Introduction

Melvin I. Urofsky

The issue in your hands includes articles on many facets of the Supreme Court's history, which, of course, has been our objective for many years. We hope that our readers will find time to put their feet up and enjoy learning more about our nation's highest tribunal.

When the Court recently handed down its decision in the same-sex marriage case, a number of commentators referred to *Brown v. Board of Education* (1954) to make a very important point. While the first case in a new field of jurisprudence gets the headlines and the attention, the real work of implementing that decision will require years and other cases to determine just how far the new ruling will go. *Brown* said that state-required racial segregation in public schools violated the Fourteenth Amendment's Equal Protection Clause. But what about racial discrimination in places other than schools?

Professor Steven P. Brown, the head of the political science department at Auburn, looks at one of these cases and its long history. Steven Girard, a wealthy nineteenth-century Philadelphia merchant, left the bulk of his estate to found a school for white orphans. Although the gift was private, there were enough connections to the city to warrant a case for state action. Professor Brown traces the history of the bequest, and the fight that took place over integrating Girard College in the 1960s. It is a fine example of the devil being in the details.

Evan P. Rothera is a graduate student in history at Pennsylvania State University, and his article on polygamy is the winner of this year's Hughes-Gossett Student Prize. Most of us who teach constitutional history focus almost entirely on *Reynolds v. United Statesem* (1879) when we discuss the Court and polygamy. But as Rothera and others are showing, there is far more to the battle against polygamy than that one case, and it involved not only the high court but Congress and the Republican Party as well.

It has been my good fortune to have Clare Cushman as the managing editor of the *Journal* ever since I took over. But Clare is not only a good editor, she is also the author of a number of books about the Court and its members. In 2011 she published

Courtwatchers: Eyewitness Accounts in Supreme Court History, which has a wealth of little known anecdotes about the high court. The response was so enthusiastic that she is now co-publishing a volume (with Todd Peppers), **Of Courtiers & Kings; More Stories by Law Clerks and Their Justices**, from which the article on pre-1940 law clerks is adapted.

The Framers of the Constitution gave federal judges tenure during good behavior, in other words, a lifetime appointment so they would be free from partisan political pressures. The vast majority of the members of Justices have stayed until they retired or died, but a handful have left the Court to do something else. James F. Flanagan, emeritus professor of law at the University of South Carolina, looks at five of these Justices and helps us to understand why they did something so rare—resign from the U.S. Supreme Court.

Abe Fortas was one of the most successful lawyers in Washington, the head of a politically connected law firm, and the epitome of the old saw about New Deal lawyers who came to Washington to do good and stayed on to do well. He was a friend of Lyndon B. Johnson, who very much wanted him on the Court, a position that neither Fortas nor his wife wanted, but LBJ could not be stopped. Then, when Earl Warren wanted to retire as Chief Justice, Johnson nominated his friend to take the center chair. Normally that would be the end of the story, but in fact it is just the beginning, as Robert David Johnson of Brooklyn College shows us. It is a tale with not one but many morals.

Finally, we have a piece from my book on dissent and the Court. In that volume I try to show that a dissent is more than merely saying "I disagree." A great dissent forces the Court, sometimes over many Terms, to come to grips with the basic argument of the dissenter. A good example is Justice Hugo L. Black's dissent in *Betts v. Brady* (1941), and how over the next two decades in numerous cases the Court could not ignore it. Finally, in *Gideon v. Wainwright* (1963), the Court adopted Black's view.

There are cases, there are Justices, there is politics, and much more. As always, enjoy!

The Girard Will and Twin Landmarks of Supreme Court History

STEVEN P. BROWN

In June 2013, the trustees of Girard College announced drastic changes in the operations of the boarding school that had served the poor children of Philadelphia since 1848. Looming financial concerns, they said, necessitated the elimination of the school's secondary education and boarding programs.[1] While distressing to students and their families as well as to Girard's staff, the announcement received relatively little notice outside of Pennsylvania. The school's difficulties were simply not that unique given the nationwide economic struggles wrought by the recession of 2008, and there was little else about Girard to commend itself to the national media. That, however, was not always the case.

From its controversial founding as part of a bequest from one of the richest men ever to live in America, to its mission to care for the "poor, white, male" children of Philadelphia, Girard College has been the focal point of national attention before. Much of that interest derived from state and federal litigation involving the school, including two major Supreme Court decisions dealing with questions of religion and race. Arising out of the same bequest, but separated by more than a century, these rulings link the Taney and Warren Courts as well as the antebellum and civil rights eras. They also garnered for Girard College the distinction, as the *New York Times* put it (and with reference to the school's Greek Revival design), as "a landmark of judicial as well as architectural history."[2]

Stephen Girard

Girard College owes its existence to a man named Stephen Girard who died seventeen years before the institution bearing his name first opened its doors. Born in 1750 in France, Girard became a successful commercial merchant in his mid-twenties, focusing on goods transported between the French

colonial cities of Port-au-Prince and New Orleans. He later added a New Orleans-New York route to his commercial accounts. While making that run in May 1776, Girard's ship was severely damaged in a storm and later intercepted by British cruisers that had been sent to blockade major port cities in the rebellious colonies. British officers searched the ship's contents for contraband, impressed some of Girard's men into the Royal Navy, and left the broken vessel and its undermanned crew to limp into the port of Philadelphia.

Unable to return to his business immediately, but also sensing the possibility of wartime profits if he stayed in America, Girard temporarily abandoned the merchant trade to set up a small store to provide supplies to American troops. That, in turn, led Girard to a series of remarkably diverse and lucrative investments. Over the next fifty years, he turned his uncanny business acumen to road and bridge construction, land speculation, canal and railroad development, farming, insurance, ship-building, international trade, and banking, among other things. It has been estimated that, at its peak and adjusted for inflation, Girard's fortune exceeded $105 billion, making him one of the wealthiest Americans ever.[3]

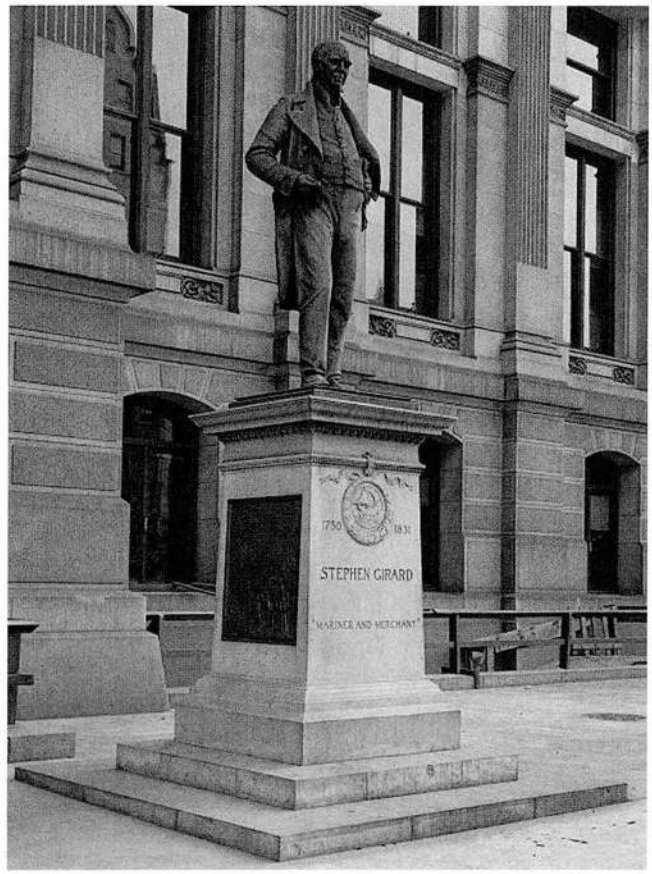
With the notable exceptions of his valorous service during Philadelphia's devastating yellow fever epidemic of 1793 and his underwriting of the War of 1812, which saved the national government from bankruptcy, Girard generally kept to himself and to his businesses, leaving the residents of his adopted city of Philadelphia to speculate and gossip about the reclusive mogul in their midst. Although few knew him well, Philadelphians still grieved when their wealthiest citizen passed away on December 26, 1831.

Those feelings of grief quickly turned to astonishment, however, both in Philadelphia and throughout the nation, when the contents of Stephen Girard's will were made public. Girard had no living heirs and had made only minor provisions for distant relatives, the captains of his merchant ships, and a few others. He left the bulk of his fortune to the city of Philadelphia. Of that considerable amount, the will stipulated that the greatest proportion was to be used to create a "permanent college, with suitable outbuildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution."[4]

The scholars of this college were to be drawn from the city's ranks of "poor white male orphan[s]" between the ages of six and ten, who would be boarded and educated at the school for free until the age of eighteen.[5] The will's use of the term "orphan" actually referred to fatherless children. The school Girard envisioned would not compete with orphanages already in operation but rather would benefit those youth whose opportunities for education and advancement in life had become severely limited with the loss of their fathers.

Girard stipulated that the boys at his school be instructed in a broad array of subjects. Some of these he specified, but the rest were to be determined "as the capacities of the several scholars may merit or warrant."[6] To those who would execute the will and see to the establishment of what would become Girard College, he gave two explicit instructions: The first was that any money remaining after the creation of the school was to be reinvested into securities that would be added to the capital fund. The second and far more controversial directive read as follows:

> [N]o ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said College; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.[7]



Stephen Girard amassed a fortune from his uncanny business acumen in road and bridge construction, land speculation, canal and railroad development, farming, insurance, ship building, international trade, and banking. His fortune exceeded $105 billion, making him one of the wealthiest Americans ever. Girard died childless in 1831.

It was this portion of the will and the "poor white male" requirement for admission to Girard College that together formed the basis for the legal challenges that, a century apart, captured the attention of the nation.

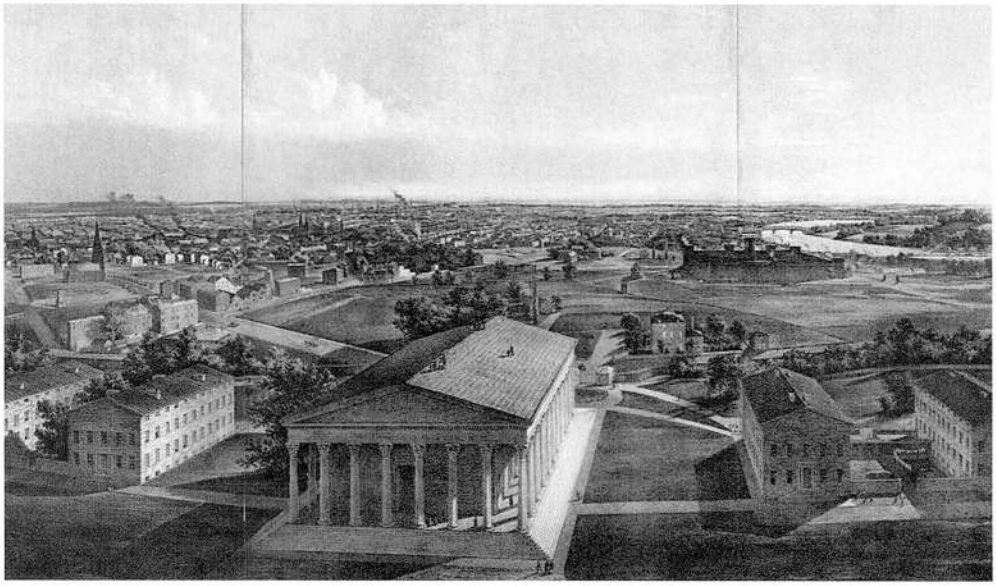
Vidal et al. v. Girard's Executors (1844)

Not surprisingly, Girard's relatives were shocked by the terms of the will and immediately challenged it, as they would several times throughout the nineteenth century. They took their initial claims to state court, where they were able to win control of several thousand acres of land that Girard had purchased after writing his will.[8] However, that court refused to set aside the will, as did a lower federal court in a subsequent challenge. Girard's relatives resolved to take the matter to the Supreme Court of the United States.

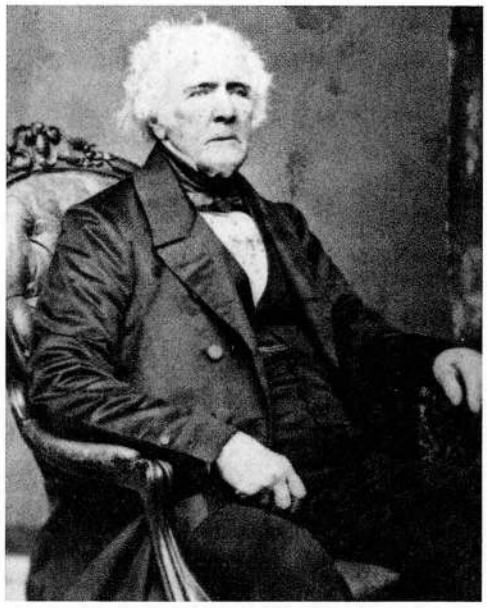
Given the fortune that was at stake, the family sought the best lawyers they could find to take their appeal, ultimately retaining Daniel Webster as lead counsel as well as Walter Jones, a seasoned veteran before the Court. Equally anxious not to lose the trust funds, the City of Philadelphia coaxed the prominent attorney Horace Binney out of retirement and also hired John Sergeant, a former Pennsylvania Congressman who also frequently argued Supreme Court cases.

The case was originally brought to the Court in 1843, but, because of absences on the Bench that year, Chief Justice Roger Taney rescheduled it for the 1844 Term, when the Court devoted ten days in February to oral arguments. The presence of Daniel Webster and the other eminent counsel combined with the facts of the case, an already decade's-worth of litigation by Girard's relatives, and the "extraordinarily vivid and picturesque description of the arguments by contemporary newspapers," guaranteed the appeal of the case to a broad spectrum of Americans.[9] Indeed, it led one Supreme Court historian to question whether *any* other case to that point had "more keenly interested the general public or brought it more in contact with the Court."[10]

The antebellum Supreme Court attracted increasing amounts of public attention for reasons that oftentimes had little to do with its rulings. One of these reasons, quite frankly, was that there was little else to do in Washington at the time, so Congressional floor debates and Supreme Court oral arguments became a form of political entertainment for those who temporarily occupied the city while Congress and the Court were in session. Many of the men and women who streamed into the Court's Chambers in the basement of the Capitol building did so not because they necessarily found the cases or Justices fascinating, but because it gave them a chance to see some of the most celebrated men of their day. Daniel Webster, John Sergeant, and Henry Clay, for example, were already famous for their positions in Congress and the Executive branch, but they were also among the most prominent advocates to ever argue before the Court—which they did frequently. And, as a contemporary account of the *Girard* case put it, the Court's small chambers provided a much more intimate setting than anywhere else in Washington "to hear the argument of these mighty and gigantic intellects . . . To observe all their gestures and movements—the glances of their eyes—the workings of their countenances—the intonations of their voices."[11]



Girard's will created a boarding school in Philadelphia for "poor white male[s]" who were fatherless. It also stipulated that no "ecclesiastic, missionary, or minister of any sect" be allowed on the premises. Above is Girard College campus in the 1850s.



When the *Girard* case came before the Supreme Court in 1844, the public swarmed to hear arguments, mostly because of the stature of the counsel arguing the case. Seasoned advocates Horace Binney (for Philadelphia, pictured) and Walter Jones (for Girard's relatives) contested the will.

The second reason for increased public attention to the Court was the vast expansion of the news media that began to take place in the first half of the nineteenth century. Some 350 newspapers existed in America in 1800 and still less than 750 by 1820. A decade later, however, there were 1,400 newspapers throughout the nation and 1,000 more by the time the *Girard* case was heard in 1844.[12]

Washington-area newspaper reports of the proceedings were copied and broadly disseminated by other newspapers throughout the nation, giving people who lived far from Washington a sense not only of the case but also of how the Court itself operated. Reporters recapped the lawyers' presentations to the Justices during the ten-day oral argument in the *Girard* case, sometimes providing extensive quotes taken verbatim from the proceedings. The *New York Herald* for example, devoted "eight closely printed columns . . . [to] the speeches made before the Supreme Court" by Daniel Webster alone in the case.[13]

Some reporting gave blow-by-blow accounts, taking on an almost prize-fighting approach to the arguments with respect to who was ahead and who was behind. Referring to the task awaiting Webster following the oral argument of Horace Binney (for Philadelphia) and Walter Jones (for Girard's relatives), the *Philadelphia Inquirer* reported, "What ground Mr. Webster may take is of course not known; but thus far Mr. Binney has made a *pulverizing* announcement—he grinds as he goes—and it will need all of Mr. Webster's talents to rebuild Mr. Jones' constructions."[14]

While commenting on the cases, reporters also made asides about the quality of the oratory, exchanges between counsel during oral argument, the attentiveness of the Justices, the press of the crowds, and the attractiveness of the female visitors, all of which informed and enlightened readers across the country. This melodramatic account from the *New Hampshire Sentinel*'s coverage of the Girard Will case is typical:

> There is a devouring curiosity to see and hear the mighty combatants in this forensic amphitheatre, where black letter cases, authorities springing out of the feudal systems, statutes of England and Pennsylvania, have already covered a wide field of argument. Ladies listen to the dry details as though they were enchanted by the sound of a lover's harp, and young men with their long hair look on as wise as the learned Gamaliels themselves.[15]

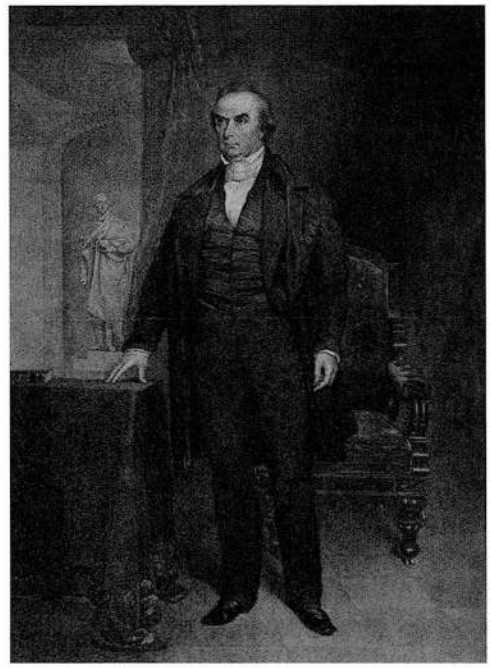
One newspaper reporter described the large number of colorfully dressed women in attendance for the oral argument. Scattered among the men in the courtroom, they reminded him of "vernal flowers springing up amid the crevices of immovable and everlasting rocks."[16] He went on to observe that the Court's chamber actually looked

> more like a ball room sometimes; and if old Lord Eldon and the defunct Judges of Westminster would walk in from their graves, each particular whalebone in their wigs would stand on end, at this mixture of men and women, law and politeness, ogling and flirtation, bowing and curtsying, going on in the highest tribunal in America.[17]

The *New York Herald* described the scene in the Supreme Court on Saturday, February 10, the first day of Webster's argument in the case in this way:

> There is a tremendous squeeze . . . Hundreds and hundreds went away, unable to obtain admittance. There never were so many persons in the Court-room since it was built. Over 200 ladies were there; crowded, squeezed and almost jammed in that little room; in front of the Judges and behind the Judges; in front of Mr. Webster and behind him and on each side of him were rows and rows of beautiful women dressed 'to the highest.' Senators, Members of the House, Whigs and Locos, foreign Ministers, Cabinet officers, old and young—all kinds of people were there . . . The body of the room, the sides, the aisles, the entrances, all were blocked up with people. And it was curious to see on the bench a row of beautiful women, seated and filling up the spaces between the chairs of the Judges, so as to look like a second and a female Bench of beautiful Judges.[18]

The legal questions presented to the Court in the case included whether a city, by definition, could serve as a trustee and, relatedly, whether the beneficiaries of the Girard Will were "too uncertain and indefinite to allow the bequest to have any legal effect."[19] Those technical questions, adequately dealt with by both parties during the first seven days of oral argument, were overshadowed by the third and far more controversial claim, the one for which the case is best known: that the requirement excluding clergy from the college demonstrated that "the plan of education proposed [was] antichristian, and therefore repugnant to the law of Pennsylvania" that protected the rights of conscience.[20]



Daniel Webster spoke for four days, arguing that the provision to exclude clergy was anti-Christian. His mesmerizing oratory combined a fiery defense of the service and sacrifices of the clergy and ridicule at the notion of a charitable trust even being deemed a "charity" if it disparaged religion. Spectators clapped.

Although this provision of the will was questioned from virtually the time it was made public, it was Webster's oral argument in the case, and the widespread reporting of it, which was responsible, as one Girard biographer lamented, "for the unfair branding of Girard College as a godless place."[21]

The case was not the Court's first brush with religion (that occurred in 1815),[22] but

Girard was unquestionably the first Supreme Court case to receive the type of public scrutiny that routinely accompanies modern questions of religion's role in civil society.

Daniel Webster was the last of the four attorneys to address the Court. His four-hour argument on Saturday, February 10, was a mesmerizing oratorical mixture that combined a fiery defense of the service and sacrifices of the clergy, ridicule at the notion of a charitable trust even being deemed a "charity" if it disparaged Christianity, bitter castigation of Stephen Girard's motives in excluding clergy from the school, sorrow at the purported inability of a sick or dying child at the school to receive the prayers of clergy, and anxiety at the college's deliberate refusal to obey Jesus' injunction to "Suffer the little children to come unto me."[23]

Illinois Congressman John Wentworth entered the Court's chambers to observe oral arguments just as Webster quoted the above scriptural passage. He recalled:

> [Webster then repeated] 'Suffer little *children* to come unto me,' accenting the word, children. He repeated it, accenting the word, little. Then rolling his eyes heavenward and extending his arm, he repeated it thus: 'Suffer little children to come unto *Me*, unto *Me*, unto *Me*, suffer little children to come.'[24]

The effect was overpowering, as Webster, according to the *New Hampshire Sentinel*, "was here quite overcome himself, and tears flowed from his own eyes and from the eyes of nearly all who saw and heard him."[25]

Webster continued the following Monday (for three hours) and Tuesday (for one hour), reportedly bringing the courtroom again to tears as he described a Girard-educated youth being asked to testify as a witness in some future court:

> He is asked, 'What is your religion?' His reply is, 'Oh I have not chosen any....' He is asked, 'Are you a Christian?' He replies, 'That involves religious tenets, and as yet I have not been allowed to entertain any....' 'Do you believe in the existence of God?' He answers that there are clashing doctrines involved in these things, which he has been taught to have nothing to do with.[26]

Webster went on ask the Justices and assembled crowd to imagine the effect on their families if their children were denied access to religious precepts in their youth. "What would become of their morals," he questioned, "their excellence—their purity of heart and life-their chastity—their hope for time and eternity?"[27] The result, he thundered, would be that these children would become what the Girard Will was itself: "mere, sheer, low, ribald, [embracing] vulgar Deism, and infidelity!"[28] In response, Congressmen Wentworth observed, he heard applause in the courtroom for the first and only time in his life. In later describing Webster's performance in the *Girard* case, Wentworth stated, "[I]t was the only three days' meeting that I ever attended where one man did all the preaching, and there was neither prayer nor singing."[29]

The Justices, however, were less enthused. Writing to his wife during the session, Justice Joseph Story commented on the "semi-theological character" of the oral arguments.[30] He noted that he was "not a little amused with the manner in which, on each side, the language of the Scriptures and the doctrines of Christianity were brought in to point the argument... with almost the formality of lectures from the pulpit."[31]

For all the attention Webster's oratory received from the general public, it failed to have an impact where it mattered most.[32] Just two weeks after oral arguments concluded, Webster's good friend Justice Story wrote for a unanimous Bench in handing down the

Supreme Court's opinion in *Vidal et al. v. Girard's Executors*.

The Court quickly dispensed with the first question in the dispute by ruling that, where a municipal corporation "has a legal capacity to take real or personal estate, there it may take and hold it upon trust in the same manner and to the same extent as a private person may do."[33] It followed up with the second question about the vague and indefinite nature of the beneficiaries of the Girard Will by essentially repudiating its own 1819 decision in *Baptist Association v. Hart's Executors*.[34] Based on the Court's understanding of the law at the time, Chief Justice John Marshall had written in that case that such beneficiaries were incapable of taking a bequest. By 1844, however, a number of previously unknown British cases and public records from the reign of Elizabeth I had been published that clearly established that similar bequests had been recognized in England two centuries earlier. Thus, as the Court in *Vidal* concluded, "Whatever doubts, therefore, might properly be entertained upon the subject [in 1819] . . ., those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."[35] If it had settled only that issue, the Supreme Court's decision in the Girard Will case would have been significant as it "established the validity of the charitable trust in the United States and . . . bec[a]me the bedrock of American charitable trust law."[36]

As to the final question that had captured the attention of the nation, the Court was unwilling to accept Webster's argument that the exclusion of clergy from the school was necessarily anti-Christian. Although it acknowledged that "the Christian religion is a part of the common law of Pennsylvania," the Court also noted that such a declaration was qualified by the rights of conscience protected by every constitution that had ever governed the Commonwealth of Pennsylvania and that were "intended to extend equally to all sects, whether they believed in Christianity or not."[37]

Further, it was not enough merely to claim, as Webster had, that the plan for the Girard College was anti-Christian. Instead, the Court said, "there must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught, but that it is to be impugned and repudiated."[38] The Court found absolutely no evidence that the school intended any such thing, and it used Stephen Girard's own will to demonstrate its point. Immediately after he categorically forbade any "ecclesiastic, missionary, or minister" from holding a position at or even visiting his proposed college, Girard explained why.[39]

> In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans . . . free from the excitement which clashing doctrines and sectarian controversy are so apt to produce.[40]

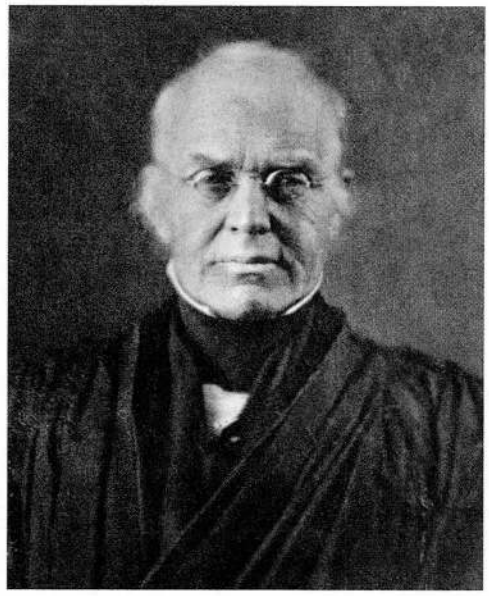
Perhaps with oral arguments in mind, Justice Story's opinion for the Court went on to answer the "What about the children?" question that had been the focus of much of Webster's melodramatic presentation. While the will did indeed forbid clergy, the ruling noted that, "there [was] no restriction as to the religious opinions of the instructors and officers" at the school.[41] Likewise, there were no constraints on laypersons in those capacities from instructing the students in Christianity. So long as no sectarian influences were introduced, the Bible itself could "be read or taught . . . its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated."[42] Thus, from the Court's perspective, there was really nothing about either the will or the college it proposed that was "inconsistent with the spirit and truths of Christianity."[43]

In writing to his wife after the ruling was announced, Justice Story expressed some

surprise at the unanimity of his Brethren in the matter, as immediately after the oral argument "there was considerable diversity of opinion among the Judges."[44] Whatever prompted those initial divisions was obviously resolved because, according to Story, "Not a single sentence was altered by my brothers as I originally drew it."[45] He went on to remark, "Mr. Webster did his best for the other side, but it seemed to me, altogether, an address to the prejudices of the clergy."[46] Story was clearly not the only one to have noticed.

A week after the decision was handed down, newspapers announced that Washington area clergy would convene to express "their admiration and views of that part of Mr. Webster's argument before the Court, which relates to the character and claims of Christianity, and for the purposes also of requesting a copy for publication in pamphlet form."[47] Webster obliged by editing the detailed press accounts of his oral arguments, which the group published as a sixty-page tract entitled "Mr. Webster's Speech in Defence of The Christian Ministry and in Favor of the Religious Instruction of the Young."[48]

Girard's relatives continued to litigate other claims in state and federal court over the next several decades, but none of those cases received the nationwide scrutiny that accompanied the Supreme Court's 1844 decision. Not long after that ruling, Girard College largely slipped from public view. Referring to the school in 1864, the *Boston Post* noted, "The world has of late years somewhat lost sight of this beneficent institution, founding in 1832 by the liberality of Stephen Girard. Twenty years ago its name was familiar to every ear from the litigation in the Supreme Court."[49]



The Court ruled unanimously in favor of Girard. Justice Joseph Story held that the will did not intend for religion to be "impugned and repudiated," and is pictured here in 1844, the year he handed down the *Girard* decision.

Pennsylvania, et al. v. Board of Directors of City Trusts of the City of Philadelphia (1957)

More than a century passed before the nation again turned its attention to the operations of Girard College. It did so, in large measure, because of the Supreme Court's ruling in *Brown v. Board of Education*.[50] On May 28, 1954, just eleven days after the Court's decision in *Brown*, the Philadelphia City Council approved a resolution seeking a court ruling on the Girard Will's requirement that only white males be admitted to the college. City Councilman Raymond Pace Alexander, whose district encompassed the school, introduced the measure and was a driving force behind the early litigation. With the backing of both the city and the Commonwealth of Pennsylvania, two young African-American boys sought admission to Girard College from the Board of City Trusts, which administered the bequest. The Board declined to enroll them, however, citing the racial stipulations of the will.

The race-based provisions were upheld at the trial level and, on appeal, by the Pennsylvania Supreme Court. The latter noted that "it is one of our most fundamental legal principles that an individual has the

right to dispose of his own property by gift as he sees fit."[51] It went on to declare that, regardless of whether the city, the state, or even the entire country viewed Girard's gift as "arbitrary, unwise, intolerant, discriminatory, or ignoble . . ., [the testator] is entitled to his idiosyncrasies and even to his prejudices."[52]

Although mindful of the Supreme Court's ruling in *Brown*, Pennsylvania's highest court questioned how Girard's bequest could even be challenged under the Supreme Court's Fourteenth Amendment jurisprudence. "It is perfectly clear," its opinion argued, "that private trusts for charitable purposes, not being subject to or controlled by '[s]tate action,' are wholly beyond the orbit of the Fourteenth Amendment."[53] According to the court, Girard never empowered Philadelphia with any authority to use any of its governmental powers in the execution of his will. It was merely a trustee, and limited as such to the "same rights, powers, and duties, no more and no less, as those of any private individual or trust company acting as a trustee."[54] The city of Philadelphia's fiduciary duty, it continued, was to carry out the terms of Girard's will. Should it be unable to do so, for any reason, it was empowered to appoint a trustee in its stead who could. In short, according to the Pennsylvania Supreme Court, *any* trustee of Girard's bequest would be obligated to deny non-white children admission to Girard College. In reporting the state court ruling, the *New York Times* succinctly summarized the entire decision with its headline "High Court of Pennsylvania Finds Girard Not Bound by U.S. Bias Decision: Will Called Paramount."[55]

Five months later, the Supreme Court of the United States reversed and remanded the lower court decision with a tersely worded, five paragraph *per curiam* ruling that concluded with this unequivocal statement:

> The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit [the two boys] to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment.[56]

The Pennsylvania Supreme Court subsequently vacated the trial court decision and remanded for consideration in light of the Supreme Court's opinion. Shortly thereafter, however, and without holding further hearings on the matter, the trial court decreed the removal of the entire membership of the Board of Directors of City Trusts, and, under its own authority, appointed as trustees thirteen private citizens, including six who had served on the just-disbanded Board. The court justified its action by claiming that dissolving the board itself, which was the offending state actor, was necessary to carry out the original intent of the Girard Will. The Pennsylvania Supreme Court took the case on appeal and upheld the decision, albeit over an incredulous and blistering dissent by Judge Michael Musmanno.

To those who complained that the lower court's action had violated both the letter and spirit of the Supreme Court's directive, Pennsylvania's high court replied simply, "Had the Supreme Court so intended [the admission of the black children], it would have said so."[57] It went on to chide the appellants' "effort to make a 'segregation' issue out of Stephen Girard's private charity."[58] Doing so, the court continued, obscured the real issue: "the right of a person to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced."[59]

For his part, Judge Musmanno wondered what the dissolution of the board had to do with the Fourteenth Amendment violation cited by the Supreme Court. "[T]he Supreme Court did not say that the Board was disqualified or incompetent," he wrote. "No

one charged the Board with misconduct, no one complained that its management of the Stephen Girard was not exemplary, no one moved for dismissal of the Board."[60]

Musmanno went on to declare that it really did not matter who the trustees were nor how they were appointed, as Girard College itself was implicated by the Fourteenth Amendment far more than any of its trustees:

> The Girard College, because of the nature of its origin, its legislative history, its councilmanic management, its municipal control and subservience to governmental supervision is as much a public institution as the University of Pennsylvania and is, therefore, bound by the decision of the Supreme Court of the United States in *Brown v. Board of Education*.[61]

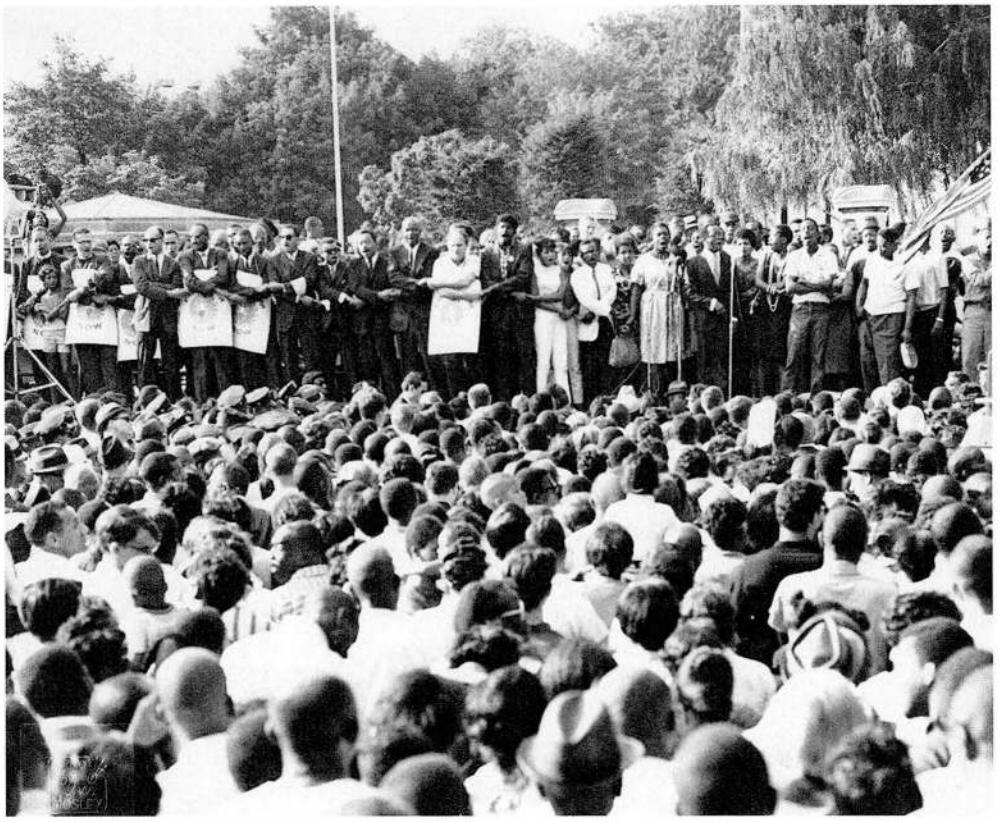
The Pennsylvania Supreme Court ruling was once again appealed to the U.S. Supreme Court, but this time the Justices declined to review the case.[62] The Court's denial of certiorari at that time, coupled with Robert Pace Alexander's appointment as the first African-American judge in Philadelphia, effectively halted four years' worth of steady momentum to desegregate Girard College. It would take several more years, another seminal Supreme Court case, and a deliberate tactical shift before Girard opened its doors to minorities.

By the early 1960s, the president of the Philadelphia chapter of the NAACP, Cecil B. Moore, had grown impatient with the litigation-focused strategy utilized by Alexander and other city leaders. Moore encouraged a direct approach to influencing Girard's decision makers, and in the spring of 1965 he announced a campaign against the college itself.

On May 1, 1965, Moore's NAACP launched a protest against Girard's admission policies. Over 800 police officers, standing six yards apart around the entire circumference of the school, separated the initial group of some fifty picketers from the ten-foot-high stonewalls surrounding Girard College.[63] Over the next several months, the number of demonstrators swelled as they participated in one of the longest protests of the Civil Rights era. From May to December they picketed the school virtually twenty-four hours a day, drawing the attention of Girard officials as well as that of civil rights leaders and the national media. At a rally held in August, Martin Luther King, Jr., commended a crowd of some 5,000 protestors for their efforts and promised that not only Girard's but all the "walls of segregation will come tumbling down."[64] The NAACP finally agreed to halt the protests when the city and state again filed suit against Girard in the latter part of December 1965.

The arc of the three years of litigation that followed was directly affected by the Supreme Court's January, 1966, decision in *Evans v. Newton* and the broadened definition of "state action" that it embraced.[65] There, by a 6-3 margin, the Court ruled that a tract of land willed to the city of Macon, Georgia, to be used as a public park for white people did not lose its "public character" simply because the city removed itself as a trustee when it could no longer enforce racial segregation. Even the subsequent appointment of private trustees to carry out the bequest could not alter the public nature of the park. Fifty years of "momentum . . . acquired as a public facility" through tax abatements, municipal care, and public use, the Court held," requires that [the park] be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."[66]

The Court went on to note that a type of public character could attach to private entities as well. That is, something that is essentially private may over time "become so



The president of the Philadelphia chapter of the NAACP, Cecil B. Moore, led a protest to desegregate Girard College that lasted for many months. Martin Luther King, Jr., participated on August 2, 1965, along with 5,000 protesters.

entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitation placed upon state action."[67] It was this language of the Supreme Court that U.S. District Judge James S. Lord III relied upon in the final round of the *Girard* litigation.

Although Philadelphia itself had been named the initial trustee, the city's Board of City Trusts was subsequently tasked with the fulfillment of Stephen Girard's bequest by erecting, maintaining, and directing the college. That same governmental entity had also fought desegregation every step of the way. Thus, for more than a century, Lord concluded, the momentum of public character associated with the school was responsible for "the institutionalization of Girard College as a governmentally sanctioned center of racial bias."[68] The district court went on to condemn the state court decision that placed Girard College into the hands of a private group of trustees because doing so still "failed to effectively disassociate the State from the discriminatory policies and purposes which the State operation of the school had come to embody."[69]

Judge Lord acknowledged that there were differences between the public park in *Evans* and Girard College, as the latter had never been public in the traditional sense. And yet, the school had "always held itself out as an institution whose benefits are available to any needy, fatherless boy—as long as he is white."[70] In short, he wrote, "racial exclusion at Girard College is so afflicted with state action, in its widened concept, that it cannot constitutionally endure."[71]

In March 1968, the trustees lost their appeal of the district court decision in a unanimous Third Circuit ruling.[72] Two months later, the Supreme Court denied certiorari to the case.[73] That fall, four African-American children—William Dade, age eleven, Carl Riley, age eight, Theodore Hicks, age nine, Owen Gowens, age seven, and a nine-year-old boy of Mongolian descent, Buddha Ragcha Dalantinov—passed through Girard's storied entrance to join some 600 white classmates.

Stephen Girard could scarcely have imagined that his effort to help fatherless boys in Philadelphia would spend more than 180 years in litigation, become the source of countless lawsuits, be the focus of the national media across two centuries, attract the efforts of both Daniel Webster and Martin Luther King, Jr., and intertwine the Taney and Warren Courts. Those factors alone make the Girard Will noteworthy. Its judicial imprint, however, is also significant, even beyond the Court's specific responses to religious concerns in the nineteenth century and civil rights in the twentieth. The judicial doctrines announced by the Court including the relative scope and limitations of charitable trusts as well as the expanded reach of state action will continue to inform and influence the law and the nation long after the Girard Will is forgotten.

Of course, even though more than four decades have passed since the desegregation of Girard College, the likelihood of the will ever being forgotten seems remote as the "most litigated will in history" continues to find its way back into the courts.[74] On August 21, 2014, a state judge in Philadelphia ruled that the Board of City Trusts could not implement its proposed changes to eliminate Girard College's secondary education and boarding programs without violating key portions of Stephen Girard's will. The Board subsequently appealed and, as of this writing, a decision is still pending.[75]

ENDNOTES

[1] John Moritz, "Girard College to Close Grades 9-12," http://articles.philly.com/2013-06-05/news/39743424_1_day-school-day-program-city-trusts. Accessed June 5, 2013.

[2] William Robbins, "Philadelphia School Fighting Its Legacy," *The New York Times*, June 1, 1982, 4(C).

[3] See http://www.businessinsider.com/richest-americans-ever-2011-4?op=1. Accessed June 4, 2014.

[4] Henry W. Arey, **The Girard College and Its Founder** (Philadelphia: C. Sherman, 1853), 67.

[5] *Ibid.*, 66.

[6] *Id.*, 74.

[7] *Id.*, 75.

[8] *National Gazette* (PA), 2 April 1833, Vol. 12, Issue 1873, 2. See also *Girard v. Philadelphia*, 1833 WL 3310 (Pa.).

[9] Charles Warren, **The Supreme Court in United States History**, Vol. 2 (Boston: Little, Brown, and Company, 1937), p. 124.

[10] *Ibid.*

[11] *Philadelphia Inquirer*, 9 February 1844, Issue 35, 2.

[12] *See* Stanford University's "The Growth of Newspapers Across the U.S.: 1690-2011" Visualization Plot at http://web.stanford.edu/group/ruralwest/cgi-bin/drupal/visualizations/us_newspapers. Accessed June 23, 2014.

[13] *Philadelphia Inquirer*, 15 February 1844, Issue 40, 2. *See also, for example*, the *Alexandria Gazette*, 21 February 1844, 2.

[14] *Philadelphia Inquirer*, 9 February 1844, Issue 35, 2. Emphasis in original.

[15] *New Hampshire Sentinel*, 21 February 1844, 2.

[16] *Philadelphia Inquirer*, 9 February 1844, Issue 35, 2.

[17] *Ibid.*

[18] Quoted in Warren, 128-29.

[19] *Vidal v. Girard's Executors*, 43 U.S. 127, at 192.

[20] *Ibid.*, at 143.

[21] Harry Emerson Wildes, **Lonely Midas: The Story of Stephan Girard** (New York: Farrar and Rinehart, 1943), p. 316.

[22] The first religion cases dealt with glebe properties claimed by the Episcopal Church and taken by Virginia and Vermont. See *Terrett v. Taylor*, 13 U.S. 43 (1815) and *Town of Pawlet v. Clark*, 13 U.S. 292 (1815).

[23] *See* Mark 10:14.

[24] *Quoted in* Warren, 130-31. Emphasis in original.

[25] *New Hampshire Sentinel*, 21 February 1844, 2.

[26] *Philadelphia Inquirer*,15 February 1844, Issue 40, 2.

[27] *Ibid.*

[28] *Id.*

[29] Quoted in Warren, 131.

[30] Joseph Story to Sarah Story, February 7, 1844, in William W. Story, ed., **Life and Letters of Joseph Story**, Volume 2 (Boston: Little, Brown, and Company, 1851), p. 468.

[31] *Ibid.*

[32] Not every witness to Webster's argument was enthralled. One reporter stated, "I cannot agree with those who have pronounced this effort of Mr. Webster the best that could be made in the circumstances—I mean the religious part of his argument, if it may so be called. He was not so ready in the scriptures as his antagonist, Mr. Binney." *New Hampshire Patriot*, March 7, 1844, Vol. 10, Issue 493, 2. Another wrote, "Binney's rather lengthy *argument* was a most powerful position of professional cannons. Webster's reply today was only a *speech*, at which ladies wept, and reporters cried Amen, but only a speech after all." *Quoted in* Warren, 132, emphasis in original.

[33] 43 U.S., at 187-88.

[34] 17 U.S.1 (1819).

[35] 43 U.S. at 196.

[36] Hershel Shanks, "'State Action' and the Girard Estate Case," *University of Pennsylvania Law Review*, vol. 105 (1956): 213

[37] 43 U.S. 127, at 198.

[38] *Ibid.*

[39] Arey, 75.

[40] *Ibid.*

[41] 43 U.S., at 200.

[42] *Ibid.*

[43] *Id.*

[44] *Quoted in* Warren, 133.

