believe [Douglas] is eminently qualified and regard him as a Westerner, and that of all the Westerners who have been talked of, he is unquestionably the best man from every point of view." Frank urged Borah not to delay, for "the matter may be decided at any moment."[58] Borah immediately contacted the White House.[59]

On Tuesday, March 14, Ickes wrote in his diary: "Tom Corcoran came in to see me late this afternoon. . . . Tom thinks that the President's inclination is now toward Douglas for the Supreme Court and both he and Douglas believe that Hutchins will consent to come on as Chairman of the SEC."[60] Corcoran was so confident that FDR would nominate Douglas that he planned "to go down to Key West today for two or three weeks' rest and upbuilding."[61] The reason for Corcoran's confidence was FDR's apparent agreement with Corcoran's strategy to offer Rutledge a place on the U.S. Court of Appeals for the District of Columbia instead of the Supreme Court and then nominate Douglas to replace Brandeis.[62]

About 4:00 p.m. on Wednesday, March 15, Murphy called Rutledge and told him that people have been making "very flattering statements" about him and that his name was still in the picture for the Supreme Court, but he asked him if the nomination went to another, would he accept an appointment to the U.S. Court of Appeals for District of Columbia. Rutledge said that he needed time to think about that and discuss it with his wife. In a letter to Brant written after Douglas's nomination, Rutledge related the events of March 15 and 16 as follows:

> [Frank Murphy] requested me to call him at midnight at the White House (he went to Baltimore for a concert), but he enjoined absolute confidence. Believe me, I was "treed." There were three outcomes & an entire future at stake with eight hours in which to decide & half of them mortgaged to other & pressing things. One was, "Supreme Court, or nothing," and the other, "unqualifiedly yes," and the third, "yes, but"

> . . . I almost slipped up on the time differential, but finally waked up to the fact that I was to call at 11:00 our time. However, the White House operator reported that Murphy was delayed returning, but he might be able to get him on the line before he retires. We waited three-quarters of an hour & then went to bed.
>
> Before I finished shaving Thursday morning Murphy called. I decided it was no time to gamble or dissemble. I felt pretty sure the matter had been decided and I was not the man. I considered Murphy's emphasis on the Court of Appeals rather than his statement that my name was still in all the pictures as presenting the probable situation. My own reaction agreed with men of whom I had been able take counsel that the appeals place is preferable to the position I have here . . . Accordingly I gave him the reply that I would accept, if the place were tendered to me.[63]

Thus, on Thursday, March 16, there was only one candidate for Brandeis's seat on the Supreme Court—William O. Douglas.

Pushback

Aware of the effectiveness of Douglas's western campaign and the influence of his friends in the White House, Schwellenbach's supporters, mostly labor leaders, pushed back during the first week of March and attacked Douglas, claiming that he was not a true liberal because he was too close to Wall Street, his writings on improper practices in reorganization were not sufficiently critical, and he had not acted against the New York Stock Exchange when it whitewashed two of its members in the Whitney affair. They also claimed Douglas was unqualified for nomination to the Supreme Court because he had no background in labor law or civil liberties.[64] The chief architect of the pushback was Max Lowenthal, a Frankfurter protégé, whose research Douglas had criticized in the *Harvard Law Review* in 1934.[65]

On Tuesday, March 14, Jerome Frank discussed the Schwellenbach supporters' charges against Douglas with Frank Murphy, and, in a letter to Murphy the next day, he explained in detail why the charges were bogus. "As for the suggestion that Douglas has dealt too softly in his writings with improper practices in reorganization matters," wrote Frank, "the short answer is that his work for the SEC . . . plainly discloses that he has been highly critical of improper reorganization activities and has vigilantly sought to procure statutory regulation which would prevent such improper practices." As for Douglas not acting against the New York Stock Exchange when it whitewashed two of its members in the Whitney affair, Frank gave two answers. First, "under existing statutes, SEC has no power to discipline persons . . . for conduct disclosed in our Whitney report; such discipline can only come from Exchange authorities." Second, Douglas felt it was not desirable at the time to attack the whitewashing publicly. To do so, he believed, would play into the hands of the reactionary group in the Exchange and thus weaken the power of the Exchange's president, William McChesney Martin, who was cooperating with the SEC.[66]