[45] *Ibid.*

[46] *Id.*

[47] *Berkshire County Whig*, 7 March 1844, Vol. 4, Issue 1, 3.

[48] *Mr. Webster's Speech in Defence [sic] of The Christian Ministry and in Favor of the Religious Instruction of the Young* (Washington: Gales and Seaton, 1844). Ten years later, amazed at the widespread acceptance of Webster's characterization of Girard, commissioners for the school published their own pamphlet that included Binney's and Sergeant's oral argument presentations as well as the full opinion of the unanimous Supreme Court. *See* Cheesman A. Herrick, **History of Girard College** (Philadelphia: Girard College, 1927), 181.

[49] *Boston Post*, 5 May 1864, Issue 36, 1.

[50] 347 U.S. 483 (1954).

[51] *In re Girard*, 386 Pa. 548, at 556 (1956).

[52] *Ibid.*

[53] *Id.*, at 560.

[54] *Id*, at 561.

[55] *New York Times*, November 13, 1956, 39.

[56] *Pennsylvania et al. v. Board of Directors of the City Trusts of the City of Philadelphia*, 353 U.S. 230, at 231 (1957).

[57] *In re Girard College Trusteeship*, 391 Pa. 434, at 440 (1958).

[58] *Ibid.*, at 441.

[59] *Id.*

[60] *Id.*, at 463.

[61] *Id.*

[62] *Pennsylvania et al. v. Board of Directors of City Trusts of Philadelphia et al.*, 357 U.S. 570 (1958).

[63] *Gettysburg Times*, 3 May 1965, 8.

[64] *New York Times*, 4 August 1956, 19.

[65] 382 U.S. 296 (1966).

[66] *Ibid.*, at 302.

[67] *Id.*, at 299.

[68] *Commonwealth of Pennsylvania v. Brown*, 270 F. Supp. 782 (1967).

[69] *Ibid.*, at 790.

[70] *Id.*, at 792.

[71] *Id.*, at 793.

[72] *Commonwealth of Pennsylvania v. Brown*, 392 F. 2d 120 (1968).

[73] *Brown v. Pennsylvania*, 391 U.S. 921 (1968).

[74] Shanks, 213.

[75] John Kopp, "Girard College Enrollment Climbs Again Despite Uncertain Future," http://www.phillyvoice.com/girard-college-enrollment-spikes-uncertain-future/. Accessed September 2, 2015.

The Tenacious "Twin Relic": Republicans, Polygamy, and *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*

EVAN C. ROTHERA

"Can we have a state in the Union," mused the Salem *Gazette* in 1849, "whose citizens are avowedly Mahomedans or idolaters, adhering to the Mahomedan or idolatrous form of doctrine and worship? And if this question should be answered in the negative, how stands the case with regard to a community of Mormons, who certainly cannot be called Christians?"[1] Less than a century and a half after the *Gazette*'s bitter denunciation of Mormons as dangerous and anti-Christian, James E. Woods, Jr. noted that many people now regard Mormons in a very different light.[2] "No longer viewed as a threat to the secular norms of American society, Mormonism has achieved a social acceptance and status far beyond what it could have envisioned in the nineteenth century. It has become, in effect, one of America's mainline denominations."[3]

This transformation in perception is largely attributable to the disassociation of the Mormon Church from the practice of polygamy. As historians have demonstrated, polygamy, or plural marriage, sparked a tremendous degree of opposition among a wide array of people in the nineteenth century. The Republican Party's 1856 platform famously denounced slavery and polygamy as the "twin relics of barbarism." However, despite the importance of polygamy as a political issue, the history of the legislative and judicial battles against polygamy has largely been overlooked.[4] By examining the legislative and judicial fight against polygamy, which culminated in the Supreme Court decision in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, we can grapple with several compelling questions.[5]

If Republicans were so vehemently opposed to polygamy, why did it take them so long to destroy a practice they claimed to abhor? If, as some scholars have suggested, polygamy was one of the keys to the creation of the third party system, was antipolygamy a strategy to maintain and unify the Republican coalition? Finally, why did the author of the *Late Corporation* decision, Justice Joseph P. Bradley, seem determined not only to vindicate the Republican Party's platform of 1856, but also to utterly repudiate the *Dred Scott* decision, despite the fact that the Fourteenth Amendment had already accomplished this end? As these questions suggest, there is still much to learn about polygamy and its discontents.

Polygamy and Antipolygamy before the Civil War

When Joseph Smith founded the Mormon Church, he and his followers faced immediate persecution. Historian Michael Scott Van Wagenen has suggested that Mormons were persecuted for three reasons: their "unorthodox theology," the number of converts, and greed; the Mormon embrace of polygamy became the fourth reason.[6] Because of this persecution and unpopularity, Smith and his flock moved, in quick succession, from New York to Ohio to Missouri and, after the Governor of Missouri signed an executive order expelling them in 1838, to Illinois, where they founded Nauvoo.[7] The Mormon tenure in Illinois was neither long nor peaceful, and, in 1844, a mob murdered Smith while he was awaiting trial.[8] After Smith's murder, the Mormons fractured into groups. Brigham Young assumed the leadership of one of the groups and led them to the "State of Deseret," the area that became the Utah Territory, to establish a religious colony.[9] After an arduous journey, the Mormons seemingly made it to the Promised Land and regarded their arrival and settlement in the State of Deseret as a deliverance from their foes.[10] Although Mormons faced persecution, attitudes towards Mormons in the late 1840s and early 1850s were initially mixed, not purely negative. While many people hated or feared Mormons, others applauded them for carving a civilization out of the wilderness.[11]

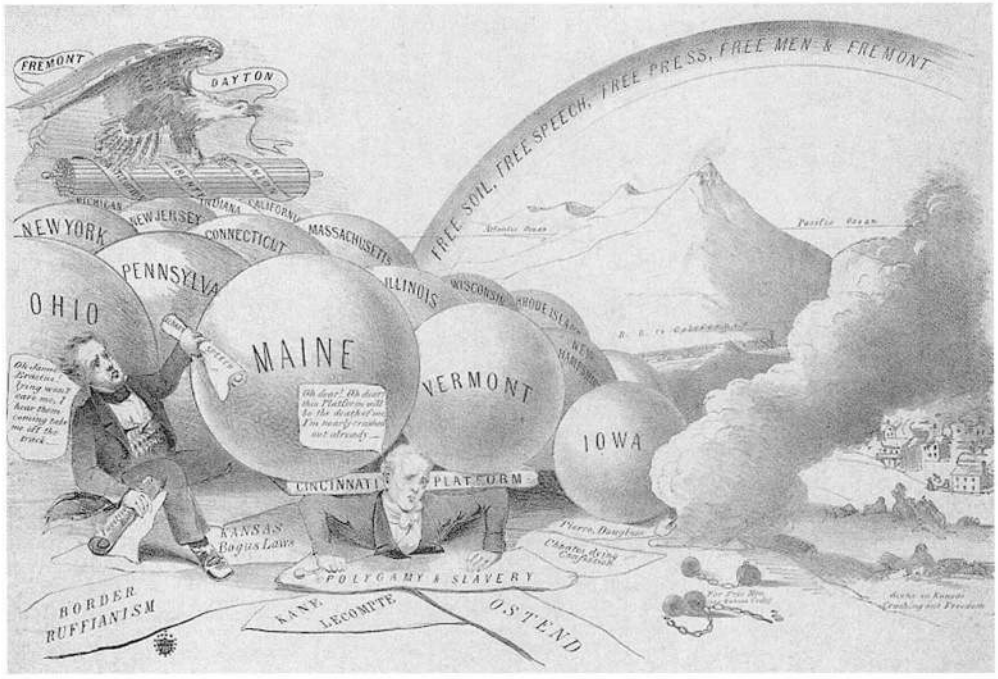
The State of Deseret did not have a long existence, but the decision of the General Assembly of the State of Deseret to incorporate the Church proved significant.[12] The act of incorporation contained three sections.

After Joseph Smith's murder, Brigham Young assumed the leadership of one group of Mormons and led them from Nauvoo to the Great Salt Lake in the "State of Deseret," the area that became the Utah Territory. There they established a religious colony. Some feared the Mormons, but others admired their courage in carving civilization out of the wilderness.

Section One gave the Church the power to sue and be sued; to defend and be defended in courts of law; to establish, order, and regulate worship; to hold and occupy real and personal estate; and to have and use a seal.[13] Section Two permitted the Church to elect one trustee in trust and twelve assistant trustees to control the real and personal property of the Church, exempted Church property from taxation, and ordered that the property be used to build and maintain houses of public worship. Section Three declared that, "in common with all civil and religious communities," the Church had both the right "to worship God according to the dictates of conscience" and the power to "originate, make, pass, and establish rules, regulations, ordinances, laws, customs and criterions for the good order, safety, government, conveniences, comfort and control of the said church." Section Three included a caveat: Church practices could not be "inconsistent with or repugnant to" the United States Constitution or the Constitution of the State of Deseret.[14] The General Assembly incorporated the Church on February 8, 1851. Congress, however, as one of the provisions of the Compromise of 1850, established a Territorial Government for the Utah Territory on September 9, 1850. This government remained unorganized as of February 1851.[15] Consequently, when the Territorial Government was organized, the new Territorial Assembly could have invalidated the act of incorporation, but the Assembly instead passed legislation validating the incorporation and Congress neither disapproved nor annulled this decision.[16] Both the lawyers for the Mormon Church and Justice Bradley were to find Congressional inaction important.

Throughout the 1850s, the population of the Utah Territory steadily increased. Tensions between the United States government and the Mormons, largely over polygamy but also territorial autonomy, grew bitter. In 1852, United States officials in the Utah Territory wrote a scathing letter to President Millard Fillmore complaining that they had been compelled to withdraw from the territory "in consequence of the lawless acts and the hostile and seditious feelings and sentiments manifested by Brigham Young, the Governor, and the great body of the residents there, towards the government and officers of the United States, in aspersions and denunciations so violent and offensive as to render the discharge of our official duties not only dangerous, but impossible."[17] The withdrawal of the officials marked the beginning of a violent period in U.S./Mormon relations. After the infamous Mountain Meadows Massacre,[18] President James Buchanan sent an army to crush the Mormon "rebellion" and end the "Utah War."[19]

The rise of the Republican Party further complicated the Mormon question. In 1856, at their first national convention in Philadelphia, Republicans included a plank in their platform declaring that "it is both the right and imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy and Slavery."[20] Republicans cleverly united slavery and polygamy, leading one scholar to contend that the "debate over polygamy was key to the formation of the third-party system."[21] Although Congressional Republicans did not have a majority and lacked the strength to extirpate the twin relics, antipolygamy proved popular. Furthermore, Republicans offered a constitutional justification for their position, pointing to the language in Article IV, Section 3 that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[22] Democrats, particularly Southerners, opposed interference by Congress in the Utah Territory, because they feared it would set a precedent and justify government intervention with slavery.[23] Thus, the fledgling Republican Party strategically fused antislavery and antipolygamy and, by so doing, tapped into the fierce anger of many



In 1856, at their first national convention in Philadelphia, Republicans included a plank in their platform declaring that "it is both the right and imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy and Slavery." This presidential election cartoon shows papers strewn under candidates Millard Fillmore (left) and James Buchanan (center) labeled "Border Ruffianism," "Kansas Bogus Laws," and "Polygamy & Slavery,"—charges associated with the previous Democratic administration's handling of the expansion of slavery and the Mormon question.

Northerners about the threat the "twin relics of barbarism" posed to white civil liberties.

Republicans and the "Twin Relics" during and after the Civil War

If Republicans could do nothing about polygamy while they remained a minority in Congress, the Civil War changed the political landscape of the nation. After eleven Southern states seceded, Republicans held commanding majorities in both houses of Congress and passed an antipolygamy measure, the Morrill Anti-Bigamy Act, in 1862.[24] Named for Congressman Justin S. Morrill of Vermont, the Act was designed to "punish and prevent the Practice of Polygamy" and to disapprove and annul "certain acts of the Legislative Assembly of the Territory of Utah."[25] The bill easily cleared the House of Representatives. The discussion in the Senate then proved revealing. Republicans not only sought to disallow polygamy, but they also had another motive, which John Parker Hale of New Hampshire made apparent. The proposed antipolygamy legislation, Hale noted, conflicted with a certain decision of the Supreme Court: *Dred Scott v. Sandford*.[26] Perhaps, Hale sneered, "we ought to read the Dred Scott decision over again, and see if we are not in danger of running counter to it."[27] Hale needled James Bayard, Jr. of Delaware, who reported the bill from the Judiciary Committee, for his past support of *Dred Scott*, commenting that "if it is clearly his opinion that we can pass this bill without trenching upon the doctrine of the Dred Scott decision, I shall interpose no objection."[28] The only objection to the bill came from James A. McDougall of California, who contended that it was ill-advised and would be a dead letter.

Thirty-seven Senators voted in favor of the bill. Only McDougall and Milton Latham, both California Democrats, opposed it.

Hale was correct; the Morrill Act flew in the face of *Dred Scott*, but this was what Republicans intended. Chief Justice Roger B. Taney, writing for the majority in *Dred Scott*, contended that Congress did not have any power to prohibit slavery in the territories and thus could not govern the territories. "Citizens of the United States who migrate to a Territory belonging to the people of the United States," Taney proclaimed grandly, "cannot be ruled as mere colonists, dependent upon the will of the General Government and to be governed by any laws it may think proper to impose."[29] Taney also raised the specter of Congress interfering with the free exercise of religion in the territories, although he observed that no one would argue that Congress has this power. However, the Morrill Act, which asserted the power of Congress to punish and prevent polygamy in the territories, was, according to Mormons, an attempt by Congress to interfere with the free exercise of their religion. Furthermore, by aiming a blow at the second twin relic, the authors of the Act struck at *Dred Scott* by insisting that Congress had the power to govern the territories. Hale and his fellow Republicans could not predict the future and had no way of knowing that in five years the Fourteenth Amendment would render *Dred Scott* a dead letter. Therefore, the Morrill Act was the first, but not the last, anti-*Dred Scott* salvo.

The Morrill Act mandated a fine of up to five hundred dollars and a prison term of up to five years for bigamy, although penalties would only be assessed on residents of territories. The Act also declared that the act of incorporation and all other acts "passed by the said legislative assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy be, and the same hereby are, disapproved and annulled."[30] The authors of the Morrill Act included an important proviso stating that it "shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned . . . only to annul all acts and laws which establish, maintain, protect or countenance the practice of polygamy."[31] Finally, the Act mandated that religious or charitable corporations were not allowed to acquire or hold real estate of greater value than fifty thousand dollars in any United States Territory during the existence of a Territorial Government. All real estate acquired or held in violation of this provision "shall be forfeited and escheat to the United States."[32]

From the beginning, Republicans linked antislavery and antipolygamy and the Thirty-Seventh Congress passed legislation to combat both twin relics (slavery and polygamy): the First and Second Confiscation Acts and the Morrill Act. The Confiscation Acts did not touch the property of corporations but provided for the confiscation of personal property, in this case slaves, of disloyal Southerners. The Morrill Act did not touch personal property but escheated the property of religious corporations countenancing polygamy. In both cases, Congress sought to punish groups engaged in treasonous or immoral behavior but employed different methods for each. Although these three acts seemed radical to contemporaries, they were conservative measures. Even as they moved to confiscate property, Republicans designed their legislation carefully to ensure that the remedy was not worse than the infirmity. Thus, the Confiscation Acts stipulated all proceedings would be conducted through the courts, a slow and laborious process. Although the Morrill Act targeted corporations in territories promoting polygamy and holding real estate worth more than fifty thousand dollars, no religious corporation, save the Mormon Church, met these criteria.[33]

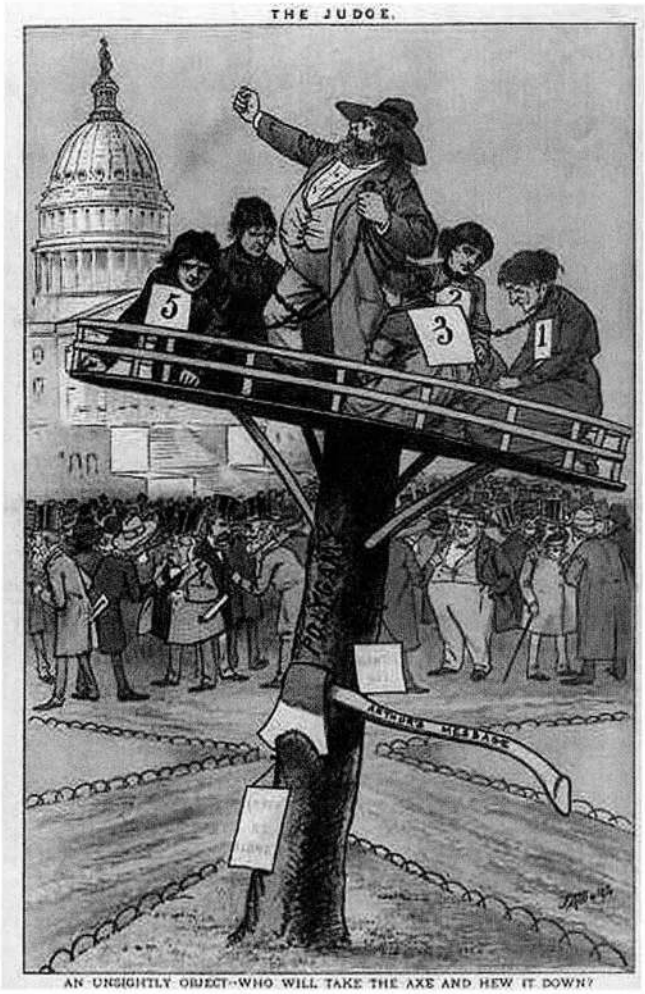
The Emancipation Proclamation, and, later, the Thirteenth Amendment, superseded the Confiscation Acts and killed slavery.

Polygamy, however, did not die so quickly. Because the Morrill Act did not provide an enforcement mechanism, it had no real impact on polygamy. While Abraham Lincoln and Andrew Johnson proved willing to utilize a "hands off" policy in regards to the Mormons, Radical Republicans were not, but the efforts of these implacable foes of polygamy to pass stronger antipolygamy legislation came to naught.[34]

The failure of such legislation raises an important question. If antipolygamy sentiment was as widespread as many historians have suggested, and if antipolygamy sentiment appealed to and resonated with so many people, why did Republicans have such a difficult time getting rid of polygamy? Once it became clear that the Morrill Act was not sufficient, Republicans could have passed another bill with their enormous Congressional majorities. During the Thirty-Ninth and Fortieth Congresses, Republicans grew accustomed to overriding Andrew Johnson's vetoes, so there was little preventing them from passing harsher antipolygamy legislation over a presidential veto. Some legislators complained about this lack of progress. "The record of the Republican Party is already glorious and immortal, but its mission is not yet completed," thundered Republican Senator Aaron Cragin of New Hampshire, "polygamy, the other 'twin relic of barbarism,' still remains, and even openly denounces the Government and defies its power."[35] But why was this "twin relic of barbarism" so tenacious? Historian Eugene Berwanger observed that "conservatives worried that the bills proposed in Congress were a violation of the First Amendment" and Sarah Barringer Gordon asserted that Moderate Republicans preferred to work toward reconciliation rather than confrontation. Ultimately, these explanations do not feel satisfactory.[36] After all, given that Republicans attempted, quite tenaciously, to remake the South in accordance with their free labor ideology, why did they pull back from their attempt to remake Utah? Why, in other words, did Republicans kill one of the twin relics and swat ineffectually at the other?

The answer to this question relates to the nature of party politics in the nineteenth century. Consider historian Michael F. Holt's description of the frazzled state of the Democratic Party in 1853. Various factions of the party seemed to be at war with each other, President Franklin Pierce did not distribute the spoils effectively, and Democratic voting strength was dissolving. This was not a secret to party leaders, and Stephen A. Douglas, in an attempt to turn the tide, seized on the organization of the Kansas and Nebraska Territories in order to "provide an issue that could unify the Democratic party."[37] The Republican relationship with polygamy should be seen in this light. There is no reason to deny the fact that many Republicans detested polygamy for moral reasons, but it would be a mistake to overlook the fact that polygamy was a useful political issue. The Republican Party was a heterogeneous organization composed of Whigs, anti-Nebraska Democrats, Liberty Party men, Free Soilers, Know-Nothings, and immigrants such as German Forty-Eighters. The various elements of the Republican organization did not always get along and the party was divided on many issues including immigration, the tariff, the currency, land redistribution, Chinese exclusion, and suffrage for African Americans. But, when it came to polygamy, Republicans could stir up the base and unify the party on a cultural issue.[38] Analyzing anti-polygamy measures in this light demonstrates the logic behind Republican actions. There was little to be gained in passing effective antipolygamy legislation, because to kill polygamy would be to kill an issue that the party could use as effectively as "bloody shirt" rhetoric.

Mormon resistance also played an important role in this story. Mormon defiance of the Morrill Act eventually led Congress to pass additional legislation to suppress polygamy.



The Republican Party found it could stir up its base and unify the party on the cultural issue of polygamy. There was thus little to be gained in passing effective antipolygamy legislation.

George F. Edmunds, a Republican Senator from Vermont, drew up two measures to stamp out polygamy. The first, which became the Edmunds Act, imposed civil disabilities on polygamists, simplified the prosecution of polygamy, and "struck at the general political power of the church by denying the vote and the right to hold any elective or appointive public office to polygamists and those unlawfully cohabiting."[39] Mormons resisted the Edmunds Act as fiercely as they had resisted the Morrill Act and anti-polygamists realized that harsher measures were necessary, so Congress passed the Edmunds-Tucker Act in 1887. This act was the fusion of a Senate bill written by Edmunds and a House bill written by John Randolph Tucker, a Democrat, of Virginia.[40] The Edmunds-Tucker Act made it the duty of the Attorney General "to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three," and thus, unlike the Morrill Act, provided an enforcement mechanism.[41] Because the proceeds from the escheated property would be sent to the schools in the Utah Territory, supporters of the Edmunds-Tucker Act proclaimed that it would not enrich the government but rather would benefit the people of the Utah Territory,

particularly children. The Edmunds-Tucker Act, like previous legislation, disapproved and annulled the actions of the Territorial Assembly and dissolved the corporation. The Edmunds-Tucker Act joined the list of legislation striking at *Dred Scott*. Despite support from Democrats, the Edmunds-Tucker Act encountered opposition from both Mormons and non-Mormons, the latter because they viewed it as an "unwarranted encroachment on the constitutional rights of the Mormons."[42]

From *Reynolds v. United States* to *Late Corporation*

The Edmunds-Tucker Act set the stage for the court case that was adjudicated by the Supreme Court in 1890.[43] However, the *Late Corporation* decision was not the first time that the Supreme Court had spoken on polygamy. In 1879, the Supreme Court ruled in the landmark case of *Reynolds v. United States*.[44] In 1874, Congress passed the Poland Act, sponsored by Congressman Luke Poland of New Hampshire, which put teeth into the Morrill Act by weakening Mormon control over the judicial system in Utah. It weakened local courts by giving jurisdiction to federal district courts and replacing the Territorial Marshal and Attorney with a U.S. Marshal and a U.S. Attorney. Thus, the Act provided a jurisdictional basis for federal charges to be brought against polygamists.

Mormons agreed to a test case to determine the constitutionality of antipolygamy legislation and carefully selected George Reynolds, a Church member and a secretary to the First Presidency, who was married to two women. The district court convicted Reynolds and the Utah Territory Supreme Court upheld his conviction. After the case had been argued before the U. S. Supreme Court, Chief Justice Morrison R. Waite wrote for a unanimous Court to affirm Reynolds's conviction.[45] According to Waite, there was a difference between religious belief and religious action. While the First Amendment did not allow Congress to legislate against belief, it did allow legislation against action, in this case polygamy. In Waite's pungent words, "Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[46] The Supreme Court thus determined that the antipolygamy legislation was constitutional. The antipolygamy attitude of the unanimous Supreme Court was unmistakable. Mormons were displeased with Waite's comparison of polygamy and human sacrifice and disheartened that the Supreme Court handed them such a bitter defeat by refusing to accept polygamy as a religious belief.

The fact that the Supreme Court delivered a unanimous opinion in *Reynolds* did not mean that they would be unanimous in *Late Corporation*. In the intervening years, the composition of the Supreme Court changed dramatically. In 1879, the Supreme Court consisted of Chief Justice Waite and Associate Justices Nathan Clifford, Noah H. Swayne, Samuel F. Miller, Stephen J. Field, William Strong, Joseph P. Bradley, Ward Hunt, and John Marshall Harlan. In 1890, the Supreme Court had a new Chief Justice, Melville Weston Fuller, appointed by Grover Cleveland. Four Associate Justices, Miller, Field, Bradley, and Harlan were still on the Court, but there were four new faces: Horace Gray and Samuel Blatchford, both appointed by Chester A. Arthur; Lucius Quintus Cincinnatus Lamar, appointed by Grover Cleveland; and David J. Brewer, appointed by Benjamin Harrison.[47] Indeed, the unanimity of *Reynolds* was not repeated in *Late Corporation* because Field, Lamar, and Fuller dissented.

The Mormon Church controlled property worth well over $50,000 ($2,000,000 in real estate and $1,000,000 in personal property) and that property was escheated. The question of whether this action was constitutional became the basis for the case. When the case came to trial in the Third District Court of the

Utah Territory, lawyers for the Church argued that the Church was still a corporation and that the Morrill Act of 1862 expressly provided that rights in property would not be impaired. Thus, any attempts to dissolve the corporation, to limit and interfere with the right to hold property, and to escheat property were unconstitutional. In a finding of facts, the Court determined that the Church existed as a corporation from January 1855, when the Territorial Assembly affirmed the act of incorporation passed by the General Assembly of the State of Deseret, until March 3, 1887, when the Edmunds-Tucker Act dissolved the corporation. Since the passage of the Edmunds-Tucker Act, the Court asserted, the Church existed as a voluntary religious sect. The Court concluded that, while only one fifth of the members of the Mormon Church practiced polygamy, Church officers refused to repudiate the practice and that personal property had been used to advance Church doctrines, including polygamy. The fact that property was being used to further an illegal action became sufficient justification for escheating it.[48] The final judgment of the Court was not favorable for the Mormons. The Court held that, on March 3, 1887, the corporation was dissolved and from that date it had no legal corporate existence. The real estate in all of "block eighty-seven in plot A of the Salt Lake City survey" was set apart for the Church, but the balance of the real estate "became escheated to and the property of the United States of America."[49] The Utah Territory Supreme Court subsequently agreed to uphold the constitutionality of the Edmunds-Tucker Act. Understandably dissatisfied with the decision, the Mormons appealed their case to the Supreme Court.

Arguing before the Supreme Court of the United States

When the appeal reached the Supreme Court, the lawyers for the Mormons, James O. Broadhead, a former Democratic Congressman from Missouri, and Franklin S. Richards, general counsel for the Mormon Church, utilized most of the arguments employed before the Third District Court, but they added several new contentions. Broadhead and Richards opened with an aggressive assertion that Congress cannot impair the safeguards protecting the civil rights of every citizen and that the Supreme Court itself had established that Congress could not pass legislation impairing the obligation of contracts. This line of argument was persuasive and the lawyers utilized past precedents such as *Dartmouth v. Woodward*.[50] If precedents were strictly adhered to, Congress had no right to impair the obligation of contracts, in this case a charter, approved first by the General Assembly of the State of Deseret and then by the Territorial Assembly, a charter Congress had neither disapproved nor disavowed. Broadhead and Richards conceded the Congress could legislate for the territories, but steadfastly maintained "There is nothing in the organic act, nor in the charter under consideration, nor in any act of Congress, which reserves to Congress or to the territorial legislature the right to alter, amend, or repeal a charter of incorporation."[51]

Up to this point, the lawyers for the Mormon Church had constructed a reasonably compelling case, supported by precedents. However, in an abrupt departure, Broadhead and Richards contended that the charter had received the implied sanction of Congress, which meant that Congress could neither impair the contract nor dissolve the corporation. Broadhead and Richards admitted that, while there was no fixed time period for Congressional disapproval, because of the lengthy period that had elapsed, the charter had received implied sanction. The idea of implied sanction was conveniently naïve. The Republican Party, born in 1854, never controlled both houses of Congress before the Civil War. Because they were the main

foes of polygamy, there was no chance of a Democratic-controlled Congress taking action against polygamy. When Republicans gained control of Congress, they quickly passed the Morrill Act in 1862 to disapprove and annul the acts of the Territorial Legislature, although the Act itself proved unable to stamp out polygamy. True, Republicans did not repeal the charter of the corporation, but they annulled all acts and laws that established, maintained, protected, and countenanced polygamy, so they hardly gave the charter implied sanction.

Broadhead and Richards argued that the Edmunds-Tucker Act was unconstitutional because it was "an act of judicial legislation, and for this reason beyond the power of the legislative department of the general government."[52] In addition, Congress was not satisfied with merely dissolving the corporation and leaving the rights of property to be adjudicated under existing laws but felt compelled to make a new law, namely the escheat provision. Broadhead and Richards denied the existence of escheat and declared, flatly, "There is no rule of equity jurisprudence which authorizes a chancellor to declare as forfeited or escheated to the government property which has been used for an illegal or immoral purpose."[53] The fact that they never drew on the work of Justice Joseph Story, given their previous use of precedents, was a glaring omission, and Justice Bradley's opinion demonstrated the problematic nature of their claim about escheat.

The Supreme Court's Verdict

The Court did not issue a decision immediately but waited for a year, as some historians have noted, in order to give the Church time to abandon polygamy.[54] When

When the Supreme Court first heard a case involving polygamy, in 1879, it ruled unanimously that the practice was not a religious belief. This photo, circa 1888, shows Utah farmer Andrew J. Russell and his plural wives.

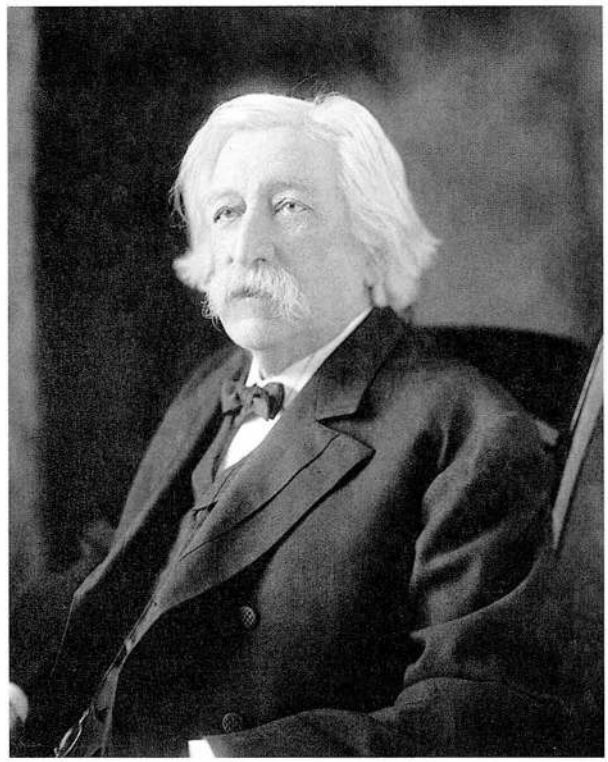
the Court issued its opinion, on May 19, 1890, Justice Bradley wrote for a majority of himself and Associate Justices Harlan, Gray, Blatchford, and Brewer.[55] The principal issues, according to Bradley, were the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints and the power of Congress and the courts to seize the property of the corporation and to hold it for the purposes mentioned in the decree.[56] Bradley answered both questions at an impressive level of detail and precision. His opinion embodied the antipolygamy sentiment that had animated so many Republicans from the beginning, which must have been disheartening to Mormons.

Bradley opened with the forceful assertion that Congress had the power to legislate for the territories. How absurd it would be, Bradley commented, if the United States could acquire territory and have no power to govern it when acquired.[57] Bradley quickly refuted the assertion by Broadhead and Richards that Congress could not repeal, alter, or amend charters. Not only did Congress have supreme power over the territories and acts of the Territorial Legislatures, but "all the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."[58] Simply stated, Bradley asserted the power of Congress over the territories and brushed aside implied sanction.

Bradley next considered whether Congress could revoke the charter of the Church and asserted that Congress could do so because the ordinance had no validity. Because Congress had organized a Territorial Government for the Utah Territory, the General Assembly of the State of Deseret had no power to make law. As the Territorial Assembly had approved the act, the corporation had a legal existence, but "this charter, or enactment, was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose."[59] For Bradley, the legal existence of the corporation was not as important as the power of Congress to revoke or repeal the charter. That the Morrill Act did not repeal the charter of the corporation Bradley dismissed as immaterial; Congress clearly had the ability to do so. Bradley also resoundingly affirmed the constitutionality of the Morrill Act and the Edmunds-Tucker Act.

It did not take Bradley long to establish the right of Congress to repeal or revoke the charter of the Mormon Church and the constitutionality of the Morrill Act and Edmunds-Tucker Act. He then turned to the seizure of property, where he began by distinguishing between a business corporation and public or charitable corporations. When a corporation is dissolved, he said, corporate property belongs to the stockholders. However, though this was the common practice concerning business corporations, it was not applied to public or charitable corporations. Since the grantor of the Church's real estate was the United States, Bradley argued that the real estate could not "revert or pass to any other person or persons than the United States."[60] Upon the dissolution of the corporation, which was within the prerogative of Congress, the real estate passed to the United States. The net effect of the funds passing to the United States was that they would be utilized for "charitable uses" in the Utah Territory.

It was at this point that Bradley allowed his inner partisan free rein in a scathing condemnation of the character of the Mormon Church and polygamy. Bradley employed the vivid rhetoric forged during the decades-long debate over polygamy to castigate Mormons, and his investigation of the character of the Church became a nakedly partisan vindication of Republican principles. Bradley tore apart the contention by Broadhead and Richards that Church property was intended for religious and charitable uses. One of the distinguishing features of the Church, Bradley spat, "is the practice of polygamy—a



Melville W. Fuller's dissent in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* centered on the Mormons' right to private property. Fuller agreed that Congress could punish polygamists in a territory, but argued that their property could not be confiscated.

crime against the laws, and abhorrent to the sentiments and feelings of the civilized world."[61] Bradley served up a stinging indictment of polygamy, which he labeled a "barbarous practice," a "nefarious doctrine," and "a blot on our civilization," "a return to barbarism," a "nefarious system and practice, so repugnant to our laws and to the principles of our civilization," and "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."[62] This powerful language allowed Bradley to paint a vivid picture of the Mormon threat to United States civilization, and his denunciations sound identical to, or perhaps even more vehement than, the Republican platform of 1856 and the decades of Republican antipolygamy rhetoric.

Bradley's use of language, especially "civilization" and "barbarism," which were vitally important tropes in the nineteenth-century United States, was strategic.[63] For one, this language was tailor-made for an election and the 1890 midterm election was less than six months away. The words of the *Late Corporation* decision could easily be used to stir up the faithful. In addition, Bradley's stigmatization of the Mormons as barbarous was important not only because so defining an enemy meant that the rules of war no longer applied, but also because his intensity seemed unnecessary. Bradley was expressing his fervent disgust with polygamy, but did he need to be so vehement? For that matter, how would this language of barbarism, coming from a Supreme Court Justice, influence people's perceptions of Mormons? Bradley's phraseology was better suited for a stump-speaker on the campaign trail, a reminder that political attacks could emanate as easily from black-robed Justices as from politicians seeking office. Moreover, these views would be

favorably received because antipolygamy sentiments had, over the course of several decades, spread throughout all levels of society to the point that they were expressed by a wide array of public and private figures.

Bradley also engaged another popular stream of thought: the Mormon as an "other." On the off-chance that his references to polygamy as a barbarous practice were not clear enough, he crafted direct comparisons between polygamy and other actions he saw as barbarous. "No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief," Bradley sneered, "but their thinking did not make it so." Bradley railed against Hindu widows' practice of "suttee" (self-immolation on the funeral pyres of their husbands) and human sacrifices by the ancestors of the Anglo-Saxons in Britain.[64] Bradley's language here was equivalent to the quote at the beginning of this article, which contended that Mormons were far worse than Muslims and other "idolaters." Furthermore, Bradley's use of human sacrifices paralleled language in Chief Justice Waite's opinion in *Reynolds*.

Remembering the dichotomy Waite drew in *Reynolds* between belief and action, Bradley dismissed as a "sophistical plea" the argument that polygamy should be permitted because it was a religious practice. The state, Bradley asserted, "has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced."[65] While Bradley likely intended this statement to refer to the federal government stamping out the practice of polygamy in Utah, his wording is nebulous enough to be utilized for other purposes, and in today's "culture wars," Bradley's rhetoric would not be out of place in anti-abortion or anti-gay marriage literature. A major component of those lines of argument is that abortion and gay marriage represent offenses against God, man, and reason.

Furthermore, there is an even more subversive potential in Bradley's rhetoric. Where the Morrill Act and the Edmunds-Tucker Act dealt with polygamy in the territories, specifically Utah, Bradley did not use the word "territory." Thus, Bradley, either deliberately or unintentionally, widened the scope of the enforcement powers of the state, providing approval both to prohibit polygamy and to strike at practices representing "open offenses against the enlightened sentiment of mankind." "Open offenses" could, depending on whom one asked, potentially include everything from abortion to gay marriage to the death penalty.[66]

After his strident attack on polygamy, Bradley discussed the question of whether the government had the right to seize Church funds and devote them to the maintenance of schools. From an exhaustive survey of Roman civil law, European law, and British law, he concluded that the government had this right. In the British system, chancery courts handled administration and application of charitable estates, except in certain cases where "the king as parens patriae, under his sign manual, disposes of the fund to such uses, analogous to those intended, as seems to him expedient and wise."[67] The fact that the United States had no king and therefore no figure to act as parens patriae did not faze Bradley, who argued that "the legislature is the parens patriae, and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England."[68] Bradley's notion that the Legislature was parens patriae was not unusual and made sense in the context of nineteenth-century politics. Republicans like Bradley favored legislative supremacy over the executive. Indeed, it would have been astounding had Bradley invested the executive with the power of parens patriae, thus making Senator Maclay's "Republican King" into something more akin to an actual king.[69]

The purpose of this discussion became evident when Bradley stated that "where

property has been devoted to a public or charitable use which cannot be carried out on account of some illegality in, or failure of the object, it does not, according to the general law of charities, revert to the donor . . . but is applied, under the direction of the courts, or of the supreme power in the state, to other charitable objects."[70] Escheating property and applying it to charitable uses was based in precedent and perfectly acceptable. Bradley dismissed the accusation by Broadhead and Richards that no such provision existed by citing a battery of authorities, including Justice Story's *Equity Jurisprudence*, to demonstrate that it did.[71] In addition, Bradley contended that the general law of charities was applicable to the situation regardless of the fact that "no formal declaration has been made by Congress or territorial legislature as to what system of laws shall prevail there."[72] Bradley's argument that the language of the "organic act" signaled that it was the intent of Congress that common law would be instituted in the Utah Territory was somewhat dubious, although not as dubious as implied consent.

Another of Bradley's statements merits further analysis. He branded the Mormon Church "a contumacious organization, wielding by its resources an immense power in the Territory of Utah, and employing these resources and that power in constantly attempting to oppose, thwart and subvert the legislation of Congress and the will of the government of the United States."[73] On the surface, this seemed an affirmation of Congress's suppressing an organization that wielded power by virtue of resources and attempted to subvert the government of the United States, which the Mormons did insofar as they resisted antipolygamy legislation. However, one could easily connect Bradley's language to Southern disunionists and the Slave Power, as small cadres of radicals who wielded disproportionate political and economic power and attempted to thwart and subvert the will of the government. Bradley again vindicated the position of the Republican Party in the 1850s and indirectly praised Republican action during the Civil War to destroy the Slave Power. This is important because the Supreme Court had a tendency to rule against Republican war measures, for example, *Ex Parte Milligan*,[74] but certainly not in this instance.

Bradley concluded his opinion by offering the judgment of the Supreme Court, which, like the judgment of the lower court, was not favorable to the Mormons. The Court, Bradley stated flatly, would not pronounce judgment on the necessity or expediency of the Edmunds-Tucker Act but simply on its constitutionality and the power of Congress to pass it. Unsurprisingly, the Court found in favor of the United States, with Bradley observing, "as to the constitutional question, we see nothing in the act which, in our judgment, transcends the power of Congress over the subject."[75] Bradley granted to the federal government "the power to dispose of the proceeds of the lands thus forfeited and escheated, for the use and benefit of common schools in the territory."[76] The Supreme Court permitted the judgment of the lower court to stand, as nothing called for a reversal, although Bradley acknowledged the possibility for modification and reserved the case for further consideration.

Justice Fuller's Dissent

Where Bradley had found in favor of the United States, Chief Justice Fuller, dissenting, would have ruled otherwise. Justices Field and Lamar joined his dissent. Fuller conceded that, per Article IV Section 3 Clause 2, Congress has power over the territories, but "Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, express or implied, in that instrument."[77] Fuller agreed with Bradley that "the power to make needful rules and regulations for the

Territories necessarily comprehends the power to suppress crime" and allowed that Congress had the power to extirpate polygamy in any of the territories by the enactment of a criminal code. However, he rejected Bradley's expansive interpretation of the powers of the legislative branch and argued that Congress was not authorized "to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices."[78] Fuller's compact dissent was not attributable to his favoring Mormons or polygamy. Rather, Fuller, and presumably Field and Lamar, wanted to offer what they saw as the correct interpretation of the Constitution and the powers of the legislative branch and because they were concerned about the implications of Bradley's decision. Thus, Fuller's dissent was a quibble not over polygamy but over the confiscation of property. On the issue of polygamy, the Court was still unanimous, as Fuller agreed that Congress could punish polygamists in a territory, although their property could not be confiscated.

Aftermath and Legacy

The *Late Corporation* decision was the final nail in polygamy's coffin. Although the practice did not disappear in an instant, "the logic of resistance lay in tatters."[79] But that final nail followed decades of antipolygamy agitation and came nearly thirty-four years after Republicans castigated polygamy and slavery as "the twin relics of barbarism." The fact that it took Republicans such a long time to kill a practice they claimed to hate is vital. However, this decision is important for other reasons as well. Bradley was not interested solely in rendering a decision, but he also seemed determined to vindicate the Republican Party as well as rule on *Dred Scott* and attack Chief Justice Taney. This highlights not only the legacy and impact of *Dred Scott* but also the depth of Republican hatred of the decision. Despite the fact that many regarded Taney's opinion as obiter dictum, Republicans still felt compelled to argue with and discredit it.

Interestingly, Bradley and Taney played similar roles. Both sought to use their decisions as a way to destroy a group they saw as a threat either to the Union—in Taney's case, the Republican Party—or a moral threat—in Bradley's case, the Mormons. Both attempted to accomplish this end by removing each group's raison d'être. Taney flatly denied the power of Congress to regulate slavery in the territories and Bradley vehemently asserted the right of Congress to interfere in the religious lives of the Mormons to extirpate polygamy. Taney's method was dubious: after denying that the Court had jurisdiction, as Dred Scott was not, by Taney's lights, a citizen and hence could not sue in federal courts, Taney took up another issue. People did not accuse Bradley of writing obiter dictum, but at times Bradley acted like a wild-eyed partisan and often allowed his antipolygamy sentiments free rein.

The similarities between Bradley and Taney have escaped the attention of historians and they merit notice for one final reason: the unintended ironic results of both decisions. Taney wanted to settle the slavery question and cripple the Republican Party, but *Dred Scott* strengthened the Republicans and pushed the country closer to civil war. While Bradley's decision in *Late Corporation* drove the final nail into polygamy's coffin, it also helped begin the easing of anti-Mormonism. The man who tossed around words like "barbarous" and "uncivilized" greatly aided the Mormons. Several months after the case was decided, Church President Wilford Woodruff issued a statement ending the official support of the Church for the practice, and in 1904 Joseph Fielding Smith put forth another declaring that any Mormons who entered into plural marriages would be

excommunicated. After opposing the admission of Utah for decades, Republicans acquiesced in 1896 and admitted Utah into the Union, because the Mormons had abandoned polygamy. As historians have shown, Mormons soon began to become respectable in many people's eyes, although some still regard them askance. In a word, close attention to the *Late Corporation* decision is vital if we want to understand not only antipolygamy and the Republican relationship to it but also the politics and culture of the nineteenth-century United States.

Author's Note: This article is dedicated to Mrs. Lois Ivins and Mrs. Dorothy A. Rugg. My thanks to Professor Mark E. Neely, Jr. for comments on an earlier draft.

ENDNOTES

[1] "State of Deseret," Salem *Gazette*, October 16, 1849.

[2] For anti-Mormonism see "Huckabee Apologizes for Mormon Remark," AP, December 13, 2007, and Charles Sellers, **The Market Revolution: Jacksonian America, 1815-1846** (New York: Oxford University Press, 1991), p. 221.

[3] James E. Woods, Jr., "New Religions and the First Amendment: 'The Law Knows No Heresy,'" in **Religion and State: Essays in Honor of Leo Pfeffer**, ed. James E. Woods. Jr., (Waco: Baylor University Press, 1985), p. 195.

[4] This has changed in recent years. *See* Sarah Barringer Gordon, **The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America** (Chapel Hill: The University of North Carolina Press, 2002), and Sarah Barringer Gordon, "The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America," *Journal of Supreme Court History* 28 (March 2003): 14-29.

[5] *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 1 (1890).

[6] Michael Scott Van Wagenen, **The Texas Republic and the Mormon Kingdom of God** (College Station: Texas A&M University Press, 2002), p. 15.

[7] Jon E. Taylor, **A President, a Church, and Trails West** (Columbia: University of Missouri Press, 2008), p. 17. *See also* Dean C. Jessee, "'Walls, Grates and Screeking Iron Doors': The Prison Experience of Mormon leaders in Missouri, 1838-1839," in **New Views of Mormon History: A Collection of Essays in Honor of Leonard J. Arrington**, eds. Davis Bitton and Maureen Ursenbach Beecher (Salt Lake City: University of Utah Press, 1987), pp. 19-42, and **The Missouri Mormon Experience**, ed. Thomas M. Spencer (Columbia: University of Missouri Press, 2010), pp. 1-26.

[8] *See* Dallin H. Oaks and Marvin S. Hill, **Carthage Conspiracy: The Trial of the Accused Assassins of Joseph Smith** (Urbana: University of Illinois Press, 1975).

[9] Woods, "New Religions and the First Amendment," pp. 194-95. For biographies of Young, *see* Stanley P. Hirshson, **The Lion of the Lord: A Biography of Brigham Young** (New York: Alfred A. Knopf, Inc., 1969); Leonard J. Arrington, **Brigham Young: American Moses** (New York: Alfred A. Knopf, Inc., 1985); and Newell G. Bringhurst, **Brigham Young and the Expanding American Frontier** (Boston: Little, Brown and Company, 1986).

[10] For information on the State of Deseret, *see* "State of Deseret," *Daily National Intelligencer*, October 9, 1849; "State of Deseret," *Alexandria Gazette*, October 10, 1849; "State of Deseret," *The Sun*, October 10, 1849; "State of Deseret," *Boston Evening Transcript*, October 11, 1849; "State of Deseret," *Richmond Enquirer*, October 16 1859; "State of Deseret," *Milwaukee Sentinel*, October 17, 1859; "State of Deseret," *Sandusky Register*, October 17 1859; "Deseret," *New York Daily Tribune*, April 30, 1872; and Dale Lowell Morgan, **The State of Deseret** (Logan, Utah: Utah State University Press, 1987).

[11] *See* "State of Deseret," Salem *Gazette*, October 16, 1849; "The New State of 'Deseret,'" *Weekly Eagle*, October 25, 1849; "The State of Deseret," *Daily National Intelligencer*, October 27, 1849; and "Fruits of Mormonism," *The Democratic State Journal*, March 13, 1858.

[12] *See* Edwin R. Keedy, "The Constitutions of the State of Franklin, the Indian Stream Republic, and the State of Deseret" *University of Pennsylvania Law Review* 101 (January 1953): pp. 516-28, esp. pp. 526-28.

[13] "State" refers to the State of Deseret.

[14] **The Compiled Laws of the Territory of Utah, Containing all the General Statutes Now in Force, To Which is Prefixed The Declaration of Independence, Constitution of the United States, Organic Act of Utah, and Laws of Congress Especially Applicable to this Territory** (Salt Lake City: Deseret News Steam Printing Establishment, 1876), pp. 233-34.

[15] Under the Compromise of 1850, states carved from the Utah Territory would choose to enter the Union as free or slave states by popular sovereignty.

[16] 136 U.S. 1, at 4-5.

[17] "Highly Important and Extraordinary Development of Mormonism," *Weekly Eagle*, January 8, 1852.

[18] Will Bagley, **Blood of the Prophets: Brigham Young and the Massacre at Mountain Meadows** (Norman: University of Oklahoma Press, 2002).

[19] Juanita Brooks, **The Mountain Meadows Massacre** (1950; repr., Norman: The University of Oklahoma Press, 1962); Paul Bailey, **The Armies of God** (Garden City, New York: Doubleday & Company, Inc., 1968), pp. 185-255; and Eugene E. Campbell, **Establishing Zion: The Mormon Church in the American West, 1847-1869** (Salt Lake City: Signature Books, 1988), pp. 233-52.

[20] **Proceedings of the First Three Republican National Conventions of 1856, 1860 and 1864** (Minneapolis: Charles W. Johnson, 1893).

[21] Gordon, **The Mormon Question**, p. 55.

[22] Constitution of the United States, Art. IV, Sec. 3.

[23] John Y. Simon, "Lincoln, Douglas, and Popular Sovereignty: The Mormon Dimension," in **Lincoln Revisited: New Insights from the Lincoln Forum**, eds. John Y. Simon, Harold Holzer, and Dawn Vogel, (New York: Fordham University Press, 2007), p. 51.

[24] *See* Francis Graham Lee, **Church-State Relations** (Westport, Connecticut: Greenwood Press, 2002), pp. 65-66, and Gordon, **The Mormon Question**, specifically pp. 55-83. For Mormons during the U.S. Civil War, *see* E. B. Long, **The Saints and the Union: Utah Territory during the Civil War** (Urbana: University of Illinois Press, 1981). The Act referred in Section One to polygamy as bigamy, a loophole the Edmunds Act later closed.

[25] **Acts and Resolutions of the Second Session of the Thirty-Seventh Congress, Begun on Monday, December 2, 1861, and Ended on Thursday, July 17, 1862** (Washington: Government Printing Office, 1862), pp. 208-209.

[26] *Dred Scott v. Sandford* 60 U.S 393 (1857).

[27] *Congressional Globe*, 37th Congress, 2nd Session, June 3, 1862, 2507.

[28] *Id.* Bayard replied, "It is sufficient to say that I have read the decision to which the honorable Senator alludes, I think with some care, and in my judgment this bill is entirely within its principles as well as within the decision itself." *Id.* Bayard's opinion was sophistry.

[29] *Dred Scott v. Sandford*, 60 U.S. 393, at 447.

[30] **Acts and Resolutions of the Second Session of the Thirty-Seventh Congress**, pp. 208-209.

[31] *Id.*, at 209.

[32] *Id.*

[33] See Daniel W. Hamilton, **The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War** (Chicago: University of Chicago Press, 2007), and William Blair, "Friend or Foe: Treason and the Second Confiscation Act," in **Wars within a War: Controversy and Conflict over the American Civil War**, eds. Joan Waugh and Gary W. Gallagher (Chapel Hill: The University of North Carolina Press, 2009), pp. 26-51.

[34] *See* Eugene H. Berwanger, **The West and Reconstruction** (Urbana: University of Illinois Press, 1981), p. 199.

[35] *Congressional Globe* 41st Congress, 2nd Session, May 18, 1870, 3573, 3574.

[36] Berwanger, **The West and Reconstruction**, pp. 200-201, and Gordon, **The Mormon Question**, p. 150.

[37] Michael F. Holt, **The Political Crisis of the 1850s** (New York: W. W. Norton & Company, 1978), p. 144.

[38] Gaines Foster in **Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865-1920** (Chapel Hill: The University of North Carolina Press, 2002), pp. 54-72, asserts that Republicans turned to antipolygamy after the death of Reconstruction as a way to mobilize followers but argues that the passage of stronger antipolygamy legislation was due to a campaign by religious lobbyists.

[39] Edwin Brown Firmage and Richard Collin Mangrum, **Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-Day Saints, 1830-1900** (Urbana: University of Illinois Press, 1988), p. 161. For more on the Edmunds Act, *see* Robert Mullen, **The Latter-Day Saints: The Mormons Yesterday and Today** (Garden City, New York: Doubleday and Company, Inc., 1966), p. 190; Robert Gottlieb and Peter Wiley, **America's Saints: The Rise of Mormon Power** (New York: G. P. Putnam's Sons, 1985), p. 49; Leonard J. Arrington and Davis Bitton, **The Mormon Experience: A History of the Latter-day Saints** (Urbana: University of Illinois Press, 1992), p. 180; and Firmage and Mangrum, **Zion in the Courts**, pp. 129-260.

[40] *See* "To Suppress Mormonism," *New Haven Register*, December 10, 1885; *Dallas Morning News*, December 18, 1885, "Bill Day in Congress" *New York Herald*, December 22, 1885, "Proposed Anti-'Mormon' Legislation" *Deseret Daily News*, December 23, 1885; Mullen, *The Latter-Day Saints*, p. 190; Gottlieb and Wiley, **America's Saints**, p. 49; and Arrington and Bitton, **The Mormon Experience**, p. 183.

[41] 136 U.S. 1, at 7.

[42] Arrington and Bitton, **The Mormon Experience**, p. 181.

[43] For analysis of the decision, *see* Leo Pfeffer, **God, Caesar, and the Constitution: The Church as Referee of Church-State Confrontation** (Boston: Beacon Press, 1975), p. 86; Robert T. Miller and Ronald B. Flowers, **Toward Benevolent Neutrality: Church, States, and the Supreme Court** (Waco, Texas: Baylor University Press, 1977), p. 60; Edwin B. Firmage, "Free Exercise of Religion in Nineteenth Century America: The Mormon Cases," *Journal of Law and Religion* 7 (1989): 281-313; Donald L. Drakeman, **Church-State Constitutional Issues: Making Sense of the Establishment Clause** (Westport, Connecticut: Greenwood Press, 1991), p. 5; and Gordon, **The Mormon Question**, pp. 211-219.

[44] *Reynolds v. United States*, 98 U.S. 145 (1878).

[45] Justice Stephen J. Field wrote a concurring opinion and dissented on a minor point.

[46] 98 U.S. 145, at 166.

[47] For biographies of the Justices, *see* **The Justices of the United States Supreme Court: Their Lives and Major Opinions**, eds. Leon Friedman and Fred L. Israel (New York: Chelsea House Publishers, 1969), pp. 505-50, 579-99, 627-42, 666-761; Howard B. Furer, **The Fuller Court 1888-1910** (Millwood, New York: Associated Faculty Press, Inc., 1986), pp. 217-31, 235-46; **The Supreme Court Justices: A Biographical Dictionary**, ed. Melvin I. Urofsky (New York: Garland Press, Inc., 1994), pp. 29-37, 61-65, 158-67, 182-88, 196-201, 205-13, 283-84, and 317-22; and Timothy L. Hall, **Supreme Court Justices: A Biographical Dictionary** (New York: Facts on File, Inc., 2001), pp. 140-43, 148-52, 161-64, 173-77, and 186-205.

[48] 136 U.S.1, at 19-28.

[49] *Id.*, at 29-32.

[50] *Dartmouth v. Woodward*, 17 U.S. 518 (1819).

[51] 136 U.S. 1, at 34.

[52] *Id.*, at 36.

[53] *Id.*, at 39.

[54] Gordon, **The Mormon Question**, p. 211.

[55] On Bradley *see* Stephen C. Neff, **Justice in Blue and Gray: A Legal History of the Civil War** (Cambridge: Harvard University Press, 2010), p. 50. Miller served until October 1890, but may not have ruled on *Late Corporation*. Some historians state the decision was 5-4, others, 5-3, and still others that it was unanimous. The last is a mistake.

[56] 136 U.S. 1, at 42.

[57] *Id.* In his analysis of the legacy of the *Dred Scott* case, Don E. Fehrenbacher emphasized this feature of Bradley's opinion. *See* Don E. Fehrenbacher, **The Dred Scott Case: Its Significance in American Law and Politics** (New York: Oxford University Press, 1978), p. 583. Bradley cited numerous precedents including *American Insurance Company v. Canter*, 26 U.S. 511 (1828); *Benner v. Porter*, 50 U.S. 235 (1850); *National Bank v. County of Yankton*, 101 U.S. 129 (1879); *and Murphy v. Ramsey*, 114 U.S. 15 (1885).

[58] 136 U.S. 1, at 44.

[59] *Id.*, at 45.

[60] *Id.*, at 47.

[61] *Id.*, at 48.

[62] *Id.*, at 49.

[63] *See* Nancy Isenberg, **Sex and Citizenship in Antebellum America** (Chapel Hill: The University of North Carolina Press, 1998), p. 135. For other examples, *see* Charles Sumner, **The Barbarism of Slavery: Speech of Hon. Charles Sumner, on the Bill for the Admission of Kansas as a Free State** (Washington, D. C.: Buell & Blanchard, Printers, 1860); *Commercial Advertiser*, May 14, 1861; *The New York Herald*, December 5, 1861; and Thomas Wentworth Higginson, **Out-Door Papers** (Boston: Ticknor and Fields, 1863), pp. 108-109.

[64] 136 U.S. 1, at 49-50.

[65] *Id.* at 50.

[66] *Id.* Bradley was a methodical and careful jurist, so this omission may have been deliberate.

[67] 136 U.S. 1, at 51-52.

[68] *Id.*, at 56-57.

[69] For Senator William Maclay and the notion of a "Republican King," *see* Joanne B. Freeman, **Affairs of Honor: National Politics in the New Republic** (New Haven: Yale University Press, 2001).

[70] 136 U.S. 1, at 56.

[71] *Id.*, at 56.

[72] *Id.*, at 62.

[73] *Id.*, at 63-64.

[74] *Ex Parte Milligan*, 71 U.S. 2 (1866).

[75] 136 U.S. 1, at 65.

[76] *Id.*

[77] 136 U.S. 1, at 67 (Fuller, dissenting).

[78] *Id.*

[79] Gordon, **The Mormon Question**, p. 219.

Fountain Pens and Typewriters: Supreme Court Stenographers and Law Clerks, 1910-1940

CLARE CUSHMAN

Until the law clerk function at the U.S. Supreme Court became standardized in the 1940s, wide variations in hiring, tenure, duties, and remuneration existed. Nonetheless, historians have tended to divide the staffing culture of the Fuller, White, Taft, and Hughes Courts neatly into two clerkship models. One is the "modern" model, which is characterized by recruitment of clerks from among the top students at elite national law schools such as Harvard, Yale, and Columbia, with the clerks given substantive legal research duties, rotated after a year or two, and then mentored into stellar careers. Horace Gray, Oliver Wendell Holmes, Jr., Louis D. Brandeis, Harlan Fiske Stone, William H. Taft, Benjamin N. Cardozo and Charles Evans Hughes practiced this model, which gradually became the institutional norm. Many of their clerks were later interviewed or wrote memoirs about their experiences working for their Justices, so early use of the modern model is well documented.[1]

The "clerical" model, practiced by the majority of the Justices between 1886 and 1940, is characterized by the hiring of students or graduates from local Washington law schools to serve for multiple Terms. These clerks, often called "private secretaries" or "career stenographers," have been largely ignored by historians because they performed dull clerical tasks for their Justices and did not write memoirs touting their experiences. Indeed, Justice David J. Brewer dismissed the clerk function in 1905 as "simply a typewriter, a fountain pen, used by the judge to facilitate his work."[2] In 1914, a reporter noted that the Supreme Court clerks' purpose was simply "to relieve their superiors of much of the drudgery that is involved in conning over the briefs and records that are submitted in every case."[3]

However, recent scholarship by Barry Cushman on the clerks of Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler reveals that

the pre-1940 clerkship was more varied than these two models suggest. He shows that each of the "Four Horsemen" recruited and deployed clerks in ways that cannot easily be categorized as either "modern" or "clerical."[4] Although Van Devanter and McReynolds each recruited a clerk from Harvard Law School to serve for a single Term, the majority of their clerks were from local D.C. law schools and had been working as stenographic clerks in the government. Van Devanter retained a clerk for as many as nine consecutive Terms and McReynolds for seven. Both experimented with having two clerks in Chambers but then reverted to one. They treated their clerks like secretaries, not as legal research assistants, although they did ask them to summarize certiorari (cert) petitions.

Sutherland recruited his clerks from a local law school, George Washington University Law School, but, unlike Van Devanter and McReynolds, he assigned them to perform substantive legal research to support his opinion-writing. Butler hired a local Catholic University law graduate for his entire sixteen-year tenure on the Court, which at first glance suggests the old-fashioned "career secretary" model, but his clerk performed functions that were decidedly modern. When asked about his duties, the clerk said he wrote "first drafts of many opinions, expressing the Justice's views so accurately that the drafts often required few changes."[5] Butler almost always employed a second law clerk, often from University of Minnesota Law School, who served stints ranging from one to eight Terms. These clerks performed clerical work and legal research and summarized cert petitions.

What about the clerkship practices of other members of the Court who served alongside the Four Horsemen in the 1910s-1930s, specifically, Edward D. White, Horace H. Lurton, Joseph R. Lamar, Joseph McKenna, Mahlon Pitney, John H. Clarke, Edward T. Sanford, and Owen J. Roberts—Justices whose clerks have not been the subject of scholarly attention?[6] (William R. Day is not considered in this article because of his unusual practice of hiring his sons, who lived at home, as his clerks.) An examination of the clerkship practices utilized by these eight Justices reveals that they subscribed consistently to the old-fashioned clerical model. Although lacking in substance and prestige, this model nonetheless merits greater examination. It was the dominant clerkship model of the Justices from 1886 through the 1930s, and it even persisted in the Stone Court era. Examining this model provides an important counterweight to the much better known experiences of the relatively small number of Justices who subscribed to the modern clerkship model before 1940. Moreover, the stories of these Justices' sixteen clerks reveal the institutional practices of the Supreme Court with respect to the hiring, remuneration, promotion, tenure, and deployment of clerks.[7] Finally, examining the clerkship practices of individual members sheds light on their individual approaches to managing their workload.

Clerks' Origins

Drawn to the Nation's Capital

These eight Justices mainly hired men already serving as clerks in various government agencies. They chose ambitious young men who had been drawn to Washington, D.C., because the federal government had openings for clerks to support its burgeoning staff. Although a few were D.C. natives—notably John E. Hoover, a sixth-generation Washingtonian[8]—most came from nearby states. Two were born in Canada and England. Some came equipped with law degrees, but most attended law school at night and supported themselves in stenographer jobs by day. Working as a clerk was a way of gaining a toehold on the first rung of the legal employment ladder that many hoped would lead to steady jobs as government attorneys.

This pathway was particularly valuable during the Depression era when legal jobs were scarce.

James Cecil Hooe, the first of the three clerks Justice Joseph McKenna employed during his twenty-six-year tenure, followed a fairly typical path toward establishing himself as a clerk in the nation's capital. Born in Alexandria into an illustrious Virginia family, Hooe came to Washington to work for his Congressman, Elisha Edward Meredith. At night he studied law at Columbian College (later renamed George Washington University), earning his law degree in 1892 and his LL.M the following year.[9] Hooe then served as a clerk in the Department of Agriculture in 1895 before becoming private secretary to Phoebe Hearst, wife of Senator George Hearst of California. A philanthropist with a strong interest in education, she was active in founding the National Congress of Mothers (precursor to the Parent-Teacher Association) during the time Hooe worked for her.[10] Popular in Washington social circles, Hooe married Edith Dingley, the daughter of Representative Nelson Dingley of Maine in 1897, and began clerking for Justice McKenna the following year.[11] He served McKenna for twelve years. Tragically, his life was cut short at age forty by tuberculosis.[12]

James Cecil Hooe (above), who came from nearby Alexandria, Virginia, clerked for Joseph McKenna for twelve terms until Hooe died of tuberculosis in 1910 at age forty.

Stenographic Skills Required

Shorthand was a prerequisite for being hired as a stenographic clerk in a government agency or a law firm. Accordingly, these men studied stenography and other clerical skills at local D.C. trade schools. Many attended Business High School or Strayer's Business College, both of which opened their doors in 1904 to accommodate a growing demand for (white) clerical workers in the federal government. Although these men also earned law degrees, being a law school graduate—even from an elite school—*did not* compensate for a deficit in stenography skills when it came to getting hired by a Supreme Court Justice.

One of Chief Justice Edward D. White's clerks learned this lesson the hard way. Leonard Bloomfield Zeisler, of Chicago, was the son of Sigmund Zeisler, who had famously defended two prominent anarchists in the Haymarket cases, and the celebrated pianist Fanny Bloomfield Zeisler.[13] Leonard received an LL.B in 1910 from the University of Chicago with highest honors,[14] and he spent six years in private practice at his father's firm of Zeisler & Friedman in Chicago. He moved to Washington, D.C., in January 1918 to join the Justice Department as an assistant attorney general in the Public Lands Division.[15] The Chief Justice hired him as his clerk on August 1, but White soon decided he "could not use" Zeisler because of "his lack of stenographic knowledge."[16] It is unlikely that White had problems with him other than his inability to take dictation, as he was welcomed back to

the Justice Department and went on to work for Assistant Attorney General Thomas J. Spellacy, who was in charge of the seizure and administration of enemy property in the United States. Under Spellacy, Zeisler received a salary promotion to $4,000 because he had "proved himself to be a very valuable man" and was "engaged largely in brief and opinion writing."[17] Supreme Court clerks were only earning $2,000, so his failure to please White was neither a financial nor career setback.

In order to reinstate Zeisler in his old position, Chief Justice White engaged John J. Byrne, who had succeeded Zeisler in his old job in the Public Lands Division.[18] The swap had been conducted "with the understanding that if Mr. Byrne failed to satisfy the Chief Justice the position should be given up by Mr. Zeisler and that Mr. Byrne should have it."[19] In other words, Byrne, who started working for White on October 14, 1918, had a guaranteed reentry at the Justice Department if his stenography skills were not up to snuff either. Happily, Byrne served the Chief Justice for three Terms, until White's death in May 1921.

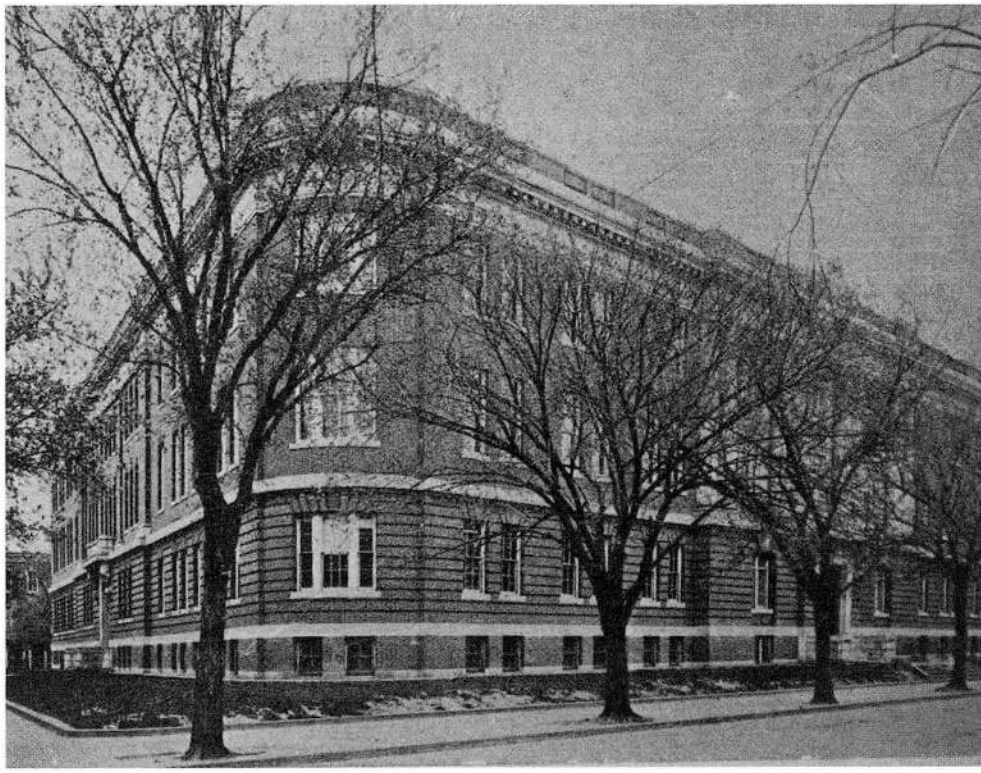
Evening Law School

None of the eight Justices examined in this study hired clerks from their law school alma maters. Instead, they mainly selected their private secretaries from local law schools: National (2), Columbian/George Washington (2), Maryland (1), and Georgetown (6). These schools offered evening classes to men working as stenographers or messengers in various government branches so they could earn their law degrees while supporting themselves. George Washington University held evening law classes that met "for an hour three times a week."[20] Georgetown Law School, situated only a few blocks from the Supreme Court, was founded as an evening program in 1870. It announced that "[t]he exercises will be held in the evening in order to facilitate the attendance of gentlemen who are engaged in the service of the Government."[21] Georgetown finally introduced morning classes in 1921, but the following year it enrolled only 193 in its morning class compared with 1,012 students in its "late afternoon" class.[22]

Some sources say that these early clerks did not have legal training,[23] but that seems to be true for only one of the sixteen clerks in this study.[24] Some were hired by a Supreme Court Justice *after* earning a law degree, but most studied law at night *while* clerking for their Justice. The Georgetown Law School 1920 yearbook entry for Justice McReynolds' clerk, Norman Frost, implied that this double duty took its toll: "Due to his rather strenuous life as Secretary to one of the U.S. Supreme Court Justices, Norman has not been as active in school affairs as some of his 'buddies.'"[25] Yet Harvey D. Jacob, Justice Horace H. Lurton's sole clerk during Lurton's four years on the Court, seemed to have an easier time balancing work and school. A founding member of the *Georgetown Law Journal*, Jacob was voted "Most Popular Man in His Class" in 1913 and "Man Who Has Done the Most for the Class." He was also yearbook editor and chancellor of The Tredecium, a student group.[26]

Hiring and Selection

Although they hired a few clerks from law firms, the eight Justices examined in this study preferred to engage trained stenographers with previous experience working in government agencies. Most had worked as clerks at the Department of Justice—in the Attorney General's Office, the Office of the Solicitor General, or some other division. They may have been encouraged to clerk for a Supreme Court Justice to gain experience, and they were given a guaranteed reentry to the Justice Department. Political scientist Chester Newland, who interviewed several retired Supreme Court clerks in 1959,



In 1918, Chief Justice Edward D. White fired his new clerk, who had a law degree from the University of Chicago, because his shorthand skills were deficient. Many Supreme Court clerks had attended Business High School (above) or Strayer's Business College, which opened their doors in 1904 to accommodate a growing demand for clerical workers in the federal government.

reported that "the clerks were selected by the Justice Department from among its younger employees, apparently with some understanding that they might later return to the department."[27]

Having a connection to the staff at the Clerk's Office at the Supreme Court was a plus for applicants. For example, John E. Hoover, a stenographer at a D.C. law firm, was recommended by William R. Stansbury, the Deputy Clerk of Court, because the firm had an active practice before the Supreme Court and Hoover was well known to him.[28] Robert F. Cogswell, Justice McKenna's third clerk, held the additional advantage of having been employed at the Court. A Washington native, he had earned a stenography and typing diploma from Business High School before being hired as an assistant clerk in the Clerk of Court's Office in 1912. He worked at the Supreme Court for five years, earning his law degree at night from Georgetown in 1913. With the advent of World War I, Cogswell enlisted in the military, serving overseas for eight months with the Eightieth Division as an artillery lieutenant.[29] Clerk of Court James D. Maher wrote a farewell letter asking him to carry with him "the assurance of my hearty appreciation of your work in this Office, and my sincere regret that a more imperative duty compels you to give up your position here."[30] Upon his return from France, Cogswell applied unsuccessfully to be a stenographer for Justice William R. Day, and then he briefly became assistant clerk to the House of Representatives' Committee on Post Office and Post Roads.[31] Finally, Justice McKenna decided to hire Cogswell, by then age thirty, as his law clerk on April 1, 1920.[32] Cogswell clerked for McKenna until the Justice stepped

down in January 1925, and he was then kept on by McKenna's successor, Harlan Fiske Stone, until the end of the Term.

Prior Experience Clerking for a Judge

For today's Supreme Court law clerk, experience clerking for a lower court judge is an informal prerequisite, but only four of these earlier clerks had such previous experience. McKenna's second hire, Ashton Embry, had clerked for Edward T. Sanford when Sanford was a district court judge in Tennessee.[33] White's fourth clerk, Bertram F. Shipman,[34] had clerked for Smith McPherson of the Southern District of Iowa in 1909, shortly after graduating from Simpson College in Indianola.[35] After his clerkship, Shipman was accepted at Columbia Law School, graduating in 1913.[36] Two other clerks had already been clerking for their Justices in their service as lower court judges. Both were career private secretaries from the judge's hometown who were "elevated" to the Supreme Court along with their employer.

The first, Harvey D. Jacob, began his career at age thirteen as a messenger in a Nashville law firm. He married at seventeen, earned an undergraduate degree at Vanderbilt University, and worked his way up to become a law firm stenographer. Horace H. Lurton then hired him to be his private secretary while he was serving on the U.S. Court of Appeals for the Sixth Circuit in Cincinnati.[37] When President Taft appointed Lurton to the Supreme Court in 1910, Lurton brought Jacob, then twenty-four and widowed with two young boys,[38] with him to Washington. Before taking his seat, however, Lurton had written to his friend and former bench-mate from the Court of Appeals, William R. Day, now sitting on the Supreme Court, for advice about staffing. He explained that he was reluctant to bring his messenger with him because, despite his being "an absolutely sober and honest man," Lurton's "only reason" for continuing to employ him would be that "somebody has got to take care of him." In contrast, he told Day he was confident about his choice of stenographer: "My purpose is to keep Mr. Jacob, who is now my stenographer, as he desires to go with me to Washington. I suppose there is no difficulty about this, but to whom shall I report his selection[?]"[39] Jacob did not yet have a law degree; he enrolled in evening law school at Georgetown while clerking for Lurton.

Similarly, Mahlon Pitney arranged to bring his long-time private secretary, Horatio Stonier, age thirty-five, from his home state of New Jersey for October Term 1913. When Pitney had joined the high bench in March, he found that he had inherited a clerk, John E. Hoover, from his predecessor, John Marshall Harlan, and Hoover saw him through the Term. Stonier was born in Staffordshire, England, and his family immigrated to Jersey City when he was ten. Pitney hired Stonier as his secretary in his law firm in Morristown, New Jersey, and kept him on as his "stenographic clerk typewriting opinions" when Pitney was appointed associate justice of the Supreme Court of New Jersey in 1901.[40] In 1908, when Pitney was appointed chancellor of New Jersey, the highest position in the New Jersey court system, he retained Stonier as his private secretary.[41] Stonier is the only clerk among the sixteen surveyed who does not appear to have attended law school. Pitney likely did not require it. Having "read law" in his father's firm, Pitney was the only Justice without a law degree when he joined the Supreme Court in 1913. Stonier served Pitney for ten years until the Justice retired in 1922. Like Pitney, Stonier excelled at playing golf.[42]

Applying for the Job

It is well known that Harvard Law School professor Felix Frankfurter placed his best students in the Chambers of Justices Holmes, Brandeis, and Cardozo. If there were law faculty members actively recommending promising students to the eight Justices examined in this study, there is no evidence

Horace H. Lurton brought Harvey D. Jacob with him from Nashville in 1910 and kept him throughout his four-year term on the Court. Jacob had been Lurton's clerk on the Court of Appeals for the Sixth Circuit, and he and his wife, Camille, pictured with Jacob, would name one of their sons Horace Lurton Jacob in honor of the Justice.

of it. Students simply wrote query letters and then supplied letters of recommendation from professors, friends, and previous employers. And it does not appear that openings at the Court were actively advertised; many of the clerks had been working in government agencies and learned about openings at the Court through the grapevine. Candidates applied to openings as they arose; there is no evidence that they tried to target a particular Justice because of ideological compatibility. Candidates were, however, aware that Justice McReynolds was difficult to work for and at least two applicants applied to clerk for him only after being turned down by another Justice.[43]

As Justices themselves hired their clerks and then later informed the Clerk of Court of the selection, there was no central recruitment process. The Clerk of Court did, however, forward query letters from potential candidates to new Justices seeking clerks or tried to find new employment for a clerk whose Justice was stepping down.[44] The Clerk's Office was also the contact point for the funds coming from the Treasury to pay the law clerks' salaries, a change from the situation prior to 1888, when positions at the Court were paid out of Marshal's office funds

Even if the job did not confer the status that it does today, Supreme Court clerkships were highly coveted because they were considered stepping stones to careers as government lawyers. The competitive nature of the application process is highlighted in the number of query letters found in Justices' papers. Typical is this 1912 letter to Justice Van Devanter from a former student:

> I am a competent stenographer and typewriter; have had five years

The Justices mainly hired clerks from among the ranks of young men working as clerical assistants in various government agencies (pictured is the Customs Division in 1910). There was no central recruitment process; candidates applied by letter and, if hired, the Justice would inform the Clerk of Court of his selection. Clerk of Court James B. Maher is featured on the cover of this issue.

> experience in active practice, largely before local courts and the Interstate Commerce Commission. In addition I have lectured and taught constitutional, corporation, and railroad law in a local law school for the same length of time. My degrees are LL.B., LL.M., M. Dip., and D.C.L.—all conferred by the George Washington University. . . . When a student in the undergraduate department of the law school of the University (then Columbian) I sat under you in Equity Jurisprudence, and hence, am taking the liberty of addressing this letter to you.[45]

As impressive as these credentials were, Van Devanter turned him down. He had already hired another former student, who had the advantage of being from the Justice's home state of Wyoming and of having worked for him at the Department of the Interior.[46]

A Preference for Married Men in Their Thirties

Justices who recruited graduates of elite law schools to serve for only one or two Terms preferred their hires to be bachelors, as they sought their clerks' unfettered attention. Holmes adamantly enforced the "no-marriage rule" with his clerks, and Brandeis insisted on it. However, nearly all of the sixteen clerks in this study were married and heads of established households by the time they were hired. Most were in their mid-thirties and about half were fathers with mouths to feed.[47] Most clerks had only one or two children. A great exception is

Harvey D. Jacob, who squired eight, and named one of his sons Horace Lurton Jacob in honor of his late employer.[48] At least one other clerk, John E. Hoover, named his son after a Justice. Warren Harlan Hoover, born in 1910, was Justice John Marshall Harlan's namesake.[49]

These eight Justices' preference for older, experienced clerks also underscores that they were not looking to be mentors to young men in the manner of Holmes or Brandeis, who took a keen interest in their clerks' lives and subsequent careers. For them, it was a one-way street, and their clerks were there simply to support them.

Performing the Work

Working in the Justices' Homes

The clerks being discussed lived in apartments with their families but worked long days in the homes of their Justices. The only exception was Jacob, who lived with Justice Lurton for all four years of his clerkship.[50] One wonders how Jacob, a widow, cared for his two young sons during his clerkship, especially since he was also attending night law school.

Most of the dwellings of the Justices were clustered northeast of DuPont Circle. White made his home in a massive stone house at 1721 Rhode Island Avenue and Lamar lived in a stately house at 1751 New Hampshire Avenue. Lurton's apartment was at 2129 Florida Avenue. Clarke's apartment at 2400 Sixteenth Street was in the same building where the Justice's nemesis on the Court, McReynolds, lived. Sanford, at 2029 Connecticut Avenue, and McKenna, at 1150 Connecticut Avenue, lived south of Dupont Circle. Roberts was a maverick, buying a row house in Georgetown at 1401 31st street. Pitney, who lived in a Federalist-style row house located at 1763 R Street, did ask for "a private office in the Capitol," because he "found the books to which he so constantly referred could not be housed at home."[51] Pitney was given space in the west side of the Senate building, and his clerk may have worked there as well as in the Justice's home.[52]

Before the Supreme Court's own building was completed in 1935, clerks toiled in isolation and did not benefit from the camaraderie and excitement of being part of the Supreme Court as an institution. Working directly for a Justice out of his home reinforced the notion that they were private secretaries, not institutional employees of the Supreme Court. They did, however, interact with each other while dropping off opinions at the printer's shop, attending the occasional oral argument, retrieving books from the Supreme Court law library, or performing research at the Library of Congress.

Clerk Duties

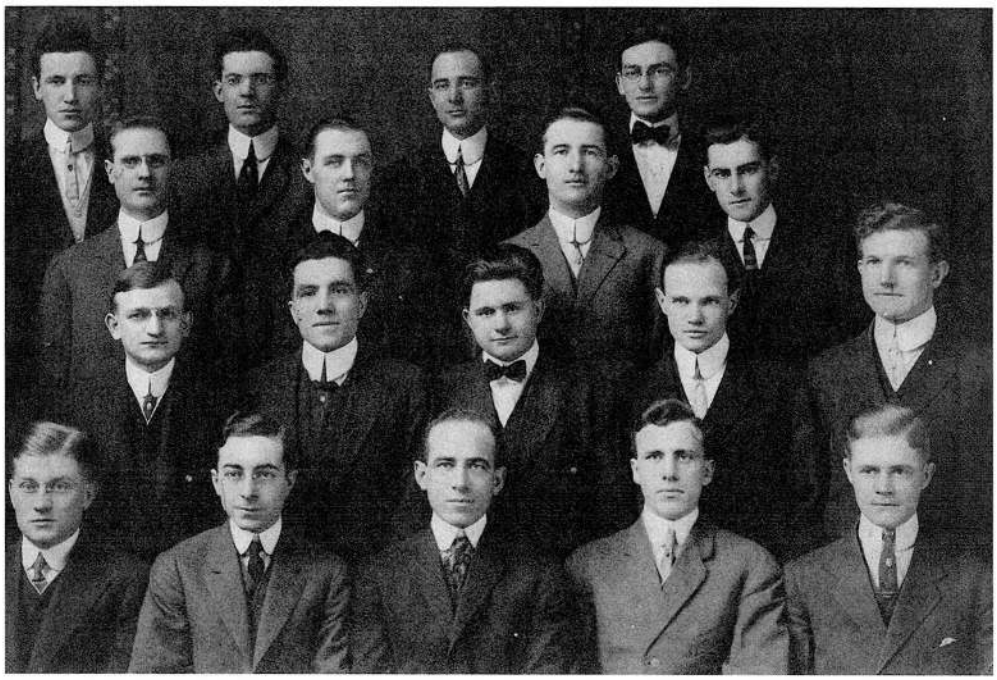
Each Justice asked his clerk to do whatever he considered necessary to help him perform his duties effectively. There was no standardized clerkship plan, and it is not clear if the Justices, or the clerks, were knowledgeable about the procedures used by the other Justices and their clerks. There were, however, certain clerical duties that were universal to every Justice's Chambers in the pre–Stone Court era. In general, a clerk's job entailed taking dictation in shorthand and then transcribing the words on a typewriter, cutting and pasting revisions, proofreading, checking citations, and rushing finished opinions to the print shop, as well as performing personal errands and paying bills. "Most of the Justices had secretaries who were lawyers," wrote Charles Evans Hughes of his time on the White Court, "but these spent the greater part of their time on stenographic work and typewriting correspondence, memoranda and opinions."[53]

Unfortunately, there is little record of what specific duties these sixteen clerks performed. None of them left memoirs, and few were interviewed about their clerking experiences. Being a stenographer, even to a

Justice, was not considered prestigious enough to attract the attention of judicial biographers or historians in the clerks' lifetimes. And those who were interviewed did not reveal much about the clerking function and how the workload was managed in Chambers. Whether this was because they did not feel their duties were sufficiently interesting or because they were protecting the confidentiality of the clerk-Justice relationship is unknown.

There are, however, a few clues as to what duties individual Justices delegated to their clerks; these clues are derived from later interviews, particularly those conducted by political scientist Chester Newland in 1959. Robert F. Cogswell explained that Justice McKenna "disliked having so much as a sentence of his opinions changed by a clerk, although he permitted suggestions for changes."[54] Harvey D. Jacob related that while clerking for Lurton, he "had practically nothing to do with the opinions until they reached the proofreading stage" and admitted he "also did little with the certiorari petitions." His duties were "confined largely to typing, proofreading, checking citations, and handling personal matters for the Justice."[55] When Lurton died suddenly of a heart attack on vacation in Atlantic City in 1914, Jacob accompanied the body by special train back to Clarksville, Tennessee, and was then involved in probating the Justice's handwritten will.[56] S. Edward Widdifield revealed that Justice Clarke liked to write out a rough draft of his opinion in longhand and then revise it while dictating a second draft to his clerk.[57]

It is unknown whether some of these clerks were also being asked to perform substantive legal research, check citations, edit footnotes, draft opinions, or summarize petitions for certiorari. It seems unlikely that a solo clerk had time to perform much substantive legal work in addition to his



Georgetown University Law School's 1913 class featured Harvey D. Jacob (current Lurton clerk, second row at right), Robert F. Cogswell (future clerk to McKenna, second row middle with bow tie), and Leroy A. Reed (current McReynolds clerk, second row at left). Georgetown was a feeder school for Supreme Court clerks.

clerical duties. One wonders if these eight Justices were even aware that their benchmates Van Devanter, McReynolds, Sutherland, Butler, Holmes, Cardozo, Stone, Taft, and Hughes were asking their clerks to write summaries of the cert petitions (Brandeis preferred to review the cert petitions himself, at least until late in his tenure). One also wonders whether the Justices' attitudes toward the types of duties they asked their clerks to perform changed when they began paying them higher salaries in 1921, when caseloads rose, or when their clerks stayed with them longer. Having two assistants in Chambers clearly would have factored into a Justice's decision to delegate substantive legal work to a clerk.

Several clerks worked for Justices whose mental or physical capacities were failing, and they may have been required to take on additional responsibilities. Perhaps the most difficult situation was when an elderly McKenna, while formerly kind, gentlemanly, and shy, became erratic and prone to angry outbursts. Chief Justice Taft stopped assigning him all but the easiest opinions. As McKenna's sole clerk working alone with him in his apartment, Cogswell must have been affected by this situation, but there is no record of how he handled it. After Chief Justice Taft finally persuaded McKenna to step down in January 1925, McKenna's successor, Harlan Fiske Stone, on taking his seat in March, kept Cogswell on briefly.[58]

Clerk Network

Clerks who had attended Harvard, Yale, or Columbia often used their law school network to find a room for rent in a "group house" inhabited by former and current Supreme Court clerks.[59] They would occasionally get together for dinner with clerks from other Chambers to compare notes, with Stone's clerks especially popular because their Justice shared with them the inside scoop on Conference deliberations.[60] One wonders if clerks who graduated from D.C. law schools and who lived with their families were invited to these dinners as well. There is no evidence of the Court organizing a social gathering at the beginning of Term for clerks, as is the practice today.

There is no recorded evidence that the sixteen clerks examined compared notes about the procedures followed by other Justices/clerks in their Chambers. However, many clerks knew each other from law school. For example, Jacob, Cogswell, and Leroy A. Reed, a McReynolds clerk, were members of Georgetown Law School's 1913 class.[61] Some clerks who worked for multiple Terms socialized together, and it is likely that they discussed their work. For example, Van Devanter's long-serving clerk, Mahlon D. Kiefer,[62] was friends with McKenna's long-serving clerk, Ashton Embry, having graduated a few years before him from National University School of Law. On at least one occasion, they had dinner together at Kiefer's apartment with their wives.[63]

Variations in Compensation

Justices had paid their "private secretaries" directly until 1886, when Congress, recognizing the Justices were overburdened, first appropriated $1,000 per clerk for secretarial help. The Attorney General apparently argued that a Justice "should not be required to have to write out his decisions with his own hand" and that "the cost of correcting the 'proof' on errors caused by defective manuscripts would alone pay for the salaries of men who would be supposed to write legibly."[64] The yearly salary of a Supreme Court "stenographic clerk" rose to $1,600 in 1895 and continued at that level until 1911.[65] However, some Justices with long-serving personal secretaries used their own pockets to supplement their clerks' incomes. There is evidence that Day[66] and Taft[67] did this, as well as White. According to Charles Evans Hughes, who sat on the Bench

with him from 1910 to 1916, the Chief Justice "hired a law clerk and paid him out of his own pocket."[68]

Some Justices may have found it necessary to offer these premiums to hire clerks away from good jobs in other branches of government. William H. Pope was earning $1,800 as a clerk in the Office of the Attorney General[69] in 1895 when Justice White hired him, so White probably offered to supplement the clerk's income out of the Justice's own salary, then $13,000 a year but raised to $15,000 in 1911, to avoid Pope's having to take a $200 pay cut. Pope must have felt adequately remunerated because he faithfully served White as a career secretary until Pope's death in 1914.[70] When White hired John J. Byrne in 1919, he may also have privately supplemented the clerk's $2000-a-year salary, because Byrne had been earning $2,400 in the Public Lands Division.[71] White did not, however, need to continue this private generosity for long. When, as described below, Congress appropriated funds in 1920 for each Justice to hire a "law clerk" in addition to a "stenographic clerk," White was able to promote Byrne to the law clerk position at the higher salary of $3,600.[72]

Content with his clerkship and salary, after White's death Byrne wrote to the Chief Justice's successor and asked to be kept on: "I have acquired a familiarity with the duties of [the] position which I believe you will find of vast service were I permitted the high honor of serving you in a similar capacity."[73] Chief Justice Taft agreed to engage him as his law clerk to supplement his longtime personal secretary, Wendell W. Mischler, who would normally be offered the lower "stenographic clerk" salary. Taft explained to Byrne, however, that because "[t]he compensation for a stenographic clerk is quite inadequate," to avoid envy on the part of Mischler, a non-lawyer, "I must make up to [him] out of my own income, so that his compensation will be equal to yours."[74] Taft, like White, was paying out of his own pocket to make sure he kept his stenographic clerk happy. This suggests that the Justices esteemed their stenographic clerks' services highly enough to consider them underpaid.