During the pushback period, the New York Stock Exchange submitted a report to the SEC that proposed amendments to the federal security laws that would have weakened the SEC as a regulatory agency. The SEC responded on March 15 with a dignified but firm rejection. Douglas's personal response was a curt oral statement. "[L]ooking at the end result," he said, "if you try to measure in terms of a program for business recovery, the report is a phony. Opening things up so that the boys in the Street can

have another party," he added, "is not going to help recovery."[67] "Douglas pounced on the Exchange proposals," wrote James F. Simon, as a means to prove his New Deal loyalty, and effectively squelched rumors, spread by Schwellenbach supporters, that he had become a prisoner of Wall Street."[68]

Nomination

On Sunday afternoon, March 19, Douglas returned home from a round of golf at the Manor Country Club in Rockville, Maryland. Awaiting him was a message from the White House saying the President was anxious to see him. After changing his clothes, he went to the White House, where he was ushered into the President's study. After some pleasantries, FDR began teasing Douglas about wanting him to accept "one of the toughest jobs in Washington . . . a thankless job with long hours," a job that was "dreary, confining, and uninteresting," a job that "is something like being in jail." The President's tone then became serious. "I want you to succeed Louie Brandeis," he said. "I am sending in your name to the Senate tomorrow noon."[69]

"I was quite overcome—dazed, to be more accurate," Douglas wrote in his diary that evening. "I thanked the President, and then we talked for another hour, not about the work of the Court but about its personalities —past and present. . . . I told him that in my opinion the C.J. was the craftiest politician on the contemporary scene & I said that in so saying I did not intend to belittle his own (the President's) talent in that line. He laughed heartily and approvingly I felt."[70]

At noon on Monday, March 20, 1939, FDR sent William O. Douglas's Supreme Court nomination to the Senate. Ben Cohen had prepared the following statement for his use:

> It was not an easy task to select a successor to Mr. Justice Brandeis. It was not an easy task to find a man with Brandeis's great knowledge of intricacies of corporate law and practice and with Brandeis's passion to use his knowledge and skill to improve the lot of the common man. Mr. Douglas's training, experience, and outlook are such I believe as to give every assurance that he will creditably uphold the great Brandeis' tradition.
>
> Although Mr. Douglas's voting residence is in Connecticut, none who know him has ever considered him a "Connecticut Yankee." He was brought up in the West, and in spirit, as well as appearance, he is unmistakably western. But I don't think that should be held against him[71]

When Cohen wrote the above statement, Wiley Rutledge's nomination to the Court of Appeals for the District of Columbia was ready to go the Senate. So was a letter from FDR to Lewis Schwellenbach that explained why he had not been chosen to fill the Brandeis vacancy. The gist of the explanation was that the President, the party, and the country needed Schwellenbach in the Senate.[72]

Gerhard Gesell, who was with Douglas when Douglas heard that his nomination had gone to the Senate, quoted him as saying: "Damn it, I did not want this job right now." Gesell asked, "Then why are you taking it?" Douglas answered: "I need the money." "My impression," said Gesell later, "was that he wanted the job for lots of reasons."[73] One of Douglas's reasons was the money—$20,000 a year, twice a much as he had been receiving at the SEC. As for the job's timing, Douglas had hoped that it would have come after he had been dean of Yale Law School and had an opportunity to reform legal education.

Among the many congratulatory messages Douglas received on Monday, March 20, one stood out. It was a telegram from Arthur

Krock, whose remarks to Douglas at the Pavenstadt home on the evening of Brandeis's retirement had launched the boom for Douglas's nomination. The telegram read: "SOMETIMES A HAPPY THOUGHT WORKS OUT, DOESN'T IT?"[74] Eight days later, Douglas and Krock celebrated the event over lunch at the Metropolitan Club.[75]

After accepting congratulations from his SEC colleagues, Douglas closed his office door, took out a sheet of SEC stationery and his fountain pen and drafted the following letter:

> Mar. 20, 1939
>
> My dear Judge Brandeis:
>
> The President has just appointed me to the Supreme Court as your successor.
>
> I am overwhelmed and filled with a deep sense of humility. Those feelings are due in part to my realization of the magnitude of the task. But in the main they are due to my recognition of the great responsibility of one who is asked to wear your robe.
>
> The honor of the position is itself a great one. But the honor of following in your footsteps is even greater.
>
> If the Senate confirms, I pray God may give me power to maintain your high standards and to serve the cause of liberalism in accordance with your noble traditions.
>
> With warm regards and great affection, I beg to remain
>
> Your obedient servant,
>
> Wm. O. Douglas[76]

Justice Brandeis responded by messenger the same day, saying that Douglas's letter was the first to bring him news of the nomination and that he was "delighted."[77]

On Sunday, March 26, Douglas called on Brandeis at his California Street apartment, and the same day he described his visit as follows:

> I saw Brandeis at his apartment and he told me something which gave me as great a thrill as the nomination. He said, "You were my personal choice for my successor." He was most gracious and held my hand with great warmth as he said it. I was deeply touched. That, I felt, was the greatest complement ever paid me. Whether he had communicated that thought to the President I do not know. I suspect that he had done so, indirectly through Felix who was most anxious that I receive the nomination. It also surprised me because I had never known Brandeis well. I had frequently called to pay my respects but our contacts were nonetheless casual. His "Other People's Money" had been of course a Bible for me for years, as had his "Curse of Bigness." the philosophy of which was my own.[78]

Confirmation

The Senate moved quickly to confirm Douglas's nomination. Senator Henry F. Ashurt, Judiciary Committee chairman, appointed a subcommittee of five Democrats—Carl A. Hatch, of New Mexico (chairman); Joseph O'Mahoney, of Wyoming; William H. King, of Utah; Edward R. Burke, of Nebraska; and Patrick A. McCarran, of Nevada—and two Republicans—William E. Borah and John A. Danaher, of Connecticut—to conduct hearings on the nomination. The subcommittee met at 2 p.m. on March 24. All of its members were present, except Burke

and McCarran. Douglas and Attorney General Murphy were also present.[79] Chairman Hatch asked his colleagues whether there were any requests to call witnesses for or against the nomination. Receiving none, he moved that the subcommittee proceed in executive session. During the executive session, *The New York Times* reported, Senator King, who originally wanted a westerner to fill the vacant seat, "put the motion that Mr. Douglas be approved."[80] A few minutes later, Chairman Hatch, who had Burke's and McCarran's proxies, announced that the subcommittee had voted unanimously to report Douglas's nomination favorably to the full Judiciary Committee. *The Times* reported: "Mr. Douglas declined to comment, but smiled broadly when Senator Hatch notified him of the decision. Attorney General Murphy termed the appointee 'a great and fine man' when asked for comment."[81]

On Monday, March 27, the full Judiciary Committee met and voted unanimously to report the nomination favorably to the Senate. In addition to members of the subcommittee, the members of the full Judiciary Committee so voting were Henry F. Ashurst, of Arizona (chairman); Matthew M. Neely, of West Virginia; Frederick Van Nuys, of Indiana; George Logan, of Pennsylvania; Key Pittman, of Nevada; Tom T. Connally, of Texas; James H. Hughes, of Delaware; George W. Norris, of Nebraska; Warren R. Austin, of Vermont; and Charles L. McNary, of Oregon.[82]

Given the geographical and ideological unanimity on the Judiciary Committee, Douglas's supporters assumed that he would be confirmed by the Senate without debate and perhaps by a voice vote, but on March 30, when his nomination came before the Senate for confirmation, Senator Lynn J. Frazier, a Republican from North Dakota, asked that the nomination be put over until he could investigate Douglas's record, which surprised his colleagues, for Frazier seldom spoke in the Senate, and, when he did, it was on agricultural matters.[83] His request was granted, and on April 3 and 4, he rehashed for almost five hours the criticisms that Schwellenbach supporters had made of Douglas earlier.[84] Senator Frank Maloney, of Connecticut, who was a close friend of Douglas, responded to Frazier's remarks. "I cannot help but feel that someone, somewhere has preyed upon sincerity and devotion to the cause of good government," said Maloney. "If there was something wrong [with Douglas's conduct], he added, "it would have been found out by now." Maloney then went on to extol Douglas as a liberal and an outstanding SEC chairman.[85] According to Drew Pearson and Robert S. Allen, Frazier's remarks "mystified" his senatorial colleagues "and gave the impression that he had merely repeated a written diatribe against Douglas composed by a friend. Apparent confirmation of this came a little later when it was reported that the instigators of Frazier's remarks were Max Lowenthal, counsel for the Senate railway financing committee, and Orben Litchfield, a member of the brokerage firm of Hibbs and Company. Far more interesting, however, was the remark of Litchfield when accused of inspiring the Frazier speech. It indicated that some of the boys are taking the presidential talk more than seriously. 'We weren't interested in Douglas as a Supreme Court justice,' said Litchfield. 'All we wanted to do was to spike his guns for 1940.'"[86]