Congress Authorizes "Law Clerk" Salaries

Congress was both proactive and unclear about offering the Justices salaries for the new position of "law clerk." In March 1919, the Supreme Court requested the usual appropriation for nine "stenographic clerks," but in July Congress appropriated money "[f]or nine law clerks, one for the Chief Justice and one for each associate Justice, at not exceeding $3,600 each, $32,400."[75] This cannot have been a complete surprise, for, as Charles Evans Hughes recalled in his memoir, the need for law clerks had been discussed, if passively, when he was an Associate Justice: "Occasionally, the question of providing law clerks in addition to secretaries would be raised but nothing was done. Some suggested that if we had experienced law clerks, it might be thought that they were writing our opinions."[76]

However, when the Justices heard the news that funds were appropriated for law clerks, they were puzzled as to whether these new assistants were meant to replace or supplement the stenographic clerks. Justice Van Devanter went so far as to query members of Congress, relaying their position back to the Clerk of Court for clarification:

> I had a short conference before leaving with the chairman of the Appropriations in the Senate and the chairman of the like committee in the House and it was then their purpose, as plainly expressed, to give each member one clerk or secretary who should be known as a law clerk and receive compensation larger than heretofore allowed.[77]

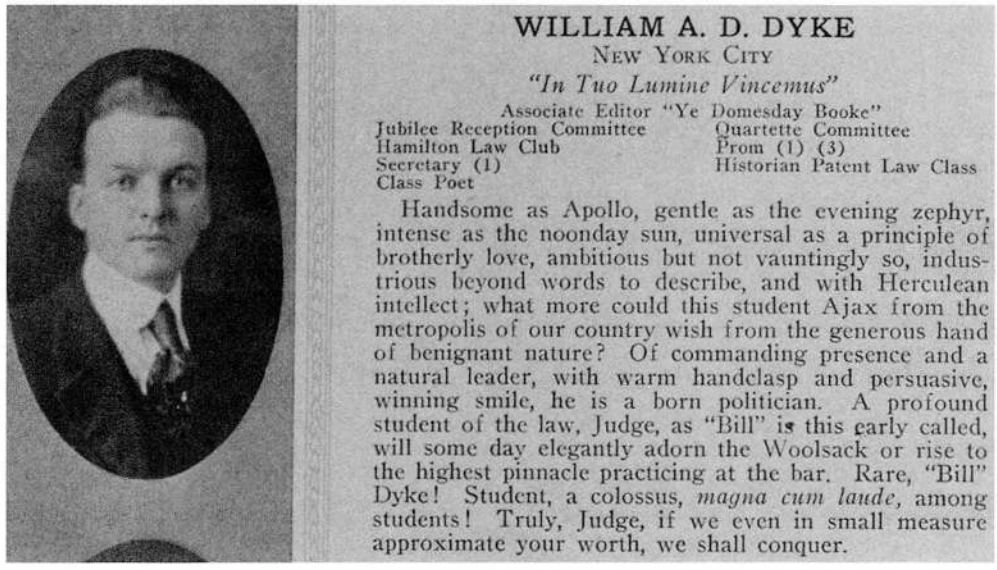
Congress clearly resolved the matter with a May 20, 1920, statute providing for

one law clerk ($3,600) and one stenographic clerk ("at not exceeding $2,000") for each Justice.[78]

Most Justices' "stenographic clerks" promptly resigned and were rehired the next day at the higher "law clerk" salary. White promoted Byrne, Van Devanter promoted Keifer, McKenna promoted Ashton F. Embry, Day promoted Rufus S. Day, McReynolds promoted Harold Lee George, Clarke promoted S. Edward Widdifield, and Brandeis promoted Dean Acheson. Holmes hired a new clerk for the following Term, as usual.

Pitney is the only one who did not promote his stenographic clerk (Horatio Stonier) and instead added a second clerk (for October Term 1922) at the higher law clerk salary. William A. D. Dyke had been serving as an assistant clerk in the U.S. Senate, earning a salary of $1,600,[79] so it was a significant raise for him to work at the Supreme Court. Pitney (like White and Taft with their longtime secretaries) had most likely been supplementing Stonier's $2,000 salary out of his own pocket, so the disparity in pay between his two clerks was probably not particularly pronounced. When the *Trenton Evening News* announced in 1912 that Stonier would be accompanying Pitney to the Supreme Court, it said his salary was "$3,000 a year."[80]

One wonders if Stonier, who had been with the Justice for more than two decades, felt displaced when Dyke came on board, but Stonier had no legal training and Dyke had just graduated from Georgetown Law School, receiving an LL.B and a M.P.L. in 1921 and distinguishing himself as class poet.[81] Whatever resentment Stonier might have felt did not play out. Sadly, Pitney suffered a debilitating stroke in August and officially retired on December 31, 1922, so it is doubtful that Dyke performed much work for him. He did, however, remain on the payroll and was hired by Justice Butler when the new Justice took his seat in January 1923. However, the law did not appeal to Dyke, who went back to medical school after seeing out the Term with Butler.[82]



WILLIAM A. D. DYKE

NEW YORK CITY

"In Tuo Lumine Vincemus"

Associate Editor "Ye Domesday Booke"

Jubilee Reception Committee
Hamilton Law Club
Secretary (1)
Class Poet
Quartette Committee
Prom (1) (3)
Historian Patent Law Class

Handsome as Apollo, gentle as the evening zephyr, intense as the noonday sun, universal as a principle of brotherly love, ambitious but not vauntingly so, industrious beyond words to describe, and with Herculean intellect; what more could this student Ajax from the metropolis of our country wish from the generous hand of benignant nature? Of commanding presence and a natural leader, with warm handclasp and persuasive, winning smile, he is a born politician. A profound student of the law, Judge, as "Bill" is this early called, will some day elegantly adorn the Woolsack or rise to the highest pinnacle practicing at the bar. Rare, "Bill" Dyke! Student, a colossus, *magna cum laude*, among students! Truly, Judge, if we even in small measure approximate your worth, we shall conquer.

Mahlon Pitney was the only Justice who did not promote his stenographic clerk, Horatio Stonier, to law clerk in 1921 when Congress authorized salaries for "law clerks" ($3,600) in addition to "stenographic clerks" ($2,000). Instead, he hired a second clerk, William A. D. Dyke (above), who had just graduated from Georgetown Law School, and kept Stonier on at the lower salary. Dyke switched to medicine after his clerkship.

Although they were now permitted two assistants, many Justices in the 1920s—including White, Holmes, Brandeis, McKenna, Day, Clarke, Sanford, and Sutherland—continued to employ just one.[83] It seems especially surprising that, during his last two Terms on the Court, Chief Justice White, despite being hampered by failing health, did not take advantage of the funds Congress provided to employ a second assistant. White suffered from cataracts and could have benefited from having a second clerk to read briefs to him, although he was also going deaf. He probably also needed extra help with the administrative matters that came from being Chief Justice.

Brandeis chose not to hire a stenographic clerk in addition to a law clerk because he relied on the Court's printer to type up his drafts, which were carried back and forth by his messenger; the other Justices only sent opinions to the printer when their stenographic clerks or secretaries had typed and readied them for circulation. Indeed, Brandeis's clerks suspected that he may have arranged for the money budgeted for his stenographer to be diverted directly to the printer.[84] Another reason Brandeis did not think he needed a second clerk was that he continued to review all incoming petitions for certiorari himself—a task that other Justices, particularly those employing two clerks, were now routinely delegating to their clerks, who were asked to write brief summaries of the petitions.

Funding Changes

On May 25, 1925, Chief Justice Taft wrote a letter to the Associate Justices informing them that Congress had changed the way it appropriated funding for "stenographic clerks":

> The Court is advised that Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Sutherland and Mr. Justice Sanford do not desire the assignment to them of clerical assistants. They prefer to do their work through their Law Clerks. The Court authorizes the fixing of salaries of stenographic clerks to Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Butler and Mr. Justice Stone as the names and amounts shall be certified to you by these Justices. The total sum of course will be within the amount appropriated by law for clerical assistants.[85]

In other words, the four associate Justices still using stenographic clerks—Van Devanter, McReynolds, Butler, and Stone (plus Chief Justice Taft, who employed his non-lawyer private secretary in the stenographer position) would have to figure out how to divide the $20,160 Congress had appropriated as a lump sum for all their clerical assistants. Congress did away completely with the distinction between law clerks and clerical assistants the following year by granting a lump sum "for all officers and employees" of the Court.[86] The Justices thus had even more discretion over how they staffed their Chambers and compensated their direct employees.

In 1924, the Court raised the salary for stenographic clerks to $2,240, but the salary ceiling for law clerks remained unchanged at $3,600. A Justice employing only one clerk could make an offer somewhere between the stenographic clerk salary and the law clerk salary. Notoriously stingy, McReynolds was reputed to pay his clerks well below the salary ceiling even though he only employed one.[87] McReynolds' October Term 1936 clerk reported that he was first offered $2,400, but then McReynolds' messenger told the Justice that the high cost of living in Washington would make it difficult for a clerk to live on so little. Accordingly, the Justice raised his offer to $2,750, but Clerk of Court Charles Elmore Cropley later told the clerk that his salary "should have been at least $3000" if he were to be "paid as much as some of the other clerks are

receiving."[88] One wonders how a Justice decided on the level at which to remunerate his clerk, whether it was based on experience, law school, previous salary, length of service, or the difficulty of the duties he assigned the clerk.

Paycheck Uncertainty: Irregular Start and End Dates

Adding to the variations in clerks' compensation was that there was no official guarantee they would be paid through the Term or the summer. This uncertainty may be tied to the fact that there was not a consistent employment policy for the start and end of clerks' appointments, with some clerks beginning their term of employment as early as July, others not until the Court opened its Term in October. The individual Justice determined the exact beginning and ending clerkship dates. As the clerkship job became regularized in the 1940s, clerks were almost systematically kept on for a whole year—August to August—and given a month of accrued leave.

A striking example of this irregularity was the desperate case of William R. Loney, the only clerk to Justice Edward T. Sanford during his seven-year tenure (1923-1930). After Sanford's premature death at age sixty-four, Loney was not automatically kept on until Sanford's successor took his seat. He was forced to scramble to remain employed and not have a break in service that would affect his pension. A native of Baltimore, Loney had clerked in the Office of the Attorney General from 1898 to 1906, when he was promoted to stenographer to Solicitor General Henry M. Hoyt.[89] He then attended National University School of Law at night, graduating in 1907.[90] By the time he was hired by Sanford in 1923, Loney was fifty-four years old and had spent his entire career as a stenographer/law clerk for the federal government, most recently in the Office of the Assistant Attorney General for the Enforcement of Antitrust Laws.[91]

Sanford died suddenly on March 8, 1930, and Loney obtained a thirty-day temporary appointment with Justice Sutherland while waiting either for the arrival of Sanford's successor or a transfer to a clerk job at the Justice Department. Desperate for work during the Depression with one son "about to enter his senior year in college,"[92] Loney, age sixty-one, begged Chief Justice Hughes for help finding new employment. "Having been so long with the Court," he wrote,

> I have become interested in its work . . . [and] in view of the urgent necessity for obtaining continuous appointment, [I suggest] that the Court consider appointing me to a position, under the Marshal's appropriation, as an assistant in the library, available for such work as may be required, and in anticipation of extra help being needed for the new building when completed (the Marshal's office being one short of what it used to be).[93]

Sutherland obtained a second thirty-day extension for Loney while waiting vainly for the confirmation of Sanford's successor, Judge John J. Parker, of North Carolina, nominated on March 20. Sutherland also "kindly telephoned" Charles P. Sisson, the assistant attorney general in charge of administrative matters, to lobby for a job at the Justice Department for his late colleague's clerk. Judge Parker's nomination was rejected by the Senate on May 7, and a frantic Loney again pressed Chief Justice Hughes for a job in the library.[94] The Chief promptly replied that "no further assistance" was needed in the library or the Marshal's office and that he "was very sorry" that Loney had "not yet found a permanent place," and he trusted that Loney would "find one at the Justice Department."[95] Having a break in government service would harm Loney's benefits and pension, so Loney persuaded Van Devanter to help him obtain a third

one-month extension, which was granted on May 9.

When Philadelphia lawyer Owen J. Roberts was confirmed to fill Sanford's seat on May 20, he kept Loney on, but only until the end of the summer. Finally, like so many clerks before him, Loney was offered a position at the Justice Department. He retired eight years later, in 1938.[96] It is not clear whether Loney should be counted as a clerk to Sutherland, Van Devanter, and Roberts, as we do not know if those Justices assigned him any work during his brief stints with them or if they hired him as a technicality until he could find another government job. It is interesting to note that the Justices had the power to give clerks appointments lasting as few as thirty days.

This end-date uncertainty was not new. When Justice Henry B. Brown retired on May 28, 1906, his clerk, Charles F. Wilson, said he had been told that he "was to be paid during the summer months, or until [a] successor was appointed."[97] However, he complained to Justice Day that the disbursing clerk of the Department of Justice "holds that I ceased to hold the office the day that Mr. Justice Brown retired, and would not even pay me for the month of June, although I worked for the Judge up until the day he left town, June 23rd. . . . It has left me in an embarrassing position, as there is very little business in Washington in the summer time."[98] Day, who was in need of a clerk, did not hire Wilson. Instead, Wilson was engaged by Justice Brown's successor, William H. Moody, on that Justice's confirmation in December. During those six months of waiting, however, Wilson was anxious about his lack of income. In July, he wrote Day that if he was not interested in hiring him, Wilson would be "very glad to hold the position until you shall have appointed some one else."[99]

Even as late as the 1939 Term, clerks continued to worry about summer paychecks. Justice McReynolds' penultimate clerk, Milton Musser, had lined up a job with a law firm in May that was to start on September 1, 1940. He thought that, if he told McReynolds that he was leaving too soon, the Justice would let him go and conveniently not pay him for the month of August when McReynolds was out of town. He also worried that the notoriously frugal Justice would also use Musser's early dismissal as an excuse not to grant his clerk the month of accrued leave he was owed after serving McReynolds for two Terms. Musser wrote his mother: "I'll have to work everything just exactly right, and then rely primarily on luck, or I'm bound to be out on a limb. The Justice will kick like a mule before he will give me a day's leave, especially if I resign."[100] He waited until July to inform McReynolds, who, despite having shortchanged a couple of his previous clerks, surprised Musser by doing the right thing and arranging for him to be paid until October 1, which included the month of accrued leave he had hoped for.[101] McReynolds' new-found fairness was in line with the practice of his Brethren and was an indication that, by 1940, practices concerning clerk appointments were becoming regularized.

Selling Insider Information

The financial insecurity these clerks faced is perhaps underscored by the leak scandal involving Ashton F. Embry, who clerked for Justice McKenna from January 6, 1911, until his abrupt and suspicious resignation.[102] Embry's story merits recounting because he is the only clerk known to have succumbed to the temptation of trading on valuable insider knowledge about an impending Court decision.[103] Born in Hopkinsville, Kentucky, in 1883, Embry had moved to Washington in 1905 and found a job as a copyist in the Justice Department at the age of sixteen. He quickly moved up the ranks from clerk, to stenographer, and then to confidential clerk. Embry was hired in June 1908 as a

law secretary to future Supreme Court Justice Edward T. Sanford, who had just been appointed a district court judge for Middle and Eastern Tennessee. Embry returned to Washington in October 1909 to work as a stenographer for Solicitor General Frederick W. Lehmann.

Three years later, Embry, now twenty-seven, was hired by Justice McKenna. During his first Term as his clerk, he continued attending National University School of Law at night, graduating in June.[104] In July 1919, McKenna promoted him to the new position of law clerk at the higher salary of $3,600.[105] While clerking, Embry also found time to develop a successful bakery business with his brother, Barton Stone Embry, and with James Harwood Graves, a Justice Department stenographer he knew from his time working there.

In a stunning turn of events, after nine years Embry resigned abruptly from his clerkship on December 6, 1919. His resignation letter to Justice McKenna offered an apparent explanation: "[M]y bakery business having expanded to such an extent as to require practically all my time, I feel that in Justice to your work and my health, I ought not to try to continue as your secretary—for it seems impossible for me to do my full duty to both places."[106] However, the real reason, as the Justice no doubt knew, was that Embry was under investigation by the Justice Department for conspiring with several Wall Street speculators to leak them inside knowledge of an upcoming Supreme Court decision in the railroad case of *United States v. Southern Pacific*.[107] Embry had given a "loan" of $6,000 to Graves, his bakery partner on November 16, 1919—the day before the Supreme Court handed down its *Southern Pacific* decision.[108] Embry would have known the result of the Saturday conferences, the votes having been recorded in their Justices' docket books.[109] Graves promptly took the overnight train to New York and shorted the stock, returning Embry's money plus $600 a few days later. He also conveyed Embry's insider information to two Wall Street speculators with whom he had been conspiring.

Embry was indicted by a grand jury several months later but pleaded not guilty. Eventually, the Justice Department realized that it lacked reliable witnesses and dropped the case quietly in 1929. The Embry brothers' thriving bakery business expanded to seven locations by the time of his retirement in 1950.

Career Longevity

Did the Justices retain good clerks by giving verbal commitments of long-term employment? The clerks' commissions were only issued for a year and would be rewritten only when they received a salary increase, so the Justices had much discretion over retention. One wonders whether a Justice had to formally notify a clerk that he was being rehired each Term or if it was assumed unless the clerk was told otherwise.

Five Justices—Lurton, Pitney, Clarke, Sanford, and Roberts—retained their loyal assistants for their entire tenure on the High Bench. Their clerks' service dates from longest to shortest are: Horatio Stonier (ten Terms with Pitney on the Court, and more than twelve years of pre-Court service); William H. Pope (eighteen Terms with White on the Court); Albert J. Schneider (fifteen Terms with Roberts on the Court, and several years prior in Roberts' law firm); William R. Loney (seven Terms with Sanford on the Court); S. Edward Widdifield (six Terms with Clarke on the Court); and Harvey D. Jacob (four Terms with Lurton on the Court, and several years on the Court of Appeals). These clerks all fit the category of "career stenographers," and their Justices' clerkship model can be categorized neatly as "clerical." James Cecil

Hooe should also be included on this list, as he served McKenna for twelve Terms until Hooe's early death.

Many clerks devoted their prime years to their Justice; indeed, three died while in service. Even if they contributed only to the form and not the substance of the Court's work, these men worked diligently and put in long hours. Mahlon D. Kiefer, who clerked for Van Devanter from 1914 to 1923, described his work life in terms that underscore why these clerks' service to the Supreme Court should neither be underestimated nor forgotten:

> I worked with him many a night all night long when he was trying to finish an opinion. While the hours were long and the work with the Justice was hard—hard because of the responsibility he put on his clerk and the fact that with him there was simply no excuse for a mistake—there was not that strain on the nervous energy which results from working under high pressure, confusion and excitement; there was always that calm, judicial atmosphere and agreeable surroundings.[110]

Inherited by the Justice's Successor

When a Justice died or retired abruptly due to illness, his clerk usually stayed on to help his successor until the end of the Term. Being inherited by a new Justice is very different from being interviewed and selected, and Supreme Court clerk databases should reflect this nuance. Moreover, it is likely that some of these clerks who were inherited toward the end of a Term did not perform much work for their new Justice but were merely kept on the payroll as a courtesy. Keeping clerks employed had its obvious advantages, allowing a clerk to fill out his commission and giving him time to find a new job, and affording the new Justice the opportunity to try out the veteran clerk and see if the clerk should be retained for the following Term.

The transition from one Justice to his successor was not always smooth. An example is the succession of William H. Dennis, White's first stenographer whom he inherited from his predecessor, Samuel Blatchford. Dennis was a graduate of Georgetown University, having received his LL.B. in 1876 and his M.A. in 1883, and having served concurrently as deputy register of wills in D.C. from 1876 to 1886.[111] Dennis was also author of **The Probate Law of the District of Columbia** (1883), and he had served as a U.S. commissioner for the District of Columbia in 1889. He clerked for Blatchford for five years.[112] When Blatchford died in July 1893 following a short illness, Dennis was kept on the payroll for October Term 1893.

However, Dennis had to wait more than seven months before his new employer took his seat. Grover Cleveland's first two choices were not confirmed by the Senate, and so the frustrated President decided to appoint White, who was serving as a U.S. Senator, on the assumption that Senators would easily approve their popular colleague from Louisiana. Indeed, Senator White was confirmed as an Associate Justice on February 19, 1894. However, he chose not to be sworn in until March 12 in order to lead the Senate battle against the President's tariff reform legislation. When he finally did take his seat, he decided to bring along his private secretary from the Senate to be his clerk. Dennis, who had been in limbo since July, probably stayed long enough to show him the ropes, but then had to quickly find another job.[113]

White's trusted private secretary was James T. Ringgold, a cousin on his mother's side and a native Washingtonian, whom he had hired to be his aide in the Senate in 1891. Young Ringgold graduated from Maryland University School of Law in 1874 and then practiced law in Baltimore for several years, also teaching at the Baltimore University School of Law.[114] He wrote and published

Ringgold's Digest of the Decisions of the Court of Appeals of Maryland. Like Dennis, he served as a U.S. commissioner in the 1880s.[115] Ringgold was counsel to the Seventh Day Adventist Church and in 1894 wrote **Sunday, Legal Aspects of the First Day of the Week**, a seminal book on laws involving Sunday closings, which is still in print today.[116] Despite these stellar credentials, Ringgold clerked for Justice White for only one Term.[117] He abused alcohol and opiates and was sent to a mental asylum in 1896, dying two years later at the age of forty-five.[118]

Serial Clerks

What made a Justice decide to rehire a predecessor's clerk instead of recruiting a new one? The value of hiring a seasoned clerk is obvious, as the clerk would bring experience in handling the business of the Court. Two clerks in this study were passed from Justice to Justice, making a career as serial clerks, and their stories clearly illustrate the Justices' desire for experience and continuity. S. Edward Widdifield served four different Justices—Peckham, Lamar, Clarke, and Sutherland—during twelve Terms; John E. Hoover served five Justices—Peckham, Harlan, Lamar, Pitney, and Hughes—during eleven Terms. With some of their stints only a few months long, both bounced around a bit and neither had linear careers without gaps in Supreme Court service. Both served Justices who were in ill health and then managed their Chambers after they died.

Born in Canada in 1875 into a Quaker family, Widdifield immigrated at age six to Traverse City, Michigan. He graduated from Detroit College of Law in 1898 and then became an attorney in Traverse City.[119]

S. Edward Widdifield (above) served four Justices—Rufus Peckham, Joseph R. Lamar, John H. Clarke, and George Sutherland—during twelve Terms, although some of his stints were only a few months long and there was a break in his service. Several years after his last clerkship, Widdifield would return to the Court to work as an assistant in the Clerk of Court's Office in 1931. He retired at age seventy-three in 1949.

Widdifield moved to Pittsfield, Massachusetts, to work as a "stenographic secretary" at the Stanley Electrical Company,[120] and then, when he was more than thirty years old, moved to Washington, D.C., where Justice Rufus Peckham hired him as his stenographer. He stayed in Peckham's employ from February 6, 1905, until the Justice died on October 24, 1909, only a few weeks into that Term.[121] In a reply to a query from a researcher in 1944 about his service to Peckham, Widdifield yielded little: "It is true that I was his secretary for over four years but that was a business relationship. . . . He had a well trained legal mind, and when he dictated a rough draft of an opinion, very few changes in it were necessary, the facts and the law stated lucidly and briefly."[122]

It appears Widdifield was kept on the payroll for a couple of months until it became clear that Peckham's successor, Horace H. Lurton, appointed December 13, would bring his own clerk with him from Tennessee.[123] When, in January 1991, Joseph R. Lamar joined the Court a year after Lurton, he rehired Widdifield to be his clerk. It is not clear where Widdifield had been working in the interim; he was thirty-six and living with his mother, a widow. He clerked for Lamar only until the end of the 1911 Term and then went back to Traverse City to marry Maud Huntingdon.[124]

Widdifield returned to Washington with his bride to work as a messenger for the Senate Committee on Congress.[125] Seeking a veteran clerk, newly appointed John H. Clarke (re) hired him in 1916 and kept him as his sole clerk throughout his six-year tenure. The clerk salary of $1,800 was a promotion from the $1,444 Widdifield was earning as a messenger,[126] and in 1920 Clarke promoted him to the higher "law clerk" salary. When Clarke's surprise departure from the Court at the end of the 1921 Term left Widdifield at loose ends, the experienced clerk was snapped up by George Sutherland for the 1922 and 1923 Terms.

The other serial clerk, John E. Hoover, a Washington D.C. native, began working at age fourteen as a "stenographer, typewriter, and general law clerk" to Nathaniel Wilson and J. Hubley Ashton, lawyers with an "active practice" before the Supreme Court.[127] When he applied for a stenographer position with newly appointed Justice Day in 1903, Hoover gave William R. Stansbury, then Deputy Clerk of the Supreme Court, as a reference as to his "ability, integrity and steadfastness to [his] work."[128] While Day did not hire him, Justice Peckham did, but only from October 24, 1904, to February 6, 1905, when Peckham engaged Widdifield as his third and final stenographer.[129]

A year and a half after leaving Peckham's employ, Hoover returned to the Court on July 1, 1906, to clerk for Justice John Marshall Harlan. During that interim, Hoover worked for Justice Harlan's son, James S. Harlan, a Chicago lawyer. Young Harlan had clerked for Chief Justice Melville Fuller in the 1888 Term and presumably was keen to engage a seasoned Supreme Court stenographer for his law practice. When Harlan senior was looking for a new clerk toward the end of his thirty-four-year tenure, James probably recommended Hoover.[130] As Justice Harlan's last private secretary, he developed a close relationship with the Justice during their nearly five Terms together. Hoover spent summers with Harlan at his home in Murray Bay, Canada, and reportedly met his wife Laura Warren there "while watching Secretary of War Taft and Justice Harlan engaged in a game of golf."[131]

Harlan became so dependent on Hoover that he requested that Congress continue to provide him with a salary for a secretary after he was to step down from the Bench because he was indispensable.[132] Harlan never did retire, but died in November 1910. Hoover was so close to the Justice's family that he took it upon himself to write to Harlan's eldest son, Richard, to describe movingly his father's last day on the Court.[133] Hoover stayed on briefly with Harlan's successor,

when Justice Pitney took his seat on March 18, 1911, and he saw the Justice through the Term. However, Pitney had chosen to bring his private secretary from home and Hoover had to find new employment.

Hoover next signed on with Justice Lamar for the 1912 Term, replacing Widdifield when that clerk returned to Michigan to get married. After five years on the Court, in September 1915, Lamar suffered a paralytic stroke, and Hoover again found himself managing a sitting Justice's demise. Lamar never recovered enough to resume his role as a Justice and died on January 2, 1916. Hoover was kept on the payroll for the rest of the 1915 Term to clerk for Associate Justice Charles Evans Hughes. It was his last clerkship: Hughes stepped down to run for president in June.[134] At age thirty-eight, Hoover then began a long career as an attorney at the Justice Department.

It is not known exactly what type of support Hoover gave his five Justices, but his obituary would later characterize his Supreme Court clerkship duties as clerical: "During that time he prepared memorandums on motions for rehearings, took down opinions stenographically, transcribed them and reviewed them for errors before they were circulated among the Justices for comment and approval."[135] However, Hoover may also have provided some legal work for Harlan. According to an earlier Harlan clerk, the job entailed both secretarial duties and "reading records in cases and stating facts from them, [and] examining authorities in briefs filed in cases pending before the court."[136]

Post Clerkship Employment

Careers at Supreme Court

Two veterans enjoyed post-clerkship careers at the Supreme Court, working in the Office of the Clerk of Court after their Justices retired. When Pitney retired in 1922, his longtime private secretary was kept on to work for Deputy Clerk Charles Elmore Cropley. Stonier's starting salary as assistant clerk was $4,000 a year, a big raise from a stenographic clerk's salary.[137] He was promoted to deputy clerk in 1928 when Cropley became Clerk of the Court, but retired the next year.[138]

Similarly, Widdifield was also hired to work as an assistant clerk in the Clerk's Office, but in his case, it was after a six-year absence from the Court. Widdifield had left the Court after Sutherland retired in 1924 to work for the Mixed Claims Commission, which had been established in the aftermath of the war to settle property claims between the United States, its citizens, and Germany. In 1929, he became an assistant clerk for the House Judiciary Committee.[139]

Unlike the situation with Stonier, however, Widdifield's rehiring in 1931 was a demotion. As a law clerk to Sutherland, he had been earning as much as $3,600. He was only paid $1,800 as an assistant clerk in 1936, a figure that rose to $2,650 in 1946.[140] Perhaps the realities of the Depression forced him to take the job. No doubt seeking to regain the higher salary of a law clerk, in 1937 he tried to get rehired as one. Indeed, fourteen years after clerking for Sutherland, Widdifield, age sixty-two, applied to clerk for newly appointed Justice Hugo L. Black.[141] "I am a stenographer, typewriter and lawyer—and member of the bar of the above [Supreme] Court—[and] familiar with the duties of the position," he wrote. Black, who would subscribe to the modern clerkship model, chose instead a newly minted graduate of Harvard Law School. Widdifield continued on as assistant clerk at the Court until 1949, retiring at age seventy-three.[142]

Careers in Government and Private Practice

How and when a clerk decided to move on is also of interest. Were there a requisite number of Terms a clerk had to spend at the Supreme Court before being considered a good

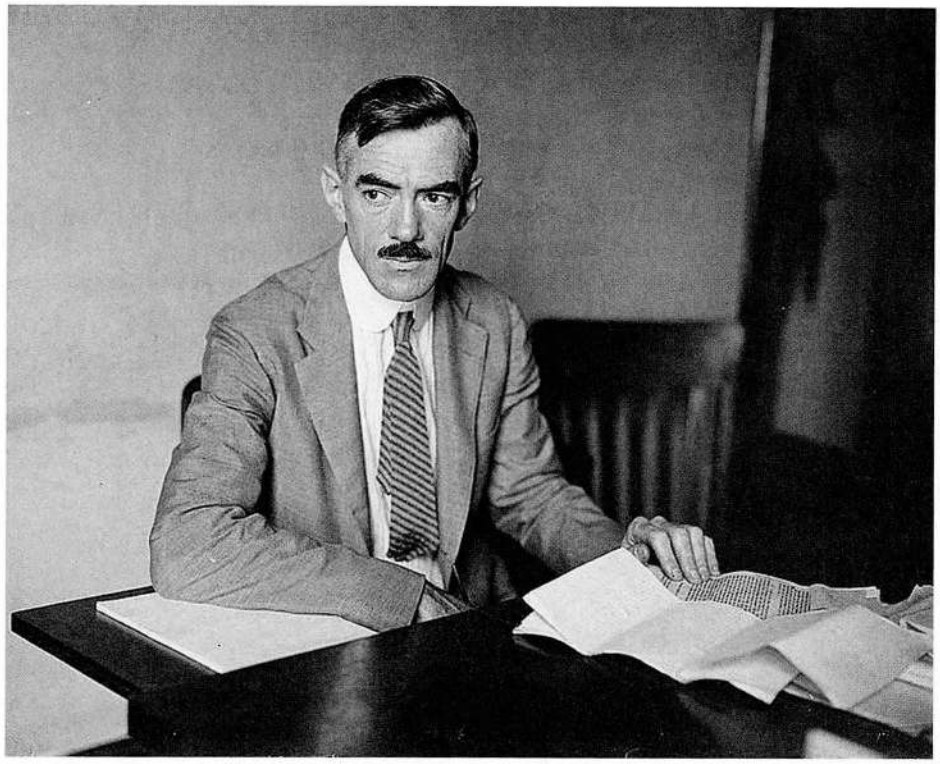
candidate for a job as an attorney at the Justice Department? A letter of recommendation from a Justice was certainly crucial toward securing better employment and a clerk had to stay long enough to be sure of securing one. Yet the financial incentive for a clerk to move on to work as an attorney was considerable. It could not have been easy to support a family on a long-term basis on a law clerk's salary. Even a young, single clerk found it a challenge. "I had to live very, very lean in my bed for $4.00 a month in a garrett up 18th street," complained a Holmes clerk in 1926.[143]

Van Devanter expressed deep regret when his trusted stenographic clerk, Mahlon D. Keifer, left him to work at the Justice Department in 1923 as a special assistant to the Attorney General but admitted, "Of course there is no hope of any promotion if you stay with me. The place and the compensation are fixed by law, and I cannot make any change in either. . . . Of course, I wish you well and shall always be interested in you and in your progress."[144]

Like Keifer, Harvey D. Jacob and John E. Hoover also used their clerkships as steppingstones to good jobs at the Justice Department. Ten days after Justice Lurton's death in 1914, Jacob, who had clerked for him for over six years, was hired as an assistant attorney general.[145] His $2,500 salary was a $700 increase from his clerkship.[146] He was promoted to attorney in the Court of Claims Division in January 1916, at a salary of $3,000. Jacob continued his career there until 1920, when he became general counsel to the National Press Club building, the National Building Corporation, and the Home Owners Loan Corporation for D.C.[147]

Shortly after Justice Hughes stepped down from the Court in 1916, Hoover, who had clerked for various Justices for a total of eleven Terms, joined Jacob in the Claims Division. Following in Jacob's footsteps, Hoover was promoted to attorney there in 1920.[148] Unlike Jacob, Hoover would spend his entire career in government (where he was eventually joined by his nephew, J. Edgar Hoover, the future F.B.I. director).[149] He defended suits against the government and argued the government's side in a hearing at the Department of Labor that resulted in the deportation of Ludwig A. C. Martens, the head of the Russian Soviet Government Bureau, which had been established during the Russian Civil War as a stopgap trade and information agency and which the U.S. government suspected of subversion.[150] In 1922, Hoover defended his own Justice Department against charges that liquor seized in Prohibition raids had been diverted to members of its staff.[151] From 1931 to 1933, he worked for the general counsel of the General Accounting Office before moving to the Credit Administration as special assistant for nine more years.[152]

While at the Justice Department, several clerks worked on the briefs of Supreme Court cases. John J. Byrne served under Assistant Attorney General Mabel Willebrandt, and he and Kiefer, Van Devanter's former clerk, worked together on two Prohibition cases.[153] Cogswell and Bertram Shipman, who both chose to enter private practice, also found themselves working on appeals to the Supreme Court. After clerking for White for four years, Shipman had been hired in 1918 by the New York law firm of Rushmore, Bisbee & Stern.[154] He specialized in corporate law and was of counsel in several Supreme Court cases.[155] Cogswell had stayed on in Washington after his clerkship ended in 1923 and specialized in estate and probate law and negotiating landlord-tenant cases. In 1928, he helped a client, who claimed that the mayor of an Ohio town had exhibited bias toward him in his prosecution of him as a judge, appeal his case to the Supreme Court.[156] When housing shortages as a result of World War II caused rents to skyrocket in D.C. and Congress passed a law freezing rents, Cogswell was appointed in 1941 to run the Office of Administrator of Rent Control, a powerful



Although the work was mostly clerical, Supreme Court clerkships were highly coveted because they were considered stepping-stones to careers as government lawyers, particularly at the Department of Justice. After clerking for Edward D. White from 1918 to the Chief Justice's death in 1923, John J. Byrne (above), went on to serve as special assistant to Attorney General Mabel Willebrandt.

job that oversaw 150,000 dwelling units in D.C. Congress repealed the rent control law in 1953, and Cogswell moved on to oversee the Department of Occupations and Professions, the D.C. agency that licenses professionals and technicians.[157]

Advent of Female Secretaries

When Harlan Fiske Stone was appointed to the Court in 1925, he followed Chief Justice Taft's practice of engaging both a law clerk and a private secretary—for Taft the long-serving Mischler—but in Stone's case the secretary was female. He hired Jane Smith as a "stenographic clerk" at a salary of $2,000, but he then promoted her in 1926 to "secretary" at a salary of $2,500, in line with what male "stenographic clerks" to other Justices were earning. However, Smith's successor, Gertrude Jenkins, was hired as a "stenographic secretary" at the $2,000 salary.[158] The varied terminology and salary for this administrative position reflected the lack of consistency in staffing policy among Chambers. Indeed, Holmes referred to his clerks as his "law secretaries" while Butler called his male stenographic clerk a "clerical assistant." Jenkins stayed with Stone until his death in 1946 and was eventually called his "secretary," as were all other female assistants at the Court in the 1940s. By that era, it had come to seem degrading for a man to turn speech into shorthand or to type out a draft of an opinion, and female secretaries were the norm at the Court and throughout the federal government.

Yet, in the 1930s, most Justices continued to have men performing their clerical duties, under a variety of staffing paradigms.

After his five-year clerkship ended with Justice McKenna's retirement in 1925, Robert F. Cogswell stayed on in Washington specializing in estate and probate law and negotiating landlord-tenant cases. When housing shortages as a result of World War II caused rents to skyrocket in D.C., Congress passed a law freezing rents, and Cogswell (above) was appointed in 1941 to run the Office of Administrator of Rent Control, a powerful job that oversaw 150,000 dwelling units in D.C.

When Charles Evans Hughes became Chief Justice in 1930, he was allotted a more ample staff that included two law clerks and a male and female stenographic clerk. Cardozo employed two Harvard Law School graduates as clerks, one of whom also handled the typing and clerical matters.[159] McReynolds refused to have a female secretary because he did not believe women should work, and he continued to make do with one law clerk performing all his administrative and legal needs. Gradually, however, the traditionally male "stenographic clerk" position began changing gender. Following Stone's lead, Owen J. Roberts engaged a law clerk and a female secretary when appointed in 1930. When Stanley F. Reed joined the Bench in 1938, he also staffed his Chambers with a law clerk and a female secretary.

It was a confusing time for job applicants. When a male law student applied to become "secretary" to newly appointed Justice Reed, he was perplexed when Reed instead chose his long-time assistant, Helen K. Gaylord, for the job. The applicant had hoped to position himself to move from "stenographic clerk" to "law clerk" as quickly as possible: he knew that Sutherland's clerk, whom he assumed Reed would inherit when he replaced Sutherland, was planning to go back to private practice.[160] He was understandably confused. According to a later Reed clerk, Gaylord would provide the Justice with the same type of support traditionally performed by male stenographic clerks:

> While denominated a secretary, as with the administrative assistants to other Justices, [Gaylord's] functions were far broader. In addition to typing memos, communications, and opinions, she maintained Reed's docket books and his financial records, followed the status of activities of the Court, often communicated with other Justices or their staffs with respect to Court matters, and, though not a lawyer, often acted as an additional law clerk, seeking requested information or research materials for Reed. She . . . worked the same long hours as did Reed and his law clerks.[161]

Gaylord's salary was, however, below what male stenographic clerks were entitled to. Her starting salary in 1938 was $2,100, but increased to $3,200 in 1941.[162]

Female secretaries were not lawyers and, unlike their male predecessors, did not see the job as a pathway to a legal career.[163] Eventually, however, some female secretaries at the Supreme Court did pursue law studies. The first was Alice O'Donnell, career secretary to Justice Tom C. Clark (1949-1967). She graduated from night law school at George Washington University in 1954 and expanded the boundaries of the job beyond clerical support. She supervised Clark's Chambers and became a liaison between the Justice and his clerks.[164]

The Last Male Stenographer

When Justice Owen J. Roberts brought along his private secretary, Albert J. Schneider, from his Philadelphia law firm of Roberts, Montgomery & McKeehan for October Term 1930, Schneider became the last of his kind. A loyal career secretary, he stayed with Roberts as his lone clerk throughout the Justice's entire fifteen-year tenure until 1945. Schneider was one of the last clerks to attend evening law school while clerking for a Justice, earning his degree in 1934 at George Washington University. Because Roberts was the first Justice to work full time in the new Supreme Court building, which opened in 1935, Schneider was also part of the modern clerkship era.

Schneider worked alongside his wife, Bertha, whom Roberts had engaged as his secretary.[165] One wonders how Bertha and Albert shared clerical duties in Roberts' Chambers. A skilled stenographer, Albert was a whiz at taking dictation. In 1921, only a year out of high school and working as a freelancer in his native New York, Schneider broke the world record in shorthand, winning first place at the World's Championship Contest of the National Shorthand Reporters' Association. Schneider won by transcribing 280-words-a-minute dictation with a 69.84 percent accuracy rate.[166] Schneider's lengthy service is reminiscent of that of Pope, White's career secretary. But Pope served from 1895 to 1914, during the heyday of the "clerical" clerkship. In the 1940s, Schneider must have seemed like an archaic throwback to the elite clerks in other Chambers. Indeed, Philip Elman, who clerked for Felix Frankfurter in October Term 1941 and 1942, remembers that "Justice Owen J. Roberts had a permanent law clerk who was not part of the crowd."[167]

Albert J. Schneider broke the world record in shorthand in 1921, winning first place at the World's Championship Contest of the National Shorthand Reporters' Association. Owen J. Roberts hired him as his clerk at his Philadelphia law firm and then brought him to the Court in 1930 to serve as his lone clerk throughout his fifteen-year tenure. Schneider's wife, Bertha, served as Justice Roberts' secretary; women were beginning to fulfill the duties previously performed by male "stenographic clerks."

After Roberts retired, Schneider was hired as a reporter at the U.S. House of Representatives. As such he was "[c]harged with jotting down every word of parliamentary prose on the House floor" as "part of a seven-man team that record[ed] debate in five-minute takes for almost split-second transcription and printing." He stayed in the job for thirty-three years. As the last male stenographer to work for a Supreme Court Justice, Schneider was likely the best at shorthand.[168]

Conclusion

Examination of the law clerks who served Justices Edward D. White, Horace H. Lurton, Joseph R. Lamar, Joseph McKenna, Mahlon Pitney, John H. Clarke, Edward T. Sanford, and Owen J. Roberts leads to quite a number of questions. Why did so many Justices continue with the "clerical" clerkship model for so long? When Congress authorized a "law clerk" to help with

substantive legal work in 1920, why did some Justices stick with their stenographic clerk while others hired a freshly minted law school graduate? Why didn't they all utilize the salaries allotted for two assistants? Perhaps some were creatures of habit and simply were more comfortable with a traditional private secretary. Or perhaps they were uncomfortable with the responsibility of being a mentor to an ambitious young lawyer. Or maybe they believed they could manage the workload with minimal support. Were they also worried, as Hughes stated, that the public would think that if they hired "experienced clerks"[169] they were delegating their opinion-writing duties?

Because the Justices managed their workload in the isolation of their homes, it is not clear if they were even aware of how other Justices recruited and deployed their clerks. In other words, they may not have known about the modern clerkship practices of their Brethren. If they had wanted to recruit a clerk from an elite law school, they may not have had a trusted professor on whom they could ask for help in selecting a clerk. We also do not know if there is a correlation between a Justice's style of opinion-writing—lengthy, note-laden, complex—and his deployment of law clerks. These questions remain unanswered, in part because there are no simple answers that fit all the Justices during the three decades examined.

The demise of the old-fashioned "clerical" model did not come until Franklin D. Roosevelt replaced the Four Horsemen with new appointees and those Justices uniformly adopted the "modern" clerkship model. Starting with Hugo L. Black's appointment in 1937, all new Justices made their Chambers in the new Supreme Court building. That move helped to regularize the clerkship function. Yet it wasn't until after Stone's death in 1946 that all nine Justices and their staffs were fully ensconced at the Court. One could even argue that the modern clerkship was not firmly launched until 1947, a date later than the well-known reminiscences by clerks to Justices Holmes, Brandeis, and Stone have led many to believe, because it was only then when, due to increasing demands of the workload, Congress authorized the Associate Justices to hire two law clerks, in addition to a secretary and a messenger. This change inside the Court also reflected the increased standardization of government jobs resulting from the tremendous growth in the federal government in the 1930s and the bureaucratization engendered by World War II.

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ENDNOTES

[1] For the origins of the modern clerkship, *see generally*, Todd C. Peppers, **Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk** (Stanford: Stanford University Press, 2006); Artemus Ward and David L. Weiden, **Sorcerer's Apprentices: 100 Years of Law Clerks at the United States Supreme Court** (New York: New York University Press, 2006); Todd C. Peppers and Artemus Ward, eds., **In Chambers: Stories of Supreme Court Law Clerks and Their Justices** (Charlottesville: University of Virginia Press, 2012); Todd C. Peppers and Clare Cushman, eds., **Of Courtiers & Kings: More Stories of Supreme Court Law Clerks and Their Justices** (Charlottesville: University of Virginia Press, 2015).

[2] David J. Brewer to William Rufus Day, August 13, 1905, Box 20, File A-C, William R. Day Papers, Library of Congress. Hereafter cited as "Day Papers."

[3] Edward G. Lowry, "The Men of the Supreme Court," in *World's Work*, 27 (1914): 637.

[4] Barry Cushman, "The Clerks of the Four Horsemen (Part I, Willis Van Devanter and James C. McReynolds)" *Journal of Supreme Court History*, 39 (2014): 386-424, and "The Clerks of the Four Horsemen (Part II, George Sutherland and Pierce Butler)," *Journal of Supreme Court History*, 40 (2015): 55-78; For McReynolds'

clerkship practices, see also Clare Cushman, "Beyond Knox: James C. McReynolds' Other Law Clerks, 1914-1941," in Peppers and Cushman, **Of Courtiers & Kings**, p. 67-99.

[5] Interview with John Francis Cotter in Chester A. Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks," *Oregon Law Review*, 40 (June 1961): 312.

[6] For a more in-depth biographical treatment of each of the sixteen clerks to these eight Justices, see Clare Cushman, "Lost Clerks of the White Court Era," **Of Courtiers & Kings**, p. 15-47.

[7] Those sixteen clerks and the Justices they clerked for are listed below, with as precise dates for their clerkships as can be ascertained:

1) William H. Dennis (Samuel Blatchford, July 1, 1888, until the Justice died in July 1893. Dennis was kept on until the end of the 1893 October Term to clerk for **Edward D. White)**

2) James T. Ringgold (Edward D. White, March 12 1893, to sometime in 1895)

3) William H. Pope (Edward D. White, December 6, 1895, to Pope's death in July 1914)

4) Bertram F. Shipman (Edward D. White, July 1, 1914, to end of 1918 Term)

5) Leonard Bloomfield Zeisler, (Edward D. White, August 1, 1918, to October 1918)

6) John J. Byrne, (Edward D. White, October 14, 1918, to White's death in May 1923, then to end of Term for Chief Justice **William Howard Taft)**

7) James Cecil Hooe, (Joseph McKenna, March 1, 1898, to his death in December 1910)

8) Ashton F. Embry, (Joseph McKenna, January 6, 1911, to December 16, 1919)

9) Robert F. Cogswell (Joseph McKenna, April 1, 1920, until McKenna's retirement in January 1925, then for **William Howard Taft** and **Harlan Fiske Stone** until the end of the Term)

10) Harvey D. Jacob (Horace H. Lurton, January 1910 to Lurton's death in July 1914)

11) S. Edward Widdifield (Rufus Peckham, February 6, 1905, to December 1909; **Joseph R. Lamar**, January 1911 until end of Term; **John H. Clarke**, October 1, 1916, to end of 1921 Term; **George Sutherland**, 1922 and 1923 Terms)

12) John E. Hoover (Rufus Peckham, October 24, 1904, to February 1905; **John Marshall Harlan**, July 1, 1906, to Harlan's death October 14, 1911; **Mahlon Pitney**, March 18, 1912, to end of Term; **Joseph R. Lamar**, October 1912 to Lamar's death January 2, 1916; **Charles Evans Hughes** until August 1916)

13) Horatio Stonier (Mahlon Pitney March 18, 1912, to December 21, 1922)

14) William A. Dyke (Mahlon Pitney August 1922 to December 21, 1922; **Pierce Butler**, January 1923 to end of Term)

15) William R. Loney (Edward T. Sanford, February 19, 1923, to March 8, 1930; three temporary 30-day appointments with **George Sutherland**, **Willis Van Devanter** and **Owen J. Roberts** until end of Term)

16) Albert J. Schneider (Owen J. Roberts, June 2, 1930, to July 3, 1945)

[8] "Aged Resident of Washington Dead," *Washington Times*, June 8, 1917, 4. Hoover's father's jobs had been in the "shoe business" and "liquor business," and he worked as a "watchman" for the government, according to Census reports.

[9] **Catalogue of the Columbian College in the District of Columbia**, 1893, 131. Hooe earned his LL.B from Columbian College in 1892, winning the "First Essay Prize."

[10] **Official Register of the United States** (Washington D.C.: Government Printing Office, 1895), 809; "James Cecil Hooe a Colonel," *Washington Post*, November 27, 1898. See also "Architects to Meet Sept. 1," *New York Times*, August 17, 1899, in which Hooe is mentioned as Pheobe Hearst's "representative in Washington" who will accompany by train a group of architects from New York to San Francisco, where they will serve as the jury for the design of the new University of California building that Hearst is sponsoring.

[11] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives. Clerkship dates were also provided by the Supreme Court of the United States Library in correspondence in April, May, and July 2013 (hereafter cited as Supreme Court Library). While there is no complete list of all Supreme Court law clerks, the Supreme Court Library maintains unofficial internal files relating to clerks' service at the Court, which it recognizes may be incomplete and contain unverified information.

[12] "James Cecil Hooe Is Dead," *Washington Post*, December 29, 1910; "Dies After Long Illness, James Cecil Hooe," *Washington Herald*, December 29, 1910 (which notes that he had been ill since the summer); "Funeral of James C. Hooe," *Washington Herald*, January 1, 1911, 1. McKenna attended his funeral, along with the current Senators from Montana, Indiana, and California, former Senators from New Hampshire and Louisiana, and former Postmaster General Robert J. Wynne.

[13] "Sigmund Zeisler, Noted Lawyer, Dies," *New York Times*, June 5, 1931.

[14] **Alumni Directory of the University of Chicago**, 1910. **Yearbook of New York County Lawyer's**

Association 1921, 14:59, notes he had received an A.B. from the University of Wisconsin in 1907.

[15] Sigmund Zeisler to U.S. Senator Medill McCormick, February 21, 1921, Justice Department File on Leonard B. Zeisler, National Archives and Records Administration, St. Louis (hereafter cited as Zeisler Personnel File); **Register of the Department of Justice** (Washington D.C.: Government Printing Office, 1919), 23.

[16] Memorandum from Francis. J. Kearful to the Appointment Clerk, Department of Justice, October 16, 1918, Zeisler Personnel File.

[17] Memorandum from Thomas J. Spellacy to the Attorney General, December 22, 1919, Zeisler Personnel File. Zeisler was promoted to special assistant attorney general on January 1, 1920.

[18] A native of Boston, Byrne had clerked for Edwin W. Sims, the U.S. Attorney for the Northern District of Illinois in 1906. **Register of the Department of Justice** (1928), 5. He then received his LL.B (1909) and LL.M (1910) degrees from Georgetown Law School, winning a prize for writing the best law thesis in his class. **Georgetown Alumni Directory**, 1947.

[19] Memorandum from Francis J. Kearful to the Appointment Clerk, Department of Justice, October 16, 1918, Zeisler Personnel File.

[20] http://encyclopedia.gwu.edu/index.php?title=Law__School.

[21] http://www.law.georgetown.edu/academics/academic-programs/jd-program/part-time-program/.

[22] Alfred Findlay Mason and Samuel Epes Turner, eds., *American Law School Review* 5 (1922): 29. In comparison, National College enrolled 650, George Washington 925, Catholic University 71, and the University of Maryland 557. According to its website, Georgetown continues to be ranked the best law school in the United States for part-time students taking class at night while working for "the government, non-profits, lobby groups, the courts, or other agencies." *See* note 21.

[23] For example, the Federal Judicial Center website states, "Although Congress in 1886 heeded the advice of the U.S. Attorney General that it pay for each of the Justices to hire a stenographer "to assist in such clerical work as might be assigned to him," it was not until 1919 that it provided funding for the hiring of **legally trained** assistants. To distinguish these assistants from the stenographers, Congress designated them as "law clerks." [emphasis added] http://www.fjc.gov/history/home.nsf/page/admin_03_11.html.

[24] No law degree has been found for Horatio Stonier. Nearly all clerks to Van Devanter, McReynolds, Sutherland and Butler had law degrees before they became clerks or earned them during their clerkships.

[25] **Ye Domesday Booke**, (Washington, D.C.: Georgetown University, 1920).

[26] **Ye Domesday Booke**, (Washington, D.C.: Georgetown University, 1913).

[27] Newland, "Personal Assistants," 306.

[28] J. E. Hoover to William R. Day, March 5, 1903, Box 18, Letter H, Day Papers.

[29] **Georgetown Alumni Directory**, 1947, "Robert Cogswell, District Aide, Dies," *Washington Post*, October 20, 1971, B10.

[30] James D. Maher to Robert F. Cogswell, July 1, 1919, Box 23, Letter M, Day Papers.

[31] **Annual Report of the House of Representatives**, (Washington, D.C.: Government Printing Office, 1920), 55.

[32] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives.

[33] "Obituary, Ashton F. Embry, Lawyer, Former Government Aide," *Washington Evening Star*, November 8, 1965, C5.

[34] "Bertram Shipman, A Lawyer Here," *New York Times*, November 23, 1963; His commission date is given as 1914 in Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives.

[35] "Bertram Shipman, A Lawyer Here." Simpson College was a small Methodist school.

[36] **Catalogue of the Officers and Graduates of Columbia University**, 1916. Shipman is listed as a graduate of the law school class of 1913 and living in Washington, D.C.

[37] **Who's Who in the Nation's Capital** (Washington, D.C.: Consolidated Publishing, 1921-22), 201. The Nashville **City Directory** lists Jacob as a stenographer in the years 1906, 1907, and 1908. "Harvey Jacob, Lawyer, Legal Aide to Justice," *Washington Post*, April 17, 1970.

[38] He married Cecelia Fenstel in 1903 and their sons were born in 1905 and 1908, when she died in childbirth.

[39] Horace H. Lurton to William R. Day, December 21, 1909. Box 26, Letter L, Day Papers.

[40] It is not known when Stonier began working for Pitney in his law firm. Stonier is first listed in the **City Directory** for Trenton as a stenographer in 1901.

[41] *See* **Treasurer's Report, New Jersey** (Trenton, N.J.: Treasury Department, 1907), 325-28; **Treasurer's Report, New Jersey** (Trenton, N.J.: Treasury Department, 1908), 380-93.

[42] *See*, for example, "Henry-Williams Cup to Horatio Stonier," *Washington Post*, August 15, 1921. Stonier had been tasked with tracking down Pitney on the golf course in Atlantic City to give him the good news that President Taft was appointing him to the Supreme Court in 1913; Pitney finished playing the round. Alan B. Reed,

"Mahlon Pitney" (senior thesis, Princeton University, 1932), 29. There is, however, no indication that Stonier played golf with Pitney, as Holmes did with some of his clerks.

[43] John C. Knox initially hoped to clerk for Van Devanter, but he already had a clerk. *See* Dennis J. Hutchinson & David J. Garrow, **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Law Clerk in FDR's Washington** (Chicago: University of Chicago Press, 2002) xi-xiv (hereafter **Knox Memoir**). Milton Musser applied to clerk for Reed, but was turned down. *See* Cushman "Beyond Knox," pp. 77-79.

[44] *See*, for example, Charles F. Wilson to William R. Day, July 9, 1906, Box 21, Letter W, Day Papers.

[45] Pascal Oberlin to Willis Van Devanter, October 5, 1912, Willis Van Devanter Papers, Library of Congress.

[46] Frederick H. Barclay. *See* Barry Cushman, "The Clerks of the Four Horsemen (Part I, Willis Van Devanter and James C. McReynolds)" *Journal of Supreme Court History*, 39, (2014): 413.

[47] Based on Census records and marriage licenses. *See generally*, Cushman, "Lost Clerks."

[48] "Miss Galloway Is Affianced," *Herald Statesman, Yonkers, New York*, July 28, 1949. 1920 Census.

[49] "John E. Hoover, 76, Dies," *Washington Star*, May 3, 1954; 1920 Census.

[50] Newland, "Personal Assistants," 312. Jacob wed his second wife, Camille, in June 1914, a month before Lurton died. They would have six children together.

[51] Reed, "Mahlon Pitney," 156.

[52] Supreme Court Office of the Curator Research Files.

[53] David J. Danelski and Joseph S. Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes** (Cambridge, Mass: Harvard University Press, 1973), p. 163.

[54] Robert F. Cogswell, January 29, 1959 interview, quoted in Newland, "Personal Assistants," 310. Cogswell also revealed that, although McKenna "possessed a good library, the Justice was not an omnivorous reader"; Robert F. Cogswell, interview, n.d., quoted in Brother Matthew McDevitt, **Joseph McKenna, Associate Justice of the United States** (Cambridge, MA: DA Capo Press, 1974), p. 227.

[55] Harvey D. Jacob interview by Chester Newland, January 14, 1959, quoted in Newland, "Personal Assistants," 312.

[56] "Will of Mrs. Helen M. Schweitzer Offered for Probate," *Washington Post*, August 23, 1914, reported that "Justice Lurton's son, Horace H. Lurton, Jr., and Attorneys William Henry White and Harry D. Jacobs [*sic*] applied to Justice Stafford yesterday" to admit the testamentary paper drawn by Lurton on June 5, 1896, in Nashville. Affidavits were submitted proving that it was in Justice Lurton's handwriting.

[57] S. Edward Widdifield interview, n.d., in Hoyt Landon Warner, **The Life of Mr. Justice Clarke** (Cleveland: Western Reserve University Press, 1950), p. 76.

[58] "Robert Cogswell, District Aide, Dies." His obituary says that he clerked for Taft as well, and he likely did work for the Chief Justice from January to March 1925.

[59] *See*, for example, Herbert Weschler's reminiscence about his living quarters in Katie Loucheim, ed., **The Making of the New Deal: The Insiders Speak** (Cambridge, Mass.: Harvard University Press, 1983), p. 45. Weschler notes that Cardozo's clerk lived around the corner and popped in frequently.

[60] Melvin Urofsky, **Brandeis: A Life** (Pantheon Books, 2009), p. 465.

[61] **Ye Domesday Booke** (Washington, D.C.: Georgetown University, 1913); *See also* "Musicale and 500 Party," *Washington Herald*, December 21, 1913, which reports that Mrs. Harvey Jacob's sister gave a party for members of Delta Theta Pi Law Fraternity of Georgetown Law School in honor of McReynolds clerk Leroy A. Reed, which the Jacobs attended.

[62] Kiefer served as a clerk for the solicitor of the treasury in the Office of the Attorney General beginning in 1904, and he was promoted to a second-class clerk in 1907. **Register of the Office of the Attorney General**, no. 2 (1911): 17. Kiefer graduated from National University School of Law in 1907 and continued at the Office of the Attorney General until Van Devanter hired him as a stenographic clerk from June 29, 1914, to July 18, 1919; he was then promoted to law clerk from July 19, 1919, to September 25, 1923. Supreme Court Office of the Curator Research Files.

[63] John B. Owens, "The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal," *Journal of Supreme Court History* 27, (2002): 14-44.

[64] Undated article, "Secretaries for the Judges," from the Clerk of Court's Office Scrapbooks, Supreme Court Office of the Curator Research Files.

[65] See **Official Register of the United States** for the years 1895, 1897, 1900, 1903, 1905, 1907, 1911. Stenographer salaries are recorded under "Supreme Court" at the top of the Judiciary section.

[66] *See* William R. Day to James G. Bachman, June 28, 1917, Box 32, Letter B, Day Papers.

[67] *See* William H. Taft to William M. Mischler, July 12, 1921, and William H. Taft to John J. Byrne, July 17, 1921, both in Personal Papers of William Howard Taft, Library of Congress.

[68] Danelski and Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes**, p. 163.

[69] **Official Register of the United States** (Washington, D.C.: 1895), 800.

[70] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives, lists Pope's commission date as December 6, 1895. He died in July 1914.

[71] Zeisler Personnel File.

[72] Supreme Court Office of the Curator Research Files.

[73] John J. Byrne to William H. Taft, July 6, 1921, Taft Papers. *See also*, Todd C. Peppers, "Summer Vacation with Will and Misch: Chief Justice William Howard Taft and His Law Clerks," in Peppers and Cushman, **Courtiers & Kings**, p. 48-66. Byrne stayed only until the end of the Term and then took a job at the Justice Department,

[74] William H. Taft to John J. Byrne, July 17, 1921, Taft Papers.

[75] 41 Stat. 209 (July 19, 1919).

[76] Danelski and Tulchin, **Autobiographical Notes**, p. 163.

[77] Willis Van Devanter to James D. Maher, Clerk of Court, July 5, 1919, quoted in Newland, "Personal Assistants," 302

[78] 41 Stat. 686-87 (May 29, 1920).

[79] **Report of the Secretary of the Senate** (Washington, D.C.: Government Printing Office, 1920), 41; **Report of the Secretary of the Senate** (Washington, D.C.: Government Printing Office, 1922), 24.

[80] "Justice Pitney Names Secretary," *Trenton (N.J.) Evening News*, April 1, 1912.

[81] *Georgetown Alumni Directory*, 1947; "Tablet Unveiled for Hilltop Boys Who Died in the War," *Washington Herald*, June 15, 1921, 2.

[82] He earned his M.D. at Georgetown in 1929. The 1930 Census lists him as an intern in a hospital and his wife, Cuba A. Dyke, as a milliner in a department store. In 1941, Dr. Dyke died tragically, at age forty-two, in a car accident. *See* "Deaths," *Southern Medical Journal* (December 1941): 1294.

[83] Newland, "Personal Assistants," 302. The author has added McKenna and Day to Newland's list.

[84] Urofsky, **Brandeis**, pp. 473-74.

[85] William Howard Taft to the Justices, May 25, 1925, Van Devanter Papers.

[86] 44 Stat. 344 (April 25, 1926).

[87] **Knox Memoir**, 246.

[88] McReynolds' messenger, Harry Parker, revealed to the clerk, John Knox, that that was the salary range. **Knox Memoir**, p. 16. Clerk of Court Charles Elmore Cropley disclosed to Knox this $3,000 figure after he was fired at the end of the Term. *Id.*, p. 256.

[89] **Register of the Office of the Attorney General** (Washington, D.C.: Government Printing Office, 1911), 9. His salary was $1,600.

[90] "William Loney Dead," *Washington Post and Times Herald*, December 11, 1956, sec. B.

[91] **Official Register of the United States**, (1921), 64.

[92] William R. Loney to Charles Evans Hughes, May 7, 1930, MSS 19, 201, Charles Evans Hughes Papers, Library of Congress (hereafter cited as Hughes Papers).

[93] 138. William R. Loney to Charles Evans Hughes, April 15, 1930, MSS 19, 201, Hughes Papers.

[94] William R. Loney to Charles Evans Hughes, May 7, 1930, MSS 19, 201, Hughes Papers.

[95] Charles Evans Hughes to William H. Loney, May 7, 1930, MSS 19, 201, Hughes Papers.

[96] "William Loney Dead." In the 1930 Census, Loney reported that he was a "lawyer for the U.S. government."

[97] Charles F. Wilson to William R. Day, July 9, 1906, Box 21, Letter W, Day Papers.

[98] *Ibid.*

[99] After Moody retired, Wilson clerked for Secretary of State Philander Knox but apparently continued to miss the Court. When Justice Day had a vacant clerk position in 1914, Wilson applied for it—again unsuccessfully. *See* James D. Maher to William R. Day, September 21, 1914, Box 29, Letter M, Day Papers. Wilson's salary as Knox's private secretary was $1,000, so he had other reasons for wanting to clerk for Day—a $700 promotion. **Official Congressional Directory** (1913), 9.

[100] Milton Musser to Ellis Shipp Musser, June 4, 1940, Box 21, Folder 4, Musser Family Papers, Utah State Historical Society.

[101] *See generally*, Clare Cushman, "Beyond Knox," pp. 67-99.

[102] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives.

[103] *See generally* Owens, "The Clerk, the Thief, His Life as a Baker," 14-44. Owens persuasively establishes that Embry was guilty of leaking information to Wall Street speculators.

[104] "Obituary, Ashton F. Embry, Lawyer, Former Government Aide," *Washington Evening Star*, November 8, 1965, C5, says Embry received his law degree from Georgetown University, but the school has no record of him having attended. Karen Wahl, archivist at George Washington University Law School, confirms Embry's 1912 graduation date from National University School of Law. National University and George Washington University merged in 1954, and the latter maintains the former's archives.

[105] Ashton Embry to Clerk of Court James Maher, July 29, 1919, Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives.

[106] Ashton Embry to Joseph McKenna, December 16, 1919, *Ibid.*

[107] 251 U.S. 1 (1919).

[108] Owens, "The Clerk, the Thief, His Life as a Baker," 35-36.

[109] Dean Acheson, who was clerking that Term for Justice Brandeis, wrote in his autobiography: "One of the joys of being a law clerk was to open the book on Saturday afternoon and learn weeks ahead of the country what our masters had done." Dean Acheson, **Morning and Noon, A Memoir** (Boston: Houghton Mifflin, 1965), p. 85.

[110] Mahlon D. Kiefer, "Memorandum for Mr. Wendell Berge, Assistant Attorney General, Re: Mr. Justice Van Devanter," February 24, 1942, Collection on Justice Van Devanter, Box 1, Folder 6, Office of the Curator, Supreme Court of the United States.

[111] **Georgetown Alumni Directory**, 1947. He also received his A.B. from Georgetown in 1874 and founded and edited the *Georgetown College Journal*. Dennis was born in Philadelphia in 1856 and raised by his mother, a widow. *See generally*, John Paul Earnest, "In Memoriam, William Henry Dennis Esq.," *Columbia Historical Society Journal*, January 1, 1919, 22: 244-245; "W. H. Dennis, 65, Bar Leader, Dies," *Washington Post*, March 24, 1919. Earnest's memorial tribute notes that Dennis was "for a time private secretary of Justice Blatchford of the Supreme Court of the United States" but does not mention White.

[112] Dennis was appointed July 1, 1888, to work for Blatchford. Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives, Washington, D.C. William H. Dennis has been confused with William *Cullen* Dennis because of a June 5, 1929, article in the *Washington Post*, "William C. Dennis Named President of Alma Mater," which erroneously mentions that the college president "was secretary to Justice White."

[113] After leaving his clerkship, Dennis went on to be a highly respected D.C. lawyer, serving as chairman of the committee on bar admissions for the District of Columbia Bar Association. *See generally*, *Washington Law Reporter* (Washington D.C.: Law Reporter, 1895), 12:407, which reports that Dennis and Enoch Totten argued a case, *Ferguson v. Railroad Company*, in the Court of Appeals for the District of Columbia; "The Legal Record," *Washington Post*, January 1, 1899; "Berret Residence Sold," *Washington Post*, June 5, 1903; "Dennis's Bitter Complaint," *Washington Post*, September 11, 1903; "Official Admitted to Bar," *Washington Post*, November 3, 1908; "Fight for Life Insurance," *Washington Post*, March 17, 1911; "Funeral for R. R. Perry," *Washington Post*, July 20, 1913; "H. T. Taggert Eulogized," *Washington Post*, December 16, 1914; "W. H. Dennis, 65, Bar Leader, Dies," *Washington Post*, March 24, 1919.

[114] 1874 Catalog of the University of Maryland School of Law, http://www.law.umaryland.edu/marshall/schoolarchives/documents/Catalog1874.pdf. He is listed as being on the faculty in 1892 at the Baltimore University School of Law, which merged in 1911 with Baltimore Law School—neither of which exists today. *See* http://archive.org/details/baltimoreuniversOObalt.

[115] **Official Register of the United States**, U.S. Civil Service Commission, United States Bureau of the Census (Washington, D.C.: Government Printing Office, 1883), 677; **Official Register of the United States** (1889), 808; **Official Register of the United States** (1890), 988.

[116] James T. Ringgold, **Sunday; Legal Aspects of the First Day of the Week** (Jersey City, N.J.: Frederick D. Linn, 1891; reprint, Lawbook Exchange, Clark, N.J.: 2003). In the 1881 Washington, D.C., **City Directory**, Ringgold calls himself a "journalist."

[117] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives, gives Ringgold's commission as March 12, 1894. Ringgold is listed as a Supreme Court clerk in 1895 in the **Official Register of the United States**, (1895), 971, but his successor, William H. Pope, was hired on December 6, 1895.

[118] "James T. Ringgold Found Dead, Heart Disease Aggravated by Dissipation Ends the Life of a Well Known Lawyer," *Baltimore Sun*, January 18, 1898; "Death of Mrs. Ringgold; She Was the Wife of Jas. T. Ringgold, Who Was Sent to Spring Grove Asylum," *Baltimore Sun*, April 3, 1896; "James T. Ringgold's Death," *Washington Post*, January 18, 1898.

[119] "Former Aid of Supreme Court Dies," *Washington Post*, October 2, 1960, lists Widdifield as a graduate of Detroit College of Law. However, the registrar of Michigan State University College of Law, affiliated with the Detroit College of Law since 1997, has no record of Widdifield attending or graduating from the school. Polk's **Traverse City and Grand Traverse County Directory, 1901-1902** (Detroit: R. L. Polk, 1902), 206 gives Gilbert & Widdifield as the name of his law firm.

[120] Application for Memberships, Massachusetts Society of Sons of the American Revolution, Boston, MA: 1905.

[121] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives.

[122] S. Edward Widdifield to Paul Mandelstam, January 25, 1944, on file with author. Mandelstam received his A. B. in 1944, A.M. in 1946, and M.D. in 1950 from Harvard University.

[123] According to a handwritten note in the Supreme Court Office of the Curator Research Files.

[124] 1910 Census; 1920 Census.

[125] **Official Congressional Directory** (Washington D. C.: Government Printing Office, 1914), 218. **Official Congressional Directory** (1915), 42.

[126] **Official Congressional Directory** (1916), 44.

[127] Where Hoover attended law school is unclear. Hoover identified himself as a "clerk/lawyer" in the 1900 Census, when he was twenty-one. His obituary says he attended Georgetown Law School ("John E. Hoover, 76, Dies," *Washington Star*, May 3, 1954), but he is not in the records there. His brother, William H. Hoover, graduated from Georgetown Law School in 1916. A student named John E. Hoover graduated from George Washington Law School, earning an L.L.B. degree in 1916 and an LL.M. in 1917. But this is a younger cousin —the future FBI director J. Edgar Hoover. "Young Lawyers Join Local Bar," *Washington Herald*, October 14, 1913, 10, records a John E. Hoover passing the D.C. bar.

[128] J. E. Hoover to William R. Day, March 5, 1903, Box 18, Letter H, Day Papers.

[129] Correspondence on Appointment of Stenographic Clerks, 1881-1931 and 1939-40, RG 267, Stack Area 17E4, Row 8, Compartment 23, Shelf 1, Box 1, National Archives.

[130] Harlan's biographer characterizes Hoover as James's secretary at the Interstate Commerce Commission, but James was appointed to that entity in August 1906, after Hoover began clerking for his father. *See* Loren P. Beth, **John Marshall Harlan, The Last Whig Justice** (Louisville: University Press of Kentucky, 1992), p.189.

[131] *Evening Star*, October 6, 1907, 2. Laura Delina Warren was Canadian.

[132] "Harlan May Retire," *Washington Post*, March 26, 1908.

[133] John E. Hoover to Richard D. Harlan, October 11, 1911, John Marshall Harlan Papers, University of Louisiana, *quoted in* Beth, **John Marshall Harlan**, 189-90. Harlan had fallen ill on the Bench, was taken home in a taxicab by Justice McKenna, and died three days later.

[134] Hoover's obituary says he clerked for Chief Justice Charles Evans Hughes, but the Supreme Court Library research files do not list him as either a Pitney or a Hughes clerk.

[135] "John E. Hoover, 76, Dies," *Washington Star*, May 3, 1954.

[136] Edgar R. Rombauer, Jr., "Secretary to Justice Harlan: The Early Days," *The Supreme Court Historical Society Quarterly* 24, no. 1 (2003): 6-7. Rombauer clerked from December 1889 to Spring 1892. He was, however, one of three clerks during his first Term, which may have enabled Harlan to give him more substantive legal tasks. Harlan only employed one clerk during Hoover's tenure.

[137] Records of the Office of the Marshal 1864-1940, General Correspondence of Clerk's Accounts, RG No. 267, Entry 71, National Archives, *see* "Disbursements by Charles Elmore Cropley, Clerk of United States Supreme Court," for Horatio Stonier.

[138] "United States Supreme Court," *New York Times*, February 21, 1928. "W. R. Stansbury, 71, 45 Years Supreme Court Officer, Dies," *Washington Post*, June 6, 1927, notes that "active pallbearers" were Deputy Clerk C. Elmore Cropley and Assistant Clerks Reginald C. Dilli, Horatio Stonier, Reynolds Robertson, Harold Wiley, and Rodolph Waggaman. Reynolds Robertson went on to clerk for Chief Justice Taft, who broke with his usual custom of rotating Yale graduates to hire an Assistant Clerk of Court.

[139] **Official Register of the United States** (1929), 78. He also developed a robust real estate business in the resort town of North Beach, Maryland, where he served as mayor for many years. "Chosen North Beach Mayor: E. Widdifield Returned at Town Election—People's Ticket," *Washington Post*, June 27, 1922.

[140] Records of the Office of the Marshal 1864-1940, General Correspondence of Clerk's Accounts, RG No. 267, Entry 71, National Archives.

[141] S. Edward Widdifield to Hugo L. Black, August 12, 1937, Box 442, Hugo L. Black Papers, Library of Congress.

[142] "Former Aid of Supreme Court Dies," *Washington Post*, October 2, 1960. *See also* "Widdifield, 74, Retires as Supreme Court Aide," *Washington Post*, February 1, 1949.

[143] Tommy Corcoran, quoted in Loucheim, **The Making of the New Deal**, p. 24.

[144] Willis Van Devanter to M.D. Kiefer, Sept. 20, 1923, Kiefer Employment Record. Quoted in Barry Cushman, "The Clerks of the Four Horsemen (Part I, Willis Van Devanter and James C. McReynolds)," 414.

[145] **Register of the Department of Justice** (Washington, D.C.: Government Printing Office, 1918), 19. Jacob was hired July 22, 1914.

[146] **Register of the Department of Justice** (1915), 20.

[147] "Harvey Jacob, Lawyer."

[148] **Register of the Department of Justice** (1919), 20.

[149] Much to his annoyance, Hoover's younger cousin, who bore the same name, joined him a year later, on July 26, 1917, at the Justice Department as an attorney in the Department of National Security and Defense. **Register of the Department of Justice** (1918), 24. The younger man's arrival forced his cousin to change his name, according to his niece: "Apparently . . . their memos, papers, mail, et al, were getting mixed up. So Uncle John (in his own usual gruff manner) called his cousin into his office saying something must be done about their names. So J. Edgar walked away forever after known as J. Edgar." Ann Hoover Holcombe posted a note dated October 22, 2000, at http://wc.rootsweb.ancestry.com/cgi-bin/igm.cgi?op=GET&db=jdamewood&id=I4295. Hoover no doubt continued to be irritated when J. Edgar Hoover, who was hired at an inferior salary of $1,800, began making the same salary as his uncle in

1920—$3,000—and quickly surpassed his on his way to becoming director of the Federal Bureau of Investigation. During World War I, Hoover (age forty) had not left Washington, but served as a draft board member, Register of the Department of Justice (1920), 78.

[150] "Martens Deportation Hearings Scheduled for December 7," *New York Tribune*, November 13, 1920, 7.

[151] "Hints Lawmaker Got Liquor Seized by Government," *Washington Herald*, May 28, 1922, 8.

[152] "J. E. Hoover Rites to Be Here Today," *Washington Post*, May 4, 1954. Hoover retired in 1942 upon reaching mandatory retirement age at sixty-four.

[153] *United States v. Sprague*, 282 U.S. 716 (1931); *Colorado v. Symes*, 286 U.S. 510 (1932). Byrne had returned to the Justice Department in 1925 after a brief stint in his native Boston when Attorney General Harlan Fiske Stone appointed him to head up efforts to prosecute bootleggers in the New England area, "Liquor Prosecution to Be Decentralized: Stone Appoints Regional Prosecutor for New England," *Washington Post*, July 30, 1924; **Register of the Department of Justice** (1928), 72. He was on the briefs in several other Supreme Court cases involving Prohibition: *United States v. Zerbey*, 271 U.S. 332 (1926); *Lederer v. McGarvey*, 271 U.S. 342 (1926); *Shields v. United States*, 273 U.S. 583 (1927).

[154] **The Lawyer's List** (New York: Hubert Rutherford Brown, 1922), 240. His firm eventually became Mudge, Stern, Baldwin & Todd.

[155] *United States v. Buttersworth-Judson Corporation*, 269 U.S. 504 (1926), a bankruptcy case; *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85 (1933), a 14th Amendment case; and *Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R.I. & P. RY. Co. et al.*, 294 U.S. 648 (1935).

[156] *Dugan v. Ohio*, 277 U.S. 61 (1928).

[157] "New District Job Goes to R. F. Cogswell," *Washington Post*, September 17, 1953.

[158] Supreme Court Office of the Curator Research Files.

[159] Andrew L. Kaufman "Cardozo and His Law Clerks," **In Chambers**, p. 92. Percy Russell and Chris Sargent, Harvard Law School graduates, were both hired as combination clerk-secretaries and did all the typing. Sargent stayed for two years; Russell for four.

[160] Milton Musser to Francis R. Kirkham, February 2, 1938, Box 23, Folder 1, Musser Family Papers; Cushman, "Beyond Knox," pp. 77-79. Sutherland's clerk, John Cragun, also did not end up working for Reed but went into private practice.

[161] John D. Fassett, **New Deal Justice: The Life of Stanley Reed of Kentucky** (New York: Vantage Press, 1994), p. 210.

[162] Supreme Court Office of the Curator Research Files.

[163] As early as 1906, one woman who wrote to ask Justice Day for evening stenography work took pains to reassure him that, although she had just graduated from night law school, "I have no intention of attempting to practice law, but I am hoping my bit of legal training may be of assistance in obtaining legal dictation [work]." She explained that her day job was "Assistant Examiner in the Legal Division of the U.S. Reclamation Service," and her typing speed was 150 words per minute. Mrs. Gertrude Ballard Fowler to William R. Day, November 23, 1906, Box 21, Letter F, Day Papers.

[164] *See* "She's More Than Just a Secretary: Legal Knowledge Need—So She Passed the Bar," *Washington Post*, September 7, 1966, sec. C-6; http://www.c-span.org/video/?125827-1/women-working-supreme-court-

[165] The 1940 Census reveals that Albert was born in 1897 and Bertha in 1893, both in Pennsylvania, and that he listed his occupation as "law clerk, supreme court" and she as "secretary, supreme court." *See also* Supreme Court Staff Directory, 1936 Term (on file with the author), which lists "A. J. Schneider" and "Mrs. A. J. Schneider" as Roberts's staff, as well as a messenger, W. Harold Joice.

[166] http://gregg.angelfishy.net/anaboutg.shtml.

[167] Norman Isaac Silber, ed., **With All Deliberate Speed: The Life of Philip Elman: An Oral History Memoir** (University of Michigan Press, 2004), p. 73.

[168] "2 Men Conclude 74 Years as Official Reporters for House," *Washington Post*, October 24, 1965, sec. A.

[169] Danelski and Tulchin, **Autobiographical Notes**, p. 163.

Five Justices and Why They Left the Court for "Better" Positions

JAMES F. FLANAGAN

Justices are notoriously reluctant to leave the Court. Forty-nine died in office, and age and illness prompted almost all the others to depart.[1] Yet five Justices did leave for another, and perhaps, better job. They were, in the order of their resignations, John Rutledge, the first senior Associate Justice, who resigned in 1791 to become the Chief Justice of the South Carolina Court of Common Pleas and General Sessions; John Jay, the first Chief Justice, who followed in 1795 after being elected governor of New York; Charles Evans Hughes, who resigned in 1916 to be the Republican candidate for President; James F. Byrnes, who left in 1942 to become the Director of the Office of Economic Stabilization; and Arthur Goldberg, who resigned in 1965 to serve as the U.S. Ambassador to the United Nations.

All were in good health and in the prime of their careers. Byrnes was sixty, Jay was forty-nine, and the others were in their fifties. All had been offered and accepted the new position when they resigned and, but for that new job, would have remained on the Court. Understanding the reasons that prompted each to leave the most powerful and prestigious position in the federal judiciary reveals much about the men, their times, and the Court. Was their momentous decision a cause of later regret, or did they find their subsequent careers more important and fulfilling?

These Justices shared some important characteristics. All were men of action and political affairs. All came to the Court as national political figures. Three had been elected to high office, Rutledge and Hughes as governors of their respective states and Byrnes as a senator, and the latter two were mentioned as potential national candidates. Jay held important positions under the Articles of Confederation and was its chief diplomat and one of the founders of the republic. Goldberg was in the high counsels of the labor movement and deeply immersed in state and national politics before becoming Secretary of Labor.

Although they sat on the highest court in the country, the judiciary had not played a

prominent role in the earlier careers. Jay had some minor judicial experience and Rutledge had sat as a judge in equity for the five years before his appointment. He had, however, oscillating views on which court was more important to him. He left the state equity court to join the Supreme Court but resigned in 1791 to return to the state Court of Common Pleas. Amazingly, he sought reappointment and was reappointed to the Court in 1795, only to become the first nominee and first interim appointee to be rejected by the Senate. Only Hughes and Goldberg enjoyed the life of a Justice.

Wars and rumors of wars were key to four of the five resignations. Jay was a diplomat and subsequently governor of a key state as Washington tried to avoid entanglements in the war between revolutionary France and Great Britain in the 1790s. Hughes was a presidential candidate with World War I raging in Europe. Byrnes became the economic czar in World War II and Goldberg was a presidential advisor and diplomat during the Vietnam conflict.

Finally, the resignations are unevenly grouped. Two occurred in the early 1790s and three in the half-century between 1916 and 1965. There have been no similar resignations in the fifty years since Justice Goldberg left the Court. Why the role of a Justice was less attractive to these men, and during those times, provides another perspective on the Court. A few other Justices also resigned in mid-career for reasons peculiar to each, including Benjamin Curtis and Abe Fortas, but the most interesting stories are the five Justices who specifically resigned to take other high positions in government service.

One other Justice must be noted in the context of resignations and post-Court positions. Justice David Davis submitted his resignation from the Court on the morning of March 5, 1877 and was sworn in as a senator that afternoon. Unlike the others, however, the motive for his resignation was not to take that position. He had made his decision to retire in 1875 for the typical reasons of heath and weariness with the work of the Court. However, many did not want President Grant to name his successor, and so Davis reluctantly agreed to defer tendering his resignation until Inauguration Day 1877. The Hayes-Tilden election of 1876 produced political deadlock, and there was intense maneuvering over which Justices might be named to the Electoral Commission that would award the disputed electoral votes. Justice Davis was not personally involved in these machinations, but, through the connivance of a small group who sought to influence him, Davis, without knowing or agreeing with their plans and efforts, was elected to the Senate in late January 1877. Thus his story is not about his resignation or his subsequent service, but how, to his surprise, he found himself in the Senate that afternoon. His experience also provides a window into the Court's role in electing Rutherford B. Hayes the President.

The 1790s: John Jay and John Rutledge

The Supreme Court careers of John Jay and John Rutledge were so intertwined that they must be told together. Both were early and strong patriots committed to the Revolution, the Constitution, and the Republic. Rutledge was the wartime governor of South Carolina, a member of the Continental Congress, and an influential delegate to the Constitutional Convention, where, among other accomplishments, he was responsible for the Supremacy Clause requiring the state courts to follow federal law.

Jay was a member of the Continental Congress and its president in 1779, and then diplomatic envoy to Spain, followed by service with Franklin and Adams negotiating the peace treaty with England. Subsequently, he was Secretary for Foreign Affairs from

1784 to 1790 under the Articles of Confederation and an author of the **Federalist Papers** and he played a key role in New York's narrow ratification of the Constitution. A man of many parts, Jay's efforts during the Revolution as a member of New York's conspiracies committee identifying and investigating Tories led to his recent recognition by the CIA as America's first counterintelligence chief.[2]

Both were strong Federalists and friends of George Washington, who considered both men for Chief Justice of the newly created Supreme Court in 1789. Washington chose Jay not only for his well-known character and contributions to the Revolution and the Republic, but also for sound political reasons. Jay, a New Yorker, balanced an administration tilted toward the southern states, and his appointment also removed him as a potential Secretary of State, which eased the way for Jefferson's appointment.[3]

Rutledge, by all accounts, was a proud man who demanded that his high status be respected. He once had the South Carolina House of Representative hold a man in contempt of his privileges as a member because the man had not accepted a message delivered by his slave.[4] Rutledge initially was reluctant to accept appointment as the senior Associate Justice. His friends privately grumbled that his judicial experience was greater than that of Jay, who had only a brief stint as a judge in New York in 1777.[5] However, Washington's warm and respectful personal letter to Rutledge led him to accept.

The federal appointment, although prestigious, came with one very large thorn. In addition to the spring and fall terms of the Court in the capital, then New York, Congress required the Justices to sit as federal circuit judges twice a year in either the Eastern, Middle or Southern Circuit. The rigors of travel in the eighteenth century included "the dangers and miseries of overturned vehicles, runaway horses, rivers in full flood or icebound and scruffy taverns."[6] Justice Rutledge drew the Southern Circuit, along with Justice Iredell of North Carolina, and had to travel through the Carolinas and Georgia. Iredell complained he had ridden 1,900 miles on the circuit plus 1,800 miles to and from New York in 1791.[7]

Rutledge would have spared his colleagues this ordeal. He had argued during the Constitutional Convention that there was no need for the lower federal courts. The state courts were open and, under his Supremacy Clause, were compelled to follow and enforce federal law. The First Congress decided otherwise, with serious consequences for the Justices' health. Iredell, for example, died at forty-eight after riding the Southern Circuit four times in five years.

Jay's situation was better. The federal government was in New York, his home, and then in nearby Philadelphia. He rode the Eastern Circuit through New England with its shorter distances and better means of transportation. However, he also complained that his position kept him away from his family for half a year and "obliges me to pass too considerable a part of my time on the road, in lodging houses and inns."[8]

Complaints by the Justices about this ordeal were prompt and incessant. Originally, it was expected that the Justices would ride each circuit in turn. Over the objections of Iredell and in the absence of Rutledge, however, the other Justices voted during the February Term 1791 to pair the Justices in a specific circuit, thus confining Rutledge and Iredell to the largest and least developed circuit.[9]

A few weeks later, on March 5, 1791 Rutledge resigned to become the chief justice of South Carolina's newly created Court of Common Pleas and General Sessions. His Supreme Court tenure ended without him ever hearing a case.[10] He was back in Charleston, then as now a comfortable and sophisticated city, and among his family and friends and in the highest stratum of the social and political hierarchy of the day. Rutledge

certainly believed that he now had a "better" position in Charleston than the second position in the federal judiciary.

Rutledge's successor, Justice Thomas Johnson of Maryland, also found the travel unbearable. He had been persuaded to accept nomination in 1792 by Washington's promise that the obligations of travel would be alleviated, and he resigned five months later when they were not,[11] leaving him with the shortest tenure of all of the Justices.

Chief Justice John Jay remained on the Court until 1795. A few important cases were beginning to appear on its docket, but it had yet to become a mature and effective third branch of the federal government.[12] Two of Jay's actions suggest that the Court did not monopolize his time or interest. In an era in which the position sought the man, Jay allowed himself to be a candidate for governor of New York in 1792, although he did not personally solicit votes.[13] Partisan vote-counting led to a narrow loss to the incumbent George Clinton.