Senator Frazier's ill-conceived attack on Douglas failed abysmally. The Senate confirmed Douglas's nomination by a vote of sixty-two to four.[87] The four senators voting "nay" were Frazier of North Dakota; Henry Cabot Lodge, Jr., of Massachusetts; Gerald P. Nye, of North Dakota; and Clyde M. Reed, of Kansas—all Republicans.

On Monday, April 17, 1939, William O. Douglas, at the age of forty, took his oath of office as an Associate Justice of the Supreme Court of the United States. He was the youngest Court appointee since James Madison appointed Joseph Story in 1811.

Reactions

Reactions to Douglas's appointment to the Supreme Court were overwhelmingly favorable.

Justice Frankfurter hosted a black-tie dinner party to celebrate the event.[88] He also congratulated Frank Murphy on recommending Douglas's appointment. On March 20, 1939, he wrote Murphy:

> Supreme Court of the United States
> Washington, D.C.
> Monday
>
> Dear Frank -
>
> You have done the country a great service. What deeper satisfaction can come to a man and an Attorney General.
>
> Gratefully yours,
> FF[89]

Arthur F. Corbin, Douglas's former colleague at Yale, told Frederick R. Barkley that "whatever comes up, Bill Douglas will pass judgment in his own mind, without regard to man, God, or devil, and he will make up his mind as he sees is legally right. He will think of rules that will work, applying the best there is in human experience."[90]

Dean Leon Green, of the Northwestern University School of Law, wrote to Douglas: "You not only merit the appointment from the standpoint of services, you are the very type of lawyer who should be on the Court and especially at that this time."[91]

New York Mayor Fiorello LaGuardia sent the following telegram:

> CONGRATULATIONS AND BEST WISHES. WE ARE EXTREMELY HAPPY HERE IN NEW YORK TO HEAR OF YOUR APPOINTMENT TO THE SUPREME COURT OF THE UNITED STATES BECAUSE WE KNOW YOU WILL LOOK FORWARD TO ACTUAL CONDITIONS AND NOT BACKWARD TO WORN OUT PRECEDENTS.[92]

David Lilienthal, director of the Tennessee Valley Authority, wrote: "You have not only the native sagacity but also the training that is almost ideal for the major work of the Court in the critical decade just ahead. For the first time there will be a Justice of the Supreme Court who knows the problems that face modern administrative agencies from his own experience as an administrator."[93]

Harold Laski, of the London School of Economics, wrote Douglas that his appointment was "simply grand!" "Felix and Hugo Black and you—that's my idea of a Supreme Court."[94]

Jennie Fisk Mann, the twin sister of Douglas's mother, wrote her nephew:

> We are all proud of you. Everyone speaks highly of your work. You deserve it all and have worked hard and have only received your just desserts. You have attained one of the highest honors that can come to a citizen of our nation. Our government needs men like you and we know your influence will be for the very best. . . . [We] only wish we could clasp your hand and say, 'God bless you.' How proud your father would be if he could know it. Your mother is proud, I am sure, to have such a capable noble son. . . . I only hope that we all improve ourselves and be worthy of being one of your kin.[95]

Douglas expressed his reaction to his appointment as follows: "I have not felt elated over it; rather I have been overwhelmed with awe and humility. I am of course supremely happy, and I look forward to a life-time of service on the Court."[96] As it turned out, Douglas's tenure was the longest in the

Court's history—slightly more than thirty-six and a half years.

Author's Note: This article is based on a chapter in my unpublished biography of William O. Douglas. I presented an abbreviated version of the article at the seventy-fifth anniversary celebration of Douglas's appointment to the Supreme Court on May 16, 2014. I thank Jill Parmer Danelski and David E. Cote for reading and commenting on previous drafts of the article.

Endnotes

[1] Douglas's desk calendar, Feb. 13, 14, 1939, Container 629, William O. Douglas Papers, Library of Congress, hereafter cited as WODLC. Newton later became mayor of Denver and president of the University of Colorado. Pavenstadt was a lawyer at the SEC.

[2] *Ibid.* The Yale law faculty had elected Douglas as its dean, and Yale made him a formal offer the next month, which he accepted on the condition that he would not receive a Supreme Court appointment. According to Laura Kalman, "he had no expectation of such an appointment." **Legal Realism at Yale, 1927–1960** (Chapel Hill: University of North Carolina Press, 1986), 140. Cf. Diary of Wm. O. Douglas, March 19, 1939, Container 1780, WODPLC, hereafter cited as Douglas Diary.

[3] A. Howard Meneely to Douglas, Container 20, March 21, 1939, *ibid.*

[4] Clark had been nominated to the U.S. Court of Appeals for the Second Circuit on Jan. 5, 1939, and was awaiting Senate confirmation on February 13.

[5] Edmund Pavenstadt to WOD, April 9, 1964, Container 363, WODPLC.

[6] Arthur Krock, "Private Memorandum," March 20, 1939, Krock Papers, Container 1, Seeley G. Mudd Manuscript Library, Princeton University. Krock said that he had written the memorandum while his conversation with Douglas at the Pavenstadt home on February 13 and his telephone call to Murphy the next day were still fresh in mind. After drafting the memorandum, he asked Douglas to attest to its accuracy for historical purposes. Douglas did so after adding that he "had not even heard of the Brandeis retirement." The two men then signed the document. Krock later presented it to Murphy the with same request, but Murphy, who said the document was accurate, declined to sign it. "Private Memorandum," March 28, 1939, *ibid.* Later, in their published memoirs, Krock and Douglas embellished the facts in the March 20 memorandum. Cf. Arthur Krock, **Memoirs: Sixty Years on the Firing Line** (New York: Wagnalls, 1968), 176–77; William O. Douglas, **Go East, Young Man** (New York: Random House, 1974), 459–69.

[7] Krock, "Private Memorandum," March 20, 1939; Douglas to Edmund W. Pavenstadt, April 9, 1964, Container 363, WODPLC.

[8] Krock, "Private Memorandum," March 20. 1939; "Private Memorandum," March 28, 1939, Krock Papers. Twenty-five years later, Douglas, wrote to Pavy Pavenstadt: "Arthur Krock really carried the ball for me, and I have been in his debt for it. Curiously, although I knew Frank Murphy quite well, I never talked the matter over with him, even in retrospect. But I had the feeling that he, like Arthur Krock, was very important in the whole design. And I am happy that you too played a role." April 9, 1964, Container 363, WODPLC.

[9] Douglas to Edmund W. Pavenstadt, April 9, 1964, Container 363, WODPLC.

[10] Raymond Clapper, "Douglas in the Spotlight," Feb. 15, 1939, Container 62, Raymond Clapper Papers, Library of Congress. In 1939, Corcoran was one of the most powerful lawyers in the Roosevelt Administration. Illustrative of his power is a note Jerome Frank wrote to him on March 25, 1939, asking to support Frank's appointment as SEC chairman. Frank said that he understood Bill Douglas will "urge the Skipper (FDR) to designate me *rather than any one else.* And I am writing to ask you whether you, too, will . . . so advise the Skipper. I know that if you do so, my chances are most excellent, but that if, on your list, others rank ahead of or equal with me, my chances are slim." Carbon copy of handwritten note, Container 329, WODPLC. Frank was appointed SEC chairman. Max Lowenthal, a protégé of Frankfurter, who hated both Douglas and Corcoran, wrote that "C[orcoran] got FDR to put D[ouglas] on the SEC in 1936, and to make him SEC chairman in 1937 when Landis left. By that time, Landis had become dissatisfied with both C[orcoran] and D[ouglas], and their relationship, and was opposed to D[ouglas's] promotion. But Landis did not have the 'in' with FDR possessed by C[orcoran]." Lowenthal, "Thomas G. Corcoran's Relation to Wm. O. Douglas," unpublished memorandum, ca. 1948, at 1, Container 41a, Max Lowenthal Papers, University of Minnesota Archives.