In April 1794, Washington asked Jay to be a special envoy to Britain to resolve growing tensions with Great Britain over the implementation of the Peace Treaty of 1783. British garrisons still remained in the Northwest Territory and English creditors were complaining that their actions against American debtors were being frustrated in American courts. Also, the British navy's blockade of revolutionary France caused the seizure of many American ships trading with the French West Indies, thus increasing the prospect of war.[14]

Jay knew that America's interests were unlikely to be fully satisfied and that any agreement would be controversial and criticized. Nevertheless, he accepted the commission. Jay chose to remain on the Court while undertaking this mission for the Executive. This provoked much criticism for violating the principle of separation of powers that had been established in the pension cases.[15] Jay sailed for England the following month and, although he and his counterpart, Lord Grenville, signed the treaty that November, Jay avoided crossing the north Atlantic in the winter and did not sail home until April 1795. That spring, while Jay was out of the country, his friends again offered him as a candidate for governor and this time it appeared that he would be elected.

In Charleston, the years after 1791 were increasingly difficult for John Rutledge. His mother, and then his wife, died in the spring of 1792, and he was depressed and under increasing financial pressure from wartime losses and land speculations.[16] He anticipated that Jay's seat would become available and he mused about returning to the Court. To sit on the national court with its growing reputation would be more prestigious and financially rewarding than his current role. Returning as Chief Justice would redress the perceived slight of his appointment in 1789 as the mere senior Associate Justice and, more important, would redeem his reputation.[17]

In June 1795, Rutledge wrote to Washington about Jay's expected resignation, stating that "I have no Objection to take the place he holds if you think me as fit as any other person . . . ." He not so subtly advised Washington that his friends (and he thought justly so) believed in 1789 that "my Pretensions to the Office of Chief-Justice were, at least, equal to Mr. Jay's, in point of Law-Knowledge, with the Additional Weight, of much longer Experience, & much greater Practice" although he conceded that the President had very sufficient reasons for his choice of Jay in 1789. Now, he was willing to serve as Chief Justice because "the duty which I owe to my children should impel me to accept it, if offered, tho, more arduous and troublesome than my present Station, because more respectable & honorable."[18]

Jay landed in New York in May 1795 to find that he was the governor of the state. Washington received Jay's resignation on June 30, the same day that Rutledge's letter arrived noting his willingness to serve as

Chief Justice. The following day the President appointed Rutledge Chief Justice, qualified slightly because it was an interim appointment subject to confirmation by the Senate when it reconvened in December.[19]

Jay's election brought Rutledge back to the Court, but his Treaty of Amity Commerce and Navigation was part of his baggage and it was very unpopular in the jingoistic and anti-British atmosphere of the times. It was also a wedge issue between the proto-political parties that were split between those favoring France, generally Republicans including Jefferson, and those favoring Great Britain, generally Federalists including Hamilton. The sensitivity of the treaty led Washington to keep its terms secret while the Senate debated, also in secret. The Senate approved the treaty on a party line vote (20-10) on June 25, 1795. When the detailed terms of the treaty were leaked, it was widely condemned as much too favorable to Great Britain, particularly in the South, where the treaty brought little benefit to American trade in the Caribbean or compensation for slaves removed by the British during the war. Charlestonians reacted by burning a British flag before the British counsel's residence.

John Rutledge resigned as Chief Justice in 1796 "Convinced by Experience that it requires a Constitution less broken than mine to discharge with Punctuality & Satisfaction, the Duties of so important an Office." He had also made impolitic statements about the Jay Treaty, which angered the administration.

In this highly charged atmosphere, John Rutledge rose to speak on the treaty at a public meeting in Charleston on July 16. Scholars debate whether he knew he was the interim Chief Justice, but, if he did, that knowledge and even his strong desire to return to the Court did not temper his virulent opposition to the treaty, which he saw as disrespectful of American sovereignty and favorable only to the British.[20] No clause escaped his scorn, but perhaps his most impolitic statement was that "he had rather the President should die, dearly as he loves him, than he should sign that treaty."[21] Two weeks later, Rutledge calmly resigned from the South Carolina court and sailed to Philadelphia to assume leadership of the Supreme Court.

Washington, rather than dying, signed the treaty on August 12, believing that it was the best agreement obtainable and was necessary to avoid a war with Great Britain, which it did until 1812. Rutledge's speech created a furor. It embarrassed the administration, gave fodder to its opponents, and created disarray among the Federalists everywhere. Opposition to his confirmation gathered and strengthened. Political considerations merged with suggestions of possible mental instability. There were hints that Washington would not be displeased by his rejection.[22]

Washington, however, formally nominated him for Chief Justice on December 10, 1795. Five days later the Senate voted (14-10) against his confirmation. The Senate's rejection of Rutledge was payback for the Charleston speech. All those voting against his confirmation had voted for the treaty in June.[23] It is perhaps the first instance in which the political views of a nominee were decisive on Senate confirmation. Among those opposing Rutledge was Oliver Ellsworth, the principal author of the First Judiciary Act and the Justices' obligation to ride the circuits. His vote helped create the vacancy that he would fill when Washington named him the third Chief Justice in 1796.[24] Ironically, the rigors of travel, albeit on a diplomatic mission to France rather than as a circuit judge, led to his resignation in October 1800.

In Charleston, Rutledge's financial situation had worsened and his depression had returned. He knew that confirmation was unlikely. It is uncertain when he learned of the Senate's rejection, but shortly after Christmas he threw himself into the Ashley River and was quickly rescued. On December 28, he calmly wrote to President Washington and submitted his resignation, stating that he was "Convinced by Experience that it requires a Constitution less broken than mine to discharge with Punctuality & Satisfaction, the Duties of so important an Office." As justification he cited his recent frustrating travels on the circuit. No judicial business had been accomplished in Augusta, Georgia, because of the death of the clerk and the absence of Judge Edmund Pendleton. Turning north, he proceeded toward Raleigh, North Carolina, but illness forced a return to Charleston.[25] He gradually withdrew from society and died of a stroke in July 1800.

Rutledge's thoughts about leaving the Court in 1791 were clear. He certainly did not regret resigning from the embryonic Court to shed its onerous travel on the circuit. He sought reappointment in 1795 to recover his declining public reputation rather than from misgivings about his earlier decision. Washington reconfirmed his esteem for Rutledge by nominating and promoting him, and he did preside as Chief Justice that fall. By the end of the year, however, resignation was inevitable due to his strongly held, but impolitically expressed, views on the Jay Treaty, and, according to his letter of resignation, his declining health.

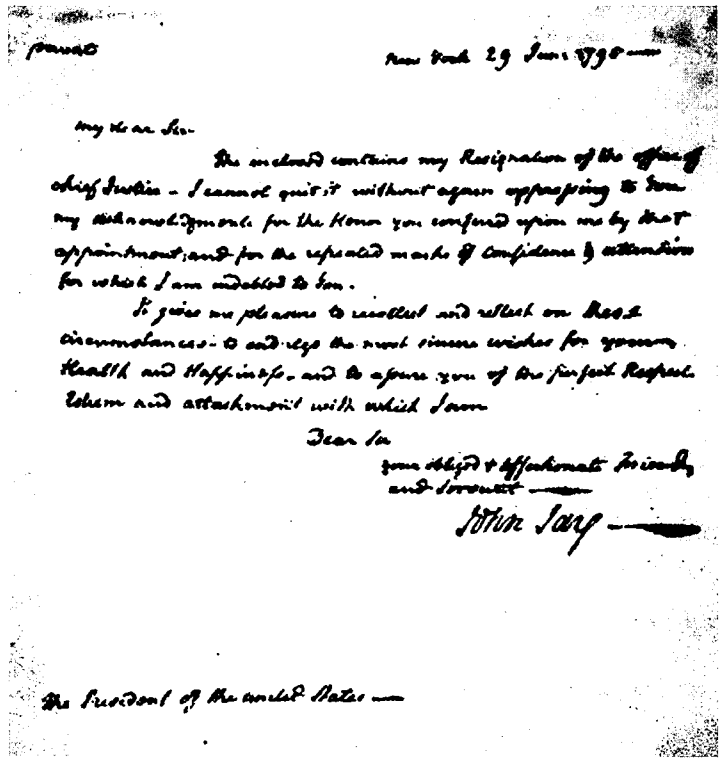
Jay also did not view his resignation in 1795 with regret. He was a popular governor and was reelected and served until 1801, when he rejected pleas for a third term in favor of a quiet retirement. He could have returned to the Court as had Rutledge. John Adams, in the closing days of his administration, nominated him to replace Oliver Ellsworth as Chief Justice. He was confirmed by the Senate, but Jay declined the appointment in January 1801, stating:

> I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was 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. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system.[26]

Upon learning of Jay's refusal, Adams literally turned to his Secretary of State, John Marshall, who was in his office at the time, and appointed him the nation's fourth Chief Justice.[27] Jay lived quietly in Bedford, New York, until his death in May 1829.

The Nineteenth Century

Two Justices left the Court in mid-career in the antebellum era. Justice Benjamin



New York 29 June 1795

My dear Sir

The enclosed contains my Resignation of the office of chief Justice - I cannot quit it without again expressing to You my acknowledgments for the Honor you conferred upon me by that appointment; and for the repeated marks of Confidence & attention for which I am indebted to You.

It gives me pleasure to recollect and reflect on these circumstances - & add the most sincere wishes for your Health and Happiness - and to assure you of the perfect Respect Esteem and attachment with which I am

Dear Sir

your obliged & affectionate friend and Servant

John Jay

The President of the united States

When John Jay landed in New York in May 1795, he found that he had been elected governor of the state while he was in Britain resolving lingering disputes over the implementation of the 1783 Treaty of Paris that ended the Revolutionary War with England. President Washington received Jay's resignation letter (above) on June 30.

Curtis, who dissented in the *Dred Scott* decision, resigned at forty-seven because his dissent ruptured the relationships with his colleagues and also because he thought the Justices' salary was inadequate. Justice John A. Campbell from Alabama, although opposed to secession and the war, resigned on April 30, 1861, to return to the South. Eighteen months later, he was named assistant secretary of war for the Confederacy, and he was one of the southern peace commissioners who met unsuccessfully with Lincoln in 1865. Both Curtis and Campbell returned to the Court as advocates. Curtis argued fifty-four times before the Court and successfully defended Andrew Johnson in his impeachment trial. Campbell argued the *Slaughter-House Case*.[28]

Justice Campbell's successor on the Court was David Davis, Abraham Lincoln's campaign manager in 1860 and a circuit judge before whom he had practiced. Named to the Court in 1862, Davis planned to retire in 1875. He was very overweight and unhappy about the Court's increasing workload, but he was prevailed upon to stay until President Grant finished his term because Grant's two prior nominations were so controversial that they had been withdrawn.[29] Thus, Davis intended to submit his resignation on Inauguration Day, March 5, 1877.

The Hayes-Tilden election of 1876 turned on whether the official returns were accepted from South Carolina, Louisiana, and, as in 2000, Florida, all states controlled by outgoing Republicans. Democrats complained of voter suppression and fraud and fought to reject those returns. In January 1877, Congress, with a Republican Senate and a Democrat-controlled House, created a commission of

five Senators, five Representatives, and five Justices of the Supreme Court. Four Justices had been named and they, in turn, would select the fifth Justice, who would cast the deciding vote on the evenly split commission. Although not consulted, Justice Davis was expected to be the fifth and deciding Justice. Privately, he told some colleagues that he believed that the commission was unconstitutional and he thought Hayes was properly elected, and he would not serve on the commission if asked.[30]

January 1877 was a dramatic month for Davis. Congress was debating the Electoral Commission bill, which, potentially, could give him the power to decide a presidential election, he was determined to leave the Court on Inauguration Day, and in his home state the Illinois legislature was meeting to elect a Senator. Justice Davis was not actively campaigning for the seat but was interested because the sessions were shorter than the Court's and he could spend more time in Illinois. Davis received a smattering and then declining number of votes in the early ballots and none after the seventeenth ballot. On the thirty-fifth ballot, his prospects suddenly revived when he received ninety-seven votes, leading to his election on the fortieth ballot. Davis's political resurrection was engineered by some rogue Tilden supporters who managed to convince the Democrats to elect the unsuspecting Davis to the Senate in the hope he would feel obligated to their candidate when serving on the electoral commission.[31]

Davis, as he had said privately, refused to serve on the commission. Justice Joseph P. Bradley became the deciding vote, and on a party line vote accepted the official returns from the disputed states thereby electing Hayes, a decision with which Davis agreed. Davis, as he had decided two years before, resigned from the Court on March 5, 1877, and was sworn in as a senator later that day. Despite the coincidence in timing, his Senate seat resulted from the strange confluence of events surrounding the election of 1876. Davis enjoyed his one term in the Senate and was elected president *pro tem* in 1881. He died in 1886.

For the Court of that era, particularly the latter half of the century, the larger problem was that Justices often stayed too long because of the increasingly important role the Court was playing, the prestige of the position, as well as perhaps economic necessity because there were no judicial pensions until 1869 and then only at age seventy and after ten years of service.

The Twentieth Century: Charles Evans Hughes, James F. Byrnes, and Arthur Goldberg

Charles Evans Hughes was born on April 11, 1862, in Glen Falls, New York. He was somewhat of a prodigy, graduating early from college and law school and then practicing in New York City with a break to teach law at Cornell. He came to prominence investigating utility rates and later the insurance industry in New York. He was elected governor in 1906 and reelected in 1908 as a progressive in the mold of Theodore Roosevelt. Because of Hughes's popularity at the polls, William Howard Taft offered him the vice-presidential nomination in 1908, which Hughes refused in favor of a second term in Albany.

Taft had often acknowledged Hughes's qualifications for the Court and nominated him on April 25, 1910. He also knew that he was removing a potential challenger in 1912. Taft wrote to Hughes at the time of his appointment, "I believe as strongly as possible that you are likely to be nominated and elected President some time in the future unless you go upon the Bench or make such associations at the Bar as to prevent."[32] Hughes promptly accepted and was confirmed that May, but he delayed resigning as governor until the Court reconvened that October.

Roosevelt's decision to elbow aside his protégé Taft and seek the presidency in 1912 dragged Hughes back into the political limelight. Practical politicians were anxious to avoid a catastrophic split in the party and floated Hughes as a compromise candidate for the Republicans. He did not want the nomination and publically stated that he would refuse to accept it.[33] The ensuing electoral disaster for the Republicans only increased his attractiveness, as many saw him as the only one able to reunite the party in 1916.

Hughes tried to avoid presidential politics, consistently stated his desire to remain on the Court, and did nothing to aid the growing draft, but he never specifically stated that he would not serve if nominated, as he had in 1912.[34] The pleas to run continued unabated. Even though he refused to let his name be used in the primaries, he led in the polls and the convention nominated him on the third ballot without knowing if he would accept it.

Hughes did accept, and his first official act was to resign from the Court on June 19, 1916. In the end, he could not refuse the call of duty. He later told his biographer that he did not want to be known as the man "who placed his own comfort and preference for the life of a judge above his duty to the nation."[35] Having refused to be a national candidate in 1908 and 1912, he could not avoid it in 1916, although it meant reluctantly giving up his seat on the Court.

Hughes narrowly lost the election and was somewhat relieved that he did not have to endure the burdens of the presidency. He returned to the practice of law and the life of a popular public figure deeply involved in civic affairs. He supported Wilson and the war and headed an investigation into allegations of fraud and misconduct in the procurement of aircraft for the war. Hughes returned to the Court as an advocate, arguing twenty-five cases within twenty-eight months.[36]

He refused to be a candidate in 1920 but returned to Washington in 1921 as Harding's Secretary of State and served until 1925. In 1928, he again refused to consider presidential politics and instead served on the Permanent Court of International Justice at The Hague. Coincidentally, his successor on the Court in 1916, Justice John H. Clarke, shared his interest in the international court. Clarke had deliberately retired from the Court in 1922 at age sixty-five after the death of his two sisters, health concerns, and disenchantment with the work of the Court. He warned his successor that he was about to undertake a "dog's life."[37] Clarke then devoted his early retirement to creating public support for the United States' participation in the League of Nations and the World Court at The Hague.

Taft, who appointed Hughes to the Court in 1910, was instrumental in bringing him back as Chief Justice twenty years later. Taft sheds a contrasting light on the Court and resignations. He twice refused to resign the important positions he held in the administration to take a much desired seat on the Court. Roosevelt offered to nominate him in 1902 when Taft was Governor-General of the Philippine Islands and again in 1906 when he was Secretary of War.[38] Accepting would have foreclosed any presidential prospects in 1908, however.

Taft reached the Court when Harding named him Chief Justice in 1921, thereby making him the only person to serve as President and Chief Justice. By 1930, his health was failing and he urged Hoover to name Hughes as his successor. Hughes had refused several high positions in the administration but accepted Hoover's nomination to the Court as Chief Justice at age sixty-seven. He was confirmed by the Senate on February 13, 1930, and became the second person, after Rutledge, to resign his seat and to return as Chief Justice. The first lawyer to address the new Chief Justice was his son and namesake, then Solicitor General, whose resignation upon his father's appointment was not yet effective.[39] The Chief Justice remained on the Court until July 1, 1941, when he retired in good health, the first Chief

Even though Charles Evans Hughes refused to let his name be used in the Republican Party primaries in 1916, he led in the polls and the convention nominated him on the third ballot without knowing if he would accept it. Hughes reluctantly gave up his seat on the Court to campaign for President (he is pictured standing sideways behind the pole), but lost by a narrow margin.

Justice to do so since John Jay.[40] He died in 1948.

Although Hughes lost the presidency and would have much preferred to remain on the Court in 1916, his sense of duty and honor compelled his resignation from the job he loved. Undoubtedly his career after the campaign was the most successful of the group. He became Secretary of State, and he enjoyed a lucrative law practice in New York and ultimately a return to the Court as Chief during the tumultuous years of the New Deal. His term is often ranked only behind that of John Marshall. There can be little room for regret that his time on the Court was interrupted by fourteen years of public service at the highest level.

James F. Byrnes

The most recent resignations from the Court were by James F. Byrnes in 1942 and Arthur Goldberg in 1965. Although they were a generation apart and very different politically, there were similarities in their careers. Both were self-made, both resigned in a time of war to serve as presidential advisors, and in both cases their Presidents, who were noted for their political subtlety if not duplicity, undermined their deepest personal ambitions.

Byrnes was born in Charleston, South Carolina, in 1882 a few months after his father's death. The Rutledge family had remained prominent in Charleston and John Rutledge's great, great, great-nephew, Benjamin H. Rutledge, was an early mentor to Byrnes, hiring him as an office boy in his law firm on Broad Street and then guiding his education through a reading of the classics.[41] Byrnes then began his long career, first as a court reporter, then as a county solicitor or prosecutor in 1908, a congressman in 1910, and, after an unsuccessful run in 1926, a United States Senator in 1930.

Then Representative Byrnes first met Franklin D. Roosevelt at the 1912 Democratic convention, and he was an early stalwart for Roosevelt and a major legislative strategist in his administration. It was said that Roosevelt never lost legislation supported by Byrnes or won it if he was opposed. By 1941, he had few peers in the Senate but also fewer attainable goals. He was unlikely to become majority leader and Roosevelt's third term foreclosed any national ambitions.

He was, however, often touted as a potential Court nominee. Many of his colleagues and presidential advisors spoke to FDR on his behalf. The President was receptive but he relied heavily on Byrnes's legislative skill and influence in the Senate and was reluctant to lose him to the Court, and so he made three appointments and secured an unassailable liberal majority before nominating the politically conservative Byrnes.[42]

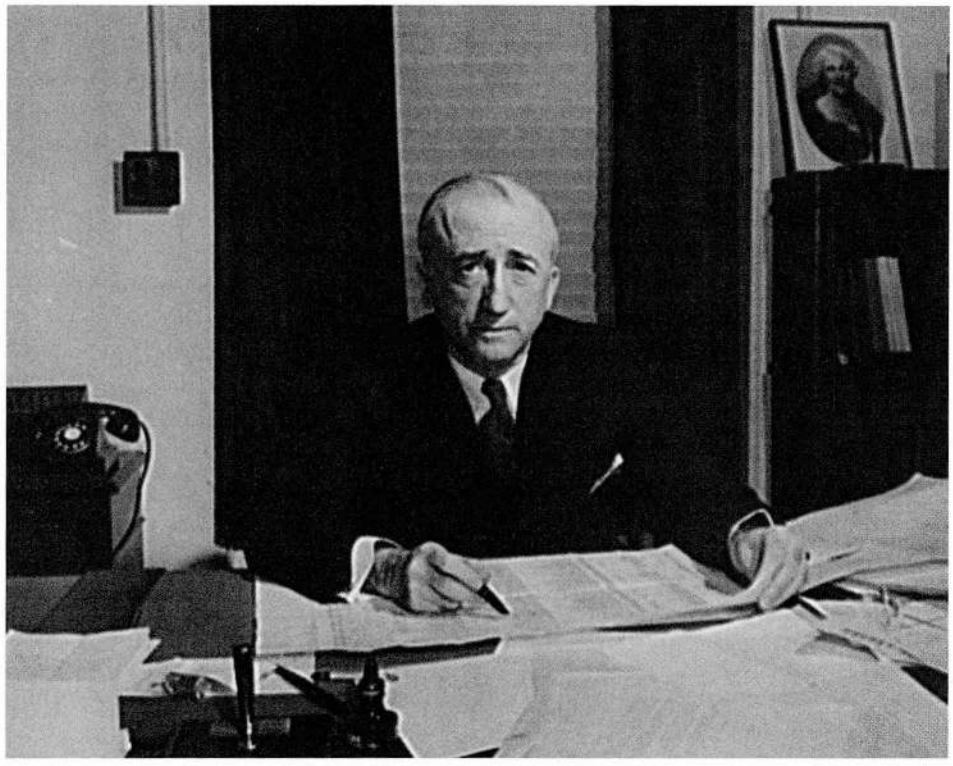
The appointment displayed Roosevelt's political skills. It discharged Roosevelt's considerable debt to Byrnes for his legislative efforts, which included the Lend-Lease Bill, as well as his political efforts in securing Roosevelt the nomination for a third term in 1940. It also served his longer-range political goal to liberalize the Democratic Party. With Byrnes on the Court, the president could advance younger and more liberal men in South Carolina. And Byrnes would not be a future vice-presidential candidate, where his anti-labor and racial views, as well as his early conversion from Catholicism, would offend all of the traditional Democratic power blocs.[43]

Byrnes apparently wanted the honor of an appointment, but he left little in the records about his desires or even the stratagems he must have employed. There is only a short note in 1939 to Bernard Baruch, a mentor to Byrnes, who was soon to see the President, advising Baruch not to raise the subject with Roosevelt.[44] The sudden death of his close friend Senator Pat Harrison also led Byrnes to choose the "more orderly" and "longer, if not happier" life as a Justice.[45]

Roosevelt nominated Byrnes on June 12, 1941, and the Senate swiftly confirmed him. He was sworn in at the White House on July 8, 1941, just missing serving with Chief Justice Hughes. He took his seat that October and soon realized that the reclusive judicial life had little attraction for him. The Court was certainly prestigious and more financially rewarding, but it lacked the social comradeship, sense of purpose, and gamesmanship of the political life. Like Jay and Frankfurter, he saw no conflict in advising the President after hours, but he no longer had the political power to shape events.[46]

Pearl Harbor was a welcome call to arms for Byrnes but, as befitted his tactical skills, he remained on the Court for a year before a job appeared that was worth his resignation. While sitting as a Justice, he served as a legislative strategist for Roosevelt on the major wartime legislation that gave the President the power to manage the war and the wartime civil economy. As in the hectic days of 1933, economic agencies sprouted—first the War Production Board to manage the civilian economy for military production and then the Office of Price Administration to manage inflation.

By September 1942, there was a need for even greater control of prices and wages including farm prices heretofore kept unregulated by the farm lobby. The solution was the Office of Economic Stabilization. The Director would manage all wages and prices and decide all jurisdictional questions about the Executive's management of the civilian economy. Roosevelt offered Byrnes the directorship on October 3, 1942, and he resigned from the Court the same day. Cannily, Byrnes insisted on an office in the White House where his proximity to the President meant that his decisions were seen as the President's. Byrnes was soon called "The Assistant President," as he had been delegated and exercised Roosevelt's authority over the



James F. Byrnes was photographed in May 1943 when President Franklin D. Roosevelt named him director of the Office of War Mobilization. Byrnes had resigned from the Court seven months earlier to assist the President with the domestic war effort. He had not enjoyed his brief tenure as a judge, preferring politics.

domestic economy. Greater power followed in May 1943, when Roosevelt named him as director of the Office of War Mobilization (OWM).[47]

Byrnes's return to the corridors of power also revived his political prospects. By 1944, Roosevelt was visibly failing and a vice-presidential succession was likely. FDR encouraged Byrnes to run and he went to the Democratic Convention in Chicago believing that he would be FDR's running mate. Byrnes, in turn, asked Harry Truman of Missouri to nominate him.[48]

Roosevelt, however, was playing a deeper game. Without quite rejecting Byrnes, FDR subtly floated Truman, and also Justice William O. Douglas, as acceptable VP candidates, and left it to the party barons to tell Byrnes that his political liabilities might cost FDR the election. Byrnes recognized the inevitable when Truman asked to be released from his promise to nominate him because Truman, at FDR's invitation, was entering the vice-presidential race. FDR's betrayal deeply wounded Byrnes and he quietly withdrew his name and left the convention.[49] He remained as head of OWM, soon to be renamed the Office of War Mobilization and Reconversion (OWMR) in preparation for victory.

Although Roosevelt passed over Byrnes to choose Edward Stettinius as Secretary of State in late 1944, in early 1945 Roosevelt unexpectedly included Byrnes in the official party to the Yalta Conference, where the big three, Roosevelt, Churchill, and Stalin, made key decisions about the postwar world. Upon his return, Byrnes resigned from OWMR on March 24, 1945.

Roosevelt's death less than three weeks later made Truman President and he immediately turned to Byrnes as a principal advisor, in part because of his knowledge about the

agreements at Yalta. Two months later, Truman named Byrnes Secretary of State, and on July 3, 1945, Byrnes became the second in the presidential line of succession at that time. Byrnes was intimately involved in the decision to use the atomic bomb on Japan and in postwar diplomacy, serving until January 1947, when he resigned and was succeeded by General George Marshall. He returned to South Carolina and became governor in 1951. Byrnes remained a factor in presidential politics and in the eventual successful southern strategy of Richard Nixon, who had first come to Brynes's attention during his year on the Court when the future President unsuccessfully sought a clerkship at the Court.[50] Byrnes died on April 9, 1972.

Byrnes and his fellow South Carolinian John Rutledge had similar short careers on the Court; both, for different reasons, were unhappy there; and both did not regret leaving the Court. Thereafter their careers radically diverged. Rutledge ultimately lost his chance to return to the Court. Byrnes, however, like Hughes, received full value for his resignation. He gained great power as the economic czar during the war, another chance at high political office in 1944, and postwar service as Secretary of State and then governor of South Carolina along with political influence until his death in 1972. Byrnes is one of the very few to have served as a Senator, a Justice, and a cabinet officer in the federal government.

Arthur Goldberg

Arthur Goldberg was born in Chicago in 1908, a generation later than Byrnes, but their similar ambitions, legal talents, and skills at negotiation and compromise propelled their respective rises to national prominence. Both suffered the absence of a father. Goldberg's father died shortly after his birth and his older siblings were all required to work to support the family. As the youngest, he was able to stay in school. His family's support and his work in the construction industry enabled him to finish law school, making him the only one in his family to go beyond grade school. He joined a prominent law firm but soon left to start his own practice. He began advising union officials in Chicago and eventually became general counsel for the Congress of Industrial Organizations (CIO) in 1948 and was instrumental in the AFL-CIO merger in the 1950s. He met John F. Kennedy when the Congressman served on the House Labor Committee and later met his brother Robert when the latter was serving as counsel to the McClellan Committee investigating corruption in organized labor.[51]

As 1960 approached, Goldberg's political heart was with Adlai Stevenson, the Democratic nominee in 1952 and 1956, but his head led him to support Kennedy's presidential ambitions that year. Goldberg provided critical support to Kennedy at the convention and campaign in bringing him the full support of labor. His service and experience with labor led directly to his appointment as Kennedy's Secretary of Labor. Kennedy nominated Goldberg to the Supreme Court in August 1962 to replace Justice Felix Frankfurter, although JFK would have preferred that Goldberg remain serving the administration.[52]

Three years later, the world had changed. By the summer of 1965, Kennedy was dead, Lyndon B. Johnson was President, and Vietnam was a brooding omnipresence. All the options there were unpalatable: withdraw and accept the geopolitical consequences in southeast Asia, remain only in an advisory role and the South Vietnamese would be defeated, or commit enough troops to obtain victory or at least force a negotiated settlement with the hard men in Hanoi. Adlai Stevenson, then ambassador to the United Nations, died suddenly, and Johnson began searching for someone of suitable stature to spearhead diplomatic efforts at the UN to end the war.

President Johnson soon fixed on Justice Goldberg. He was a skilled negotiator in the bare-knuckled labor management arena, a former cabinet member, and now a Justice, which, in itself, established his credibility in the diplomatic world. Johnson, as all Presidents do, also factored in his political goals and hoped that appointing a liberal stalwart of the Kennedy administration might bolster his standing with his critics on the left while also serving his personal agenda by opening a seat on the Court for his longtime friend, adviser, lawyer, and Washington insider, Abe Fortas.

Goldberg had to be persuaded to leave the Court. Johnson subjected him to his legendary treatment on Air Force One as they traveled to Stevenson's funeral in Chicago. Goldberg did not want to be merely a spokesman for the administration as Stevenson had been. He, like Byrnes, wanted to be a force in the administration, and he extracted two promises from the President before accepting the ambassadorship. First, Johnson assured him that he was firmly committed to a negotiated settlement in Vietnam, and, second, that Goldberg would be a member of the group determining strategy and would be consulted on all major decisions on the war.[53]

Goldberg's resignation from the Court and immediate diplomatic appointment on July 26, 1965, shocked everyone because his love for the Court and satisfaction with the position were well known, while his tenure and prospects for success as a presidential adviser and as a diplomat were uncertain at best. The Justice had no illusions about the risks, and yet he also thought he might return to the Court. Johnson would be obligated to him for his sacrifice in resigning, Chief Justice Warren's seat would soon be available,[54] and other things could happen. Johnson reportedly argued to him in the oval office that the person who ended the war would be the next one to sit in the presidential chair. Even so, many still found Goldberg's resignation inexplicable, and, knowing LBJ, thought that he had some malign leverage that extracted Goldberg's acceptance.[55]

Goldberg's tenure at the UN lasted until April 1968. He was an able and successful diplomat on many issues, but he was ultimately frustrated in his effort to change the aggressive policy on Vietnam. Even before Goldberg was appointed, the President and his advisers had largely decided on escalating the military commitment to Vietnam to force negotiations. From the first, Goldberg opposed this strategy, but he was much in the minority. His continuing opposition eventually eroded his influence with the President. Ultimately, Goldberg was proven correct by the Tet Offensive in January 1968, which finally convinced Johnson that escalation had failed.

Johnson denied Goldberg the opportunity to be chief peace negotiator by naming Averill Harriman to that role. Goldberg resigned on April 26, 1968. By then, his hopes for a return to the Court were also gone. In June, Johnson nominated Fortas to be Chief Justice but the nomination ran into increasing opposition and eventually, at Fortas's request, LBJ withdrew the nomination in early October. With Johnson no longer a candidate and with his Vice-President Hubert Humphrey running far behind Nixon in the polls, Johnson did meet with Goldberg later that month to discuss a possible appointment to the Court, although it would be a recess appointment with confirmation uncertain, if not impossible, in the expected Nixon administration. Goldberg was willing to take the risk, as had Rutledge, but Johnson did not make any appointment. In 1970, Goldberg made an unsuccessful run for governor of New York against Nelson Rockefeller and then retired from public life. He died on January 19, 1990.

Goldberg's resignation was seen by many, then and now, as a bad decision. As with Hughes, Goldberg loved being on the Court, so his sacrifice was real. The

As they traveled to Adlai Stevenson's funeral in Chicago on Air Force One, Lyndon B. Johnson (left) pressured Arthur Goldberg (right) to step down from the Supreme Court and succeed the deceased as ambassador to the United Nations. To persuade Goldberg, Johnson assured him that he was firmly committed to a negotiated settlement in Vietnam and that Goldberg would be consulted on all major decisions on the war.

ambassadorship brought him only frustration and personal betrayal by LBJ, who manipulated his resignation to favor his friend Fortas, by nominating him first to replace Goldberg and then to replace Chief Justice Warren. LBJ also rejected Goldberg's sound advice against escalation in Vietnam and sidelined him in peace efforts in 1968. Goldberg's subsequent career could not approach the level or the satisfaction of being a member of the cabinet and a Justice. Of the five, he is the most likely to have regretted his resignation. He always preferred to be addressed as Mr. Justice Goldberg.

Goldberg insisted later that it was his decision. "Nobody can twist the arm of a Supreme Court Justice." His rationale was clear: "We were in a war in Vietnam. I had an exaggerated opinion of my own capabilities. I thought I could persuade Johnson that we were fighting the wrong war in the wrong place [and] to get out. . . . I would love to have stayed on the Court, but my sense of priorities was [that] this would be disastrous."[56] His statement repeats all of the themes of the twentieth century resignations. It was wartime and he saw the need and felt the duty to respond. As a man of action he, like Hughes and Byrnes, could not remain aloof.

After 1965

Since 1965, no Justice has been called from the Court to assume new governmental responsibilities. The resignations have been due to age, infirmity, or simply retirement—with two exceptions. Justice Tom Clark resigned in 1967 to advance his son's career when Ramsey Clark was named Attorney General, recalling a similar familial sacrifice when Charles Evans Hughes Jr. resigned as Solicitor General when his father was reappointed to the Court in 1930. Justice Fortas resigned as an Associate Justice in 1969 because of challenges to his integrity.

As had Justices Curtis, Campbell, and Hughes, he returned to argue before the Court.

Recent Presidents have avoided nominees who have achieved independent political power, as had the five Justices profiled here. Politics generally, and Supreme Court appointments in particular, have become very contentious and partisan since LBJ's nomination of Fortas to be Chief Justice in 1968. Today, the political life of those who have served as elected officials may contain too many obstacles for a President to expect confirmation without a bruising battle. In addition, those who have exercised political power may prove independent on the Court. President Eisenhower's experience with Earl Warren is a prime example. The former governor of California, and the Republican candidate for Vice-President in 1948 and presumed conservative, became a progressive and activist Chief Justice much to the President's frustration.

Instead, Presidents have preferred to name sitting judges. Thirteen of the sixteen appointments since Goldberg and Fortas have been appellate judges. Their views on the law are on the record and they can be expected to rule consistently with their established and politically acceptable views. Moreover, they have been successfully confirmed. Only three recent Justices, Lewis F. Powell, William H. Rehnquist, and Elena Kagan, had not served as appellate judges. Powell had been president of the ABA and the last two served in policy positions in the Department of Justice as, respectively, Assistant Attorney General and Solicitor General. None of their appointments were particularly controversial and none have disappointed their Presidents. Prior judicial experience is no guarantee of judicial performance to a President, however. Eisenhower was also disenchanted with William J. Brennan, a former justice of the Supreme Court of New Jersey who joined Chief Justice Warren in the liberal wing of the Court.

For now, it appears that appointees are likely to continue to come from the judiciary, but it is instructive that many of the "great" Justices had no prior judicial experience, including Marshall, Taney, Hughes when first appointed, Brandeis, Frankfurter, Black and Warren.[57] This certainly suggests that appointees from other backgrounds, including those who have occupied high political office, bring intangible and important benefits to the Court.

Was It Worth It?

For all but one of the Justices profiled here the answer is certainly yes. Rutledge in 1791, Jay in 1795, and Byrnes in 1942 had no regrets about resigning from the Court. Whatever reluctance Hughes had in 1916 must have evaporated upon his reappointment as Chief Justice in 1930. He, as well as Jay and Byrnes, gained new responsibilities and opportunities that were more than adequate rewards for their resignations. Justice Davis, of course, was happy to submit his delayed resignation, and that he was a Senator was an unexpected bonus.

For Goldberg, the tally is more complex. He loved the Court and his resignation was a sacrifice. Ultimately, he was frustrated by LBJ, but he was correct on the folly of escalation in Vietnam and he had the opportunity to be influential on the key issues of his times, the effects of which still resonate today. No doubt he shared with Hughes the desire to be remembered as a man who preferred his duty to the country rather than his own comfort. Perhaps, Rutledge in 1795 might also have found similar consolation in the thought that, as a statesman, he was obligated to speak forthrightly on the critical issue of that year, the Jay Treaty, even at the cost of his seat on the Court.

The final incongruity about these resignations is that Rutledge, Jay, and Hughes were reappointed and promoted to Chief

Justice. Goldberg harbored hopes of reappointment as Chief Justice and he discussed it with LBJ in late 1968. Jay refused the honor and retired and Rutledge failed to be confirmed. LBJ did not appoint Goldberg, and, if he had, intervening events would have left him, like Rutledge, with a truncated term as Chief Justice.[58] Only Hughes's return to the Court was successful.

ENDNOTES

[1] One hundred twelve persons have sat on the Supreme Court. Nine are presently serving, forty-nine died in office, and almost all of the remaining Justices resigned for age or health reasons. Perhaps no more than ten Justices left the Court in good health before their sixty-fifth birthday. JUSTICES OF THE SUPREME COURT; THEIR LIVES AND MAJOR OPINIONS 558 & Chart I Informational Table of the Supreme Court Justices 559-69, Leon Friedman & Fred L. Israel eds., (2013); *see also* David N. Atkinson, LEAVING THE BENCH (1999).

[2] Walter Stahr, JOHN JAY, FOUNDING FATHER 72, 385–88 (2005) (reporting that the CIA named a conference room in his honor and summarizing Jay's career).

[3] *Id.* at 271–72.

[4] James Haw, JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA 184–85 (1997).

[5] *Id.* at 220–21; Julius Goebel, Jr., I HISTORY OF SUPREME COURT OF THE UNITED STATES. ANTECEDENTS AND BEGINNINGS TO 1801, at 552 (1971).

[6] *Id.* at 569.

[7] Goebel, HISTORY OF SUPREME COURT, at 557.

[8] Stahr, JOHN JAY, at 280.

[9] Goebel, HISTORY OF SUPREME COURT, at 557. Congress tinkered with circuit court duties and even abolished them for one year in 1801 but complete relief was delayed until 1891. *Id.* at 559; 566-67; 569.

[10] Haw, JOHN AND EDWARD RUTLEDGE, at 224–25.

[11] Goebel, HISTORY OF SUPREME COURT, at 554.

[12] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), an important case on the scope of federal jurisdiction under Article III, was promptly and universally rejected by the states and was soon nullified by the adoption of the Eleventh Amendment.

[13] Stahr, JOHN JAY, at 283.

[14] *Id.* at 313–15.

[15] *Id.* at 316.

[16] Haw, JOHN AND EDWARD RUTLEDGE, at 229–32.

[17] *Id.* at 245–46.

[18] I THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, pt. 1, 94–95 (Maeva Marcus et al. ed., 1985).

[19] Haw, JOHN AND EDWARD RUTLEDGE, at 247.

[20] *Id.* at 248 n.11 (discussing the contending views on the issue).

[21] 1 DOCUMENTARY HISTORY, at 765–69; Haw, JOHN AND EDWARD RUTLEDGE, at 248–49.

[22] 1 DOCUMENTARY HISTORY, at 98–99; Haw, JOHN AND EDWARD RUTLEDGE at 250, 252–56.

[23] Haw, JOHN AND EDWARD RUTLEDGE, at 256.

[24] 1 DOCUMENTARY HISTORY, at 100.

[25] Haw, JOHN AND EDWARD RUTLEDGE, at 257–58.

[26] 1 DOCUMENTARY HISTORY, at 146–47; Atkinson, LEAVING THE BENCH, at 12–13.

[27] Stahr, JOHN JAY, at 364.

[28] Atkinson, LEAVING THE BENCH, at 36–37, 38–39.

[29] Willard King, LINCOLN'S MANAGER, DAVID DAVIS, 286-87 (1960).

[30] *Id.* at 287–90.

[31] *Id.* at 290–93.

[32] Merlo J. Pusey, I CHARLES EVANS HUGHES 271–74 (1951).

[33] *Id.* at 300–301.

[34] *Id.* at 315–29.

[35] *Id.* at 323.

[36] *Id.* at 384.

[37] Hoyt L.Warner, THE LIFE OF MR. JUSTICE CLARK, 112–14 (1999).

[38] Henry J. Abraham, JUDGES, PRESIDENTS AND SENATORS, A HISTORY OF THE US SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON, 123 (rev. ed. 1999).

[39] Merlo J. Pusey, I CHARLES EVANS HUGHES, at 663–64.

[40] Atkinson, LEAVING THE BENCH, at 114.

[41] David Robinson, SLY AND ABLE: A POLITICAL BIOGRAPHY OF JAMES F. BYRNES, 22 (1994).

[42] FDR appointed Justices Frankfurter and Douglas in 1939, and Justice Murphy in 1940.

[43] Robinson, SLY AND ABLE, at 28, 297–98, 353-56.

[44] *Id.* at 304.

[45] *Id.* at 305.

[46] *Id.* at 302–07.

[47] *Id.* at 311–20.

[48] *Id.* at 350–53.

[49] For a detailed account of the Machiavellian maneuvers, see Robinson, SLY AND ABLE, at 346–63.

[50] Robinson, SLY AND ABLE, at 301. The Office of Price Administration, an agency within Byrnes's jurisdiction, did hire Nixon for a few months before he entered the Navy in August 1942.

[51] David Stebenne, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 160–61, 174–75 (1996).

[52] *Id.* at 215–16, 233–34, 309–10.

[53] *Id.* at 346–48.

[54] *Id.* at 348.

[55] Justice Goldberg's biographer relates one scenario. Goldberg, as Secretary of Labor, hosted a party, ironically in Johnson's honor, in January 1962. An

aide solicited funds to pay for the party from Billie Sol Estes, a Texan whose business career soon ended with accusations of fraud. Exposing the source of the funds would have damaged Goldberg and any potential nomination to the Court. There is no evidence that LBJ used it to persuade Goldberg to leave the Court. *Id.* at 348–51.

[56] Transcript, Arthur J. Goldberg Oral History Interview I, 3/23/93 by Ted Grittinger, Internet Copy, LBJ Library *quoted in* Stebenne, ARTHUR J. GOLDBERG, at 348.

[57] Abraham, JUDGES, PRESIDENTS AND SENATORS, at 5–7 (discussing rankings), 194 (discussing CJ Warren), 200 (discussing J. Brennan).

[58] Stebenne, ARTHUR J. GOLDBERG, at 373.

Hugo L. Black's Dissents: From *Betts* to *Gideon*

MELVIN I. UROFSKY

A dissent in an appellate court, especially the Supreme Court, is more than a statement of disagreement with the majority decision. While most dissents—and many majority opinions—are soon and rightfully forgotten, there are some that have a life of their own, sometimes outlasting the life of their authors. These dissents fit the description penned by Charles Evans Hughes: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed. Nor is this appeal always in vain."[1]

All dissents are part of a constitutional dialogue, one that takes place primarily among members of the high court but also between the Court and the other branches of government, the states, and the citizenry. The dissents that are important, described by some scholars as "prophetic dissents," are those that essentially will not go away. Their logic, their style, their argument is so strong that eventually the Court—often years later—will come around to their point of view. The first Justice Harlan's dissents in the *Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896) seemed to have been forgotten until they emerged triumphant in *Brown v. Board of Education* (1954) and the subsequent civil rights decisions of the Warren Court.[2] The dissents by Oliver Wendell Holmes, Jr., and Louis D. Brandeis in the speech cases of the 1920s were eventually adopted in *Brandenburg v. Ohio* (1969).[3] One of these prophetic dissents was written by Hugo L. Black in 1942, and, unlike Harlan, Holmes, and Brandeis, he lived to see his dissent become the law of the land.

The Betts Case

In May 1939, Smith Betts, an unemployed farm worker, found himself in the Circuit Court of Carroll County, Maryland, about an hour northwest of Baltimore. Forty-three years old and on relief, he was charged with the armed robbery of a country store on Christmas Eve, 1938. When arraigned before

Judge William H. Forsythe, Jr., he said he could not hire an attorney, and he requested that the court appoint a lawyer to represent him. Judge Forsythe said this could not be done, as the practice in Carroll County was to appoint counsel for indigent defendants only in prosecutions for murder and rape.