[11] Douglas Diary, March 26, 1939; Lowenthal, "Thomas G. Corcoran's Relation to Wm. O. Douglas," 1.

[12] Douglas's and Edith Waters' desk calendars, Feb. 16, 1939.

[13] Arthur Douglas to Douglas, Feb. 23, 1939, Container 240, *ibid.*

[14] Copies of Arthur Douglas's letters to westerner friends are in Container 240, WODPLC.

[15] Arthur Douglas to Howard Manning, Feb. 22, 1939; Charles D. Martin to Howard Manning, Feb. 20, 1939, Container 20, *ibid.*; W.A. Bratton to Arthur Douglas, Feb. 21, 24, 1939, Container 18, *ibid.*; Roy De Grief to

Douglas, March 6, 1939, Container 19, *ibid.*; James O. Cull to Homer T. Bone, Feb. 27, 1939; James O. Cull to Arthur Douglas, Feb. 24, 26, March 8, 1939; WOD to James O. Cull, Feb. 26,1939, *ibid.*; Cameron Sherwood to Arthur Douglas, Feb. 21, 1939, with Walla Walla County Bar Association endorsement attached; J. Howard Schubert to Arthur Douglas, Feb. 20, 21, 23, 25, March 6, 1939, Container 21; Chester C. Maxey to Douglas, March 21, 1939, Container 20, *ibid.*; Cameron Sherwood to Arthur Douglas, Feb. 21, 24, 1939, *ibid*; Cameron Sherwood to James M. Simon, Nov. 30, 1977, William O. Douglas Papers, Yakima Valley Museum; Sherwood Cameron to William E. Borah, with Walla Walla County Bar Association resolution endorsing Douglas attached, Feb. 20, 1939, Container 523, William E. Borah Papers, Library of Congress; Stephen B. L. Penrose to William E Borah, Feb. 19, 1939, *ibid.*

[16] Newspaper clippings, Container 1758, WODPLC.

[17] Jerome Jay Williams to Wes Ballinger, Feb. 21, 1939; Jerome Jay Williams to WOD, Feb. 22, 24, 1939; Jerome Jay Williams to Paul C. Smith, Feb. 18, 1938; Jay Jerome Williams to Don Sterling, Feb. 28, 1939; Paul Smith to Drew Pearson, Feb. 22, March 7, 1939. *Ibid.*

[18] Douglas, **Go East, Young Man**, 461.

[19] Douglas's desk calendar, Feb. 20, 1939.

[20] Bruce Blake to Saul Haas, Feb. 22, 1939, Container 1, Saul Haas Papers, University of Washington. Haas later interviewed Douglas for a biographical sketch that Senator Bone sent to the Senate Judiciary Committee. The sketch is attached to U.S. Senate, Committee on the Judiciary, Hearings on the Nomination of William O. Douglas, March 24,1939, Container 1783, WODPLC.

[21] Joseph Alsop and Robert Kintner, "Roosevelt Reported Ready to Consider Douglas for the Court If He Is to Be Called True Westerner," *Washington Evening Star,* Feb. 20, 1939.

[22] Douglas to Robert Kintner, May 24, 1939, Container 251, WODPLC.

[23] Drew Pearson and Robert Allen, *Seattle Post-Intelligencer,* Feb. 23, 1939.

[24] *A Register of Rhodes Scholars,* 1903–1981 (Oxford: Alden Press, 1981), 120.

[25] Ernest Lindley, "East Meets West: Geography and the Supreme Court," *Washington Post,* Feb. 19, 1939.

[26] Thomas G. Corcoran, "Rendezvous with Democracy," chap. 10 at 34, Corcoran Papers, Library of Congress.

[27] Unpublished manuscript of the Diary of Harold L. Ickes (microfilm), Harold L. Ickes Papers, Library of Congress, hereafter referred to as the Ickes Diary.

[28] Ickes Diary, March 5, 1939, 3268.

[29] *Ibid.*, 3269–70.