No stranger to the court system—in 1935, he had been sentenced to three years in prison after a larceny conviction—Betts did not waive his right to counsel, pleaded not guilty, and asked to be tried without a jury. He gave the court a list of witnesses he wanted called in his behalf, cross-examined the State's witnesses, and examined his own witnesses in trying to show he had an alibi. Betts did not, however, take the stand in his own behalf, because his prior conviction could then have been entered into testimony. After hearing the evidence, the judge found Betts guilty and sentenced him to eight years in prison.

While serving his sentence, Betts filed a petition with the Circuit Court for Washington County for a writ of habeas corpus, claiming he had been denied the right of counsel guaranteed to him by the Fourteenth Amendment. The circuit court heard Betts's arguments and rejected them. Returned to jail, he now filed another petition for habeas corpus with the Chief Judge of the Maryland Court of Appeals, Carroll T. Bond. Because the state's highest court recognized the importance of the issue, it directed an attorney to help Betts with the appeal. At the hearing, both sides agreed on a formal statement of facts incorporating the trial record, and, although Judge Bond issued the writ, he nonetheless denied Betts relief and remanded him to prison. In his opinion, Judge Bond said that the trial had been simple and routine, and "in this case it must be said there was little for counsel to do on either side." Betts had been able "to take care of his own interests."

Subsequent examination of the case reveals that a lawyer could have made a great difference. Betts did not protest, as any good defense attorney would have, the police station identification of him without a lineup, when he was wearing clothing similar to that described by the store attendants. Neither did he demand that the prosecution witnesses be kept out of the courtroom so they would not hear and repeat each other's testimony. It is also appears that the police had shown the witnesses photographs of Betts as a convict. As Professor Yale Kamisar, a leading authority on criminal procedure, noted, "the Betts record cries out for the talents of trained defense counsel."[4]

Betts no doubt had heard of the decision in *Johnson v. Zerbst* (1938), in which the Supreme Court had ruled that defendants in federal courts had a right to counsel guaranteed by the Sixth Amendment.[5] He may also have heard about an earlier ruling of the Court in the Scottsboro case, in which the Court had held that state defendants in capital cases were entitled to counsel, and, if they could not afford it, the state would have to provide a lawyer.[6] Despite these two cases, at the time states did not have to provide counsel for indigents in criminal cases other than those carrying the death penalty.

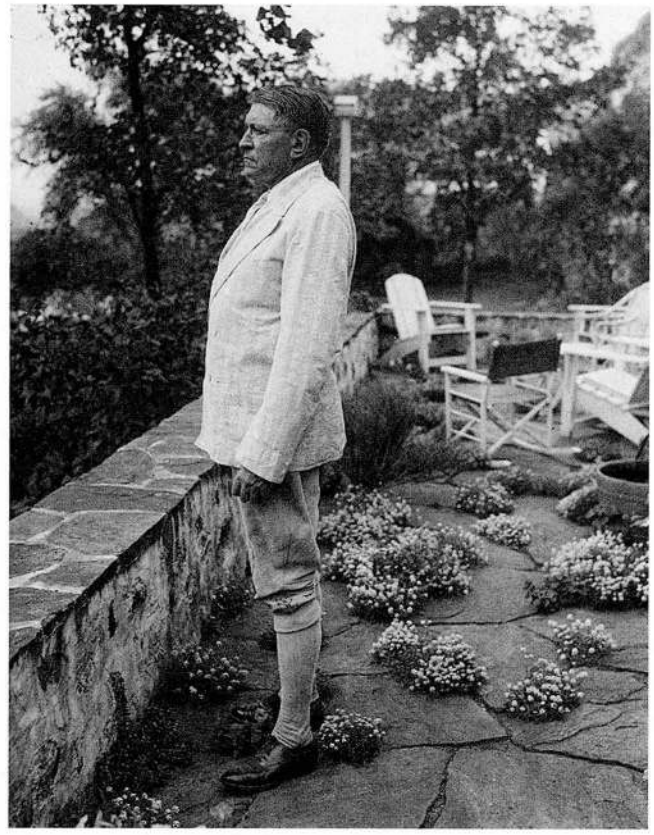
From there, and apparently with the approval of Judge Bond, Betts applied for certiorari to the U.S. Supreme Court, which granted the writ and heard arguments on April 13 and 14, 1942. According to Justice Owen J. Roberts, who wrote opinion for the six-to-three majority, the Court first had to decide two questions. One was a matter of jurisdiction and the other involved determining whether Betts had exhausted all of his state remedies before applying to the high court.[7] The jurisdictional question centered on whether Judge Bond had, in issuing the writ, acted as a proper court, and the Court quickly concluded he had. Although Betts had not properly followed state procedures, the fact that Judge Bond as a member of the state's highest court had ruled on the matter allowed the case to come to the Supreme Court. Roberts then got to the real meat of the

issue, "whether due process of law demands that, in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant." The Sixth Amendment had been interpreted to mean that in all *federal* criminal cases counsel had to be supplied for indigent defendants. But "the Amendment lays down no rule for the conduct of the States," Roberts noted, so the question must be whether the constraint laid upon federal courts "expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."[8]

Roberts here touched upon one of the great constitutional debates that took place in the high court starting in the 1920s and continuing thereafter—whether the provisions of the Bill of Rights, clearly designed to protect individuals from the national government, had been "incorporated" through the Due Process Clause of the Fourteenth Amendment to protect citizens from the states as well. The idea had first been put forward in dissents, that of John Marshall Harlan in *Patterson v. Colorado* (1907) and of Louis D. Brandeis in *Gilbert v. Minnesota* (1920).[9] In 1937, Justice Benjamin N. Cardozo laid down the criteria for incorporation. The Fourteenth Amendment, he argued, did not incorporate all of the protections in the Bill of Rights, but only some of them. Cardozo included all the provisions of the First Amendment, for freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom." But, for the Second through Eighth Amendments, the Court should apply only those that are "of the very essence of a scheme of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked fundamental."[10]

After reviewing the history of the Sixth Amendment as well as the history of the original thirteen colonies and state actions after the Constitution had been adopted, Roberts found that, while a defendant had the right to an attorney, this did not mean that the state had to provide one in all cases. He quoted from Judge Bond's opinion that "[c]harges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it." Furthermore, Roberts warned, if one interpreted the Fourteenth Amendment to protect property as well as life and liberty, "logic would require the furnishing of counsel in civil cases involving property." In his conclusion, Roberts did leave the door slightly ajar. Due process, he declared, would prohibit "the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and, while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."[11] Although it is doubtful that Roberts recognized it at the time, this statement practically invited a flood of appeals from indigents who had been denied counsel, with claims that there had been unusual circumstances that could be construed as "offensive to fundamental ideas of fairness."

Justice Hugo L. Black dissented, joined by the two most liberal members of the Court, William O. Douglas and Frank Murphy. Black had been born in Alabama in 1886, and his law practice in Birmingham had included a fair amount of criminal work; he had also served as a police court judge for two years and a county solicitor for three, and he was the only member of the Court at that time with any actual trial experience in criminal cases. Black's first major opinion on the Court involved the Sixth Amendment, *Johnson v. Zerbst* (1938). Two



After reviewing the history of the Sixth Amendment as well as the history of the original thirteen colonies and state actions after the Constitution had been adopted, Owen J. Roberts found in *Betts v. Brady* (1942) that, while a defendant had the right to an attorney, this did not mean that the state had to provide one in all cases. Roberts is pictured at his summer house in Pennsylvania in 1939.

Marines, on leave, had been charged with the felony offense of possessing and passing counterfeit twenty-dollar bills. They had pleaded not guilty and had been tried and convicted without the assistance of counsel. The Court overturned the conviction, and Black wrote:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides are lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, where in the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. . . . The Sixth Amendment withholds from federal Courts in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.[12]

Roberts had joined this opinion, and, despite Black's language that a fair trial could only be had with the representation of an attorney, in *Betts* Roberts nonetheless argued that the right to counsel did not, in

Cardozo's words, constitute a fundamental right "of the very essence of a scheme of ordered liberty."

Black began his dissent in *Betts* by dismissing Roberts's assertion that, if the Court granted Betts the right to counsel, defendants in every type of case would have to be granted a lawyer. Rather, he suggested that just looking closely at the trial of Smith Betts would show that he had been denied the procedural protection guaranteed by the Fourteenth Amendment. The court below had found that Betts had "at least an ordinary amount of intelligence." To Black, it was clear from his examination of witnesses "that he was a man of little education."

Black said that, had the case come from federal court, there would have been no question that the conviction would have been reversed on the grounds that the defendant had been deprived of his right to counsel. But he then went on to say, "I believe that the Fourteenth Amendment made the Sixth applicable to the states." This view, however, had never been supported by a majority of the Court, nor had it been in the *Betts* decision, so he would not argue that today. Rather, Black believed that Betts's trial had not met the Court's prevailing view of what constituted due process, and therefore the conviction should be reversed.

Black then quoted from various Supreme Court opinions, including his own in *Zerbst*, as well as from a number of state court decisions, to support his assertion that even "the intelligent and educated layman . . . lacks the skill and knowledge adequately to prepare his defense, even though he have a perfect one." Defendants in criminal trials, he concluded, needed a lawyer. "Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law." He then appended a list of states that, either through constitutional provision, statute, or judicial decision, required that indigent defendants in noncapital as well as capital cases be provided with counsel on request.[13]

Backlash against *Betts*

Criticism began not long after the *Betts* decision came down. In a lengthy letter to the *New York Times*, Benjamin V. Cohen, the noted New Deal lawyer, and Erwin N. Griswold, then a professor and later dean of the Harvard Law School, harshly attacked the Roberts opinion. The decision comes at "a singularly inopportune time. Throughout the world men are fighting to be free from the fear of political trials and concentration camps. From this struggle men are hoping a bill of rights will emerge which will guarantee to all men certain fundamental rights." Most Americans, lawyers and laymen alike, would have thought prior to this decision that the right to counsel in "a serious criminal case was unquestionably a part of our own Bill of Rights."[14] Although the *Journal* of the American Bar Association accepted the majority opinion as reasonable, most other law journals—the publications that Brandeis believed should always be critiquing court decisions—condemned it. The *Columbia Law Review* picked up on Roberts's assertion that the circumstances in some cases might warrant counsel. "It would seem that a supposed constitutional guaranty should not be made dependent on distinctions that are at best difficult of ascertainment and often tenuous."[15] The criticism continued when it became unclear just what criteria—other than if the defendant had been charged with a capital crime—the Court employed. "When one pleads to a capital charge without benefit of counsel," the Court ruled in 1961, "we do not stop to determine whether prejudice resulted." All this did, of course, was reaffirm Black's opinion in *Zerbst*.[16]

In the early cases, the Court relied on *Betts* and denied that any special circumstances

had been present. In 1947, Felix Frankfurter asserted that the Court in all noncapital cases would follow the rule of *Betts* except when special circumstances could be shown. "It does not militate against respect for the deeply rooted systems of criminal justice in the states," he wrote, that "such an abrupt innovation as recognition of the constitutional claim [to assistance of counsel] would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." Frankfurter here expressed a fear, also held by some of the other Justices, that, if the Court overruled *Betts* and the ruling were made retroactive, thousands of prisoners who had not been given an attorney would demand either release or retrial. But even at this point four members of the Court —Black, Douglas, Murphy, and Rutledge—dissented, and, had the latter two not died in 1949 and been replaced with more conservative Justices, the life span of *Betts* might have been much shorter. Black responded to Frankfurter's worry: "I do not believe that such a reason is even relevant to a determination that we should decline to enforce the Bill of Rights."[17]

But the *Betts* ruling, and Black's continuing dissents, kept troubling the members of the Court. In 1944, the Court had adopted Rule 44 of the Federal Rules of Criminal Procedure, which stated unequivocally that "if the defendant appears in court without counsel, the court shall advise him of his right to counsel to represent him at every stage of the proceeding." This rule, however, applied only in federal courts, but the vast majority of criminal prosecutions took place in the states, and there counsel could only be provided in special circumstances.

What, however, constituted these special circumstances? Justice Stanley F. Reed tried to answer this question in 1948:

> Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or prosecuting officials, and the complicated nature of the offense charged, and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . . the accused must have legal assistance.[18]

In other words, if the defendant was so legally illiterate or mentally impaired as not to comprehend the charges, or if the judge and prosecutors prejudicially abused their authority, or if the nature of the law was very complex, then counsel had to be provided.

The problem, of course, lay in the fact that, except at the self-evident extremes, Reed's criteria were remarkably subjective and relied upon judicial interpretation as to whether these conditions actually existed in a particular trial. According to one study of state practices, courts "rarely if ever bothered to find out whether the circumstances were 'special'."[19] This offended Black as well, who throughout his career opposed judges making such evaluations. The law should be clear, and not subject to whether one judge thought conditions warranted a lawyer while another, looking at the same facts, did not.

What Black objected to could be seen in two cases decided the same day, June 14, 1948. Frank Gryger claimed that he had been given a life sentence because the trial judge thought that state law required him to do so. Gryger had no attorney who could have disputed this and shown the judge that another sentence was possible under Pennsylvania law. In the other case, also from Pennsylvania, Townsend said the judge in his case had imposed sentence on the mistaken belief that he had been convicted on two prior charges, when in fact he had been acquitted. In the two majority opinions, both written by Justice Robert H. Jackson, the Court by a five-to-four vote affirmed Gryger's conviction, but, by a six-to-three vote, reversed that of Townsend. Nothing in the majority opinions indicates why a majority of the Court found

that due process had been violated in one case but not the other. In the *Gryger* decision, Justice Wiley Rutledge dissented, joined by Black, Douglas, and Murphy, the same trio that had dissented in *Betts*.[20] Little wonder that one academic critic could write that the cases decided under *Betts* "are distinguished neither by the consistency of their rules nor by the cogency of their argument."[21]

Cases kept coming to the Supreme Court, with the claim that one of the special circumstances delineated in Justice Reed's opinion applied to them. One state after another enacted legislation to provide counsel to indigents in all felony cases. Academic criticism also continued, and somehow, according to Anthony Lewis, the Court began to retreat from *Betts* "almost invisibly, paying it lip service but never really allowing it to stand in the way of desired results." In 1950, the Court affirmed—for the last time—a state court conviction in which the defendant had been refused counsel. From 1950 on, whenever a case involved denial of an attorney, the Court found "special circumstances" and reversed the conviction.[22]

In all of these cases, Justice Black's dissent, even when not cited, hovered over the decisions like Banquo's ghost, reminding the Justices that the right to counsel was fundamental in ensuring a fair trial, and that the most straightforward way to ensure fairness was by a rule applied to all cases: indigent defendants had to have a lawyer.

Starting in 1960, it seemed as if the Justices were paying attention. In that year, Justice Potter Stewart found counsel required, not due to a special circumstance but on

Hugo L. Black dissented in *Betts*, suggesting that the trial of Smith Betts, an unemployed farm worker charged with armed robbery, showed that he had been denied the procedural protection guaranteed by the Fourteenth Amendment. Black is pictured above with his wife, Josephine, arriving at Justice Pierce Butler's funeral in 1939.

constitutional grounds. Midway through a trial of two men in North Carolina, with no counsel appointed, one of the defendants struck a bargain and changed his plea to guilty, a fact that could easily have prejudiced the jury against the other defendant. Justice Clark, dissenting, said that the Court's opinion, "without so much as mentioning *Betts v. Brady* cuts serious inroads into that holding."[23] It would be the last dissent in a denial of counsel case before the Court changed its mind completely.

Ready to Overrule *Betts*

By the early 1960s, the conditions seemed ripe to tackle *Betts* head on. Forty-five of the fifty states required that counsel be provided to indigents in felony cases; the other five, in the South, generally ignored *Betts*. In 1956, Black had managed to establish the right of an indigent defendant to an effective hearing on appeal by holding, for a closely divided Court, that a state must furnish a free transcript of the trial to a defendant in a noncapital case.[24] He also began to work actively to ensure that, when a pauper's case came to the federal courts, one of his former clerks—who knew and agreed with his views on representation—would be assigned the case. Although none of these cases challenged *Betts* directly, Black wanted to attack it on the fringes until the day a frontal assault would be possible.

In 1961, the Court reversed an assault conviction of Elijah McNeal because of the "complex and intricate legal questions" in his case that "were obviously beyond the ken of a layman." Justice Douglas, joined by Justice William J. Brennan, Jr., concurred and called for the abandonment of *Betts*, which, he wrote, "is so at war with our concept of equal justice under law that it should be overruled."[25] Shortly afterward, Brennan gave a lecture at New York University in which he emphasized what had been implied in the concurrence, that equal protection demanded assistance of counsel as much as did due process. He cited Black's opinion in *Griffin* that a state could not distinguish between rich and poor in allowing appeals. The denial of counsel to an indigent at the trial, Brennan averred, "seems almost to me to be an *a fortiori* case of the violation of the guarantee of equal protection of the laws."[26]

By the beginning of the 1961 Term, several members of the Court, including Felix Frankfurter, Black's arch-foe through most of the 1940s and 1950s, seemed ready to overrule *Betts*. "I think I'm prepared," Frankfurter told Brennan, "in view of the change of climate and or legislation to spell out my view of due process and overrule Betts and Brady."[27] By this time Chief Justice Warren had his clerks scouring the *in forma pauperis* petitions (those filed by indigent prisoners who did not have the money either to have a lawyer make the appeal or to pay the filing fees) to find the "right" case to overturn *Betts*. In the Court's choosing that case, we can see another part of the constitutional dialogue—that between the Court and the public.

In 1962, the Court heard two cases, in both of which defendants claimed that they had been denied due process because they had no attorneys. An illiterate man, Willard Carnley had been convicted of incest and sexual assault upon a child, and, given the evidence produced by the state, there was no question of his guilt. The witnesses against him included his thirteen-year-old daughter, his fifteen-year-old son, and another minor whom he had sexually assaulted. But he had not been given assistance of counsel at the trial. The Court could have overruled *Betts* here, but, as Frankfurter explained, it was impossible to "imagine a worse case, a more unsavory case to overrule a long standing decision." Warren was anxious to get rid of *Betts*, but not with this defendant. So in an opinion by Brennan, the high court reversed on the grounds that due process required

assistance of counsel unless it had been intelligently waived. Clearly, the defendant lacked the intelligence to make that decision, so in effect the Court utilized one of the special circumstances test from *Betts* and its progeny. Black concurred in the results, but once again he called upon the Court to make the Sixth Amendment applicable to the states.[28]

In the other case, Bennie Will Meyes and William Douglas had been jointly tried and convicted in a California court for thirteen felonies. Under California law, they were entitled to a lawyer, and the court appointed a public defender to represent them. Then Meyes did, as prosecutors like to call it, the "right thing," admitted his guilt, and ratted out Douglas. At this point, the overworked and inexperienced public defender was in over his head, but the trial court refused to appoint a second lawyer so that each defendant could be separately represented. Douglas claimed that he had in effect been deprived of a lawyer, because he and Meyes now had competing interests. Again, the facts of this case would have supported overturning *Betts*, as none of the usual special circumstances applied. But, just as the Court did not want to make what the Justices realized would be a major criminal law decision that would favor an obviously guilty sex predator and child molester, neither did they want to do it for someone clearly guilty of thirteen felonies. So they ordered the case held, because on the morning of January 8, 1962, the clerk of the Court had accepted a large envelope from Clarence Earl Gideon, then resident at the Florida State Prison in Raiford.

Overruling *Betts: Gideon v. Wainwright*

Thanks to Anthony Lewis's classic work—and the Henry Fonda movie based on it—the public probably knows as much about Clarence Earl Gideon's case as it does about any of the Court's criminal procedure decisions. A drifter, Gideon had been in and out of prison, and he had been arrested on charges of breaking and entering a pool hall and stealing change, a misdemeanor under Florida law. From the Warren Court's point of view, he provided the ideal case. He was neither a child molester nor someone convicted of thirteen felonies. He may have been innocent, but even if he were guilty, his crime would not lead the critics of the Warren Court to charge the Justices with setting a vile and dangerous man free.

As is normal with pauper cases, the Court asked an attorney to represent the indigent in preparing a brief and in oral argument, and in this case specifically asked both sides to argue whether *Betts* should be reconsidered, i.e., overruled. If one seeks a clue as to what the Court wanted to do, then its appointment of Abe Fortas to represent Gideon is as clear as anything. One of the most able lawyers in Washington, Fortas could be depended upon to make a strong argument on Gideon's behalf that depriving him of an attorney violated his rights under the Sixth Amendment. Moreover, twenty states had filed amicus—friend of the court—briefs urging the Court that *Betts* was "an anachronism when it was handed down" and that it should be overruled; only two states, both from the South, filed briefs supporting Florida. The Court heard oral argument on January 15, 1963, and handed down its opinion two months later, on March 18. Aware of Hugo L. Black's long crusade to incorporate the Sixth Amendment, Chief Justice Warren assigned the opinion to him.

After noting the facts of the case, Black observed that "the facts upon which Betts claimed he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim." If judged by the *Betts* holding, Gideon's claim would have to be denied. "Upon full reconsideration we conclude that *Betts v. Brady* should be overruled."[29]

No one could ever accuse Justice Black of being unfocused, and his reasoning in

Gideon is essentially the same as that of his dissent in the earlier case—the Fourteenth Amendment incorporates the guarantees of the Sixth and applies them to the states. *Betts* had been wrongly decided, and the time had long since come to be rid of it. "In deciding as it did," he wrote, the Court "made an abrupt break with its own well-considered precedents." He rehearsed all of the cases prior to *Betts* that supported this conclusion, and quoted with approval Justice George Sutherland's opinion in the Scottsboro case that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." In returning to these older precedents, he said that in *Gideon* the Court is doing nothing more than "restor[ing] constitutional principles established to achieve a fair system of justice."[30]

Seven Justices signed on to the opinion, including William O. Douglas, who also wrote a separate opinion briefly elaborating on the relationship between the Bill of Rights and Section I of the Fourteenth Amendment. Justice Tom Clark concurred in the result but based his decision on due process rather than the right to counsel. John Marshall Harlan also concurred, but did so to protest both that *Betts* was "entitled to a more respectful burial than has been accorded" and to emphasize that the majority opinion did not automatically extend every protection of the Bill of Rights to the states.[31]

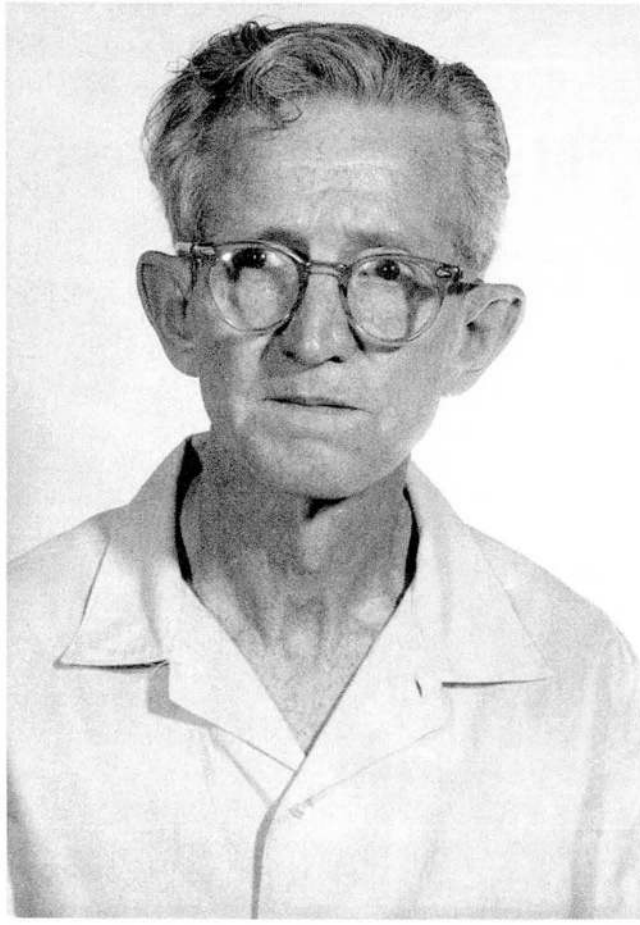
Following the ruling, the State of Florida retried Clarence Earl Gideon, but this time he had the assistance of a lawyer, and the jury found him not guilty.

Impact of *Gideon*

There is no question that Hugo L. Black's dissent in *Betts v. Brady*, and his continuous objections in cases where the Court followed the *Betts* rule, had a great deal to do with the result in *Gideon v. Wainwright*. One can see the constitutional dialogue taking place in the two decades between decisions, and it is possible that, had Frank Murphy and Wiley Rutledge not died in 1949 and been replaced with more conservative Justices, Betts might have been abandoned earlier. By the early 1960s, only two members of the original *Betts* Court, Black and Douglas, still remained but they had been joined by Justices like Earl Warren and William J. Brennan, Jr. Even Felix Frankfurter had come around, and shortly after the *Gideon* decision Black had visited the ailing Frankfurter to tell him about the conference votes and discussion. Black said that he believed that Felix, true to his own view of due process, would have voted to reverse Gideon's conviction. Frankfurter said "Of course I would."[32]

More than simple personnel changes had taken place. With the advent of Earl Warren as Chief Justice and the Court's decision in *Brown v. Board of Education* in 1954, a major jurisprudential shift took place, one that had been building since the early 1940s. While the Court that heard *Betts* had been deferential to federalism and reluctant to interfere with state prerogatives, the Justices who heard the segregation and apportionment cases were far more concerned with individual civil rights and liberties. The fact that Clarence Earl Gideon had not had a lawyer for his trial meant far more than the fact that Florida had never provided counsel except in capital cases.

In addition, the Court's experience in those two decades showed that the flexible, case-by-case evaluation that Owen J. Roberts had proposed, and the special circumstances described by Stanley F. Reed, did not work well. The criteria were so imprecise and so open to differing interpretations as to create chaos in the lower courts. In the 1950s, as far as the cases that came before them, the Justices found in every instance that the accused had been the victim of special



The *Betts* ruling troubled members of the Court for decades, but was not overturned until *Gideon v. Wainwright* in 1963. In that case, an indigent Florida man named Clarence Earl Gideon (above) petitioned the Court for the right to counsel and won. Fittingly, Chief Justice Earl Warren assigned Justice Black to write the opinion.

circumstances and needed counsel. And, as Black kept reminding them, it would be far simpler to adopt the protection of the Sixth Amendment and apply it to the states. According to law professor Lucas Powe, "*Betts* was so out of step that had Fortas lost, then a retirement with his beloved violin would have been fitting. . . . Gideon could have argued *Gideon* and won 9-0."[33]

For the most part the reception of *Gideon* proved positive, in part because nearly all of the states had already adopted the rule, and so it made little difference to them. The five other states—Florida, North Carolina, South Carolina, Alabama, and Mississippi—quickly enacted laws to set up public defender offices. Even in these states, the reaction to *Gideon* was for the most part positive. The head of the Wake County, North Carolina, Bar Association, R. Mayne Albright, said, "I think few lawyers would disagree with the principle enunciated by the Supreme Court. It was time we recognized the need for the defendant who is indigent to have a lawyer."[34] Some people grumbled that the costs were prohibitive, especially to lawyers in private practice who had no choice when courts appointed them to serve as counsel to indigents. In some areas, legal aid and the public defender's offices were overwhelmed, but eventually the system reached equilibrium.[35]

Interestingly, the Justices carried on the dialogue with the public, something they had not done after either the segregation or apportionment decisions. Justice Tom Clark called *Gideon* historic, a case that would "possibly have more physical impact on the administration of justice than any decided by the Court," and urged law schools to upgrade the study of criminal law. State and local bar associations also had a role to play, and Clark urged them to establish programs to make lawyers available to the courts for indigent cases. Chief Justice Warren told the Conference of Judicial Councils that *Gideon* would "amount almost to a revolution in some states," and judges had to make sure that the spirit of the Sixth Amendment was carried out. Whatever expenses the states incurred, said Warren, they would be more than repaid not only in fairer treatment of indigent defendants but also in criminal courts that would work more efficiently and effectively with lawyers' help.[36]

For many people, as Barry Friedman concluded, "*Gideon* crystallized all that was good in the Warren Court's activism: equal justice for all, the furthering of national values against foot-dragging states; the Court acting because others would not." Without the Supreme Court, Clarence Earl Gideon said, "it might have happened sometime, but it wouldn't have happened in [Florida] soon."[37]

Conclusion

One of his law clerks that Term, now law professor A.E. Dick Howard, said that for Black "*Gideon* was real exuberance. The Judge knew he was summing up thirty years of cases, knitting up in this area. It gave him special pleasure." In many cases, the Court does not adopt the dissenting position for many years, usually long after the dissenter has left the bench. A few weeks after the decision came down, Hugo L. Black told a friend that "When *Betts v. Brady* was decided, I never thought I'd live to see it overruled."[38]

Editor's Note: This article was adapted from a chapter in the author's new work, **Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue** (Pantheon Books, 2015).

ENDNOTES

[1] Charles Evans Hughes, **The Supreme Court of the United States** (New York, 1928), 68.

[2] *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 637 (1896); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[3] *Abrams v. United States*, 250 U.S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1927); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[4] Quoted in Alan Barth, **Prophets with Honor: Greats Dissents and Great Dissenters in the Supreme Court** (New York, 1974), 81.

[5] 304 U.S. 458 (1938).

[6] *Powell v. Alabama*, 287 U.S. 45 (1932).

[7] *Betts v. Brady*, 316 U.S. 455 (1942). Details of the Betts trial can be found in Barth, **Prophets with Honor**, 80-88, and in Anthony Lewis, **Gideon's Trumpet** (New York, 1964), 109-10.

[8] 316 U.S. at 464, 465.

[9] *Patterson v. Colorado*, 205 U.S. 454, 463 (Harlan dissenting), and *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis dissenting).

[10] *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); only Justice Pierce Butler dissented, but without opinion. For the incorporation controversy, *see* Richard C. Cortner, **The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties** (Madison, 1981). The debate over incorporation continues. In *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), the Court interpreted the Second Amendment as providing an individual right to own firearms and applied this to the states. Two years earlier it had applied this interpretation to the federal government in *District of Columbia v. Heller*, 554 U.S. 570 (2008). As of this writing, only the Third (quartering of troops) and the Seventh Amendments (jury trial in civil cases) have not been incorporated.

[11] 316 U.S. at 473. Altogether, Judge Bond is mentioned by name fifteen times, an unusual practice, and Professor Paul Freund suggested that the esteem in which he was held by members of the high court may have influenced the result. Lewis, **Gideon's Trumpet**, 111.

[12] 304 U.S. at 462-63.

[13] 316 U.S. at 474 (Black dissenting). Black, it should be noted, had signed on to Cardozo's *Palko* opinion calling for selective incorporation. In *Betts*, he took the first step on what would become one of the defining characteristics of his jurisprudence, the belief that the Fourteenth Amendment incorporated *all* of the protections of the first eight amendments and applied them to the states. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black. J., dissenting).

[14] *New York Times*, 2 August 1942, quoted in Lewis, **Gideon's Trumpet**, 112.

[15] Unsigned Note, "Right to Counsel," 42 *Columbia Law Review* 1205, 1208 (1942).

[16] In two 1945 cases, convictions were reversed for lack of counsel, but these were capital cases. *Williams v. Kaiser*, 323 U.S. 471 (1945), and *Tomkins v. Missouri*, 323 U.S. 485 (1945). The quote is from *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

[17] *Foster v. Illinois*, 332 U.S. 134, 139 (1947). Black dissented at 139, Rutledge at 141, with all of the dissenters signing on to both opinions.

[18] *Uveges v. Pennsylvania*, 355 U.S. 437, 441 (1948); *see also Bute v. Illinois*, 333 U.S. 640 (1948).

[19] Yale Kamisar, "How Earl Warren's Twenty-two Years in Law Enforcement Affected His Work as Chief Justice," 3 *Ohio State Journal of Criminal Law* 21 (2005).

[20] *Gryger v. Burke*, 334 U.S. 728 (1948); *Townsend v. Burke*, 334 U.S. 736 (1948).

[21] Francis A. Allen, "The Supreme Court, Federalism and State Systems of Criminal Justice," 8 *DePaul Law Review* 213, 230 (1959).

[22] Lewis, **Gideon's Trumpet**, 114. The last case affirming conviction was *Quicksall v. Michigan*, 339 U.S. 660 (1950).

[23] *Hudson v. North Carolina*, 363 U.S. 697 (1960). Justice Clark's dissent. at 704, was joined only by Justice Whittaker.

[24] *Griffin v. Illinois*, 351 U.S. 12 (1956). Black spoke for himself, Chief Justice Warren, Douglas, and Brennan; Frankfurter concurred in the result but not the reasoning. Justices Burton, Minton, Reed, and Harlan dissented.

[25] *McNeal v. Culver*, 365 U.S. 109, 116 (1961); the Douglas concurrence is at 117, 119.

[26] William J. Brennan, Jr., "The Bill of Rights and the States," 36 *NYU Law Review* 761, 773 (1961).

[27] Newman, **Hugo Black**, 526. For relations between Black and Frankfurter, and their ultimate reconciliation, *see* James F. Simon, **The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America** (New York, 1989).

[28] *Carnley v. Cochran*, 369 U.S. 506, 517 (1962) (Black concurring). For details on choosing the "right" case, *see* Lucas A. Powe, Jr., **The Warren Court and American Politics** (Cambridge, 2000), 381-85.

[29] *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

[30] *Id.* at 344-45, citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

[31] The Douglas opinion is at 372 U.S. at 345, that of Clark at 347, and Harlan's is at 350.

[32] Lewis, **Gideon's Trumpet**, 221-22.

[33] Powe, **Warren Court**, 385. Powe also sees *Gideon* as a civil rights case. Although Gideon himself was white, the system he had been tried under had acted prejudicially to the poor and racial minorities for decades. The rest of the Warren Court's criminal procedure cases all came from the North.

[34] Lewis, **Gideon's Trumpet**, 203.

[35] *See* John Thomas Moran, **Gideon Undone: The Crisis in Indigent Defense Spending** (Chicago, 1983), a joint publication of the American Bar Association and the National Legal Aid and Defender Association.

[36] Lewis, **Gideon's Trumpet**, 201.

[37] Barry Friedman, **The Will of the People** (New York, 2009), 273.

[38] Newman, **Hugo Black**, 528.

Lyndon B. Johnson and the Fortas Nomination

ROBERT DAVID JOHNSON

In mid-September 1968, Joseph Kraft reflected on the lessons of Abe Fortas's doomed bid to become Chief Justice. "The books are full of information about how power is used and accumulated in Washington," the veteran reporter noted. "But there is now going on here something that is not much described or well understood—the crumbling of power." Normally, the Senate would have comfortably confirmed Fortas, but instead the partisan interests of Senate Republicans had aligned with the ideological interests of diehard Southern segregationists. "The lesson of all this," Kraft concluded, "is that the lack of power tends to corrupt as much as power."[1]

The Fortas confirmation fight marked a transition away from what the legal scholar Jonathan Zasloff has termed the "informal institutions of American governance," or "those habits and customs outside of formal, written law that make democracy work."[2] In the last half-century, customs that smoothed the way for Congress to operate from the New Deal through the Great Society—including the belief that opponents should not filibuster a Supreme Court nominee, or that judicial nominees would be evaluated on the basis of competence rather than ideology or partisanship—have fallen by the wayside. As commentator Jonathan Chait has argued, informal Senate traditions are just that—*informal*—and with congressional polarization, "such social norms will never hold up, [since] ultimately, the parties are going to maximize their partisan self-interest as allowed under the rules."[3]

The literature on the Fortas nomination includes single-case narratives, comparative studies, biographies of the Justice, and surveys of the Johnson Presidency. These earlier studies share two source-based shortcomings. First, all but one predate the release of the Johnson Presidential tapes for 1968. This condition is all the more unfortunate as Fortas and Homer Thornberry, who was to replace him as Associate Justice, are among only six Supreme Court nominees, and the only unsuccessful choices, for which Presidential recordings exist. Second, despite the

Senate's power to confirm Supreme Court nominees, previous publications on Fortas have utilized few Senate manuscript collections and in some cases none. As always occurs with congressional sources, the quality varies widely; some key players in the Fortas fight either left behind no papers for the relevant period or have closed collections. But for other important Senators, there is available material that, to date, no scholar on the Fortas confirmation has consulted. The list includes Fortas's most prominent opponents, Robert Griffin (R-Michigan) and Strom Thurmond (R-South Carolina), but also lower-profile Judiciary Committee members such as Hiram Fong (R-Hawai'i) and Quentin Burdick (D-North Dakota), who played important roles at stages of the confirmation process.[4]

On June 13, 1968, Chief Justice Earl Warren delivered a conditional resignation, to be effective when the Senate confirmed his successor. Though Warren justified the peculiar wording on grounds of the Court always needing a Chief Justice, it seemed as if he sought to ensure that, either way the confirmation vote turned out, a strong liberal would remain as Chief Justice. Johnson played the part by indicating that he would accept the resignation only when the Senate confirmed a successor.[5]

After the Court-packing fight of 1937, the Senate confirmed twenty-two consecutive Justices, fifteen by a voice vote.[6] It thus was not unreasonable, as most Washington observers thought, to expect little resistance for Warren's replacement.[7] For three reasons, however, Johnson might have anticipated the difficulties any prospective nominee would face. First, in 1967, the nomination of Thurgood Marshall, against which eleven Senators ultimately voted, revealed signs of a different approach by some Senators to Supreme Court selections.[8] Second, Warren's resignation coincided with Congress's considering crime and gun control bills—issues

Vice President Johnson was sworn in as President aboard Air Force One in 1963 as Homer Thornberry, a Texas Congressman, looked directly at the camera. Two years later Johnson appointed Thornberry to the Fifth Circuit Court of Appeals, and in 1968 he nominated him to replace Abe Fortas on the Supreme Court. Once Fortas withdrew his nomination, Thornberry's became moot and was withdrawn by the White House without a vote.

that returned attention to the Court's highly unpopular crime-related decisions, notably *Miranda v. Arizona*.[9] Third, Senate elections of 1964 and 1966 produced a number of Republicans who—for reasons of ideology, partisanship, or both—challenged the Senate's traditional mores.[10]

Robert Griffin later wondered whether events of the next three months would have unfolded differently if the President had chosen a high-quality, independent candidate for Chief Justice instead of nominating two old friends.[11] An obvious selection was Arthur Goldberg, who had left the Court in 1965 to become U.S. Ambassador to the United Nations. But Johnson dismissed Goldberg out of hand, citing "most lawyers" for the proposition that a Justice "oughtn't to be leaving the Court and going back on the Court." In any event, given the realities of the confirmation process, the President reasoned bluntly if not perhaps inaccurately, "I oughtn't to have two Jews—one as Chief Justice, and another one back on." Minority Leader Everett Dirksen (R-Illinois), with whom Johnson shared this assessment, concurred.[12]

Instead, Johnson would make "the best lawyer on the court" the new Chief Justice.[13] Johnson's relationship with Fortas dated to the Roosevelt years; in 1948, Fortas's expert, if risky, lawyering had saved Johnson's political career after the contested Senate runoff in Texas.[14] During the 1964 Presidential campaign, Fortas's work containing ethics scandals culminated with his removal of confidential material about campaign finance irregularities just before FBI agents inspected the safe of disgraced White House aide Walter Jenkins.[15] Though Johnson named Fortas to the Court in 1965, the Justice continued to advise his longtime patron on matters ranging from highly significant (Vietnam, riots in Detroit) to banal (undermining the relationship between Lynda Bird Johnson and actor George Hamilton).[16]

Elevating Fortas required nominating a new Associate Justice. Johnson concluded that each likely nominee had too many "problems": He was either too old (Defense Secretary Clark Clifford), too prone to ill health (Army Secretary Cyrus Vance), too liberal (Attorney General Ramsey Clark), or too vital in his current post (Treasury Secretary Henry Fowler).[17] These convenient eliminations allowed Johnson to turn to his successor in the House of Representatives, Homer Thornberry, who had been appointed by Kennedy as a district court judge in 1963 and whom Johnson had elevated to the Fifth Circuit in 1965. In retrospect, the President's launching what one aide termed "old crony week" was a fatally flawed decision.[18] This problem was apparent not only in retrospect. Perhaps Johnson's most astute counselor, the First Lady, told him that cronyism was "what worries me about Homer—although I'd love to see him on the Supreme Court."[19]

Johnson's selections changed the dynamics of the confirmation fight in two ways. First, in what political scientist Kevin McMahon has termed "a case of gross political malpractice," the Fortas choice gave opponents the opportunity to place the Warren Court on trial, in a way that would have been far more difficult if Johnson had nominated someone not currently serving on the Court.[20] Second, the Thornberry selection linked the President with a nominee that even he conceded would not be "brilliant" or "exceptionally outstanding."[21] At times, Johnson seemed sensitive to the critique, cautioning Dirksen against viewing Thornberry as "a dumbbell."[22] More often, however, he ignored Thornberry's limitations, as the judge fulfilled the President's ideal vision of a Supreme Court nominee: "I want somebody that I'll *always* be proud of his vote. That's the first thing. I may not be proud of his opinion, but I want to be proud of the side he was on. He may not be as eloquent as Hugo Black, or [Fortas], or somebody. But I want to be damn sure he votes right."[23]

Lyndon B. Johnson's strategy for getting Abe Fortas confirmed as Chief Justice rested on Richard Russell (D-Georgia) pacifying Southern Democrats and Everett Dirksen (D-Illinois, above) maintaining Republican support.

Before making the announcement, Johnson locked up the Senators he regarded as key to a successful outcome. He reached out to Dirksen, who endorsed Fortas enthusiastically and Thornberry somewhat less so.[24] At a White House meeting, his one-time mentor, Richard Russell (D-Georgia), warmly supported Thornberry.[25] Other Southerners, Johnson hoped, might be pacified by James Eastland (D-Mississippi).[26] In a thirty-three-minute call about the nomination, the President laid out three options. First, he could simply "refuse Warren's resignation," which horrified Eastland. Second, he could nominate Arthur Goldberg, though such a move "would give us problems with two." Eastland picked up on the implied religious reference and quickly agreed. Even Jewish groups, the Mississippi Senator mused, would not want two Jewish Justices. Or third, Johnson could promote Fortas, and focus on "the associate justice who would take his place." Confronted with those choices, Eastland was unequivocal: It made a "helluva lot of sense" for Johnson to replace Warren, and then to appoint "the right kind of man as an associate."[27] Johnson believed that the call had ensured that the Judiciary chairman would handle the nomination promptly, but Eastland later said that he only promised to finish the hearing in "my own time."[28]

Johnson's swift response to Warren's resignation boxed in the Republican candidates for President. Nelson Rockefeller backed the choices; Ronald Reagan expressed outrage at Johnson's tactics but seemed resigned that the President would prevail.[29] Richard Nixon took a cagier approach. The GOP's frontrunner aggressively used law and order as a political issue, spoke of the need for "strict constitutionalists" on the Court, and issued a campaign position paper indicating "a need for future Presidents to include in their appointments to the Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land." Still, Nixon also declined to oppose the selection of Fortas publicly and eventually expressed skepticism about a filibuster against the nominee.[30]A handful of Republican Senators, however, decided to resist.

The Emergence of Senate Opposition

Of Robert Griffin, one colleague observed, "I doubt if he has any scruples, politically or otherwise."[31] He would demonstrate as much during the Fortas fight. Griffin told his staff that he would oppose anyone nominated by Johnson, but aides doubted his chances of success. At a Republican caucus meeting to consider Fortas, however, signs of resistance emerged: Class of 1966 members Howard Baker (R-Tennessee) and Clifford Hansen (R-Wyoming) threatened to filibuster the nomination; so too did Southerners Strom Thurmond and John Tower, and, surprisingly, moderate Hiram Fong. Led by Dirksen, several establishment Republicans opposed obstructing the nominations, and the caucus adopted no formal position.[32]

Shortly after the meeting, Griffin and several allies conferred on the Senate floor. On the spur of the moment, George Murphy (R-California) suggested that the critics "get up a statement declaring our opposition and get some of our colleagues to sign it"; the California Senator worked with fellow first-termer Paul Fannin (R-Arizona) to collect nineteen signatures.[33] Though Griffin disingenuously denied any partisan motivation, pointing to polls (non-existent by that point) indicating that Democrat Hubert Humphrey would succeed Johnson and thus make a future appointment if the Senate rejected Fortas, Gordon Allott (R-Colorado) was more candid: "I believe a Republican should be appointed."[34]

Despite the central role played by Griffin and Murphy in preparing the round robin, perhaps the most noteworthy signature came from Howard Baker. The night before Johnson announced the nominations, Dirksen lobbied his son-in-law over dinner, but Baker was firm: "I'm sorry, Mr. D., but I'm going to have to oppose this."[35] Baker's decision, which baffled Johnson, provided the first indication of the President's newfound remoteness from Senate culture. Tennessee's major newspapers, Johnson noted, backed the nomination, "and Tennessee is Fortas's [native] state, and all of his family and folks live there, and every Jew. He's a young man, going to be running the rest of his life, and voting against the first Jewish Chief Justice. I can't understand that."[36]

GOP partisans were not alone in opposing Johnson's decision. Contrary to Johnson's expectations, not a single Southern Senator singled out Thornberry for praise.[37] Ramsey Clark told the President that Judiciary Committee members Sam Ervin (D-North Carolina) and John McClellan (D-Arkansas) were the two "most essential" of the Senate's Southern contingent who should be persuaded "at least to stand still."[38] Yet the administration, apparently confident that Russell and Eastland would be enough, was remarkably blasé in reaching out to either Ervin or McClellan. The President's preferred talking points for the duo—that since the only "question is whether Warren goes and Thornberry comes on, . . . you can't tell me that Thornberry ain't a hell of a lot better for Dick Russell and John McClellan and Sam Ervin than Warren is"—failed to engage either Senator's concerns with the nature of Warren Court jurisprudence.[39]

While Johnson's gambit of coupling Thornberry with Fortas had failed to firm up Democratic backing for the nomination, it repelled moderate and liberal Republicans whose support the President desperately needed. Jacob Javits (R-New York), for instance, denounced the appointments as "old cronyism" but reluctantly backed both candidates, on the basis of his embrace of the Warren Court's liberalism.[40] Clifford Case (R-New Jersey) endorsed Fortas but considered Thornberry unqualified.[41] White House officials found that Edward Brooke (R-Massachusetts), the first African American elected to the Senate, seemed supportive but did "not want to come out against Griffin."[42]

Hiram Fong typified the ambivalent reaction of moderate Republicans. The first—and, to date, only—Republican Senator from the Aloha State, Fong balanced the interests of his party with the demands of a majority-minority constituency that strongly supported civil rights.[43] By far the most moderate Republican to sign Griffin's round robin letter, Fong struggled to articulate why he had done so. Initially, he hailed the "principle that a lame duck President should not make critical appointments."[44] A few weeks later, however, he claimed to "disapprove strongly of the term 'lame duck'," since Johnson maintained "the full authority of his office." Moreover, the Hawai'i Senator celebrated Fortas's "merit and qualifications." Why, then, did he oppose confirmation? Because polls showed that the country wanted a change, and Richard Nixon was

"extraordinarily able and uniquely qualified to lead the Nation."[45] No wonder Johnson concluded that "nobody can understand why we lost Fong."[46]

Surveying these developments, Johnson privately began to fear that, in the Senate of 1968, "I don't know how to get 'em." Sometimes, it seemed, "we just live in another world."[47] Most in the media initially failed to discern the changing congressional norms. *The Economist* captured the press consensus: By coupling the Fortas choice with that of Thornberry, an "old-style Texas politician" with "a host of friends and absolutely no enemies," the nominations would move through.[48] But reporters based their confidence more on Johnson's reputation than the actual situation in the Senate. The administration's vote-counting machinery—featuring at least four advisors doing head counts, and many more contacting individual senators—was uncoordinated and rusty, and all but ignored the possibility of a filibuster against Fortas until it was too late to adjust strategy.[49]

The advisors' dismissing the dangers of a filibuster was, in one respect, understandable. Since the establishment of the cloture rule in 1917, no Supreme Court nominee had been subject to a filibuster. And, in both political and public consciousness, use of the filibuster remained associated with Southern efforts to obstruct civil rights legislation. But the reality was more complex, especially since, prior to the Fortas fight, it was Senate liberals who had organized the last Court-related filibuster. And it was Lyndon Johnson himself who had designed the strategy. Between 1962 and 1964, Warren Court decisions on representation (*Baker v. Carr*, *Reynolds v. Sims*, and *Wesberry v. Sanders*) had diminished the power of previously overrepresented rural voters.[50] After Virginia representative William Tuck's bill to strip from the Court authority to address redistricting questions cleared the House, liberals worried about the precedent for future civil rights issues. And so Johnson devised the response: Senate liberals could filibuster, since talking was "what they do best." The President correctly predicted that Majority Leader Mike Mansfield (D-Montana) would not work hard to break any filibuster, meaning "the Tuck bill will be dead. The Supreme Court will be riding high. That'll be it—period."[51] On September 8, 1964, the Senate declined to impose cloture, thereby dooming the Tuck bill.[52]

White House advisors were not alone in failing to detect the possibility that the Fortas nomination would confront this new filibustering culture. George Aiken (R-Vermont) predicted that the administration's most difficult problem would be getting the nomination out of committee, but "once it is reported, the ball game is over."[53] The tactical deviousness of Fortas's foes had an impact in this regard: Largely at the behest of John Williams (R-Delaware), Republicans refrained from using the word filibuster, minimizing its association with Southern opponents of civil rights. Term the effort, the Delaware Senator urged Griffin, a "full debate" or an "educational campaign."[54]

One aide subsequently wondered whether the President, perhaps "over-impressed by his past record in the Senate," had "underestimated his decline."[55] Ironically, Johnson's reputation as a master political manipulator not only fueled the confidence that he would rescue the nominations but ultimately undermined Fortas's chances. At the most basic level, Johnson's strategy rested on Russell pacifying Southern Democrats and Dirksen maintaining Republican support. But two revelations about Johnson's machinations from early July—one probably accurate, the other less clear—raised questions that transactional politics, rather than the Senators' conceptions of the national interest, explained their endorsement of the Fortas/Thornberry tandem.

By custom, the Georgia Senators rotated recommendations for federal appointments. When a district court seat became vacant in

early 1968, Russell recommended the former president of the Georgia Bar Association, Alexander Lawrence. In 1958, Lawrence had delivered a speech—which Russell subsequently inserted into the *Congressional Record*—entitled "Modern Garb of Tyranny." Both the local NAACP and Ramsey Clark strongly opposed the nomination; reflecting his general policy, Johnson declined to overrule the Attorney General. In April, the President briefed Russell, who noted that "there has been a little flair-up by some of the extremists who are protesting his nomination" but expressed confidence that the nomination ultimately would be submitted. Instead, through the spring, Clark continued to slow-walk Lawrence's candidacy.[56]

By July 1, Russell lost patience—or simply seized an excuse to jettison his commitment to Fortas. Resentful at being "treated as a child or a patronage-seeking ward heeler," he released himself "from any statements" made to Johnson regarding the Supreme Court. The Georgia Senator's decision, which one aide described as having come "out of the blue," panicked White House officials, who recognized the "serious blow" to the confirmation.[57]

White House aide Larry Temple claimed that Russell "couldn't have been more wrong" in linking the two issues.[58] In fact, the connection between the Lawrence and Fortas nominations was murkier than Temple realized. Johnson speculated to his aide that an anti-Fortas Senator had planted the linkage idea in Russell's mind. If so, the likely culprit was Eastland—given that Johnson himself had, without prompting and while discussing Fortas's nomination as Chief Justice, told Eastland that Russell "called me the other day: he's got a judge [Lawrence] down there, and I had Fortas examine him."[59] It seems hard to believe that the President connected Lawrence and Fortas without some reason, even if solely to remind *Eastland* that Johnson could assist him if the Mississippi Senator did not obstruct the nominations.

Shortly after Russell defected, Dirksen's position badly weakened. In late June, Griffin had denounced "backroom political manipulations," in which support for Fortas was traded for unspecified "political plums."[60] (His refusal to specify whether these comments referred to Dirksen fooled no one.) Dismissing the "crass" claim as an "outrage," Dirksen poked in the stomach a newsman who raised the question at a press conference.[61] Then, on July 11, the muckraking columnists Drew Pearson and Jack Anderson revealed the "inside story" of why Dirksen "is steadfastly for Abe Fortas." It was "no secret" that Dirksen wanted to sustain the Subversive Activities Control Board (SACB), which had been set to expire until Johnson had suddenly intervened in late June.[62]

Johnson already had tailored Justice Department actions to accommodate Fortas's candidacy; in late June, after learning that the Justice Department planned to file an anti-trust lawsuit against the reclusive billionaire Howard Hughes, the President ordered the Attorney General to delay for sixty days. Hughes was a major donor to Nevada Senator Alan Bible, a conservative Democrat who remained uncommitted on Fortas. "By God," the President complained, Ramsey Clark was trying to "lose us every vote he could."[63]

Bible was an obscure back-bencher, but Dirksen was Fortas's highest-profile Senate supporter, making the SACB revelation politically damaging. Before 9:00 a.m. on the 11th, Johnson called Dirksen, trying to contain the fallout. According to the President, "there's been no demand, and no trade, and no nothing else." (Dirksen, of course, heartily agreed.) It was true, Johnson conceded, that at the time of Warren's resignation, Dirksen had reminded both the Attorney General and the White House that cases ought to be referred to the SACB. But it was "ridiculous" to imply any "connection with the Fortas nomination at all." (Dirksen, again, heartily agreed.)[64] To most Washington

observers, however, these allegations were only too believable.

Despite these setbacks, one issue might have salvaged the nomination. While Griffin generally dismissed administration attacks against him, allegations that anti-Semitism motivated the effort to block the first Jewish Chief Justice very much worried the Michigan Senator. Like most GOP Senators in the 90th Congress, Griffin came from a state whose Republican party had strongly backed civil rights.[65] (Michigan also had just under 100,000 Jewish residents in 1968.)[66] These realities explained why, in his first interview about Warren's replacement, Griffin indicated that he would support Arthur Goldberg. As the summer progressed, he repeatedly cited this assertion to prove his good intentions.[67] And, in case anyone challenged him further, he added that "there is a wonderful woman in my office who is of the Jewish faith. She handles all our mail."[68]

Alas, Griffin discovered, having a Jewish secretary failed to neutralize the "continuing concern" with the "Jewish problem involved in the controversy."[69] Detroit's *Jewish News* charged that Griffin's "drive to keep Fortas from becoming the first Jew in American history to occupy the nation's third highest post has been gleefully welcomed by the lowest dregs of anti-Semitism."[70]

Recognizing the potency of the issue, the President privately and recklessly attributed Republican opposition to anti-Semitism almost from the day of the nominations.[71] (Of John Tower's coming out against Fortas in late June: "It's pure anti-Semitism with him," Johnson scowled. "Just anti-Semitism, 100 percent.")[72] Rumors existed on Capitol Hill that opposition Senators risked retaliation from Jewish donors or Jewish voters; one White House memo passed along word from a pro-Fortas attorney that "we have gotten the Jews wound up."[73]

After a string of off-the-record conversations between Johnson and Washington reporters, the issue broke into the open thanks to another Drew Pearson column. "If you dial certain telephone numbers in Washington," Pearson breathlessly reported, "you get a stream of abuse and hate poured out against Fortas," so "vicious" that the correspondent could not repeat the contents in the newspaper. And to stress the analytical point, Pearson charged that "Republican senators who are trying to block Fortas's confirmation are, of course, giving fuel and hope to this anti-Semitic underground."[74]

Johnson and Pearson had a long, mutually beneficial, relationship, so it seemed plausible that Pearson's column was a designed White House leak.[75] But linking GOP opposition to Fortas's promotion with anonymous anti-Semitic smears—without corroboration—allowed Republicans to allege character assassination. Fong condemned the "unwarranted attack," noting that he had voted to confirm both Goldberg in 1962 and Fortas in 1965.[76] Javits offered to defend colleagues from allegations of anti-Semitism, and only became more forceful after his long shot Democratic opponent, Paul O'Dwyer, accused him of downplaying the issue so as to "curry favor with ultra-conservatives" in his caucus.[77] Transforming anti-Semitism into a partisan, rather than a pro-Fortas, line of attack neutralized its impact on the confirmation struggle. As Griffin piously informed the National Press Club, anti-Semitism "should never be used as a crutch or a weapon."[78]

The Senate Judiciary Committee Hearing

With Russell defecting, Dirksen on the defensive, and unconvincing allegations of anti-Semitism in the air, the Judiciary Committee opened its hearings on July 11. During the hearings, the administration and its Senate supporters consistently found themselves outmaneuvered tactically. Aided immensely by Majority Leader Mansfield's

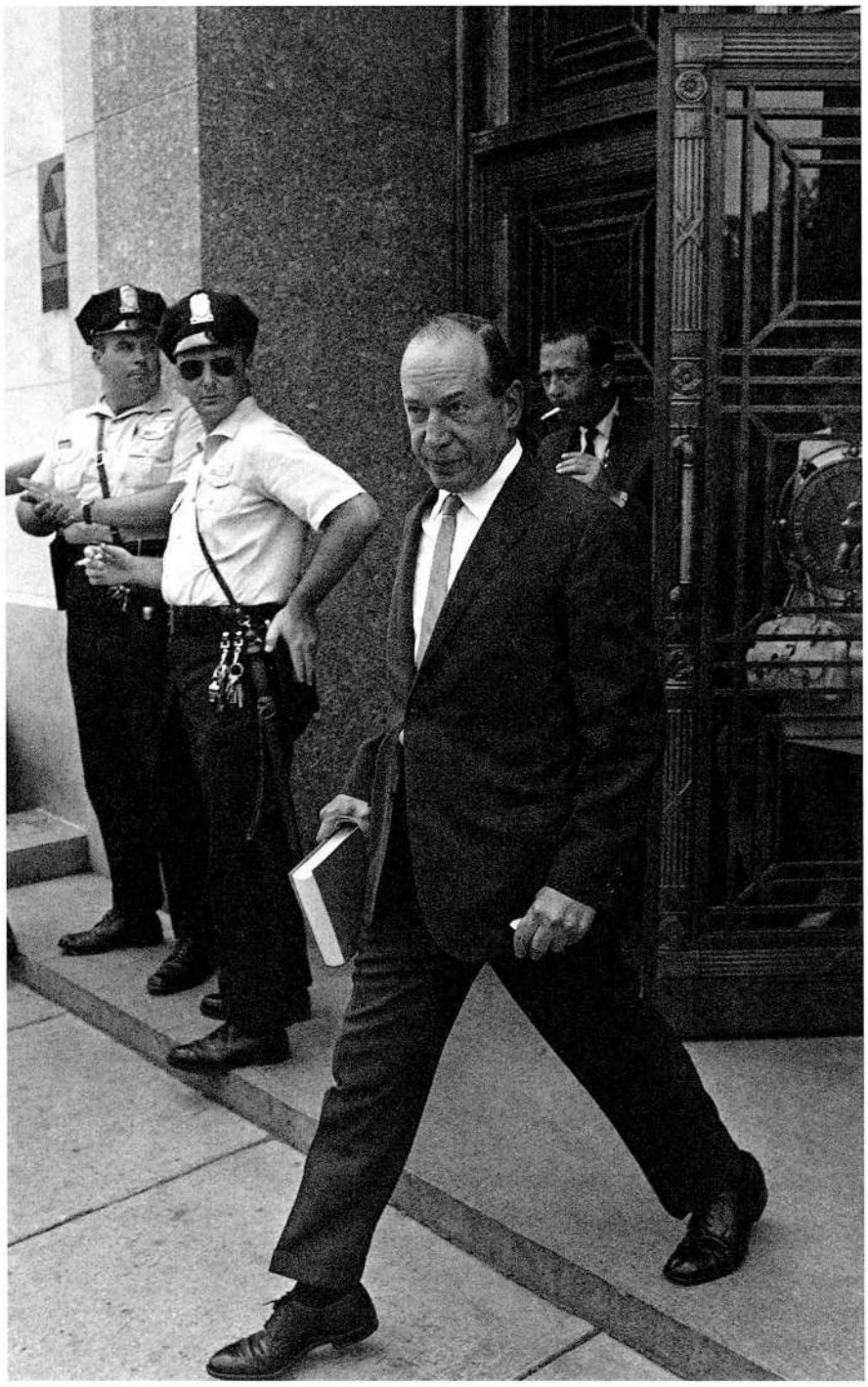
promise not to alter the Senate schedule to accommodate the nomination, Fortas's opponents delayed. Thurmond objected to waiving the Senate rule that forbade committees from meeting while the Senate itself was in session on the floor.[79] Later in the summer, Southern Senators invoked a committee rule, rarely used at the time, to demand a week's delay in the hearings; they also boycotted scheduled committee meetings, thereby denying a quorum and forcing further postponements. Johnson, who regularly utilized such procedural chicanery as Majority Leader, seemed puzzled by these developments. When George Smathers (D-Florida) informed him that McClellan and Ervin were essentially "going to filibuster it in the committee," the President was astonished: "Can you just do that, constantly?" It turned out they could.[80]

In a departure from custom, Eastland invited Griffin to testify first. In a forty-minute statement, Griffin urged the Senate to differentiate between cabinet appointments, for which the President received the "widest latitude," and judicial appointments, for which "the Senate has a duty to look beyond the question, 'Is he qualified?'" The Michigan Senator wanted this criterion to apply to all Supreme Court appointments.[81] Dirksen responded to the other committee members but avoided looking at Griffin, in a tone that raised eyebrows. The *Washington Star*'s Lyle Denniston described him as handling Griffin "as rough, verbally, as he ever treated a Democratic Senator." The *Los Angeles Times*'s Ronald Ostrow cited Dirksen's rebuke of Griffin as almost unprecedented.[82]

Reflecting changing congressional norms, Fortas's appearance marked the first time that, except for a recess appointee, a sitting Justice had ever testified about his beliefs.[83] The Senators enthusiastically engaged. This new norm, Griffin recalled, "fortified" the opposition by producing a "grab bag" of anti-Fortas issues.[84] McClellan criticized the nominee for envisioning the Court as an agent of social change.[85] Ervin charged Fortas with abandoning both "judicial restraint" and the original meaning of the Constitution.[86] Thurmond aggressively explored the Warren Court's decisions on crime, leaving Senators to look away uneasily as he wondered if Fortas agreed with letting murderers walk free on technicalities.[87]

While Fortas was "very confident" about testifying, his hair-splitting, legalistic responses only hurt his chances.[88] When Ervin, for instance, faulted him for an excessive willingness to overturn precedent, Fortas cited *State v. Ballance*, authored in 1949 by then-Justice Ervin, in which the North Carolina Supreme Court had overturned a precedent on grounds that fundamental constitutional guarantees "are intended to secure to each person . . . extensive individual rights."[89] (Information about Justice Fortas having privately rebuked Ralph Lazarus, the former head of Federated Department Stores who had criticized Johnson's Vietnam policy, had come to Ervin through Griffin's office. The night of the exchange, Ervin told a Griffin aide that he would raise these conflict-of-interest concerns, which he previously had not planned to explore.)[90] When pressed on rumors that he had continued to advise Johnson on policy issues, Fortas argued that the President only consulted him on matters about which he lacked "any expertise."[91] (Why Johnson would then desire his input was left unclear.) This record made Fortas almost uniquely ill-suited to rebuff the Judiciary Committee's newfound enthusiasm for determining his views on specific cases. When asked about the merits of Warren Court decisions, he claimed that answering the questions would violate the separation of powers.[92] Griffin noticed that many of his colleagues appreciated the irony of Fortas avoiding senatorial questioning, while "he apparently felt no such limitations" in dealing with the executive branch.[93]

After Fortas concluded, James Clancy, head of Citizens for Decent Literature,



Associate Justice Fortas exited the Senate after testifying before the Senate Judiciary Committee in 1968 in connection with his qualification to be Chief Justice. Reflecting changing congressional norms, Fortas's appearance marked the first time that, except for a recess appointee, a sitting Justice had been asked by the Senate about his beliefs.

testified that the Justice's votes against pornography laws had extended "an open invitation to every pornographer" to distribute hardcore pornography.[94] At some level, the sudden focus on pornography—based as it was on a per curiam opinion, *Schackman v. California*—was absurd.[95] The *Washington Post* published a cartoon featuring Strom Thurmond approaching a man on the street, whispering, "Psst—Want to see some dirty pictures?"[96] Quentin Burdick lamented the distortion of Fortas's "work and character" by focusing on "an extraordinary amount about one matter, Mr. Fortas's stand on obscenity."[97] But, as Smathers recognized, the issue provided an excuse for Senators already predisposed to oppose Fortas. The Florida Senator considered Thurmond "a real nut . . . who up until this point hadn't really made much sense." After canvassing his colleagues, however, Smathers discovered that "a lot of guys that don't want to be recorded as for, [and] are looking for some reason to be against him." McClellan in particular was "preaching, and ranting and raving about how this kind of thing was ruining the life of his grandchildren, and everybody else." Johnson darkly joked, referencing the film of the previous year, "He ought to go see this *Graduates* [sic]."[98]

After Clancy's testimony, Eastland took the committee into executive session to discuss the obscenity issue. In a further effort at delay, McClellan and Ervin insisted on holding over the nomination until they could see the movie that Clancy referenced. McClellan wondered how much notice his colleagues would need before making themselves available for a screening. ("About five minutes," Ervin replied, to general laughter.)[99] All told, thirty Senators watched the films at some point in the confirmation process; Philip Hart (D-Michigan) lamented that the public might have the "accurate impression that U.S. senators, however righteously disapproving, have been slipping into innumerable private showings of 'dirty' films."[100]

Aide Larry Temple recalled Johnson as "very, very frustrated" at the committee's slow pace. "We're a bunch of dupes down

Johnson strategized with George Smathers (D-Florida), his top ally on the Judiciary Committee. Smathers explained to the President that Senators were quick to condemn Fortas's opinions in obscenity cases because they were looking for a reason not to support his nomination.

here," the President fumed. "They're whipsawing us to death because they're dragging their feet. We've got to do something."[101] But apart from Smathers, Johnson could not obtain candid advice from within the committee. In a view that no neutral observer remotely shared, Philip Hart, who served as floor leader for the nomination, deemed Fortas "just superb" in the hearings, so much so that "he made me feel like a plumber listening to him."[102] Searching for a more realistic perspective, the President asked Earle Clements to sound out his contacts among Southern Democrats. The Kentucky governor returned with bad news: "You're not going to have any vote till after Labor Day."[103]

Recounting the hearings to Justice William O. Douglas, Fortas admitted that Thurmond and Ervin, the "principal mouthpieces," reflected "in an articulate way the feeling of others" about the Warren Court. With the opposition fueled by rage against decisions on race and crime, the Justice fretted that "as matters now stand, it is highly doubtful that Administration forces could break the threatened filibuster." He could only hope for an "unexpected development," such as Nixon endorsing the nomination.[104] By this point, in fact, Nixon was privately encouraging conservatives to oppose Fortas.[105]

Public Reaction

In an election year in which the Court and criminal justice issues emerged as major issues, public opinion was unlikely to rescue the nomination. Public support for Fortas was middling, with the Justice's opponents far more engaged on the issue.[106] Congressional mail documented the intensity gap. During the summer and early fall of 1968, Senate offices received around 50,000 letters or telegrams on the Fortas nomination, which overwhelmingly tilted against the nomination.[107] George Murphy claimed that, in a ten-week period, he received 6,983 letters from constituents opposing Fortas, with only 197 letters in support of the confirmation.[108] In late June, George Aiken told White House staffers that he "never" opposed judicial nominations and would therefore back Fortas and Thornberry.[109] But mail to Aiken's office ran around seven-to-one against Fortas, perhaps explaining the Vermont Senator's late switch to the opposition—which he implausibly justified on the need for more debate.[110]

The contrasting level of passion between Fortas's opponents and supporters manifested itself in electoral politics. With his state's primary scheduled for September 10, Senator Wallace Bennett (R-Utah) returned home to campaign in late July. Before leaving Washington, he (rather inconsistently) announced that, even though he had signed the Griffin round-robin letter, he would "definitely not join a filibuster."[111] The Utah Senator was expected to best his primary foe, a John Birch Society member named Mark Anderson, easily. Instead, in what the *Deseret News's* political editor termed "unexpectedly heavy support" for the far right, Anderson held the three-term incumbent to 60.8% of the vote.[112] A few days later, in a bow to the need to retain far-right support amidst a vigorous challenge from Democratic state party chairman Milton Weilenman, Bennett firmly returned to Griffin's camp and affirmed support for a filibuster. His Democratic colleague, Frank Moss, whose seat came up in 1970, told local reporters that he still backed Fortas, but did so, one correspondent observed, "with little open enthusiasm."[113]

The intense public response to the nomination also affected the majority and minority leaders, neither of whom, White House aide Barefoot Sanders observed, approached "the fight with any enthusiasm or confidence."[114] Mail to Mansfield passionately opposed Fortas. Numerous constituents alleged that Fortas had been "linked" with

"known communists"; others denounced "cronyism and the appointment of extreme liberals."[115] In response, Mansfield minimized his role as merely a type of gatekeeper, ensuring that the nomination would "be looked into very carefully by the Senate as a whole" if reported to the floor.[116] In public, meanwhile, the Senator only tepidly defended Fortas, prompting Johnson to complain that Mansfield "really will not fight."[117] And by the end of August, rumors reached the President about Dirksen "pulling in [his] horns on Fortas." Johnson pressed the Minority Leader "to stand up there and slug it out," but Dirksen doubted that he could "take charge against Jim and Sam Ervin and John McClellan, because they're all—and Strom Thurmond—they're hostile."[118]

Fortas's position soon collapsed entirely. On July 19, an anonymous caller informed Griffin aide Lawrence Meyer that private donors had funded a seminar taught by the Justice at American University Law School.[119] The idea for the seminar, for which Fortas was paid $15,000, originated with his former law partner Paul Porter, who wanted to ameliorate the financial pinch that Fortas experienced in going from a lucrative practice to a Supreme Court Justice's $39,500 salary.[120] But the optics were troubling, as became clear when hearings re-commenced. American University dean D.J. Tennery unconvincingly justified the salary on grounds that Fortas did more than simply teach a handful of classes—he "prepared a basic kind of syllabus, and other materials," as well.[121] During the dean's testimony, Dirksen leaned over to tell Eastland, "This is going to look awfully bad in print."[122] John Williams recalled that the American University revelation "was the clincher . . . that's when we got people we didn't expect."[123]

As the committee explored the seminar question, Johnson privately found it hard to "see any two-thirds vote" for cloture. The one-time master of the Senate now lacked "strong convictions one way or the other" on how to influence the Senate, and ultimately could do no more than hope that Fortas's dwindling band of supporters would speak up more loudly.[124] Instead, the reverse occurred. Smathers, upon whom the President had relied for inside information about the committee's deliberations, absented himself from the September hearings. Dirksen attended, but refrained from questions. That left Fortas's committee defense to the ineffectual Hart and one of the Senate's lowest-profile members—Quentin Burdick.

The Fortas nomination presented two problems for the first Democratic Senator popularly elected from North Dakota. First, as occurred with most Senators, mail to Burdick's office ran against Fortas, in this case by a margin of around twenty-to-one; North Dakotans were particularly concerned with questions of morality and pornography in the nomination fight.[125] Second, for a Senator whose re-election in 1970 was hardly assured, Burdick had good reason to disassociate from the Warren Court's decisions on crime.[126] Despite these political difficulties, Burdick returned from the summer congressional recess convinced that "no single remaining legislative item is of greater importance than the Fortas and Thornberry nominations."[127] He squarely rejected the argument that the Senate should evaluate Fortas's ideology. The American Bar Association evaluated Fortas as "highly acceptable from the viewpoint of professional qualifications"; the North Dakota Senator held that technical competence was the criteria that the Senate should use.[128]

Unfortunately for the White House, Burdick was virtually alone in more aggressively defending Fortas as the nomination process continued. The committee's three most senior members—Southern Democrats Eastland, McClellan, and Ervin—voted no. So too did three Republicans—the trio reporter Neil MacNeil labeled "the rabid Thurmond, the moderate Baker, and the nondescript Fong."[129] Even Fortas's eleven

positive votes were not committed supporters. Two months earlier, Dirksen had assured the President that Roman Hruska (R-Nebraska) had "a high regard for Abe Fortas."[130] But in a statement issued after his affirmative committee vote, the Nebraska Senator committed neither to vote for the nomination on the floor nor to back cloture.[131]

Defections occurred on the Democratic side as well. Every early vote count had counted on liberal Democrats unanimously backing Fortas, but, in mid-September, the administration abruptly listed Ernest Gruening (D-Alaska) as a likely opponent.[132] The Alaska Senator's contentious history with Fortas dated back to the early 1940s, when Gruening was territorial governor and Fortas served in the Interior Department.[133] As other Democrats cringed amidst revelations of the American University seminar, Gruening privately mocked such typical "Fortasian" greed.[134] The Alaskan's early opposition to the Vietnam War also had alienated him from the administration, paving the way for his upset defeat in the 1968 Alaska Democratic primary.[135] As the floor debate approached, one White House aide observed "we will be lucky if we can get Gruening to go salmon fishing instead of voting."[136]

With Fortas's chances now all but doomed, his Senate backers prioritized their own interests. Amidst discussion that Griffin's efforts might yield a challenge to his position as minority leader, Dirksen suddenly reversed his position on imposing cloture, absurdly claiming he needed more time to review a months-old death penalty decision by the Court.[137] (When asked whether the announcement made things more difficult, Mansfield replied, "It sure as hell does.")[138] And Hart incredibly "denied that he was actually the floor manager" for the nomination; a *Chicago Tribune* reporter reminded readers that the Michigan Senator was "no stranger to defeat."[139]

With the Senate about to filibuster a Supreme Court nominee for the first time, editorialists recognized shifting institutional norms but divided on assigning blame. The *Washington Post* worried about precedent and (presciently) cautioned, "If a minority can now block Fortas, there will be a standing temptation to make every judicial appointment in the future into a political tug-of-war."[140] Three days later, the *Wall Street Journal* conceded that Griffin's tactics ignored Senate traditions but argued that the disreputable conduct of Johnson, Warren, and Fortas gave Griffin no choice. "Why then should anyone be surprised," *Journal* editors asked, "that those who oppose the views in question also start playing politics, start using whatever means they can find to see that those views don't prevail?"[141] In the end, when Fortas's opponents had to choose between advancing their short-term agenda and upholding informal Senate customs, they selected the former.

The Demise of the Nomination

"On the basis of the general level of discussion in the Judiciary Committee," the *New York Times* editorialized as the floor debate commenced, "the only way the Senate can go is up."[142] Perhaps this was true, but the upper chamber still turned in a lackluster performance. The Majority Leader opened debate with a speech that one correspondent noted "left some doubt at just how totally Mansfield himself viewed the brilliance of Johnson's selection of Fortas."[143] Most other pro-Fortas Senators mirrored Mansfield's perspective; one observer discovered Hart "slumped mournfully in his chair," seemingly "too discouraged to press" Fortas's critics.[144]

With few rivals for the position, Burdick continued his unexpected emergence as the Justice's most passionate defender. He ridiculed the "heralded filibuster," which overlooked how the Framers "specifically rejected the two-thirds requirement for judicial appointments." The "real nub of this

controversy" was the opposition's inappropriate strategy.[145] Burdick was the only Democrat to challenge GOP attacks on the seminar fee publicly, telling Howard Baker that American University's behavior was no different from the "manner in which many universities receive money to carry on their educational opportunities."[146]

Reflecting the overall disparity in passion, only nine Senators spoke on Fortas's behalf, with twenty-two in opposition.[147] Southern Democrats sounded familiar refrains. Ervin argued that Fortas stood for "tyranny on the bench."[148] Robert Byrd (D-West Virginia) wanted to send a message to a Supreme Court that "has arrogated to itself the legislative function."[149] The best speech along these lines came from freshman Ernest Hollings (D-South Carolina), who rejoiced that the Fortas nomination "has focused the attention of not only the Senate but also of the people of America on a much larger issue, the issue of the Court itself." Citing Hamilton's argument in *Federalist 78* that the Supreme Court would be the least dangerous branch, the South Carolina Senator reasoned that the Court had clearly exceeded its power, rendering it proper for the Senate to consider "the philosophy of the prospective Chief Justice."[150]

The final pre-cloture activity consisted of an invitation to colleagues by Jack Miller (R-Iowa)—whom Hart mockingly termed the "committee's favorite film critic"—for a "private showing" of one final obscene film.[151] Griffin, undertaking a last-minute check of the vote count, was too busy for such matters. On October 1, as the clerk started to call the roll, the Michigan Senator surveyed the scene on the Senate floor. As he turned to the gallery, he locked eyes with Carol Agger, Fortas's wife. Neither acknowledged the other, and then Griffin looked away.[152]

Fortas had no chance of obtaining the necessary two-thirds of those present and voting. But in a final indignity, the Justice failed even to reach fifty votes: forty-five Senators voted yes, while forty-three wanted to allow the debate to continue. Despite the outcome, neither Johnson nor Fortas, even at this very late stage, had accepted the altered Senate culture that the confirmation fight revealed. Johnson now pondered nominating John Pastore (D-Rhode Island), whose selection would put GOP colleagues "in a helluva shape."[153] (The President did not explain why he had refrained from such a tactically bold move at an earlier stage of the process.) Fortas was even more delusional. Apparently hoping that the Senate might reconsider cloture after the elections, he concluded that "the best thing to do would be to forget it. Let it stay up there." Johnson, incredulous, noted that "all we need is a name—a good name" to keep "Nixon from getting that vote."[154]

In the end, Johnson realized that no nomination would move forward. Warren remained Chief Justice in an interim capacity, eventually to be replaced by conservative Warren Burger. For the first time since 1930, the President's choice had not prevailed in the Senate. And the ideological and partisan swirls that destroyed the Fortas nomination would come to be the norm, rather than the exception, for subsequent Supreme Court nominations.

As the confirmation fight drew to a close, Dirksen told one White House aide, "Win or lose, the stain of this terrible ordeal will remain with Fortas on or off the Bench."[155] Throughout the summer, however, Johnson never considered this problem. After all, he reasoned, Fortas was "just going to sit on one side of the table or the other. He can't be changed—he's going to be there as long as he lives."[156]

Dirksen's forecast proved more prescient than he could have realized. Revelations in 1969 that Fortas had accepted a $20,000 annual retainer from Wall Street financier Louis Wolfson—who was under investigation for fraud and was seeking a pardon from Johnson—led to discussions of impeachment; Fortas ultimately resigned. The ethics

The failure of President Johnson (conversing here with Fortas) to manage Warren's retirement effectively, coupled with the exposure of Fortas's ethics problems, allowed President Nixon to make two nominations that otherwise would have gone to appointees of a Democratic President. This timing set into motion the pattern, which persists to this day, of a Supreme Court whose majority was appointed by Republican Presidents.

violation was serious. But could Fortas have survived absent the bruising confirmation fight, and especially the revelations about the American University seminar, which conditioned the public and the media to believe the worst about the Justice's ethics? It seems at least plausible that a less politically exposed Fortas could have rebuffed calls for his resignation.

Johnson's failure to manage Warren's retirement effectively, coupled with the exposure of Fortas's ethics problems, allowed Nixon to make two nominations that otherwise would have gone to appointees of a Democratic President. This timing set into motion the pattern, which persists to this day, of a Supreme Court whose majority was appointed by Republican Presidents. Reflecting on the outcome a year after Fortas's defeat, the nominee's most vociferous Senate opponent, Robert Griffin (R-Michigan), remarked that "it seemed as if the President, once the master legislative strategist who sensed unerringly the subtleties of the Senate, had lost all touch with reality."[157]

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[151] John Cory, "Strom's Dirty Movies," *Harper's Magazine*, December 1968, 35.

[152] Griffin memoir, 4, Box 418, Folder 2, Griffin Papers.

[153] President Johnson and Clark Clifford, 1 October 1968, 5.40pm, WH6810.01, Citation No. 13507, LBJ Tapes.

[154] President Johnson and Abe Fortas, 1 October 1968, 6.06pm, WH6810.01, Citation No. 13509, LBJ Tapes.

[155] Dirksen quoted in Mike Manatos, "Memorandum for the President," 16 Sept. 1968, Box 3, Fortas-Thornberry Special File.

[156] President Johnson and Deke DeLoach, 1 July 1968, 5.02pm, WH6807.01, Citation No. 13202-3, LBJ Tapes.

[157] Griffin memoir, 125, Box 418, Folder 2, Griffin Papers.

Letter to the Editor

The *Journal* has recently published two competing articles relating to the claim made by Justice Douglas thirty-five years ago that he wrote both the majority and minority opinions in *Meyer v. United States*, 364 U.S. 410 (1960), a decision that the official reports show Justice Whittaker writing for the majority with Douglas in dissent. Professor Craig Alan Smith concluded in his 2014 article in this *Journal* that Douglas's claim was "pure fabrication." Professor David J. Danelski undertook to rebut Professor Smith in a 2015 *Journal* article.

Those who accepted the Douglas claim saw it as testimony to Douglas's skills, an indication of Whittaker's inadequacy, or both. As a former Whittaker clerk, I believe the correct answer is none of the above, because the Danelski rebuttal only partially succeeds in hitting its target.

Surprisingly, Professor Danelski makes no serious attempt to defend the claim that Douglas literally wrote both opinions in the case. Instead, he suggests that a proper interpretation of Douglas's claim is that "Douglas had written a draft that was the basis of the opinion Whittaker handed down." Danelski further suggests that "Whittaker revised the language but not the substance of Douglas's draft before he circulated his majority opinion." But not even those modified observations are fully supported by Danelski's own analysis.

Meyer was a federal estate tax case from the Second Circuit, heard by the Court because of a conflict with the Third Circuit. The case was argued on October 12, 1960. The original vote was 5-4 for reversal in favor of the petitioners. Douglas was assigned the majority opinion and circulated a draft on November 2. Whittaker circulated a short, two-paragraph dissent on November 3. Justice Frankfurter, then Justice Harlan, switched their votes. Ultimately, the lineup went from 5-4 Douglas to 6-3 Whittaker.

As a result of the vote switches, the majority opinion in *Meyer* was officially assigned to Whittaker on November 15. Douglas visited Whittaker that day and found Whittaker quite upset because he was unable to start writing his majority opinion. Douglas offered to provide a draft and Whittaker accepted the offer. According to Douglas, the draft was in Whittaker's office within an hour. As Professor Danelski notes, however, both Frankfurter and Harlan had also provided material for Whittaker to consider, with Harlan focusing on the legislative history of

the statute involved. Whittaker circulated his majority opinion on November 17, two days after the Douglas visit.

Professor Danelski views this short turnaround as significant because of his view that "Whittaker, unlike Douglas, did not write quickly or easily." Although Danelski correctly notes that Whittaker did not use his clerks to draft opinions assigned to him, Whittaker actually had been quite productive in the October-November time frame. Aside from his dissent in *Meyer*, he had in that same period also circulated majority opinions in *McPhaul v. United States* and *Aro Mfg. Co. v. Convertible Top Replacement Co.*, as well as a dissent in *United States v. Hougham*.

That level of activity seems to contradict any suggestion that Whittaker was slow in producing opinions at that time.

The final Whittaker opinion in *Meyer* was handed down on November 21. It consisted of only eight paragraphs. Although Professor Danelski apparently could not locate a copy of the November 15 Douglas draft, he shows that the first paragraph of the Whittaker opinion is attributable to Douglas by referencing Douglas's earlier November 2 majority draft recirculated on November 4. Danelski then contends that paragraphs two through five of the Whittaker opinion are a mix of Douglas and Whittaker. None of the first five paragraphs is consequential. They merely set out the history of the case, the undisputed facts, and the petitioners' arguments.

Professor Danelski then acknowledges that paragraphs seven and eight are "almost identical" to the two paragraphs that comprised Whittaker's original dissent, with two additional sentences. These two substantive paragraphs are central to the opinion. They address and refute the petitioners' main argument and explain how the majority interpreted the relevant statute to refute the petitioners' statutory argument.

Notwithstanding his discovery regarding paragraphs seven and eight, Professor Danelski points to paragraph six to support his claim that the Douglas draft was "the basis of the opinion Whittaker handed down." Danelski asserts that the legislative history discussed in paragraph six, which was not contained in the original Whittaker dissent and which he attributes to Douglas, "would be the basis of the Supreme Court's decision." Danelski makes no mention here of Harlan's memorandum supporting the Second Circuit's application of the legislative history, "which differed from Douglas's version." He also makes no mention of his own observation that Harlan had not circulated a draft concurring opinion, "apparently because Whittaker made the revisions Harlan had requested." Since Whittaker would certainly want to accommodate Harlan as a new member of his majority, all signs point to Harlan, not Douglas, as the Justice responsible for the legislative history discussion in paragraph six.

In any event, and even more importantly, paragraph six addresses only one of the two issues in the case. It essentially anticipates the statutory analysis set forth in paragraph eight and uses an example from the legislative history as support for the majority's interpretation of the statute. Nothing in the discussion addresses the other issue to be decided. That issue, on which the petitioners heavily relied, was considered and resolved in paragraph seven. Contrary to Professor Danelski's suggestion, therefore, the newly cited legislative history in paragraph six could not itself have been "the basis of the Supreme Court's decision."

In the end, Professor Danelski succeeds in establishing that Whittaker, in constructing his final opinion, used some of what Douglas had drafted, though precisely how much is unclear. Danelski falls short in his attempt to establish that what Douglas had provided became the basis of the opinion Whittaker handed down. The true substantive basis of Whittaker's opinion turns out to be Whittaker's original dissent, with the added discussion of legislative history providing further support on one of the two issues being decided.

Interestingly, Danelski's attempt to rebut Professor Smith's assertions actually highlights two aspects of the Court's decision-making process. First, it provides a prime illustration of how frequently and openly Justices offer material to other Justices for use in writing Court opinions. In *Meyer*, Frankfurter, Harlan, and Douglas all provided input for Whittaker's use. *Meyer* is by no means unique, although the occasions when the minority offers to help the majority are undoubtedly more limited. While an offer of help from Douglas thus may have been surprising, what remains most puzzling is the scope of the help Douglas offered and why he became so obsessed with what he erroneously thought he had accomplished.

Second, the Danelski analysis raises the question why Whittaker felt under pressure to produce his majority opinion so quickly. Here, there may be a back story. Whittaker had won a victory in capturing the *Meyer* Court from Douglas and presumably wanted to seal the deal rapidly. He may have been remembering the history of *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960), a business case decided just a few months earlier, at the end of the prior Term. In that case, Douglas had written the opinion for a majority of five and Whittaker had circulated a strong dissent for four. A vote then switched from Douglas to Whittaker, requiring Whittaker to convert his dissent into the majority opinion, which drove Douglas to add to his original opinion, which caused the vote to switch again and give the majority back to Douglas.

Meyer presented Whittaker with a situation very similar to *Henry Broch*. He therefore may have welcomed Douglas's offer, not only to help get his own opinion off the ground, but also so that Douglas would consider himself invested in both sides of the case and would not undertake to rewrite what was now his dissent in *Meyer* in an effort to recapture the Court he had lost.

Actually, if Whittaker had been able to hold the majority in *Henry Broch*, it would have been his second such success in capturing a Court during the prior Term. Votes had also changed in *Florida Lime & Avocado Co. v. Jacobsen*, 362 U.S. 73 (1960), a procedural case involving the role of three-judge district courts, in which Whittaker and Douglas were on opposite sides. In that case, what started as a Whittaker dissent for two became the majority opinion for seven, while Douglas stayed with Frankfurter on the main issue in what ended up as the minority view.

In his 2014 article, Professor Smith saw the *Meyer* case as illustrating that "Whittaker had some influence on the Court, however marginal." Professor Smith included a discussion of other examples such as the *Inman* and *Flora* cases, both also decided in the prior Term, where a Whittaker opinion either caused other Justices to change their position or came very close to doing so.

The references here to *Henry Broch* and *Florida Lime & Avocado* therefore seem appropriate in adding to an understanding of Justice Whittaker's under appreciated influence on the Court during this particular period of his tenure.

Jerome B. Libin
Sutherland Asbill & Brennan LLP
Washington, DC

Contributors

Steven P. Brown is a professor of political science and department chair at Auburn University.

Clare Cushman is Director of Publications at the Supreme Court Historical Society and co-editor, **Of Courtiers & Kings: More Stories of Supreme Court Clerks and Their Justices** (University of Virginia Press, 2015).

James F. Flanagan is the Oliver Ellsworth Professor of Federal Practice Emeritus, University of South Carolina School of Law.

Robert David Johnson is a professor of history at Brooklyn College.

Evan P. Rothera is a PhD candidate in the department of history at Pennsylvania State University.

Melvin I. Urofsky is editor of the *Journal of Supreme Court History* and author of **Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue** (Pantheon Books, 2015).

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Cover: Clerk of the Court James B. Maher served from 1913 to 1921. Collection of the Supreme Court of the United States.

Correction:
In the previous issue, the photo caption on page 260 misidentified the African-American man being admitted to the Supreme Court bar. He is Samuel Lowry, the first African-American admitted from a Southern state—Alabama, in 1880. The caption correctly stated that John S. Rock was the first African American admitted to the Supreme Court bar, in 1865.