[30] In discussing possible successors to Cardozo with FDR and Harry Hopkins, Robert Jackson said: "Mr. President, . . . [y]our greatest contribution in the light of history will be the change of the Supreme Court's interpretation of the Constitution. What is urgently needed at this time is someone who can interpret it with scholarship and with sufficient assurance to face Chief Justice Hughes in conference and hold his own in the discussion. Any man you would be likely to name from the west would be possessed of an inferiority complex in the presence of the Chief Justice, who looks like God and talks like God. He would be completely unable to help give direction to the action of the Court." Impressed by Jackson's statement, FDR mused: "I think that Felix is the only man who could do that job, Bob." Quoted in Eugene C. Gerhart, **America's Advocate: Robert H. Jackson** (Indianapolis: Bobbs-Merrill Co., 1958). 165–66, citing Robert H. Jackson, "Autobiographical Notes." Though Jackson's statement undoubtedly influenced FDR, Corcoran claimed that he "had been the strategist who persuaded Roosevelt to alter his judicial priorities and appoint Felix ahead of [a westerner]." Corcoran, "Rendezvous with Democracy," chap. 10 at 34.

[31] "Justice Brandeis Retires from Supreme Court; Post May Go to West . . . Schwellenbach in Line," *The New York Times,* Feb. 14, 1939.

[32] Lewis Baxter Schwellenbach, **Biographical Directory of the American Congress, 1774–1971** (Washington: U.S. Government Printing Office, 1971), 1666.

[33] John M, Ferren, **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge** (Chapel Hill: University of North Carolina Press, 2004), passim.

[34] David J. Danelski, unpublished biography of William O. Douglas, passim.

[35] W. Averell Harriman, Foreword to Henry H. Adams, **Harry Hopkins** (New York: Putnam's Sons, 1977), 18.

[36] Ickes Diary, March 12, 1939, 3281.

[37] *Ibid.*

[38] Harry Truman quoted in David McCollouch, **Truman** (New York: Simon & Schuster, 1992), 213.

[39] Quoted in "Two Considered to Succeed Brandeis, Three Senators Say," *Washington Evening Star,* Feb. 22, 1939.

[40] Lee Pressman, Oral History, 474, COHP, Columbia University.

[41] Irving Brant to Wiley B. Rutledge, Feb. 19, 1939, Container 12, Wiley B. Rutledge Papers, Library of Congress.

[42] Ickes Diary, March 12, 1939, 3283.

[43] *Ibid.*, 3282.

[44] Department of Justice Appointment File for Wiley Blount Rutledge, Jr., PF42a, FDR Papers, FDR Library. Attached to Rutledge's appointment file is a copy of William O. Douglas's resume.

[45] Joseph Alsop and Robert Kintner, "Murphy Study Explodes Myth Supreme Court Needs Special Interpreter of Western Law," *Washington Evening Star,* March 9, 1939.

[46] Lewis J. Paper, **Brandeis: An Intimate Biography of One of America's Truly Great Supreme Court Justices** (Seacaucus, N.J.: Citadel Press, 1980), 391, 432.

[47] Quoted in Melvin J. Urofsky, **Brandeis: A Life** (New York: Pantheon Books, 2009), 899. The Fisher interview is in the Lewis J. Paper Papers, Harvard Law School Library.
[48] Paper, *Brandeis,* 432.
[49] Cf. Urosky, *Brandeis,* 750–51, 899.
[50] Ickes Diary, March 12, 1939, 3285.
[51] *Ibid.*, 3283.
[52] *Washington Evening Star,* March 7, 1939.
[53] FDR to Lewis B. Schwellenbach, March 21, 1939, Container 1, Lewis B. Schwellenbach Papers, Library of Congress.
[54] Kenneth Stewart, "The Honorable Justice from Yakima," n.d., ca. 1947, William O. Douglas's Vertical File, FDR Library.
[55] Jerome Frank to Frank Murphy, Feb. 21, 1939, Microfilm Roll 49, Frank Murphy Papers, Bentley Historical Library, University of Michigan.
[56] John M. Ferren, **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge** (Chapel Hill: University of North Carolina Press, 2004), 161, citing an interview with C. David Ginsburg.
[57] Drew Pearson and Robert S. Allen, "Borah Backs Douglas for Supreme Court," *Seattle Post-Intelligencer,* March 6, 1939.
[58] Jerome Frank to William E. Borah, March 13, 1939, Container 523, William E. Borah Papers, Library of Congress.
[59] Author's interview, C. David Ginsburg, 1998.
[60] Ickes Diary, March 14, 1939, 3293.
[61] *Ibid.*
[62] Lowenthal. "Thomas G. Corcoran's Relation to Wm. O. Douglas." Lowenthal Papers; Irving Brant to Wiley B. Rutledge, March 21, 1939, Container 13, Rutledge Papers; Ferren, **Salt of the Earth**, 166.
[63] Wiley B. Rutledge to Irving Brant, March 21, 1939, Container 13, Brant Papers.
[64] Howard Costigan, secretary of the Washington Commonwealth Federation, quoted in "Costigan Raps Douglas for Post in Court," *Seattle Post-Intelligencer,* March 12, 1930, clipping in Container 14, Lewis B. Schwellenbach Papers, Library of Congress; A.F. Whitney, president of Brotherhood of Railway Workers to Frank Murphy, March 7, 1939, forwarded to the White House and quoted in M. H. McIntyre to FDR, March 14, 1939, PPF, 6389, FDR Papers; Lee G. Miller, "Friends Reply to Attack on Douglas's Liberalism," *Washington Daily News,* March 14, 1939.
[65] William O. Douglas, "Protective Committees in Railroad Reorganizations," *Harvard Law Review*, 47 (1934), 565–90.
[66] Jerome N. Frank to Frank Murphy, March 15, 1939, Microfilm Roll 50, Murphy Papers.
[67] Quoted in "SEC Hits Proposals to Loosen Trading," *The New York Times,* March 16, 1939.
[68] James F. Simon, **Independent Journey: The Life of William O. Douglas** (New York: Harper & Row, 1980), 193–94.
[69] Douglas Diary, March 19, 1939, WODPLC.
[70] *Ibid.*
[71] Statement attached to Benjamin V. Cohen to Marguerite Le Hand, March 20, 1939, PTF, Container 127, FDR Papers.
[72] FDR to Lewis B. Schwellenbach, March 21, 1939, Container 1, Schwellbach Papers.
[73] Gesell's oral history, Katie Louchheim, **The Making of the New Deal** (Cambridge: Harvard University Press, 1983), 136. Gesell was a Douglas student at Yale, a lawyer at the SEC, and later a federal district judge.
[74] Arthur Krock to Douglas, March 20, 1939, Container 20, WODPLC.
[75] Douglas's desk calendar, March 28, 1939, *ibid.*
[76] Louis Dembitz Papers, University of Louisville, Microfilm Edition, the Library of Congress, Roll 18.
[77] Louis D. Brandeis to Douglas, March 20, 1939, Container 525, Douglas Papers.
[78] Douglas Diary, March 26, 1939.
[79] Transcript, U.S. Senate Judiciary Committee, Hearings on the Nomination of William O. Douglas, March 24, 1939, Container 1783, Douglas Papers.
[80] "Senators Approve the Nomination of William O. Douglas," *The New York Times,* March 25, 1939.
[81] *Ibid.*
[82] "Nomination of William O. Douglas to the Supreme Court of the United States," Container 1758, WODPLC.
[83] 80 *Congressional Record,* 4979.
[84] *Ibid.*, 5242–51.
[85] *Ibid.*, 5252–57.
[86] Drew Pearson and Robert S. Allen, "The Washington Merry Go Round," undated clipping, William O. Douglas file, Beta Theta Pi Fraternity, Whitman College.
[87] 80 *Congressional Record,* 5257.
[88] Douglas's desk calendar, March 27, 1939, WODPLC.
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[90] Quoted in Frederick R. Barkley, "The Man Named to Succeed Brandeis," *The New York Times Magazine,* March 26, 1939 at 21.
[91] Leon Green to Douglas, March 22, 1939, Container 19, WODLC.
[92] F. H. La Guardia to Douglas, March 20, 1939, Container 20, *ibid.*
[93] David E. Lilienthal to Douglas, March 22, 1939, *ibid.*
[94] Harold Laski to Douglas, March 21, 1939, Container 349, *ibid.*
[95] Jennie Fisk Mann to Douglas, March 22, 1939, Container 20, *ibid.*
[96] Douglas to A. Howard Meneely, April 7, 1939, Container 10, *ibid.*

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